MEDIATION MANUAL

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PREFACE

Justice D. N. Patel
Acting Chief Justice, High Court of Jharkhand & Executive Chairman, JHALSA

यस्मिन् जीवति जीवन्ति बहवः स तु जीवति।
काकोऽपि किं न कुरूते चञ्च्वा स्वोदरपूरणम्।।

(If the 'living' of a person results in 'living' of many other persons, only then consider that person to have really 'lived'.)

I am happy to hand over this Manual to the member of legal fraternity with hope and trust of its usefulness for all of us. Mediation is a way of life. It saves time, money, relationship and seeks to find solutions, no one can refuse. We can find the roots of Mediation in our age old panchayti system. Strong Panchayati system has been the hallmark of Indian civilization. Dispute is not possible when there is only one person. So long as there are people, there are issues and thus, there shall be requirement of dispute resolution mechanism. Our own experience as well as the same of other Countries, show the success of Mediation.

MEDIATION STATISTICS OF JHARKHAND

Year	No of Cases Settled (A)	No of Cases Unsettled (B)	% of Success $\frac{A}{A+B} = 100$
2013	1234	2720	31.20%
2014	1784	2565	41.02%
2015	1402	1628	46
2016	2184	2094	52%
2017(up to July)	2457	1836	57.23%

Year	No of Cases Settled (A)	No of Cases Unsettled (B)	% of Success $\frac{A}{A+B} = 100$
Jharkhand High Court			
2015	74	69	52%
2016	105	50	68%
2017(up to July)	89	37	70.63%

Mediation is an informal process whereby people who have disputes are assisted to resolve them. Business is about building relationships and if they can be resolved amicably, relationships can be retained. An adversarial approach usually destroys relationships and that is litigation. Further, in mediation, the parties can arrive at a novel solution which a court or arbitrator could not. The experienced mediator is able to help the parties to distill the issues between them and will focus on defining identity of interests, the needs, desires or concerns that underlie each party's position. It will be seen that there is not a focus on rights only. In the commercial world of today, mediation is an accepted form of dispute resolution. Many commercial contracts, international and otherwise today have dispute resolution clauses that require the parties to attempt mediation before resorting to arbitrational litigation.

We have been progressing steadily. But, there should be no place for complacency. Online Mediation, Community Mediation and Arbitration-Mediation-Arbitration are the areas we should be focussed at. We should never stop learning from the experience of others. It is the best way to enlighten ourselves. Our Rishis have said :

नाम्भोधिरर्थितामेति सदाम्भोभिश्च पूर्यते।
आत्मा तु पात्रतां नेयः पात्रमायान्ति संपदः।।

One should make himself worthy by hard work .
Success itself will come to that worthy person.

Mediation avoids conflicts of interest by using an outside Qualified Neutral Person as mediator. When Mediator walk into a situation, his main goal is to maintain neutrality. Sometimes that is challenging. Certain personalities are more difficult than others, but his job is to keep encouraging the parties to talk and find solutions. Mediation ensures, objectivity is maintained in the process. A good mediator can help people get past to focus on the behavior that's causing the problems, as opposed to engaging in character assassinations. So it's about trying to help both parties look beyond their own personal slice of reality. Mediation is much less expensive than litigation. Advocates have a place and a function, but Mediator can resolve the conflict without getting an advocate involved. Mediator is free from prejudices, such as, who's going to win? who's going to lose? who's right? who's wrong? To the extent possible, Mediator tries to make this a win-win situation for all.

Father of the Nation Mahatma Gandhi has beautifully narrated the benefits of mediation in Chapter-39 of his Biography- **My Experiments with Truth** and I want to reproduce entire Chapter-39 for Lawyers and Litigants both:

"Chapter 39
PREPARATION FOR THE CASE

The year's stay in Pretoria was a most valuable experience in my life. Here it was that I had opportunities of learning public work and acquired some measure of my capacity for it. Here it was that the religious spirit within me became a living force, and here too I acquired a true knowledge of legal practice. Here I learnt the things that a junior barrister learns in a senior barrister's chamber, and here I also gained confidence that I should not after all fail as a lawyer. It was likewise here that I learnt the secret of success as a lawyer. Dada Abdulla's was no

small case. The suit was for £ 40,000. Arising out of business transactions, it was full of intricacies of accounts. Part of the claim was based on promissory notes, and part on the specific performance of promise to delivery promissory notes. The defence was that the promissory notes were fraudulently taken and lacked sufficient consideration. There were numerous points of fact and law in this intricate case.

Both parties had engaged the best arrorneys and counsel. I thus had a fine opportunity of studying their work. The preparation of the plaintiff's case for the attorney and the sifting of facts in support of his case had been entrusted to me. It was an education to see how much the attorney accepted, and how much he rejected from my preparation, as also to see how much use the counsel made of the brief prepared by the attorney. I saw that this preparation for the case would give me a fair measure of my powers of comprehension and my capacity for marshalling evidence.

I took the keenest interest in the case. Indeed I threw myself into it. I read all the papers pertaining to the transactions. My client was a man of great ability and reposed absolute confidence in me, and this rendered my work easy. I made a fair study of book-keeping. My capacity for translation was improved by having to translate the correspondence, which was for the most part in Gujarati. Although, as I have said before, I took a keen interest in religious communion and in public work and always gave some of my time to them, they were not then my primary interest. The preparation of the case was my primary interest. Reading of law and looking up law cases, when necessary, had always a prior claim on my time. As a result, I acquired such a grasp of the facts of the case as perhaps was not possessed even by the parties themselves, inasmuch as I had with me the papers of both the parties.

I recalled the late Mr. Pincutt's advice - facts are three-fourths of the law. At a later date it was amply borne out by that famous barrister of South Africa, the late Mr. Leonard. In a certain case in my charge I saw that, though justice was on the side of my client, the law seemed to be against him. In despair I approached Mr. Leonard for help. He also felt that the facts of the case were very strong. He exclaimed, 'Gandhi, I have learnt one thing, and it is this, that if we take care of the facts of a case, the law will take care of itself. Let us dive deeper into the facts of this case.' With these words he asked me to study the case further and then see him again. On a re- examination of the facts I saw them in an entirely new light, and I also hit upon an old South African case bearing on the point. I was delighted and went to Mr. Leonard and told him everything. 'Right,' he said, 'we shall win the case. Only we must bear in mind which of the judges takes it.'

When I was making preparation for Dada Abdulla's case, I had not fully realized this paramount importance of facts. Facts mean truth, and once we adhere to truth, the law comes to our aid naturally. I saw that the facts of Dada Abdulla's case made it very strong indeed, and that the law was bound to be persisted in, would ruin the plaintiff and the defendant, who were relatives and both belonged to the same city. No one knew how long the case might go on. Should it be allowed to continue to be fought out in court, it might go on indefinitely and to no advantage of either party. Both, therefore, desired an immediate termination of the case, if possible.

I approached Tyeb Sheth and requested and advised him to go to arbitration. I recommended him to see his counsel. I suggested to him that if an arbitrator commanding the confidence of both parties could appointed, the case would be quickly finished. The lawyers' fees were so rapidly mounting up that they were enough to devour all the resources of the clients, big merchants as they were. The case occupied so much of their attention that they had no time left for any other work. In the meantime mutual ill-will was steadily increasing. I became disgusted with the profession. As lawyers the counsel on both sides were bound to rake up points of law in support of their own clients. I also saw for the first time that the winning party never recovers all the costs incurred. Under the Court Fees Regulation there was a fixed scale of costs to be allowed as between party and party, the actual costs as between attorney and client being very much higher. This was more than I could bear. I felt that my duty was to befriend both parties and bring them together. I strained every nerve to bring about a compromise. At last Tyeb Sheth agreed. An arbitrator was appointed, the case was argued before him, and Dada Abdulla won.But that did not satisfy me. If my client were to seek immediate execution of the award, it would be impossible for Tyeb Sheth to meet the whole of the awarded amount, and there was an unwritten law among

the Porbandar Memans living in South Africa that death should be preferred to bankruptcy. It was impossible for Tyeb Sheth to pay down the whole sum of about £ 37,000 and costs. He meant to pay not a pie less than the amount, and he did not want to be declared bankrupt. There was only one way. Dada Abdulla should him to pay in moderate instalments. He was equal to the occasion, and granted Tyeb Sheth instalments spread over a very long period. It was more difficult for me to secure this concession of payment by instalments than to get the parties to agree to arbitration. But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. **The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby - not even money, certainly not my soul."**

Mediation offers a significantly higher level of compliance since the parties involved create the list of agreements. Mediation provides a process through which participants are able to find common understanding and reduced conflict. It's invariably communication, communication, communication. When we think about any relationship— whether it's personal or professional— the ability to communicate effectively and the ability to resolve conflicts effectively are the two things we always look for in a mate, in a good friend or in a Mediator.

Mediation allows for the restoration and well being of relationships – there are clear emotional and physiological benefits to be gained.

I did experiment on the premise that a person, **expert** in his field, would be definitely a good mediator in respect of the dispute relating to his sphere. The Hon'ble **MCPC** accepted my request and in February, 2016, 40 Hours Mediation Training was imparted to **20 Experts, i.e., Retd IAS, IPS, Doctors, Engineers, Entrepreneurs, Psychologists, Community leaders**. The performance of these **Expert Mediators** has been par excellence with their success rate above **70%**. Again in July, 2017, the **MCPC** accorded approval for 2nd Batch of Expert Mediators on our request and 40 Hours Mediation Training was imparted to **20 Experts**. Now, we have 40 Expert mediators, who are doing mediation work excellently. This **new initiative** has been well acknowledged and is gradually gaining countrywide acceptace.

With the advent of Information technology, the Countries have become interconnected. Therefore, our Lawyers need to keep updating and improving themselves. India is slowly but sreadily becoming the growth engine of world economy. Commercial disputes of Multinational dimension is common. The only way to remain relevent is to learn the requirements of the day. It has been rightly said for times immemorial :

यो यमर्थ प्रार्थयते यदर्थं घटतेऽपि च।
अवश्यं तदवाप्नोति न चेच्छ्रान्तो निवर्तते।।

If a person wants something, and if he makes efforts to achieve it - without getting tired - then no doubt he gets it.

We have attempted to collect and compile the materials relating to Mediation at one place. Any suggestion for improvents is highly solicited and same will be incorporated in future publications. I coclude by saying :

Let all know the benefits of Mediation, Let all have the fruits of Mediation, Let all be happy always.

Date : 10th September, 2017

Justice D.N.Patel

Acting Chief Justice, High Court of Jharkhand
& Executive Chairman, JHALSA

CHAPTER - 1

MEDIATION RULES - 2015

Rule 1 : Title

These Rules shall be called the Mediation Rules, 2015

Rule 2 : Function of the Mediation Centre

[1] To maintain a panel of trained Mediators sufficient in number to meet the requirement of work referred to the Mediation Centre.

[3] On receipt of the matter by way of referral for mediation, the Co-ordinator of the Mediation Centre may assign the matter to any mediator who is best suited to deal with the matter from the panel of mediators maintained by the Mediation Centre.

[4] The Mediation shall not be limited only to the issues in the referred dispute and the Mediator may take into account the disputes between the parties to a case which are not the subject of the pending litigation, and may resolve all disputes between the parties.

[5] During the mediation, counsel for the parties may also participate in the mediation process.

[6] In appropriate cases, the Mediation Centre may invite any person/ persons, other then those who are involved in the pending litigation to join the Mediation for the purpose of finding comprehensive and complete solutions including an expert pertaining to any field.

[7] If any party to the dispute referred to Mediation has any objection to the mediator assigned to it, the said party shall inform the Mediation Centre of the same and thereafter the Co-ordinator, Mediation Centre shall endeavour to appoint a Mediator who may be acceptable to all the parties.

Rule 3 : Appointment of Mediator

a) In a Court annexed mediation, the coordinator of the mediation centre shall appoint the mediator as he may deem fit.

b) in exceptional cases, the Court may also appoint a mediator who is not necessarily from the panel of Mediators referred to in Rule 4 nor bear the qualifications referred to in Rule 5 but should not be a person who suffers from the disqualifications referred to in Rule 6.

Rule 4 : Panel of Mediators.

a) The High Court shall empanel only those persons as mediators who have necessary qualifications as indicated in Rule 5 and a list of such mediators empanelled with the mediation centre should be prepared.

b) The District Court shall also prepare a panel of qualified Mediators with the approval of the High Court Mediation Committee.

All the mediators as appointed under clause (a) and Clause (b) shall normally be on the panel for a period of 3 years from the date of appointment and further extension of their tenure shall be at the discretion of High Court Mediation Committee.

Rule 5 : Qualifications of persons to be empanelled under Rule 3 :

The following persons are eligible for training as Mediators:

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

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the Courts of equivalent status.

(iv) Judicial Officers of Higher Judical Service.

(b) Legal practitioners with atleast 10 years' standing at the bar at the level of the Supreme Court or the High Court or the District Court or equivalent status;

(c) Experts or other professionals with at least fifteen years' standing; or retired senior bureaucrats or retired senior executives;

Rule 6 : Disqualification of persons.

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

(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 proceedings (s).

Rule 7 : Addition to or deletion from panel.

There shall be periodical assessment of the performance of the mediators. The High Court or the District & Sessions Judge with prior approval of the High Court Mediation Committee, may in its/his discretion, from time to time, add or delete any person in the panel of mediators.

Rule 8 : Preference.

The Coordinator shall, while nominating any person from the panel of mediators referred to in Rule 3, consider his suitability for resolving the dispute (s) involved and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

Nomination to a mediation proceeding shall not be perceived as a right by mediators. Such nomination shall be at the discretion of the Coordinator of the Mediation Centre.

Rule 9 : Duty of mediator to disclose certain facts.

(a) When a person is approached in connection with his proposed appointment as mediator, he shall disclose any circumstance likely to give rise to a reasonable doubt as to his independence or impartiality.

(b) Every Mediator shall from the time of his appointment and throughout continuance of the mediation proceedings, without delay, disclose to the parties, about the existence of any circumstance referred to in Clause (a).

Rule 10 : Withdrawal of appointment.

Upon information furnished by the mediator under Rule 9 or upon any other information received from the parties or other persons, if the Court, in which the suit or proceeding is pending or the coordinator of the Mediation Centre, is satisfied, that the said information has raised a reasonable doubt as to the mediator's independence or impartiality, it/he may withdraw the appointment and replace him by another mediator.

Rule 11 : Mediation process.

a) All civil and criminal compoundable matters may be referred to mediation during the course of litigation, by the Court.

b) The mediation process will comprise of reference as well as the steps taken by the mediator to facilitate the settlement of a referred matter by following the structure usually followed, including but not limited to introduction and opening statement, joint session, separate session(s) and closing.

c) failure to arrive at a settlement would not preclude the Court from making fresh reference of the matter for mediation.

d) In case of failure of resolution of the referred dispute, the Mediator shall inform the Mediation Centre, by a report and the Co-ordinator of the Mediation Centre shall inform regarding the same to the Court.

Rule 12 : Mediator not bound by Indian Evidence Act, 1872 or Code of Civil Procedure, 1908.

The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, but shall be guided by the principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute(s).

Rule 13 : Representation of parties

The parties shall ordinarily be present personally or through constituted attorney at the sessions notified by the Mediator. They may also be represented by a counsel with permission of the mediator in such sessions.

Rule 14 : Consequences of non-attendance of parties at sessions on due dates.

If a party fails to attend a session notified by the mediator on account of deliberate or wilful act, the other party or the mediator can apply to the Court in which the suit or proceeding is pending, in that

case Court may issue the appropriate directions having regard to the facts and circumstances of the case.

Rule 15 : Administrative assistance.

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

Rule 16 : Role of Mediator.

The mediators shall attempt to facilitate voluntary resolution of the dispute(s) by the parties. He shall assist them in understanding the problems, identifying the underlying issues, reducing mis-understandings, generating the options and developing option which are mutually acceptable to both the parties.

Rule 17 : Parties alone responsible for taking decision.

The parties shall be made to understand that the mediator only facilitates in arriving at a decision to resolve dispute(s) and that he will not and cannot impose any settlement nor does the mediator give any assurance that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

Rule 18 : Time limit for completion of mediation.

On the expiry of Ninety days from the date fixed for the first appearance of the parties before the mediator, the mediation 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.

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.

Rule 20 : Confidentiality, disclosure and inadmissibility of information :

[1] when a mediator receives factual information concerning the dispute 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 subject to a specific condition that it be kept confidential, the mediator shall not disclose the information to the other party.

[2] Receipt or perusal of any document by the mediator or receipt of information orally by the mediator while* serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the document or record or oral information nor as to what transpired during the mediation.

[3] Parties shall maintain confidentiality in respect of events that transpired during the mediation and shall not rely on or introduce the said information in any proceeding as to :-

[a] views expressed by a party in the course of the mediation proceeding;

[b] documents produced during the mediation which were expressly required to be treated as confidential or other notes or drafts or information given by the parties to the mediators.

[c] proposal made or views expressed by the mediator.

[d] admission made by a party in the course of mediation proceeding.

[e] the fact that a party had or had not indicated willingness to accept a proposal.

[4] There shall be no stenographic or audio or video recording of the mediation proceedings.

[5] A mediator may maintain personal record regarding progress of the mediation for his personal use.

Rule 21 : Privacy :

The mediation sessions shall be conducted in complete privacy ; only the concerned parties or their counsels or power of attorney holders can attend, other persons may attend only with the consent of the parties and permission of the mediator.

Rule 22 : Immunity :

No mediator shall be held liable for anything bonafidely done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit or proceeding to appear in a Court of Law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him -during the mediation proceedings.

Rule 23 : Communication between mediator and the Court:

[1] In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in sub-rules [2] and [3] of this Rule.

[2] If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their constituted attorneys or the counsel.

[3] All communication between the mediator and the Court shall be made only by the mediator and in respect of the following matters :

[a] the failure of a party or parties to attend; or

[b] the mediator's assessment that die case is not suited for settlement through mediation; or

[c] settlement of dispute or disputes arrived at between parties.

Rule 24 : Settlement agreement:

Where an agreement is reached between the parties with regard to all the issues in the suit or proceeding or some of the issues, the same shall be reduced to writing and signed by the parties or their constituted attorney. If any counsel has represented the parties, the mediator may obtain his signature also on the settlement agreement.

[1] The agreement of the parties so signed shall be submitted to the Co-ordinator, Mediation Centre, who shall, with a covering letter signed by him forward the same to the Court in which the suit or proceeding is pending.

[2] 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 in writing to the Co-ordinator, Mediation Centre, who shall, with a covering letter signed by him forward the same to the Court in which the suit or proceeding is pending.

Rule 25 : Court to record settlement and pass decree :

On receipt of settlement agreement, if the Court is satisfied that the parties have settled their disputes voluntarily, the Court may pass appropriate order/decree on the basis of settlement, if the same is not found collusive/illegal /unworkable. However if the settlement disposed of only certain issues arising in the matter, the Court may record settlement in respect of the issues settled in the mediation and may proceed to decide other issue which are not settled. Settlement between the parties shall be final in respect of the proceedings pending before the Court.

Rule 26 : Fee of the Mediators

a) the mediators shall be paid honorarium as under :

S.No	Nature of case	Honorarium
1	On settlement through mediation of a matrimonial case [including criminal], custody, guardianship, probate, partition and possession.	Rs.3000/- per case [with two or more connected cases, the maximum would be Rs.4000/-]
2	All other matters.	Rs. 2000/- per case [with two or more connected cases, the maximum would be Rs.3000/-]
3	Connected case	Rs.500/- per case subject to a maximum of Rs.1000/-[regardless of the number of connected cases]
4	In case of no settlement	No honorarium

It is subject to revision from time to time as deemed fit by the Hon'ble Chairman and Members of MCPC.

b) However, in exceptional cases the Court may fix consolidated amount as fee of the Court nominated mediator/Mediators.

c) Each party shall bear the cost for production of their witnesses and experts, as also for production of documents.

Rule 27 : Ethics and code of conduct for mediator :

The Mediator shall follow and observe these Rules strictly and with due diligence.

(1) Not indulge in conduct unbecoming of a mediator.

(2) uphold the integrity and fairness of the mediation process.

(3) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the mediation process.

(4) While communicating with the parties avoid any impropriety or appearance of impropriety.

(5) The mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest, he is bound to disclose to the parties such indirect interest at die earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator, despite such indirect interest.

(6) Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.

(7) Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle.

(8) Mediators have a duty to remain neutral throughout the mediation.

(9) Mediators must respect the voluntary nature of mediation and must recognize the rights of the parties to withdraw from the mediation at any stage.

(10) Mediation being confidential in nature, a mediator shall be faithful to the confidentiality reposed in him.

(11) Mediator has a duty to encourage the parties to make their own decisions both individually and collectively about the resolution of the dispute, rather than imposing his own ideas on the parties. Self determination is the essence of the mediation process.

(12) Settlement of dispute must be based on informed consent.

(13) Conduct all proceeding relating to the resolution of dispute in accordance -with the law.

(14) Mediator must refrain from promises or guarantee of results.

Rule 28 : Consequences of breach of Rule 27 :

It shall, be open to the Coordinator to take such action with the approval of the High Court Mediation Committee as may be appropriate if the mediator violates any code of conduct expressed in Rule 27 or behaves in a manner not expected of him as a Mediator".

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CHAPTER - 2

JHARKHAND HIGH COURT MEDIATION RULES

In exercise of the rule-making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) sub-section (2) of Section 89 of the said Code, the High Court of Jharkhand is hereby issuing the following Rules :-

PART - A
ALTERNATIVE DISPUTE RESOLUTION RULES

1. **Title** - These rules in Part I shall be called the Civil Procedure Alternative Disputes Resolution Rules, 2006.

2. **Procedure for directing parties to opt for alternative modes of settlement** -

(a) The Court shall after recording admissions and denials at the first hearing of the suit under Rule 1 Order 10 and where it appears to the Court that there exist elements of settlement, which may be acceptable to the parties, formulate the terms of settlement and give them to the parties for their observations under sub-section (1) of Section 89 and parties shall submit to the Court their responses within thirty days of the first hearing.

(b) At the next hearing, which shall be not later than thirty days of the receipt of responses, the Court may reformulate the terms of a possible settlement and shall direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in clauses (a) to (d) of sub-section (1) of Section 89 read with Rule 1-A of Order 10 in the manner stated hereunder:

Provided that the Court, in the exercise of such power, shall not refer any dispute to arbitration or to judicial settlement by a person or institution without the written consent of all parties to the suit.

3. **Persons authorised to take decision for the Union of India, State Governments and others** -

1) For the purpose of Rule 2, the Union of India or the Government of a State or Union Territory, all local authorities, all Public Sector Undertakings, all statutory corporations and all public authorities shall nominate a person or persons or group of persons who are authorised to take a final decision as to the mode of alternative dispute resolution in which it proposes to opt in the event of direction by the Court under Section 89 and such nomination shall be communicated to the High Court within the period of three months from the date of commencement of these Rules and the High Court shall notify all the subordinate certs in this behalf as soon as such nomination is received from such Government or authorities.

2) Where such person or persons or group of persons have not been nominated as aforesaid, such party as referred to in clause (1) shall, if it is a plaintiff, file alongwith the plaint or if it is a defendant, file alongwith or before the filing of the written statement, a memo into the Court, nominating a person or persons or group of persons who is or are authorised to take a final decision as to the mode of alternative dispute resolution, which the party prefers to adopt in the event of the Court directing the party to opt for one or other mode of alternative dispute resolution.

4. Court to give guidance to parties while giving direction to opt.- (a) Before directing the parties to exercise option under clause (b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely :

i) that it will be to the advantage of the parties, so far as time and expense, are concerned, to opt for one or other of these modes of settlement (referred to in Section 89) rather than seek a trial on the disputes arising in the suit;

ii) that, where there is no relationship between the parties which requires to be preserved, it may be in the interest of the parties to seek reference of the matter of arbitration as envisaged in clause (a) of sub-section (1) of Section 89;

iii) that, where there is a relationship between the parties which requires to be preserved, it may be in the interest of parties to seek reference of the matter to conciliation or mediation, as envisaged in clause (b) or (d) of sub-section (1) of Section 89;

Explanation - Disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

iv) that, where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to the Lok Adalat or to judicial settlement as envisaged in clause (c) of sub-section (1) of Section 89;

v) the difference between the different modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement is as explained below :

Settlement by 'arbitration' means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes ah award by the application of the provisions of the Arbitration and Conciliation Act, 1996.

Settlement by 'conciliation' means the process by which a conciliator, who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (29 of 1996) insofar as they relate to conciliation, and in particular, in exercise of his powers under Sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by 'mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting

parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasising that it is the parties own responsibility for making decisions which affect them.

Settlement in the Lok Adalat means settlement by the Lok Adalat as contemplated by the Legal Services Authorities Act, 1987.

Judicial settlement means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the provisions of that Act.

5. Procedure for reference by the Court to the different modes of settlement

a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under clause (b) of Rule - 2 and the Court shall, within thirty days, of the said application, refer the matter to arbitration and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to arbitration under that Act, shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act.

b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat or where one of the parties applies for reference to the Lok Adalat, the procedure envisaged under the Legal Services Authorities Act, 1987 and in particular by Section 20 of that Act, shall apply.

c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within thirty days of the direction under clause (b) of Rule 2 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to the Lok Adalat under that Act, shall apply as if the proceedings were referred for settlement under the provisions of that Act.

d) Where non of the parties are willing to agree to opt or agree to refer the dispute to arbitration or the Lok Adalat, or to Judicial settlement within thirty days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

e) i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the application refer the matter to conciliation and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to conciliation under that Act, shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act.

ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

f) Where under clause (d), all the parties are not able to opt and agree for conciliator or mediation, one or more parties pay apply to the Court within thirty days of the direction under clause (b) of Rule 2, seeking settlement through conciliation o mediation as the case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application and

i) In case all the parties agree for conciliation, the Court shall refer the matter conciliation and thereafter, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference conciliation under that Act, shall apply.

ii) In case all the parties agree for mediation, the Court shall refer the matter mediation in accordance with the Civil Procedure Mediation Rules, 2003 Part II shall apply.

iii) In case all the parties do not agree and where it appears to the Court, that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure-Mediation Rules, 2003, shall apply.

g) i) Where none of the parties apply for reference either to arbitration, or the Lok Adalat, or judicial settlement, or for conciliation or mediation, within thirty days of the direction under clause (b) of Rule 2, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

ii) After hearing the parties or their representatives on the day so fixed the Court shall, if there exist elements of a settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, refer the matter to conciliation or mediation. In case the dispute is referred to conciliation, the provision of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act shall apply and in case the dispute is referred to mediation, the provisions of the Civil Procedure Mediation Rules, 2003, shall apply.

h) i) No next friend or guardian for the suit shall, without the level of the Court, expressly recorded in the proceedings of the Court, opt for anyone of the modes of alternative dispute resolution nor shall enter into any settlement on behalf of a minor or person under disability with reference to the suit in which he acts as mere friend or guardian.

ii) Where an application is made to the Court for leave to enter into a settlement initiated into in the alternative dispute resolution proceedings on behalf of a minor

or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file a certificate alongwith the said application to the effect that the settlement is, in his opinion, for the benefit of the minor or other person under disability. The decree of the Court based on the settlement to which the minor or other person under disability is a party, shall refer to the sanction of the Court thereto and shall set out the terms of the settlement.

6. Referral to the Court and appearance before the Court upon failure of attempts to settle disputes by conciliation or judicial settlement or mediation -

1) Where a suit has been referred for settlement for conciliation, mediation or judicial settlement and has not been settled or where it is felt that it would not be proper in the interests of justice to proceed further with the matter, the suit shall be referred back again to the Court with a direction to the parties to appear before the Court on a specific date.

2) Upon the reference of the matter back to the Court under sub-rule (1) or under sub-section 20 of the Legal Services Authorities Act, 1987, the Court shall proceed with the suit in accordance with law.

7. Training in alternative methods of resolution of disputes, and preparation of manual -

a) The High Court shall take steps to have training courses conducted in places where the High Court shall take steps to have training courses conducted in place where the High Court and the Distric Courts or courts of equal status are located, by requesting bodies recognised by the High Court or the Universities imparting legal education or retired faculty members or other persons who, according to the High Court are well versed in the techniques of alternative methods of resolution of disputes, to conduct training courses for lawyers and judicial officers.

b) i) The High Court shall nominate a committee of Judges, faculty members including retired persons belonging to the above categories, senior members of the Bar, other members of the Bar specially qualified in the techniques of alternative dispute resolution, for the purpose referred to in clause (a) and for the purpose of preparing a detailed manual of procedure for alternative dispute resolution to be used by the Courts in the State as well as by the arbitrators, or authority or person in the case of judicial settlement or conciliators or mediators.

ii) The said manual shall describe the various methods of alternative dispute resolution, the manner in which anyone of the said methods is to be opted for, the suitability of any particular method for any particular type of dispute and shall specifically deal with the role of the above persons in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.

c) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of alternative dispute resolution procedures throughout the State or States over which the High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers.

d) Persons who have experience in the matter of alternative dispute resolution procedures, and in particular in regard to conciliation and mediation, shall be given preference in the matter of empanelment for the purposes of conciliation or mediation.

8. Applicability to other proceedings - The provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (66 of 1984), while dealing with matrimonial, maintenance and child custody disputes, wherever necessary, in addition to the rules framed under the Family Court Act (66 of 1984).

PART II
CIVIL PROCEDURE MEDIATION RULES

1. Title - These Rules in Part II shall be called the Civil Procedure Mediation Rules, 2003.

2. Appointment of mediator -

a) Parties to a suit may all agree on the name of the sole mediator for mediating between them.

b) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.

c) Where parties agree on a sole mediator under clause (a) or where parties nominate more than one mediator under clause (b), the mediator heed not necessarily be from the panel of mediators referred to in Rule 3 nor bear the qualifications referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5.

d) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

3. Panel of mediators -

a) The High Court shall, for the purpose of appointing mediators between parties in suits filed on its original side, prepare a panel of mediators and publish the same on its notice board, within thirty days of the coming into force of these Rules, with a copy to the Bar Association attached to the original side of the High Court.

b) i) The Courts of the Principal District and Sessions Judge in each district or the Courts of the Principal Judge of the City Civil Court or courts of equal status shall, for the purposes of appointing mediators to mediate between parties in suits filed on their original side, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the same on their respective notice boards.

ii) Copies of the said panels referred to in clause (i) shall be forwarded to all the courts of equivalent jurisdiction or courts subordinate to the courts referred to in sub-clause (i) and to the Bar Associations attached to each of the courts.

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

d) The panel of names shall contain a detailed annexure giving details of the qualifications of the mediators and their professional or technical experience in different fields.

4. Qualifications of persons to be empanelled under Rule 3 - The following persons shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 3, namely :

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

ii) Retired Judges of the High Court;

iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or courts of equivalent status.

b) Legal practioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court; or the District Courts or courts of equivalent status.

c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives.

d) Institutions which are themselves experts in mediation and have been recognised as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

5. Disqualifications of persons - The following persons shall be deemed to be disqualified for being empanelled as mediators :

i) any person who has been adjudged as insolvent or is declared of unsound mind, or

ii) any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending, or

iii) any person who has been convicted by a criminal court for any offence involving moral turpitude.

iv) any person against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment.

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

vi) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings,

vii) such other categories of persons as may be notified by the High Court.

6. Venue for conducting mediation - The mediator shall conduct the mediation at one or other of the following places :

i) Venue of the Lok Adalat or permanent Lok Adalat.

ii) Any place identified by the District Judge within the court precincts for the purpose of conducting mediation.

iii) Any place identified by the Bar Association or State Bar Council for the purpose of mediation, within the premises of the Bar Association or State Bar Council, as the case may be.

iv) Any other place as may be agreed upon by the parties subject to the approval of the Court.

7. Preference - The Court shall, while nominating any person from the panel of mediators referred to in Rule 3, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

8. Duty of mediator to disclose certain facts -

a) When a person is approached, in connection with his possible appointment as a mediator, the person shall disclose in writing to the parties, any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.

b) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in clause (a).

9. Cancellation of appointment - Upon information furnished by the mediator under Rule 8 or upon any other information received from the parties or other persons, if the Court, in which the suit is filed, is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator.

10. Removal or deletion from panel - A person whose name is placed in the panel referred to in Rule 3 may be removed or his name be deleted from the said panel, by the Court which empanelled him if :

i) he resigns or withdraws his name from the panel for any reason:

ii) he is declared insolvent or is declared of unsound mind;

iii) he is a person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;

iv) he is a person who has been convicted by a criminal court for any offence involving moral turpitude;

v) he is a person whom disciplinary proceedings on charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment;

vi) he exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;

vii) the Court which empanelled, upon receipt of information, if it is satisfied, after conducting such inquiry as it deems fit, is of the view, that it is not possible or desirable to continue the name of that person in the panel;

Provide that, before removing or deleting his name, under clauses (vi) and (vii), the Court shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order.

11. Procedure of mediation -

a) The parties agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

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

i) he shall fix, in consultation with the parties, a time-schedule, the dates and the time of each mediation session, where all parties have to be present;

ii) he shall hold the mediation conference in accordance with the provisions of Rule 6;

iii) he may conduct joint or separate meetings with the parties;

iv) each party shall, ten days before a session, provide to fhe mediator 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 to understand the issue; such memoranda shall also be mutually exchanged between the parties;

v) each party shall furnish to the mediator, copies of pleadings or documents or such other information as may be required by him in connection with the issues to be resolved:

Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix.

vi) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.

c) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party that nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes.

12. Mediator not bound by the Evidence Act, 1872 or the Code of Civil Procedure, 1908. - The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, but shall be guided by the principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

13. Non-attendance of Parties at sessions or meetings on due dates. -

(a) The parties shall be present personally or may be represented by their counsel or power-of-attorney holders at the meetings or sessions notified by the mediator.

(b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator without sufficient reason, the court may take action against the said party by imposition of costs.

(c) The parties not resident in India, may be represented by the counsel or power-of- attorney holders at the sessions or meetings.

14. Administrative assistance - In order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance hy a suitable institution or person.

15. Offer of settlement by parties -

(a) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.

(b) Any party to the suit may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with notice to the mediator.

16. Role of mediator - The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute emphasizing that it is the responsibility of the parties to take decisions which affect them; he shall not impose any terms of settlement on the parties.

17. Parties alone responsible for taking decision - The parties must understand, that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

18. Time-limit for completion of mediation. - On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the court, which referred the matter, either suo motu, or upon request by the mediator or 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.

19. Parties to act in good faith. - While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute, if possible.

20. Confidentiality, disclosure and inadmissibility of information.

1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.

2) When a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding the documents or what is conveyed to him orally as to what transpired during the mediation.

3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding

the documents nor in regard to the oral information nor as to what transpired during the mediation.

4) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said-information in any other proceedings as to:

a) views expressed by a party in the course of the mediation proceedings;

b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

c) proposals made or views expressed by the mediator;

d) admission made by a party in the course of mediation proceedings;

e) the fact that a party had or had not indicated willingness to accept a proposal;

5) There shall be no stenographic or audio or video recording of the mediation proceedings.

21. Privacy - Mediation sessions and meetings are private; only the parties or their counsel or power-of-attorney holders concerned can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.

22. Immunity - No mediator shall be held liable for anything bone fide done or omitted to be done by him during the mediation proceedings for civil or criminal action, nor shall he be summoned by any party to the suit to appear in a court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

23. Communication between mediator and the Court.

a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in clauses (b) and (c) of this Rule.

b) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.

c) Communication between the mediator and the Court shall be limited to communication by the mediator:

(i) with the Court about the failure of the party to attend;

(ii) with the Court with the consent of the parties;

(iii) regarding his assessment that the case is not suited for settlement through mediation;

iv) that the parties have settled the dispute or disputes.

24. Settlement agreement -

1) 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 to writing and signed by the parties or their power-of-attorney holders. If any counsel have represented the parties, they shall attest the signature of their respective clients.

2) 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.

3) Where no agreement is arrived at between the parties, before the time-limit stated in Rule 18 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said court in writing.

25. Court to fix a date for recording settlement and passing decree.-

(1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement, if it is not collusive.

(2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.

(3) If the settlement disposes of only certain issues arising in the suit, the. Court shall record the settlement on the date fixed for recording the settlement, and

i) if the issues arc severable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, the Court may pass a decree straight away in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues, which are not settled,

ii) If the issues are not severable, the Court shall wait for a decision of the Court on the other issues which arc not settled.

26. Fee of mediator and costs. -

1) At the time of referring the disputes to, mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.

2) As far as possible a consolidated sum may be fixed rather than for each session or meeting.

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

4) The expense of the mediation including the fee of the mediator, 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.

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

6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in clauses (1), (3) and (4) The remaining. 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the Court.

7) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or parties, direct the parties concerned 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.

8) Where a party is entitled to legal aid under Section 12 of the Legal Services Authorities Act, 1987, the amount of fee payable to the mediator and costs shall be paid by the Legal Services Authority concerned under that Act.

27. Ethics to be followed by the mediator. - The mediator shall:

1) follow and observe these Rules strictly and with due diligence;

2) not carry on any activity, or conduct which could reasonably be considered as conduct unbecoming of a mediator;

3) uphold the integrity and fairness of the mediation process;

4) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process;

5) satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;

6) disclose any interest or relationship likely to affect, impartiality or which might seek an appearance of partiality or bias;

7) avoid, while communicating with the parties, any impropriety or appearance of impropriety;

8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator;

9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

10) recognise that mediation is based on the principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;

11) maintain the reasonable expectations of the parties as to confidentiality;

12) refrain from promises or guarantees of results.

28. Transitory provisions. - Until a panel of arbitrators is prepared by the High Court and the District Court, the courts referred to in Rule 3, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 4 and is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute.

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CHAPTER-3

MEDIATION TRAINING MANUALS

CHAPTER - 3.1

MEDIATION TRAINING MANUAL OF INDIA

CHAPTER - 3.1.1

INTRODUCTION

Though documentation is scant, it is believed that nearly every community, country, and culture has a lengthy history of using various methods of informal dispute resolution. Many of these ancient methods shared procedural features with the process that has coalesced in the form of contemporary mediation. In India, as in other countries, the origin of mediation is obscured by the lack of a clear historical record. In addition, there is a lack of official records of indigenous processes of dispute resolution due to colonization in India over the past 250 years. There is scattered information, set forth below, that can be gathered by tracing mediation in a very elementary form back to ancient times in the post-Vedic period in India. Tribal communities practiced diverse kinds of dispute resolution techniques for centuries in different parts of the world, including India. In China government-sponsored mediation has been used on a widespread basis to resolve disputes based on aged societal principles of peaceful co-existence. Native Americans are known to have adopted their own dispute resolution procedures long before the American settlement.

HISTORICAL PERSPECTIVE

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries.

The scarcely available ancient Indian literature reflects the cultural co-existence of people for many centuries. This reality necessitated many of the collaborative dispute resolution methods adopted in the modern mediation process. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with

the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business, dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience. These different mechanisms of dispute resolution were given considerable autonomy in matters of local and village administration and in matters solely affecting traders' guilds, bankers and artisans. The modern legislative theory of arbitrage by domestic forums for deciding cases of members of commercial bodies and associations of merchants finds its origin in ancient customary law in India. Cases were decided according to the usages and customs as were approved by the conscience of the virtuous and followed by the people in general. The parishad recognized the modern concept of participatory methods of dispute resolution with a strong element of voluntariness, which another founding principle of modern mediation. Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom". This Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator. Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties. It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision- making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.*

Mediation in the United States has developed in several distinct directions. Community mediation emerged in the 1960's in response to racial tensions and integration issues. Neighbourhood Justice Centers were established to address those issues. Later, community mediation expanded in application to neighbour-neighbour disputes, family disputes, and other disputes where the issues were predominantly interpersonal. This view held that mediation should be community-based and independent of the legal system, opining that mediation could deliver a high rate of satisfying settlement results if it were separate from the legal bureaucracy. In the 1980's, private mediation caught on when insurance companies realized the cost benefits of resolving insurance claims informally and

* Michael McIlwrath - the host of the CPR International Dispute Negotiation (IDN)

expeditiously. Private mediation took hold in a variety of ways, including the emergence of private/ independent mediators, non-profit mediation programs and agencies, and for-profit mediation providers. Private mediation was applied to pre-litigation disputes, litigated disputes, and, more recently, commercial and international disputes. Court-annexed mediation, which was the subject of experimental usage in the 1970's and 1980's, began to expand significantly in the 1990's. This school of thought concluded that mediation should be an extension of the legal system, even seeing mediation as an effective means of narrowing issues for litigation in courts. Currently, court-annexed mediation is offered by most courts at the trial and appellate levels. All three forms of mediation, community mediation, private mediation, and court-annexed mediation continue to co-exist, thrive, and to meet the needs of disputing parties in the United States.

A turning point in the use of alternative dispute resolution in the United States occurred in 1976, at a nationwide conference of lawyers, jurists, and educators called the Pound Conference. The conference was convened to address the urgent problems of over-crowding in the jails, lengthy delays in the courts, and the lack of access to justice due to the prohibitive costs of litigation. The need for alternatives to litigation generated in the new concept of a "Multi-door Court-house," and reinforced the importance of "Neighbourhood Justice Centers". The Multi-door Court-house concept, originated by Harvard professor Frank Sander, envisioned a scenario in which an aggrieved party could simply go to a kiosk at the entrance of a courthouse where a facilitative attendant would direct the disputant to one of the doors providing alternative or traditional dispute resolution processes. Prof. Sander described it as fitting the forum to the fuss. In this manner, the legal system could help the litigants achieve the most satisfactory result, in effect placing responsibility for providing alternative processes, including mediation, in the hands of the judicial system. The idea of a neutral assisting the disputants in arriving at their own solution instead of imposing his solution was introduced. Professors Ury, Brett and Goldberg opined that reconciling interests was less costly and probing for deep-seated concerns, devising creative solutions and making trade-offs was more satisfying to the disputants than the adjudicatory process.

MEDIATION IN INDIA

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world. The East India Company from England gained control over the divided Indian Rulers and developed its apparent commercial motives into political aggression. By 1753 India was converted into a British Colony and the British style courts were established in India by 1775. The British ignored local indigenous adjudication procedures and modeled the process in the courts on that of British law courts of the period. However, there was a conflict between British values, which required a clear-cut decision, and Indian values, which encouraged the parties to work out their differences through some form of compromise.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. Even in England it was formed during a feudal era when an agrarian economy was dominant. While India remained a colony, the system thrived, prospered and deepened its roots as the prestigious and only justice symbol. Indigenous local customs and community-based mediation and conciliation procedures successfully adopted by business associations in western India were held to be discriminatory, depriving the litigants of their right to go to courts.

The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation.

Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies.

Almost all the democratic countries of the world have faced similar problems with court congestion and access to justice. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

LEGAL RECOGNITION OF MEDIATION IN INDIA

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes." Detailed procedures were prescribed for conciliation proceedings under the Act.

Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Indian Legislature made headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a Central Authority with the Chief Justice of India as its Patron-in-Chief. The Central Authority has been vested with duties to perform, inter alia, the following functions: -

* To encourage the settlement of disputes by way of neg otiations, arbitration and conciliation.
* To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.

* To frame most effective and economical schemes for the purpose.
* To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.
* To undertake research in the field of legal services.
* To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.
* To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in universities, Law Colleges and other institutions.
* To act in co-ordination with governmental and non-governmental agencies engaged in the work of promoting legal services.

The Indian parliament enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.

In 1999, the Indian Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

Since the inception of the economic liberilisation policies in India and the acceptance of law reforms the world over, the legal opinion leaders have concluded that mediation should be a critical part of the solution to the profound problem of arrears of cases in the civil courts. In 1995-96 the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M. Ahmadi, undertook an Indo-U.S. joint study for finding solutions to the problem of delays in the Indian Civil Justice System and every High Court was asked to appoint a study team which worked with the delegates of The Institute for Study and Development of Legal Systems [ISDLS], a San Francisco based institution. After gathering information from every State, a central study team analyzed the information gathered and made some further concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code with special reference to the Indian scenario.

EVOLUTION OF MEDIATION IN INDIA

The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad. On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India. The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code. Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate

Course for "Intensive training in Theory and Practice of Mediation". The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003. The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India. The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation centre in the Academy's campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon'ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Banglore, Ranchi, Indore and Chandigarh.

MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52 Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.

The Supreme Court of India upheld the constitutional validity of the new law reforms in the case filed by Salem Bar Association and appointed a committee chaired by Justice Mr. Jagannadha Rao, the chairman of the Law Commission of India, to suggest and frame rules for ironing out the creases, if any, in the new law and for implementation of mediation procedures in civil courts. The Law Commission prepared consultation papers on Mediation and Case Management and framed and circulated model Rules. The Supreme Court approved the model rules and directed every High Court to frame them. The Law Commission of India organized an International conference on Case Management, Conciliation and Mediation at New Delhi on 3rd and 4th May 2003, which was a great success. Delhi District Courts invited ISDLS to train their Judges as mediators and help in establishing court annexed mediation centre. Delhi High Court started its own lawyers managed mediation and conciliation centre. Karnataka High Court also started a court-annexed mediation and conciliation centre and trained their mediators with the help of ISDLS. Now court-annexed mediation centres have been started in trial courts at Allahabad, Lucknow, Chandigarh, Ahmedabad, Rajkot, Jamnagar, Surat and many more Districts in India.

Mandatory mediation through courts has now a legal sanction. Court-Annexed Mediation and Conciliation Centres are now established at several courts in India and the courts have started referring cases to such centres. In Court-Annexed Mediation the mediation services are provided by the court as a part and parcel of the same judicial system as against Court-Referred Mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving them a feeling

that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants are given an opportunity to play their own participatory role in the resolution of disputes. This also creates public acceptance for the process as the same time-tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. In court-annexed mediation, the court is the central institution for resolution of disputes. Where ADR procedures are overseen by the court, at least in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

CHAPTER - 3.1.2

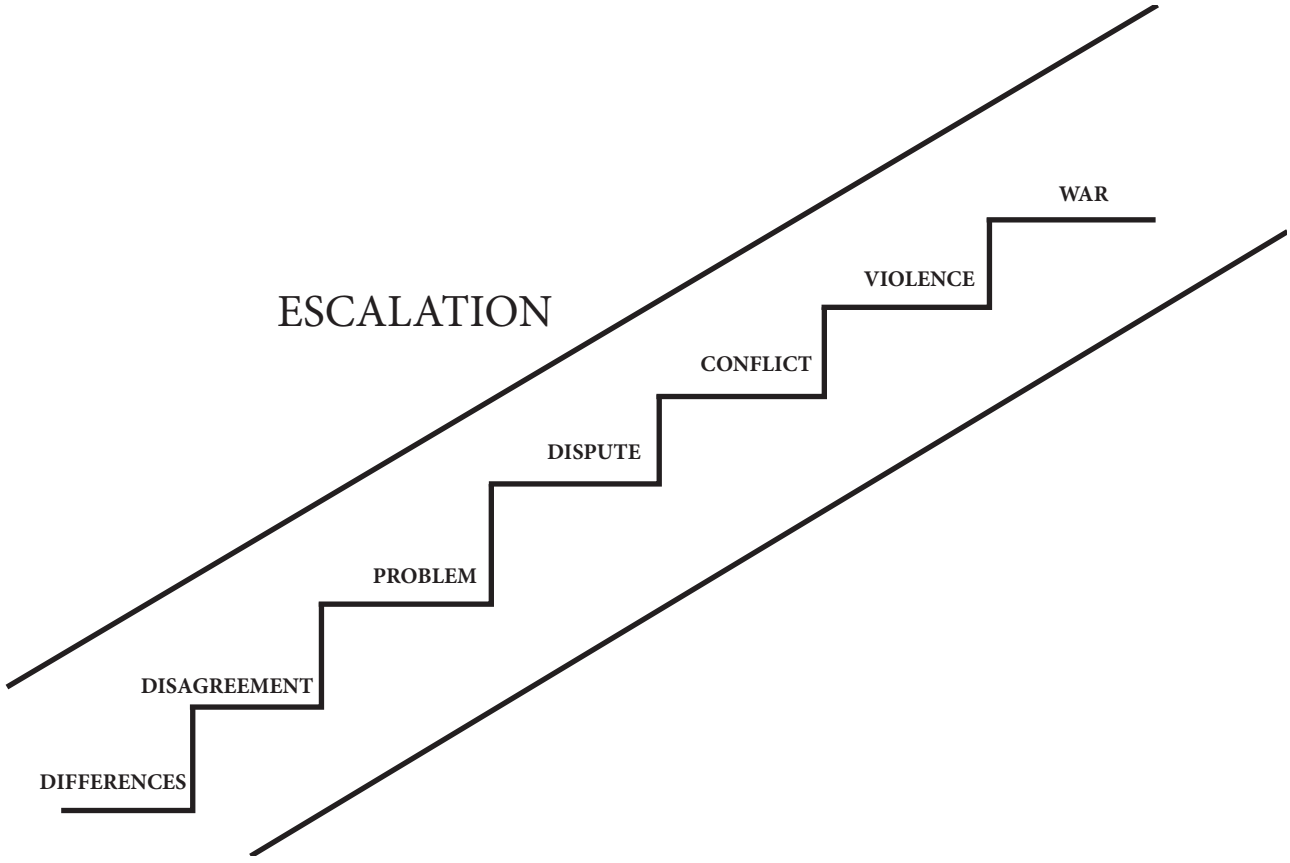
UNDERSTANDING CONFLICT

THE NATURE OF CONFLICT

It is appropriate to begin the study of mediation with an examination of the nature of conflict and the principles of conflict resolution which underlie the mediation process. We will first attempt to understand conflict, then examine the need to manage conflict through negotiation and finally study mediation as assisted negotiation to resolve conflict effectively. This becomes necessary because how we understand conflict determines the way we will mediate.

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreement unresolved become dispute. Unresolved disputes become conflicts. Unresolved conflicts can lead to violence and even war. This is called the continuum of tension and is often illustrated by the following chart:

CONTINUUM OF TENSION



We will study the nature of Conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral). (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle). Understanding these dimensions will help us understand our own approaches to conflict as well as those of the parties we deal with.

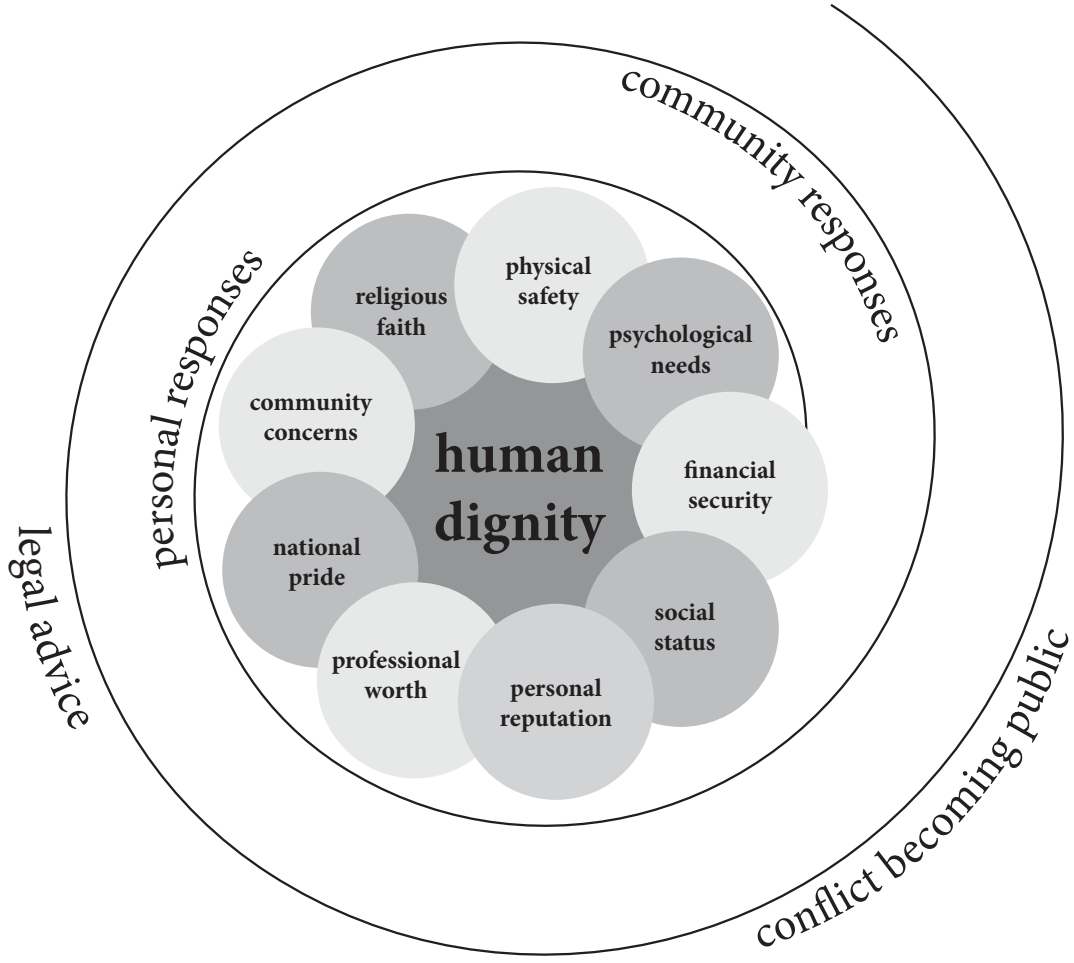
THE DIMENSIONS OF CONFLICT

1) THE CONFLICT CORE

The Conflict Core diagram shows how at the very core of any conflict, there lies a sense of threat concerning individuals, groups, communities or nations. This sense of threat emerges when any disagreement, annoyance, competition or inequity threatens any aspect of human dignity, personal reputation, physical safety, psychological needs, professional worth, social status, financial security, community concerns, religious membership or national pride. This list is not exhaustive and only indicates broad areas of threat. By the time parties get to the negotiating or mediation table, they are threatened both by the opposite side and within themselves! There is fear, suspicion, helplessness, frustration, embarrassment, anger, hurt, humiliation, distrust, desperation, vengeance and a host of mixed emotions that need to be addressed. Failure to address these emotions will prevent the parties from resolving their dispute.

THE CONFLICT CORE AND CONFLICT SPIRAL

Conflicts emerge when something impotant is threatened and creates initial tensions



2) THE CONFLICT SPIRAL

When a given conflict intensifies, the initial tensions start spiralling outwards, affecting individuals, relationships, tasks, decisions, organizations and communities. This outward manifestation of the conflict is called the Conflict Spiral.

Personal responses. The stress of conflict provokes strong feelings of anxiety, anger, hostility, depression, and even vengeance in relationships. Every action or in-action of the other side becomes suspect. People become increasingly rigid in how they see the problem and in the solutions they demand. It can be difficult for them to think clearly. Hence what the parties really need is a forum which will understand and address their emotions and not just their dispute. Without emotions being addressed it is difficult to find real solutions.

Community responses. Emotions have a vital community and cultural context, even though individual responses may not always be the same for all members of the same culture or community. Any dispute takes colour from its community and cultural context. When the dispute begins to affect those around it, people may take sides or leave. Communities and families get polarized when the dispute involves a family or community member. However, a solution for a family dispute in one part of the country may not necessarily be perceived to be the solution in another part of the country. Similarly, a solution in the context of a metropolitan urban city may not be the same as for a rural area. A solution for a voluntary organisation working with education may not be the solution for an information technology firm.

Legal advice. Legal advice often becomes important in a conflict. This may add to the increasing tensions and inability of parties to control the situation themselves. Through process of interaction between the parties, assisted by a neutral person, a possible solution acceptable to all can be evolved.

Conflict becoming public

Sometimes the conflict becomes public. Each side develops rigid positions and gathers allies for the cause. The conflict may spread beyond the original protagonists' control. It may also attract public and media attention. The relationships of the old and new protagonists become more complicated. Resolving the original conflict therefore becomes more difficult.

3) THE CONFLICT TRIANGLE*

The Conflict Triangle arranges the three primary aspects of Conflict namely: the People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the basic framework to understand and address conflict. Elements of each side of this Conflict Triangle differ from person to person, situation to situation and problem to problem requiring different solutions.

1. People. Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.
2. Process. Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.
3. Problem. Every conflict has its own content. This comprises of all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

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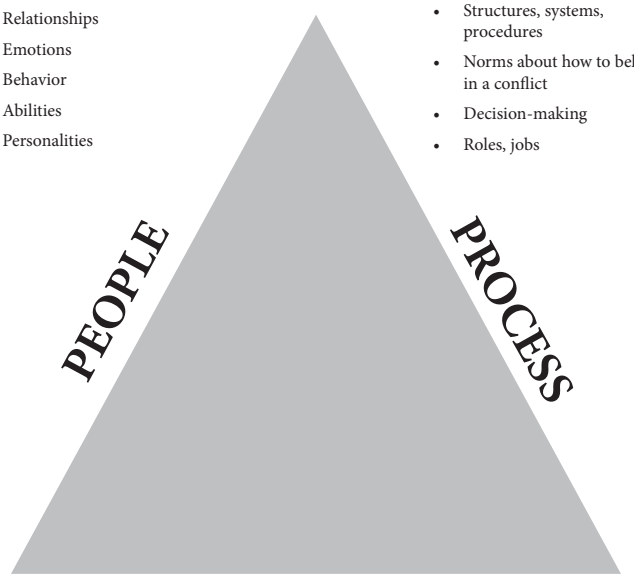
* Acknowledgement of concepts and ideas of the Conflict Core, Spiral and Triangle: 'The Mediator's Handbook' by Jennifer E. Beer with Eileen Stief developed by Friends Conflict resolution programs, revised and expanded 3rd. Edition, New Society publishers

THE CONFLICT TRIANGLE-1

- Past history
- Values, meanings
- Relationships
- Emotions
- Behavior
- Abilities
- Personalities

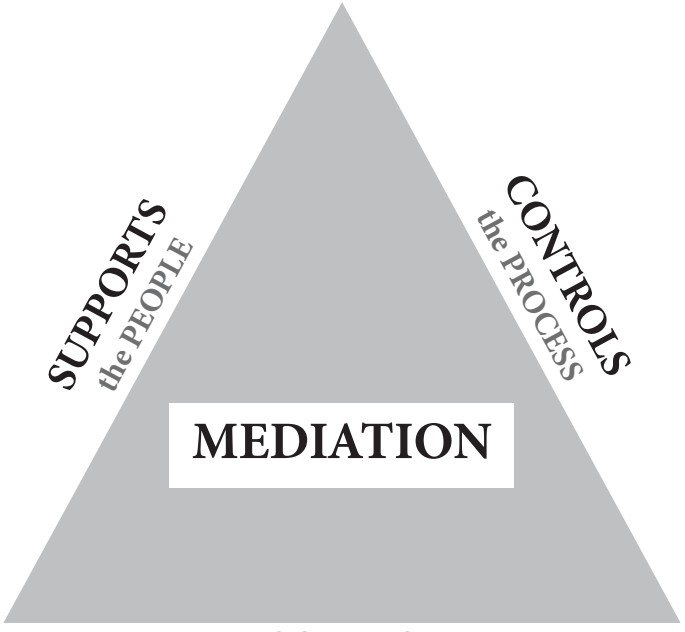
- How people communicate issues and feelings
- Structures, systems, procedures
- Norms about how to behave in a conflict
- Decision-making
- Roles, jobs



PROBLEM

- Facts
- Positions
- Issues
- Consequences of events

- Perceptions
- Interests, needs
- Solutions
- Consequences of possible outcomes



SOLVES
the PROBLEM

GOING BEYOND MERE PROBLEM-SOLVING

If the parties are able to address each side of the conflict triangle, easing their emotional state, changing their ways of interacting and addressing the problems which threatened their core interests, then the conflict is not merely resolved, but mindsets and hearts change. It is in this sense that mediation at its best goes beyond mere problem-solving or managing a conflict.

CAUSES OF CONFLICT AND ADDRESSING THEM

The first step in resolving conflict is identifying its cause. Once the cause has been identified, the next step is to evolve a strategy to address it. The following are some examples of causes of conflict and strategies to address them.

CAUSES	STRATEGY
Information	
• Lack of information • Misinformation • Different interpretations of information	• Agree on what data are important • Agree on process to collect data • Agree on considering all interpretations of information
Interests and Expectations	
• Goals, needs • Perceptions • Find creative solutions • Clarify perceptions	• Shift focus from positions to interests • Expand options
Relationships	
• Poor communication • Repetitive negative behavior • Misconceptions, stereotypes • Distrust • History of conflict • Focus on improving the future, not dissecting the past	• Establish ground rules • Clarify misconceptions • Improve communication • Agree on processes and procedures • Keep your word
Structural Conflicts	
• Resources • Power • Time constraints	• Reallocate ownership and • Establish fair, mutually acceptable decision-making process • Clearly define, change roles
Values	
• Different criteria for evaluating ideas • Different ways of life, ideology and religion	• Search for super-ordinate goals • Allow parties to agree and to disagree • Build common loyalty

CHAPTER-3.1.3

CONCEPT OF MEDIATION

1. Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

   1.1 Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

   1.2 Mediation is a party-centred negotiation process. The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

   1.3 Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process . The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.

   1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/ commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

   1.5 Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

   1.6 Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute. The mediator is a guide who helps the parties to find their own solution to the dispute. The mediator's

personal preferences or perceptions do not have any bearing on the dispute resolution process.

1.7 In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator evaluates when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.

1.8 The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.

1.9 Mediation is a private process, which is not open to the public. Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for / during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.

1.10 Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties.

1.11 In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".

1.12 The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.

1.13 Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.

1.14 Mediation in a particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

TYPES OF MEDIATION

1. COURT- REFERRED MEDIATION- It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

2. PRIVATE MEDIATION - In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

ADVANTAGES OF MEDIATION

1. The parties have CONTROL over the mediation in terms of 1) its scope (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome (i.e., the right to decide whether to settle or not and the terms of settlement.)

   1.1. Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

   1.2. The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

   1.3. The procedure is SPEEDY, EFFICIENT and ECONOMICAL.

   1.4. The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

   1.5. The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.

   1.6. Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

   1.7. The process is CONFIDENTIAL.

   1.8. The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.

   1.9. Mediation helps to maintain/ improve/ restore relationships between the parties.

   1.10. Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process - in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

   1.11. In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL SETTLEMENT.

   1.12. A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

   1.13. Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

   1.14. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

   1.15. Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

   1.16. REFUND OF COURT FEES is permitted as per rules in the case of settlement in a court referred mediation.

CHAPTER-3.1.4

COMPARISON BETWEEN JUDICIAL PROCESS AND VARIOUS ADR PROCESSES

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1.	Judicial process is an adjudicatory process where a third party (judge/ other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
2.	Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3.	The decision is binding on the parties.	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
4.	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
5.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
6.	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
7.	Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
8.	No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
9.	Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

	MEDIATION	CONCILIATION	LOK ADALAT
1.	Mediation is a non- adjudicatory process.	Conciliation is a non- adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
2.	Voluntary process.	Voluntary process.	Voluntary process.
3.	Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
4.	Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
5.	Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
6.	The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
7.	The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties ismandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
8.	The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
9.	Not appealable.	Decree/order not appealable.	Award not appealable.
10.	The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
11.	Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
12.	In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In Lok Adalat, parties are not actively and directly involved so much.
13.	Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

A ROLE PLAY TO DEMONSTRATE THE DIFFERENCES BETWEEN ADJUDICATION AND MEDIATION

"THE FAMILY PORTRAIT"

FACTS: Their father died recently, leaving the family property to the two sons. Their mother died earlier, so both parties are the sole surviving heirs. Their father's will is clear regarding the family home and his other personal property - everything has been divided fifty-fifty. However, the will mentions that the family portrait, an original painting by a famous Indian Painter, of their parents and grandparents, and which is a cherished family possession is to go to the father's "favourite child". The will does not name his favourite child. The two brothers cannot agree on who the father's favourite child is.

EXERCISE : Resolve the dispute using (i) arbitration (adjudication) and (ii) mediation.

Exercise (i)

ARBITRATION (ADJUDICTION)

The arbitrator has to first decide upon what the ISSUE in dispute is : Which child fits the definition of the "favourite child"?

Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.

The arbitrator evaluates the evidence and DECIDES who fits in the definition of "favourite child" - the painting is awarded to that child.

No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

Exercise (ii)

MEDIATION

Here, the mediator facilitates the negotiation of the same issue. The parties will try and work out a solution between themselves, rather than relinquishing control over the resolution of the dispute to an arbitrator or any other neutral. The parties are free to choose creative compromises - there is no right and wrong, and consequently, there need not be only one winner.

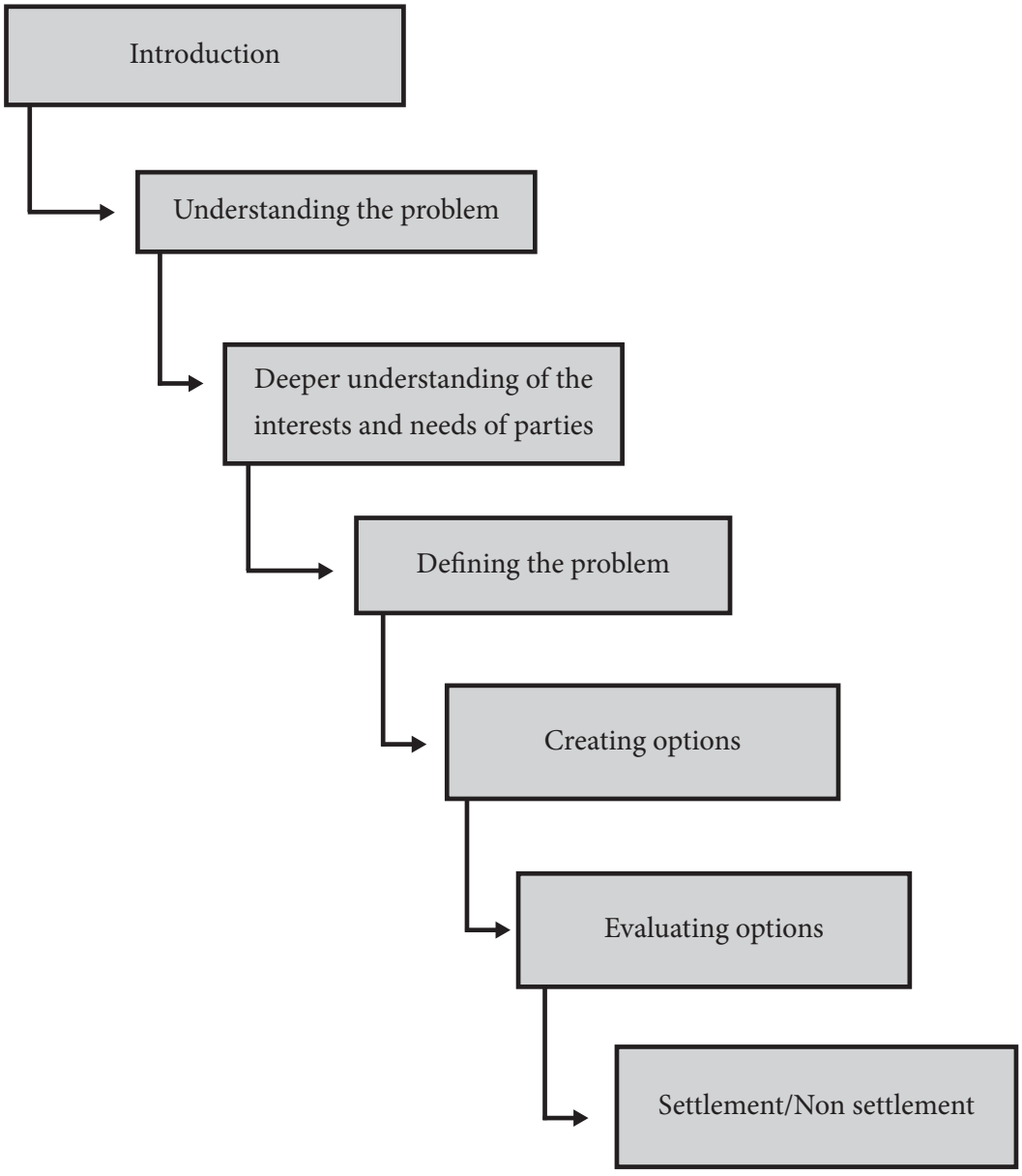
Mediator is to demonstrate

- Identifying need
- Creating options
- Controlling process
- Restoring relationship

CHAPTER-3.1.5

THE PROCESS OF MEDIATION

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.



Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished before moving to the next phase.

CHAPTER-3.1.6

STAGES OF MEDIATION

The functional stages of the mediation process are:

1) Introduction and Opening Statement
2) Joint Session
3) Separate Session(s)
4) Closing

STAGE 1: INTRODUCTION AND OPENING STATEMENT

Objectives

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

Seating Arrangement in the Mediation Room

At the commencement of the mediation process, the mediator shall ensure that the parties and/or their counsel are present.

There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

- The mediator can have eye-contact with all the parties and he can facilitate effective communication between the parties.
- Each of the parties and his counsel are seated together.
- All persons present feel at ease, safe and comfortable.

Introduction

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.

- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.
- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues
- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

The Mediator's Opening Statement

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

- Concept and process of mediation
- Stages of mediation
- Role of the mediator
- Role of advocates
- Role of parties
- Advantages of mediation
- Ground rules of mediation

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator
- Finality
- Possibility of settling related disputes

- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

- Ordinarily, the parties/counsel may address only the mediator
- While one person is speaking, others may refrain from interrupting
- Language used may always be polite and respectful
- Mutual respect and respect for the process may be maintained
- Mobile phones may be switched off
- Adequate opportunity may be given to all parties to present their views

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

STAGE 2 : JOINT SESSION

Objectives

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

Procedure

- The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/ respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.
- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.
- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.
- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.
- The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.

- The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.
- During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

STAGE 3: SEPARATE SESSION

Objectives

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

Procedure

(i) RE - AFFIRMING CONFIDENTIALITY

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

(ii) GATHERING FURTHER INFORMATION

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);
- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;

- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

(iii) REALITY - TESTING

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in REALITY-TESTING. Reality-testing may involve any or all of the following:

(a) A detailed examination of specific elements of a claim, defense, or a perspective;

(b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;

(c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;

(d) Examination of the monetary and non-monetary costs of litigation and continued conflict; (e) Assessment of witness appearance and credibility of parties;

(f) Inquiry into the chances of winning/losing at trial; and

(g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:

1. Asking effective questions,
2. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or
3. Considering the consequences of any failure to reach an agreement (BATNA/WATNA / MLATNA analysis).

(I) ASKING EFFECTIVE QUESTIONS

Mediator may ask parties questions that can gather information, clarify facts or alter perceptions of the parties with regard to their understanding and assessment of the case and their expectations.

Examples of effective questions:

- OPEN-ENDED QUESTIONS like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business'. 'What were your reasons for including that term in the contract?'
- CLOSED QUESTIONS, which are specific, concrete and which bring out specific information.

  For example, 'it is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who built this building?'
- QUESTIONS THAT BRING OUT FACTS: 'Tell me about the background of this matter'.

'What happened next?'

- QUESTIONS THAT BRING OUT POSITIONS: 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'
- QUESTIONS THAT BRING OUT INTERESTS: 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?'

'What do you hope to accomplish?' 'What is really driving this case?'

(II) DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OF THE PARTIES

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as, 'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or

'How much money will it take in legal fees and expenses in court?

(III) CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA /MLATNA ANALYSIS).

BATNA Õ Best Alternative to Negotiated Agreement

WATNA Õ Worst Alternative to Negotiated Agreement

MLATNA Õ Most Likely Alternative to Negotiated Agreement

One technique of reality-testing used in the process of negotiation is to consider the different alternatives to a negotiated settlement. In the context of mediation, the alternatives are 'the best', 'the worst' and 'the most' likely outcome if a dispute is not resolved through negotiation in mediation. As part of reality-testing, it may be helpful to the parties to examine their alternatives outside mediation (specifically litigation) so as to compare them with the options available in mediation. It is also helpful for the mediator to discuss the consequences of failing to reach an agreement e.g., the effect on the relationship of the parties, the effect on the business of the parties etc.

While the parties often wish to focus on best outcomes in litigation, it is important to consider and discuss the worst and the most likely outcomes also. The mediator solicits the viewpoints of the advocate/party about the possible outcome in litigation. It is productive for the mediator to work with the parties and their advocates to come to a proper understanding of the best, the worst and the most likely outcome of the dispute in litigation as that would help the parties to recognize reality and thereby formulate realistic and workable proposals.

If the parties are reaching an interest-based resolution with relative ease, a BATNA/WATNA/ MLATNA analysis need not be resorted to. However if parties are in difficulty at negotiation and the mediator anticipates hard bargaining or adamant stands, BATNA/ WATNA/ MLATNA analysis may be introduced.

By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their

focus to problem-solving. The parties are then encouraged to explore several creative options for settlement.

(iv) BRAIN STORMING

Brain Storming is a technique used to generate options for agreement. There are 2 stages to the brain storming process:

1. Creating options
2. Evaluating options

1. **Creating options:-** Parties are encouraged to freely create possible options for agreement.

   Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.

2. **Evaluating options:-** After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained. This information further helps to find terms that are mutually acceptable to both parties.

   Brainstorming requires lateral thinking more than linear thinking.

   Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement.

   Linear thinking: Linear thinking is logical, traditional, rational and fact based. Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(v) SUB- SESSIONS

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub- sessions with only the advocate (s) or the party or any member(s) of the party.

- Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.
- If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub- session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

(vi) EXCHANGE OF OFFERS

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

STAGE 4: CLOSING

(A) Where there is a settlement

- Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

  1. Mediator orally confirms the terms of settlement;
  2. Such terms of settlement are reduced to writing;
  3. The agreement is signed by all parties to the agreement and the counsel if any representing the parties;
  4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
  5. A copy of the signed agreement is furnished to the parties;
  6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
  7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
  8. The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

- THE WRITTEN AGREEMENT SHOULD:

  3 clearly specify all material terms agreed to;

  3 be drafted in plain, precise and unambiguous language;

  3 be concise;

  3 use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);

  3 use language and expression which ensure that neither of the parties feels that he or she has 'lost';

  3 ensure that the terms of the agreement are executable in accordance with law;

  3 be complete in its recitation of the terms;

  3 avoid legal jargon, as far as possible use the words and expressions used by the parties;

  3 as far as possible state in positive language what each parties agrees to do;

3 as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) Where there is no settlement

- If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.
- The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

CHAPTER-3.1.7

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

(i) facilitate the process of mediation; and

(ii) assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.

- motivating the parties to agree on mutually acceptable settlement.
- assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

A mediator performs an evaluative role by-

- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) Mediator and Conciliator

The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case through reality testing and assisting the parties to evaluate the options for settlement. But in the process of a conciliation, the conciliator himself can evaluate the cases of the parties and the options for settlement for the purpose of suggesting the terms of settlement.

The role of a mediator is not to give judgment on the merits of the case or to give advice to the parties or to suggest solutions to the parties.

(ii) Mediator and Adjudicator

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

(C) QUALITIES OF A MEDIATOR

It is necessary that a mediator must possess certain basic qualities which include:

i. complete, genuine and unconditional faith in the process of mediation and its efficacy.

ii. ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

iii. sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

iv. highest standards of honesty and integrity in conduct and behavior. v. neutrality, objectivity and non-judgmental.

vi. ability to be an attentive, active and patient listener.

vii. a calm, pleasant and cheerful disposition.

viii. patience, persistence and perseverance.

ix. good communication skills.

x. open mindedness and flexibility. xi. empathy.

xii. creativity.

(D) QUALIFICATIONS OF MEDIATORS

The Supreme Court of India in Salem Advocate Bar Association V Union of India, (2005) 6 SCC 344 approved the Model Civil Procedure Mediation Rules prepared by the Committee headed by Hon'ble Mr. Justice M.J.Rao, the then Chairman, Law Commission of India. These Rules have already been adopted by most of the High Courts with modifications according to the requirements of the State concerned. As per the Model Rules the following persons are qualified and eligible for being enlisted in the panel of mediators:--

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

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status;

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

(E) ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. Avoid conflict of interest

A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest.

Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.

A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. Awareness about competence and professional role boundaries

Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience.

Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. Practice Neutrality

Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even handed approach.

4. Ensure Voluntariness

The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. Maintain Confidentiality

Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless ;

a. the mediator is specifically given permission to do so by the party concerned; or

b. the mediator is required by law to do so.

6. Do no harm

Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process (e.g. meet the parties separately or meet the counsel only) and if necessary withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

7. Promote Self-determination

Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

8. Facilitate Informed Consent

Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

9. Discharge Duties to third parties

Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

10. Commitment to Honesty and Integrity

For a mediator, honesty means, among other things, full and fair disclosure of :

a. his qualifications and prior experience;

b. direct or indirect interest if any, in the outcome of the dispute;

c. any fees that the parties will be charged for the mediation; and

d. any other aspect of the mediation which may affect the party's willingness to participate in the process.

Honesty also means telling the truth when meeting the parties separately, e.g. if party 'A' confidentially discloses his minimum expectation and party 'B' asks the mediator whether he knows the opponent's minimum expectation, saying 'No' would be dishonest. Instead, the mediator could say that he has discussed many things with party 'A' on a confidential basis and, therefore, he is at liberty to respond to the question, just as he would be precluded from disclosing to party

'A' certain things what was told by party 'B'. When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. He must not abuse the trust the parties placed in him, even if he believes that bending the truth will further the cause of settlement.

Apart from the fee/remuneration/honorarium, if any, prescribed under the rules, the mediator shall not seek or receive any amount or gift from the parties to the mediation either before or after the conclusion of the mediation process.

Where the mediator is a judicial officer he shall not mediate any dispute involved in or connected with a case pending in his Court.

CHAPTER-3.1.8

TRAINING OF MEDIATORS

A system, even if perfectly structured, may not yield desired result if the persons operating it do not have requisite operational skills. A person who is selected to perform a particular job may commit errors if he is not properly trained for it. Training is indispensable before a person starts performing. Training, seeks to identify the gaps in the expertise of a person and to fill such gaps to equip him to perform efficiently. Training should be focused, specialized, result oriented and structured according to the task. It should improve skills, knowledge and attitude of a trainee.

Mediation is a developing concept in India. Efforts are being made to make mediation a fully developed tool for resolution of disputes. Training is necessary for a mediator to learn the fundamentals of mediation. Training is required for a mediator irrespective of his background, whether he is a judicial officer or advocate or person belonging to any other category.

It is necessary to follow uniform mediation process and programme all over India. Uniformity is required also in the matter of duration, nature and curriculum of the training for mediators.

DURATION OF TRAINING

In the light of International standards and indigenous requirements, the duration of training should be a minimum of 40 hours.

NATURE OF TRAINING

Training consists of :-

(i) Theory

(ii) Exercises like role play and demonstration.

(iii) Practical training of mediating a few actual disputes under the guidance of a trainer or a trained mediator.

CURRICULUM

The curriculum for training shall include :-

1. Concept and process of Mediation.
2. Evolution and Legislative History of mediation in India.
3. Conflict management and resolution.
4. Concept of Mediation.
5. Types of Mediation.
6. Advantages of Mediation.
7. Difference between Mediation and other modes of Dispute Resolution.
8. Stages of Mediation.
9. Negotiation.

10. Communication.
11. Impasse management.
12. Role of Mediator.
13. Ethics and code of Conduct for Mediator.
14. Role of Referral Judges.
15. Role of Parties and their Advocates.
16. Enforceability of settlement agreement.
17. The Mediation Rules.

CHAPTER-3.1.9

COMMUNICATION IN MEDIATION

1.1 Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.

1.2 Communication is not just TALKING and LISTENING. Communication is a process of information transmission.

1.3 The intention of communication is to convey a message.

1.4 The purpose of communication could be any or all of the following :

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

1.5 Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.

1.6 Communication is also information sent by one to another to be understood by the receiver in the same way as it was intended to be conveyed.

1.7 Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and attributing thoughts, feelings/ideas to the message. It evokes a response in the Receiver who conveys the same to the sender through words/gestures/acts/expressions.

1.8 Consequently, a communication would involve :-

A Sender - person who sends a message.

A Receiver - person who receives the message.

Channel - the medium through which a message is transmitted which could be words or gestures or expressions.

Message - thoughts/feelings/ideas/emotions/knowledge/information that is sought to be communicated.

Encoding - transforming message/information into a form that can be sent to the receiver to be decoded correctly.

Decoding - understanding the message or information.

Response - answer/reply to a communicated message.

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

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

1.10 Communication may be verbal or non-verbal. Communication could be through words - spoken or written, gestures, body language, facial expressions etc. Studies reveal that in any communication, 55% of the meaning is transmitted through body language, 38% is transmitted through the attitude/demeanor of the communication, and 7% is transmitted through words.

VERBAL AND NON-VERBAL COMMUNICATION

Verbal Communication is transmission of information or message through spoken words.

Non-verbal communication refers to the transmission of information or message from sender to receiver without the use of spoken words. It includes written communication, body language, tone, demeanor, attitude and other modes of non-verbal expression. It is often more spontaneous than verbal communication and takes place under less conscious control. Therefore, it can provide more accurate information.

It is important for a mediator to pay adequate attention to non verbal communications that take place throughout the mediation. It is also important for a mediator to analyze the message sent by the parties through such non verbal communication.

1.11 REQUIREMENTS FOR EFFECTIVE COMMUNICATION :

i) Use simple and clear language.

ii) Avoid difficult words and phrases.

iii) Avoid unnecessary repetition.

iv) Be precise and logical.

v) Have clarity of thought and expression.

vi) Respond with empathy, warmth and interest.

vii) Ensure proper eye contact.

viii) Be patient, attentive and courteous.

ix) Avoid unnecessary interruptions.

x) Have good listening abilities and skills.

xi) Avoid making statements and comments or responses that could cause a negative effect.

1.12 CAUSES OF INEFFECTIVE COMMUNICATION :

i) Differences in perception i.e. where the Sender's message is not understood correctly by the Receiver.

ii) Misinterpretation and distortion of the message by the Receiver.

iii) Differences in language and expression.

iv) Poor listening abilities and skills.

v) Lack of patience.

vi) Withholding or distortion of valuable information by a third party/intermediary, where a message is transmitted by the sender to the receiver through such third party/intermediary.

1.13 BARRIERS TO COMMUNICATION : PHYSICAL BARRIERS :

i) lack of congenial atmosphere.

ii) lack of proper seating arrangements.

iii) presence of third parties.

iv) lack of sufficient time.

EMOTIONAL BARRIERS :

i) temperaments of the parties and their emotional quotient.

ii) feelings of inferiority, superiority, guilt or arrogance.

iii) fear, suspicion, ego, mistrust or bias.

iv) hidden agenda.

v) conflict of personalities.

1.14 COMMUNICATION IN ADVERSARIAL SYSTEM AND MEDIATION

	ADVERSARIAL SYSTEM	**MEDIATION**
GOAL	To win.	To reach mutually acceptable solutions.
STYLE	Argumentative.	Collaborative.
SPEAK	To establish and convince.	To explain.
LISTEN	To find flaws and develop counter arguments.	To understand.

COMMUNICATION SKILLS IN MEDIATION

Communication skills in mediation include :-

(A) Active Listening.

(B) Listening with Empathy.

(C) Body Language.

(D) Asking the Right Questions.

(A) ACTIVE LISTENING :

Parties participate in mediation with varying degree of optimism, apprehension, distress, anger, confusion, fear etc. If the parties understand that they will be listened to and understood, it will help in trust building and they can share the responsibility to resolve the dispute.

In active listening the listener pays attention to the speaker's words, body language, and the context of the communication.

An active listener listens for both what is said and what is not said.

An active listener tries to understand the speaker's intended message, notwithstanding any mistake, mis-statement or other limitations of the speaker's communication.

An active listener controls his inner voices and judgments which may interfere with his understanding the speaker's message.

Active listening requires listening without unnecessarily interrupting the speaker. Parties must be given uninterrupted time to convey their message. There is a difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one also understands the meaning of what has been said. Listening is an active process.

Following are the commonly used techniques of active listening by the mediator:

1. **Summarising:** This is a communication technique where the mediator outlines the main points made by a speaker. The summary must be accurate, complete and worded neutrally. It must capture the essential points made by the speaker. Parties feel understood and repetition by them is minimized.

2. **Reflecting:** Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is a restatement of feelings and emotions in terms of the speaker's experience, e.g. "So, you are feeling frustrated". Reflecting usually demonstrates empathy.

3. **Re-framing:** Re-framing is a communication technique used by the mediator to help the parties move from Positions to Interests and thereafter, to problem solving and possible solutions. It involves removal of charged and offensive words of the speaker. It accomplishes five essential tasks:

    1. Converts the statement from negative to positive.
    2. Converts the statement from the past to the future.
    3. Converts the statement from positions to interests.
    4. Shifts the focus from the targeted person to the speaker.
    5. Reduces intensity of emotions.

    Example:

    Party: "My boss is cruel and indifferent. It is impossible to talk to him. I should be able to meet him at least once a day. He doesn't make any time for me and always ignores me."

Mediator Re-frames: "You want regular access and communication with your boss and you want him to be considerate, is that right?" This re-frame has converted the employee's complaint from negative to positive, past to future, position to interest and shifted the focus back to the employee's needs/interests.

NOTE :

Position: A position is a perception ("my boss is cruel and indifferent") or a claim or demand or desired outcome ("I should be able to meet him at least once a day").

Interest: An interest is what lies beneath and drives a person's demands or claims. It is a person's real need, concern, priority, goal etc. It can be tangible (e.g. property, money, shares etc.) and/ or intangible (e.g. communication, consideration, recognition, respect, loyalty etc.).

4. **Acknowledging:** In acknowledgment the mediator verbally recognizes what the speaker has said without agreeing or disagreeing. Example "I see your point" or "I understand what you are saying. This way mediator assures the speaker that he has been heard and understood.

5. **Deferring :** A specialized communication technique where the mediator postpones the discussion of a topic until later. While deferring a mediator should write down the topic he has deferred and re-initiate the discussion of the topic at the right time.

6. **Encouraging :** The mediator can encourage parties when they need reassurance, support or help in communicating. Example : " what you said makes things clear" or "this is useful information"

7. **Bridging :** A technique used by a mediator to help a party to continue communication. Example: "And--------", "And then-----", The word "And" encourages communication whereas the word "But " could discourage communication.

8. **Restating :** In this the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker. Example: "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."

9. **Paraphrasing:** Is a communication technique where the mediator states in his own words the statements of the speaker conveying the same meaning.

10. **Silence:** A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts.

11. **Apology:** It is an acknowledgment of hurt and pain caused to the other party and not necessarily an admission of guilt. Parties should be carefully and adequately prepared by the mediator when a party chooses to apologise.

    Example: "I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you"

12. **Setting an agenda:** In order to facilitate better communication between the parties the mediator effectively structures the sequence or order of topics, issues, position, claims,

defences, settlement terms etc. It may be done in consultation with the parties or unilaterally.

For example, when tensions are high it is preferable to select the easy issue to work on first. The mediator may determine what is to be addressed first so as to provide ground work for later decision making.

BARRIERS TO ACTIVE LISTENING :

(i) **Distractions :-** They may be external or internal. The sources of external distractions are noise, discomfort, interruptions etc. The sources of internal distractions are tiredness, boredom, preoccupation, anxiety, impatience etc.

(ii) **Inadequate time :-** There should be sufficient time to facilitate attentive and patient listening.

(iii) **Pre-judging :--** A mediator should not prejudge the parties and their attitude, motive or intention.

(iv) **Blaming :--** A mediator should not assign responsibility to any party for what has happened.

(v) **Absent Mindedness :-** The mediator should not be half-listening or inattentive.

(vi) **Role Confusion :--** The mediator should not assume the role of advisor or counselor or adjudicator. He should only facilitate resolution of the dispute.

(vii) **Arguing / imposing own views:--** The mediator should not argue with the parties or try to impose his own views on them.

(viii) Criticising

(ix) Counseling

(x) Moralising

(xi) Analysing

(B) LISTENING WITH EMPATHY

In the mediation process, empathy means the ability of the mediator to understand and appreciate the feelings and needs of the parties, and to convey to them such understanding and appreciation without expressing agreement or disagreement with them.

Empathy shown by the mediator helps the speaker to become less emotional and more practical and reasonable. Mediator should understand that Empathy is different from Sympathy. In empathy the focus of attention is on the speaker whereas in sympathy the focus of attention is on the listener.

Example:

Wife : "I had such a hard day at work"

Husband : "I am so sorry you had a hard day at work"

(focus is on listener/ husband) - Sympathy

Husband : "You had a hard day at work, mine was worse" - Sympathy

(focus on listener/husband)

Husband: " You feel it was hard for you at work today.

Would you like to talk about it?"

(focus on speaker/wife) - Empathy

Reflecting' is a good communication technique used to express empathy.

(C) BODY LANGUAGE :

The appropriate body language of the listener indicates to the speaker that the listener is attentive. It conveys to the speaker that the listener is interested in listening and that the listener gives importance to the speaker.

In the case of mediators the following can demonstrate an appropriate body language :-

(i) Symmetry of posture - It reflects mediator's confidence and interest.

(ii) Comfortable look - It increases the confidence of the parties.

(iii) Smiling face - It puts the parties at ease.

(iv) Leaning gently towards the speaker - It is a sign of attentive listening.

(v) Proper eye contact with the speaker - It ensures continuing attention.

(D) ASKING THE RIGHT QUESTIONS

In mediation questions are asked by the mediator to gather information or to clarify facts, positions and interests or to alter perception of parties. Questions must be relevant and appropriate. However, questioning is a tool which should be used with discretion and sensitivity. Timing and context of the questioning are important. Different types of questions will be appropriate at different times and in different context. Appropriate questioning will also demonstrate that the mediator is listening and is encouraging the parties to talk. However, the style of questioning should not be the style of cross examination. Questions should not indicate bias, partiality, judgment or criticism. The right questions help the parties and the mediators to understand what the issues are.

TYPES OF QUESTIONS :

(a) **Open Questions:** These are questions which will give a further opportunity to the party to provide more information or to clarify his own position, retaining control of the direction of discussion and maintaining his own perspective. They are broad and general in scope.

Examples: "Can you tell me more about the subject ?"

"What happened next?"

"What is your claim?"

" What do you really want to achieve?"

(b) **Closed Questions:** These questions are limited in scope, specific, direct and focused.

They are fact-based in content and tend to elicit factual information. The response to these questions may be 'Yes' or 'No' or a very short response and may close the discussion on the particular issue.

Examples: "What colour shirt was the man wearing?"

"On which date was the contract signed?"

"What is the total amount of your medical bills?"

"Were you present in the market when the event occurred?"

(c) **Hypothetical Questions:** Hypothetical questions are Questions which allow parties to explore new ideas and options.

Examples: "What if the disputed property is acquired by Government?"

"What if your husband offers to move out of the parental house and live separately?"

Other types of questions like Leading Questions and Complex Questions are not ordinarily asked in mediation, as they may not help the mediation process.

CHAPTER-3.1.10

NEGOTIATION AND BARGAINING IN MEDIATION

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of negotiation. Negotiation refers to the process of communication that occurs when parties are trying to find a mutually acceptable solution to the dispute. Negotiation may involve different types of bargaining.

What is Negotiation?

Negotiation is an important form of decision making process in human life. Negotiation is communication for the purpose of persuasion. Mediation in essence is an assisted negotiation process. In mediation, negotiation is the process of back and forth communication aimed at reaching an agreement between the parties to the dispute. The purpose of negotiation in mediation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem solving and interest based approach. The mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called 'Shuttle Diplomacy'. Any negotiation that is based on merits and the interest of both parties is Principled Negotiation and can result in a fair agreement, preserving and enhancing the relationship between the parties. The mediator facilitates negotiation by resorting to reality-testing, brainstorming, exchanging of offers, breaking impasse etc.

Why does one negotiate?

a. To put across one's view points, claims and interests.

b. To prevent exploitation/harassment.

c. To seek cooperation of the other side.

d. To avoid litigation.

e. To arrive at mutually acceptable agreement.

NEGOTIATION STYLES

1)	**Avoiding Style**	**Unassertive and Uncooperative:** The participant does not confront the problem or address the issues.
2)	**Accommodating Style**	**Unassertive and Cooperative:** He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice.
3)	**Compromising Style**	**Moderate level of Assertiveness and Cooperation:** He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands Emphasis will be on apparent equality.
4)	**Competing Style**	**Assertive and Uncooperative:** The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.
5)	**Collaborating Style**	**Assertive, Cooperative and Constructive:** He values not only his own interests but also the interests of others. He actively participates in the negotiation and works towards a deeper level of understanding of the issues and a mutually acceptable solution satisfying the interests of all to the extent possible.

What is Bargaining?

Bargaining is a part of the negotiation process. It is a technique to handle conflicts. It starts when the parties are ready to discuss settlement terms.

TYPES OF BARGAINING USED IN NEGOTIATION

There are different types of Bargaining. Negotiation may involve one or more of the types of bargaining mentioned below:

(i) Distributive Bargaining

(ii) Interest based Bargaining.

(iii) Integrative Bargaining.

(i) **Distributive Bargaining:** is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.). In distributive bargaining the parties may not necessarily understand their own or the other's interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome. Distributive bargaining is often referred to as "zero sum game", where any gain by one party results in an equivalent loss by the other party. The two forms of distributive bargaining are:

Positional Bargaining: Positional Bargaining, is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining, the parties simply trade positions, without discussing their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic form of negotiation and is often the

first method people adopt. Each side takes a position and argues for it and may make concessions to reach a compromise. This is a competitive negotiation strategy. In many cases, the parties will never agree and if they agree to compromise, neither of them will be satisfied with the terms of the compromise.

Example: Varun and Vivek are quarrelling in a room. Varun wants window open Vivek wants it shut. They continue to argue about how much to leave open - a crack, halfway, three quarter way.

Rights-Based Bargaining: This form of bargaining focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, "Your client was negligent. Therefore, s/he owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages."

Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining (e.g., "Your client was negligent, so she owes my client X amount in compensation.) Rights-Based Bargaining can lead to an impasse when the parties differ in the interpretation of their respective rights and obligations.

Negative consequences of Distributive Bargaining are:

(a) By taking rigid stands the relationship is often lost.

(b) Creative solutions are not explored and the interests of both parties are not fully met.

(c) Time consuming.

(d) Both parties take extreme positions often resulting in impasse.

(ii) I**nterest-Based Bargaining:** A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie. Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have on-going relationships and / or interests they want to preserve.

Example: The story of two sisters quarrelling over one orange. They decide to cut the orange in half and share it, although both are not happy as it would not adequately satisfy their interest. The mother comes in to enquire what is the real interest of each one. One says that she needs the juice of one orange and the other says that she needs the peel of one orange. The same orange could satisfy the interest of both parties. Both sisters go away happy.

Three steps in interest-based bargaining

There are three essential steps in interest-based bargaining.

(a) Identifying the interests of parties.

(b) Prioritizing the parties' interests.

(c) Helping the parties develop terms of agreement/settlement that meets their most important interests.

(iii) **Integrative Bargaining:** Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

To continue the earlier example of Varun and Vivek quarrelling in the room. Ashok comes into the room and enquires about the quarrel. Vivek says that the cold air blowing on his face is making him uncomfortable. Varun says that the lack of air circulation is making the room stuffy and he is uncomfortable. Ashok opens the window of the adjoining room and keeps the connecting door open. Both parties are happy. The cold air is not directly blowing into Varun's face and Vivek is comfortable as there is adequate air circulation in the room.

As the interests and needs of both parties have been identified, it is easier to integrate the interests of both parties and find a mutually acceptable solution.

Another example of integrative bargaining. A car salesman may reach an impasse with a customer on the issue of the price of a new car. Instead of losing the deal, the car salesman will offer to throw in fancy leather seats as part of the deal while maintaining the price on the car. If necessary the salesman may also agree to help the customer to sell his old car at a good price.

The fancy leather seats and the offer to help in the sale of the old car are integrative terms because they result from an exploration of whether additional terms or trade-offs could be of interest to the customer. Similarly, the Mediator can help parties avoid or overcome an impasse by actively exploring the possibility and desirability of additional terms and trade-offs.

NOTE :

Position: A position is a perception ('my boss is cruel and indifferent') or a desired outcome ('My boss should meet with me once a day to talk'). The claim or demand, itself, is a position.

Interest: An interest is a person's true need, concern, priority, goal etc.. It can even be intangible (not easily perceivable) e.g. respect, loyalty, dependability, timing, etc. An interest is what lies beneath and drives a person's demands or claims.

BARRIERS TO NEGOTIATION

1) Strategic Barriers.
2) Principal and Agent Barriers.
3) Cognitive Barriers (Perception Barriers).

1) Strategic Barriers:

A Strategic Barrier is caused by the strategy adopted by a party to achieve his goal. For example with a view to make the husband agree for divorce the wife files a false complaint against her husband and his family members alleging an offence under Section 498 A of the Indian Penal Code.

A mediator helps the parties to overcome strategic barriers by encouraging the parties to reveal information about their underlying interests and understanding the strategy of the party.

2) Principal and Agent Barriers:

The behaviour of an agent negotiating for the principal may fail to serve interests of the principal. There may be conflict of interests between the principal and his agent. An agent may not have full information required for negotiation or necessary authority to make commitments on behalf of the principal. In all such contingencies the mediator helps the parties to overcome the 'Principal and Agent Barrier' by bringing the real decision maker (Principal) to the negotiating table.

3) Cognitive Barriers (Perception Barriers).

Parties while negotiating make decisions based on the information they have. But sometimes there could be limitation to the way they process information. There could be perceptional limitations which could occur due to human nature, psychological factors and/or the limits of our senses. These perceptional limitations are called cognitive barriers and can impede negotiation. It is important a mediator to identify Cognitive Barriers and use communication techniques to overcome it.

Example of Cognitive Barriers

Risk Aversion: People tend to be averse to risk regarding gain and would rather have a certain gain than an uncertain larger gain. They are ready to bear risk with regard to loss. They would avoid a certain loss and take a risk of greater loss. For example, some parties would rather postpone a certain loss through settlement at mediation for an uncertain outcome of the trial in the future. A good mediator will assist the parties in addressing these realities.

Assimilation bias: The tendency of negotiators to ignore any unfavorable information. For example, a court decision which could prejudice the case. To counter this, repeat the important information, provide documentary and other tangible evidence and reduce information to writing.

Inattentional blindness: Negotiators sometimes fail to focus on the entire picture and instead focus only on specific details. To counter this, the mediator may frequently shift focus from the specific to the larger picture.

Reactive devaluation: People in conflict have a tendency to minimize the value of offers from the other side. To counter this, mediator can change the focus from the source of the offer to the terms of the offer. For example, instead of saying "the plaintiff offers 5 lakhs" the mediator may say " will you be satisfied with something like 5 lakhs".

Endowment effect: The tendency for people with property or interests in something to over value it. (their house, their land, a lawyer's evaluation of their case etc.) . To counter this, the mediator may enquire about the actual value, use objective criteria like the Sub-registrar's valuation, ask for the latest Court judgment supporting the submission etc.

Psychological impediments:

People make unwarranted assumptions about the motives and intentions of the other parties.

Anchor Price, Aspiration Price and Reservation Price

To facilitate meaningful and successful negotiation the mediator should be aware of the Anchor Price, the Aspiration Price and the Reservation Price.

Anchor Price is a base number or a set of terms or an opening offer that has to be assessed by the mediator from the information given by the parties. This will serve as a parameter in the

negotiation. If the anchor price is defined appropriately, parties tend to treat it as a real and valid bench mark against which subsequent adjustments are made. It must be based on complete information and if not it can be misleading. Mistaken or misguided anchor prices can increase the chance of impasse and can have unintended consequences in a negotiation.

Aspiration Price is the price that a party aspires to obtain from the negotiation.

Reservation Price is the lowest a party may be open to receive.

ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate the parties from the problem

A mediator should help the parties to separate themselves from the problem.

For example, if Aparna has been consistently late to work for the past 2 weeks, a perception may develop that "The problem is Aparna." Viewed in this manner the only way to get rid of the problem is to get rid of (dismiss, transfer etc.) Aparna. This is an example of merging the people with the problem and illustrates how it limits the range of options that are available for resolving the problem. To separate people from the problem, the key is to focus on the problem itself, independent of the person. In the above example, the employer might frame the problem as lack of punctuality. The employer can ask Aparna about her record of being on time for many years and the reasons for the recent two weeks of late arrival enquiring specifically whether there are circumstances that are resulting in Aparna's late arrivals. She may answer that she was involved in a motor vehicle accident recently and her vehicle repairs will be completed shortly. She might say that she had to change the route to work due to road repair, or she might say that she has to ride in a car pool to work and the driver has a temporary problem that caused the delay. By focusing on the problem itself, the employer has opened the door to understanding the root of the problem, which may lead to various options for handling it.

(b) Be hard on the issues and soft on the people

In being hard on the issues, the Mediator will request documentation on damages, verify the accuracy of numbers and confirm the evidence provided by both parties. At the same time, the mediator will encourage the parties to be polite and cordial with each other and the mediator will demonstrate the same qualities during mediation.

(c) Focus on interests

In negotiation, focus must be on interests rather than on positions. Hence the mediator should help the parties to shift the focus from their positions to their interests.

(d) Create variety of options

The Mediator is required to facilitate generation of various options and selection of the option most acceptable to the parties.

(e) Rely on objective criteria

When perceptions of the parties differ, in appropriate cases objective criteria like expert's opinion, scientific data, valuation report, assessor's report etc. can be relied on by the parties to examine the options and arrive at a settlement.

AN EXERCISE TO IDENTIFYING UNDERLYING INTERESTS

Mohan Industries V/s All India Express

Facts for Mohan Industries

The owner of a small plastic supply company called Mohan Industries is a party at mediation. He is the defendant in a contract dispute with a large manufacturer called All India Express ("All India"). The dispute centers around his company's shipments of supplies to All India, which have been 7-10 days late for the past 3 months. All India's shipments to its customers consequently have been late and its customers have started to complain. Until 3 months ago, Mohan Industries had delivered timely shipments to All India.

All India's attorney demanded that Mohan Industries make its shipments on time and pay for the damages resulting from the 3 months of delayed shipments. If the case continues in Court, All India probably will win a suit for breach of contract.

Mohan Industries has had a profitable business relationship with All India having a supply contract for 10 years. It would be profitable for Mohan Industries to work with All India in the future.

The reason the shipments have been late for the past 3 months is that Mohan Industries is in the process of upgrading its computers for better service. This is a temporary problem that probably will be cleared up in 3 more months. A good deal of their operating expenses is going towards this computer upgrade and they generally operate on a thin profit margin. Hence they do not want to spend a large amount of money on litigation.

Mohan Industries is also in the process of bidding on a supply contract with another large manufacturer. They would like to use All India as a good reference in submitting their bid.

The President of Mohan Industries is 84-years-old and he is not in good health. He has planned to turn over the company to his eldest son this year, but that is doubtful now that this legal dispute has come up. He does not want the final phase of his career in business to be tied up in litigation.

Facts for All India Express

The party at mediation is All India Express (All India). The counsel for All India has advised them that they have a right to sue Mohan Industries for breach of contract and that it will probably prevail in court.

All India has stated that it has had a good and profitable working relationship with Mohan Industries for the past 10 years. There are no other suppliers available that makes the plastic product as well as Mohan Industries. The price charged by Mohan Industries is reasonable.

All India is in the process of introducing its products on an international level. It is very important to All India that there be no interruption in plastic supplies for the next few years.

All India is operated by a young man (37-years-old) who recently suffered a severe setback in his health (diabetes). He would like to focus his time and energy on the international expansion and getting better physically.

This is the right time for All India to expand internationally because its main competitor, another Indian company, is not yet ready for such as expansion (though it will be ready soon).

All India has explained that it values its customers and it is worried that it will lose them if plastic supply shipments continue to be late.

CHAPTER-3.1.11

IMPASSE

During mediation sometimes parties reach an impasse. In mediation, impasse means and includes a stalemate, standoff, deadlock, bottleneck, hurdle, barrier or hindrance. Impasse may be due to various reasons. It may be due to an overt conflict between the parties. It may also be due to resistance to workable solutions, lack of creativity, exhaustion of creativity etc. Impasse may be used as a tactic to put pressure on the opposite party. There may also be valid or legitimate reasons for the impasse.

TYPES OF IMPASSE

There are three types of impasse depending on the causes for impasse namely

(i) Emotional impasse

(ii) Substantive impasse

(iii) Procedural impasse

- Emotional impasse can be caused by factors like :
  - Personal animosity
  - Mistrust
  - False pride ã Arrogance ã Ego
  - Fear of losing face
  - Vengeance
- Substantive impasse can be caused by factors like:
  - Lack of knowledge of facts and/or law
  - Limited resources, despite willingness to settle
  - Incompetence (including legal disability) of the parties
  - Interference by third parties who instigate the parties not to settle dispute or obstruct the settlement for extraneous reasons.
  - Standing on principles, ignoring the realities
  - adamant attitude of the parties
- Procedural impasse can be caused by factors like :
  - Lack of authority to negotiate or to settle
  - Power imbalance between the parties
  - Mistrust of the mediator

STAGES WHEN IMPASSE MAY ARISE

Impasse can arise at any stage of the mediation process namely introduction and opening statement, joint session, separate session and closing.

TECHNIQUES TO BREAK IMPASSE

The mediator shall make use of his/her creativity and try to break impasse by resorting to suitable techniques which may include following techniques:

(a) Reality Testing

(b) Brainstorming

(c) Changing the focus from the source of the offer to the terms of the offer.

(d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purposes.

(e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.

(f) Taking assistance of other people like spouses, relatives, common friends, well wishers, experts etc. through their presence, participation or otherwise.

(g) Careful use of good humour.

(h) Acknowledging and complementing the parties for the efforts they have already made.

(i) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse.

(j) Role-reversal, by asking the party to place himself/ herself in the position of the other party and try to understand the perception and feelings of the other party.

(k) Allowing the parties to vent their feelings and emotions.

(l) Shifting gears i.e. shifting from joint session to separate session or vice-versa.

(m) Focusing on the underlying interest of the parties.

(n) Starting all over again.

(o) Revisiting the options.

(p) Changing the topic to come back later.

(q) Observing silence.

(r) Holding hope

(s) Changing the sitting arrangement.

(t) Using hypothetical situations or questions to help parties to explore new idea and options.

CHAPTER-3.1.12

ROLE OF REFERRAL JUDGES

Judges who refer the cases for settlement through any of the ADR methods are known as referral judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

Reference to ADR and statutory requirement

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

Stage of Reference

The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/ or their authorized representatives.

Consent

Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly the court can refer the case for conciliation under section 89 CPC only with the consent of all the parties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not effect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

Avoiding delay of trial

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

Choice of Cases for reference

As held by the Supreme Court of India in **Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors., (2010) 8 Supreme Court Cases 24**, having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process.

i. i. Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.

ii. Disputes relating to election to public offices.

iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

vi. Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

i) All cases relating to trade, commerce and contracts, including

-disputes arising out of contracts(including all money suits);

-disputes relating to specific performance;

- disputes between suppliers and customers;

- disputes between bankers and customers;

-disputes between developers/builders and customers;

- disputes between landlords and tenants/licensor and licensees;

- disputes between insurer and insured

ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;

- disputes relating to partition/division among family members/coparceners/co-owners; and

- disputes relating to partnership among partners.

iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);

- disputes between employers and employees;

- disputes among members of societies/associations/apartment owners' associations;

iv) All cases relating to tortious liability, including

- claims for compensation in motor accidents/other accidents; and

v) All consumer disputes, including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorisation of cases is not exhaustive or rigid. They are illustrative which can be subjected to just exceptions or addition by the courts/ tribunals exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

Motivating and preparing the parties for Mediation

The referral judge plays the most crucial role in motivating the parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

Referral Order

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of the institution/mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/ mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

Role after conclusion of mediation

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court.

If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation.

If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

CHAPTER-3.1.13

ROLE OF LAWYERS IN MEDIATION

Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. Though the role of the lawyer in mediation is functionally different from his role in litigation, the service rendered by the lawyer to the party during the mediation process is a professional service. Since lawyers have a proactive role to play in the mediation process, they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. The role of the lawyer commences even before the case comes to the court and it continues throughout the mediation process and even thereafter, whether the dispute has been settled or not. Awareness programmes are necessary to make the lawyers aware of the concept and process of mediation, the advantages and benefits of mediation and the role of lawyers in the mediation process.

The role of lawyers in mediation can be divided into three phases:

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

(i) Pre-Mediation

When faced with a dispute and the prospect of approaching an adjudicatory forum for relief, a party first contacts a lawyer. The lawyer must first consider whether there is scope for resorting to any of the ADR mechanisms. Where mediation is considered the appropriate mode of ADR, educating the party about the concept, process and advantages of mediation becomes an important phase in the preparation for mediation. The lawyer is best placed to assist his client to understand the role of the mediator as a facilitator. He helps the client to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The lawyer can help the parties to change their attitude from adversarial to collaborative. The party must be informed that in a dispute involving the break down of relationship, whether personal, contractual or commercial, mediation helps to strengthen/ restore the relationship. While helping the party to understand the legal position and to assess the strength and weakness of his case and possible outcome of litigation, the lawyer makes him realize his real needs and underlying interest which can be better satisfied through mediation.

(ii) During Mediation

The role of lawyers is very important during mediation also. The participation of lawyers in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the lawyer influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, lawyers must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The lawyer must himself observe the ground rules of mediation explained by the mediator and advise the party also to observe them. The lawyer must be prepared on the facts, the law and the precedents. At the same time, he must enable and encourage the party to present his case before the mediator. Considering that the party may not always be able to state the complete and correct facts or refer to the relevant documents, the lawyer must be alert and vigilant to supplement them. With the help of reality-testing, using the BATNA/ WATNA/ MLATNA analysis, the lawyer must constantly evaluate the case of the parties and the progress of mediation and must be prepared to advise the party to change position, approach, demands and the extent of concessions. When it is felt necessary to have a sub-session with the lawyer(s) the mediator may hold such sub-session with the lawyer(s) and the lawyer(s) must cooperate with the mediator to carry forward the process and arrive at a settlement. Such sub-sessions with the lawyer(s) can be held by the mediator also at the request of the party or the lawyer. The lawyer participates in finalizing and drafting the settlement between the parties. He must ensure that the settlement recorded is complete, clear and executable. He must also explain to his client and make him understand every term of the settlement.

iii) Post-Mediation

After conclusion of mediation also, the lawyer plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism.

If a settlement between the parties has been reached before the mediator, the lawyer has the responsibility to reassure his client about the appropriateness of the client's decision and to advise against any second thoughts. To maintain and uphold the spirit of the settlement, the lawyer must cooperate with the court in the execution of the order/decree passed in terms of the settlement.

CHAPTER-3.1.14

ROLE OF PARTIES IN MEDIATION

Mediation is a process in which the parties have a direct, active and decisive role in arriving at an amicable settlement of their dispute.

Though the parties get the assistance of their advocate and the neutral mediator, the final decision is of the parties. As far as the parties are concerned, the whole process of mediation is voluntary. Though consent of the parties is not mandatory for referring a case to mediation and though the parties are required to participate in the mediation, mediation is voluntary as the parties retain their authority to decide whether the dispute should be amicably settled or not and what should be the terms of the settlement. Neither the mediator nor the lawyers can take the decision for the parties and they must recognize and respect the right of self-determination of the parties.

During the process of mediation, parties should focus on their interests rather than their entitlement or legal technicalities.

The parties are free to avail of the services of lawyers in connection with mediation.

Mediation is about communicating, persuading and being persuaded for a settlement. Hence, each party needs to communicate its view to the other party and should be open to receive such communication in return. Both speaking and listening are equally important. The attempt must not be to argue and defeat but to know and inform. Parties may have to change their position and align it with their best interest.

In mediation, trust in the mediator is essential. Hence, the mediator must be a person who continues to enjoy the trust of the parties.

A settlement duly arrived at between the parties in mediation is binding on the parties and the parties are bound to cooperate in the execution of the order/decree passed in terms of the settlement.

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CHAPTER-3.2

MEDIATION TRAINING MANUAL FOR AWARENESS PROGRAMME

CHAPTER-3.2.1
INTRODUCTION

Justice Delivery System in India is described by technical procedures with characteristics of the adversarial system with accompanying delays, arrears and taxing cost. Justice Delivery System reliance on win-lose situation leads to repeated use of the legal process. The unwarranted delays in dispensation of justice undermine the credibility of entire justice delivery system of the country. It leads to instances where people are settling disputes on their own, resulting in emergence of criminal syndicates and mob justice indicative of loss of confidence of the people in the rule of law and constitutional mechanisms. The adversarial system may be the appropriate method where authoritative interpretation or establishment of rights is required. To make rule of law a reality, assurance of speedy justice should be extended to citizens. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays. Justice Delivery System in India is under stress mainly because of the huge pendency of cases in courts. It emphasizes the desirability to take advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of conventional trial. In a developing country like India with major economic reforms, Alternative Dispute Resolution Mechanism could be one of the best strategies for quicker resolution of disputes to lessen the burden on the courts and to provide suitable mechanism for expeditious resolution of disputes.

In Indian Legal System, appropriate methods of disputes resolution are available, such as arbitration, conciliation, mediation and Lok adalat etc. These methods are less formal, encourage disputants to communicate and participate in the search for solutions, focus better on the root causes of the conflict ,salvage relationships, and have significant savings in time and cost.

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act,1947. The conciliators appointed under Section 4 of the Act are "charged withthedutyofmediatinginandpromotingthesettlementoflndustrialdisputes."

Arbitration, as a dispute resolution process was recognized as early as1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Legislature also enacting The Legal Services Authorities Act,1987 which provides constitution of the National Legal Services Authority as a Central Authority which is also vested with duties to encourage the settlement of disputes by way of negotiations, arbitration and conciliation.

The Parliament also enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties.In1999,the Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from1st July,2002.

The Supreme Court upheld the Constitutional validity of newly inserted Section 89 in CPC in **Salem Advocate Bar Association, T. N.V Union Of India, (2003) 1 Supreme Court Cases 49. (Relevant Para:9, 10 & 11)** A Committee was also constituted to devise case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The Supreme Court also directed respective High Courts to take appropriate steps for making rules which have been finalized by the Committee in exercise of rule making power subject to modifications, if any, which may be considered relevant and prior to finalization, the same should be circulated to the High Courts, subordinate courts, the Bar Council of India, State Bar Councils and the Bar Associations, seeking their responses.

The Supreme Court in **Salem Advocate Bar Association, T.N.V Union of India, (2005) 6 Supreme Court Cases 344** also clarified possible conflict between Section 89 and Order10 Rule1- A and observed that Section89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. **(Relevant Para : 54 & 55)** The Supreme Court also held that the court is not involved in the actual mediation/conciliation and Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. There is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. It was also observed that the parties need not to incur extra expenditure for resorting ADR modes as it is likely to act as a deterrent for adopting these methods.

The Supreme Court of India in **Afcons Infrastructure Limited And Another V Cherian Varkey Construction Co. (P) Ltd., (2010) 8 Supreme Court Cases 24** also clarified anomalies in Section 89 and interchanged the definitions of "Mediation" and "Judicial Settlement" as given in Section 89. **(Relevant Para:11 to 13)** It was also clarified that there is no requirement to formulate the terms of settlement as per mandate of Section 89. **(Relevant Para:14 to19)**

The Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) on 09.04.2005which in its meeting held on11.07.2005 had decided to initiate a pilot project on Judicial Mediation in Tis Hazari Courts in Delhi. 30 Judicial Officers were imparted 40 hours training on "Techniques of Mediation" by the experts invited from ISDIS. In Delhi District Courts, formal Judicial Mediation was started w.e.f. 13.09.2005 with six judicial officers functioning as trained mediators. MCPC is implementing mediation at national level.

CHAPTER-3.2.2

MEDIATION: DEFINITION & CONCEPT

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

- Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.
- Mediation is a party-centred negotiation process. The parties and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. The parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.
- Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process. The mediation process is structured and formalized with a degree of flexibility.
- Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/ commercial, family, social and community interests.
- Mediation provides an efficient, effective, speedy,convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.
- Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute.
- In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator evaluates when he assists each party to analyze the merits of a claim/ defence, and to assess the possible outcome at trial.

- The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.
- Mediation is a private and confidential process, which is not open to the public. Mediation is confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties.
- Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".
- The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.
- Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.
- Mediation in a particular case need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

CHAPTER-3.2.3

BENEFITS AND ADVANTAGES OF MEDIATION

1) The parties have CONTROL over the mediation in terms of 1) its scape (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome (i.e., the right to decide whether to settle or not and the terms of settlement.)
2) Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.
3) The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.
4) The procedure is SPEEDY, EFFICIENT and ECONOMICAL.
5) The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.
6) The process is conducted in an INFORMAL,CORDIAL and CONDUCIVE environment.
7) Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.
8) The process is CONFIDENTIAL.
9) The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.
10) Mediation helps to maintain/ improve/restore relationships between the parties.

11) Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process - in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

12) In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL SETTLEMENT.

13) A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

14) Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and nonconventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

15) When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

16) Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

17) REFUND OF COURT FEES is permitted as per rules in the case of settlement in court referred mediation.

CHAPTER-3.2.4

COMPARISON BETWEEN MEDIATION AND OTHER PROCESSES

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1.	Judicial process is an adjudicatory process where a third party ijudge/ other authority) decides other authority) decides	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
2.	Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act,1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3.	The decision is binding on the parties.	The award in arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
4.	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.

5.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
6.	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and infornrualproceeding held in private with flexible procedural stages.
7.	Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
8.	No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
9.	Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

	MEDIATION	CONCILIATION	LOKADALAT
1.	Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	LokAdalat is non- adjudicatory if it is established under Section 19 of the Legal Services Authorities Act,1987. LokAdalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act,1987.
2.	Voluntary process.	Voluntary process.	Voluntary process.
3.	Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
4.	Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
5.	Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat the scope of negotiation is limited.
6.	The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
7.	The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
8.	The referral court applies the principles of Order XXIII Rule 3i CPC for passing decree/order in terms of the agreement.	In conciliation the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21of the Legal Services Authorities Act,1987.
9.	Not appealable.	Decree/order not appealable.	Award not appealable.
10.	The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
11.	Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.

12.	In mediation parties are actively and directly involved.	In conciliation parties are actively and directly involved.	In Lok Adalat parties are not actively and directly involved so much.
13.	Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat.

CHAPTER-3.2.5

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to :-

(i) Facilitate the process of mediation; and

(ii) Assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.
- motivating the parties to agree on mutually acceptable settlement.
- assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

A mediator performs an evaluative role by-

- helping and guiding the parties to evaluate their case through reality - testing.

- assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM ADJUDICATOR

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

CHAPTER-3.2.6

ROLE OF REFERAL JUDGES

Judges who refer the cases for settlement through any of the ADR methods are known as Referral Judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

A) REFERENCE TO ADRAND STATUTORY REQUIREMENT

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

The cases which are not suitable for ADR process should not be referred for ADR process including mediation. The court has to form an opinion regarding suitability of a case for being referred to ADR process. Having regard to the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, the Court may choose not to refer to an ADR process. If the case is unsuited for reference to any of the ADR process, the court shall briefly record the reasons for not referring the case to any of the settlement procedures prescribed under section 89 of the Code. It is mandatory for the Courts to consider recourse to ADR process under section 89 of the Code but actual reference to an ADR process in all cases is not mandatory. If the case falls under an

excluded category then it should not be refer to ADR process but in all other case reference to ADR process is mandatory. **(Relevant Para of Afcons: 24 & 26)**

B) STAGE OF REFERRAL

The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. H for any reason, the court did not refer the case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/ or their authorized representatives.

(Relevant Para of Afcons: 24, 41& 42)

C) CONSENT

Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly the court can refer the case for conciliation under section 89 CPC only with the consent of all the parties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

(Relevant Para of Afcons:36)

D) AVOIDING DELAY OF TRIAL

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

E) CASES SUITABLE FOR REFERENCE

As held by the Supreme Court of India in Afcons case, having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process.

a) Representative suits under Order I Rule 8 CPC which involves public interest or interest of numerous persons who are not parties before the court.

b) Disputes relating to election to public offices.

c) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

d) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

e) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

a) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts(including all money suits)
- disputes relating to specific performance
- disputes between suppliers and customers
- disputes between bankers and customers
- disputes between developers/builders and customers
- disputes between landlords and tenants/licensor and licensees
- disputes between insurer and insured

b) All cases arising from strained or soured relationships, including

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

c) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.)
- disputes between employers and employees
- disputes among members of societies/ associations/ apartment owners' associations d) All cases relating to tortious liability, including
- claims for compensation in motor accidents/ other accidents

f) All consumer disputes, including disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/ professional reputation and credibility or product popularity

The above enumeration of "suitable" and "unsuitable" categorization of cases is not exhaustive or rigid. They are illustrative which can be subjected to just exceptions or addition by the courts/ tribunals exercising its jurisdiction/ discretion in referring a dispute/ case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances. (Relevant Para of Mcons:27,& 28)

F) MOTIVATING AND PREPARING THE LAWYERSS AND PARTIES FOR MEDIATION

The referral judge plays the most crucial role in motivating the lawyers and parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade

and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

REFERRAL ORDER

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of/ mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/ mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

ROLE AFTER CONCLUSION OF MEDIATION

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation, the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court.

If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation.

If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. The court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act,1987 (in respect of settlements by a Lok Adalat or a Mediator).Only then such settlements will be effective. **(Relevant Para of Afcons:37 to 40)**

To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

CHAPTER-3.2.7

IMPORTANT GUIDELINES FOR REFERRAL JUDGES

1) As per Section 89 and Rule 1-A of Order 10, the court should explore the possibility of referral to ADR processes after the pleadings are complete and before framing the issues when the case is taken up for preliminary hearing for examination of parties under Order10 of the Code. If for any reason, the court could not considered and referred the matter to ADR processes before framing issues, the case can be refer even after framing of the issues.

   In family disputes or matrimonial cases, the ideal stage for mediation would be immediately after service of respondent and before filing of objections/written statements. In such cases, the relationship between concerned parties becomes hostile on account of the various allegations in the petition. The hostility would be further aggravated by the counter-allegations made in written statement or objections.

2) After completion of the pleadings and before framing of the issues, the court shall fix a preliminary hearing for appearance of parties to acquaint itself with the facts of the case and the nature of the dispute between the parties.

3) The court should first consider whether the case is not fit to be referred to any ADR processes. If the case is not suitable for any ADR process then court should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. If case can be referred to ADR processes, the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

4) The court should first ascertain regarding choice of parties for arbitration and should inform the parties that arbitration is an adjudicatory process and reference to arbitration will permanently take the suit outside the ambit of the court.

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

6) If parties are not agreeable for arbitration and conciliation, the court after taking into consideration the preferences/ options of parties, refer the matter to any one of the other

   (a) Lok Adalat;

   (b) Mediation by a neutral third party facilitator or mediator; and

   (c) A judicial settlement, where a Judge assists the parties to arrive at a settlement.

7) If the case is simple or relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties, the court may refer the matter to Lok Adalat.

8) If the case is complicated and requires negotiations, the court should refer the case to mediation. If the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the case can be refer to another Judge for attempting settlement.

9) If ADR process is not successful, then court shall proceed with hearing of the case. If case is settled, then court shall examine the settlement and shall make a decree in terms of it keeping in view the legal principles of Order 23Rule3of the Code.

10) If the settlement includes terms and conditions which are not the subject matter of the suit, the settlement shall be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21of the Legal Services Authorities Act,1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat).

11) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

12) The court shall record the mutual consent of the parties if the case is referred to arbitration or conciliation.

    If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. The Referral Order should not be an elaborate order.

13) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

14) If the Presiding Judge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is, therefore, advisable to refer cases proposed for Judicial Settlement to another Judge.

15) If the court refers the case to an ADR process (other than Arbitration),it should keep track of the case by fixing a hearing date for the ADR Report. The period allotted for the ADR process should not exceed from the period as permitted under applicable Mediation Rules.

    The Court should take precaution that under no circumstances the ADR process shall be used as a tool in the hands of an unscrupulous litigant to delay the trial of the case.

16) The court should not send the original judicial record of the case at the time of referring the case for an ADR forum, however only copies of relevant papers of the judicial record should be annexed with referral order. If the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

CHAPTER-3.2.8

ROLE OF LAWYERS IN MEDIATION

It has been found that wherever the lawyers are assisting their parties during the course of mediation, the settlements have been easy to come. (Barring a few cases where the lawyers have stalled the settlement which was just going to be arrived.). Always give recognition to the presence of the lawyer and tell them their importance of being present with the parties and that it would be easier for the parties to settle the dispute if they are assisted by their lawyers. Give credits to the lawyers for reaching the settlement. The lawyers want their clients to feel that without them they would have paid more or get less.

ARE THERE BENEFITS IN MEDIATION FOR LAWYERS?

Mediation helps lawyers as for lawyers

a) It is another avenue of professional practice and income.

b) Appearing for a client is a professional service for which lawyers charge their fees. When cases come up faster for resolution instead of decades later, the income is earned now.

c) Studies have shown that clients are far more willing to pay fees for mediations in which they participate and can understand than for litigation in which they feel excluded and do not see progress.

d) Mediation invariably means satisfied clients who participate and sees results, And satisfied clients come back to their lawyers with more business.

e) There is satisfaction in helping to bring about beneficial solutions.

AS MEDIATORS

f) Lawyers make good mediators and are sought after. Becoming a mediator is a new field which lawyers, especially senior ones, may like to try. It has elements of the resolver and peacemaker, and can also be professionally rewarding.

So whether the lawyer refers clients' cases to mediation, or appears in mediations for clients, or becomes a mediator part or whole time, several opportunities have opened up for members of the legal profession.

Abroad, it is now common to find leading lawyers and retired Judges of distinction focusing on mediation.

WHAT IS THE ROLE OF LAWYERS IN MEDIATION?

In Mediation the lawyer's role of arguing, demolishing or cutting down the other side's arguments does not help very much since there is no presiding officer to give a verdict for one or the other. Instead the lawyer's role is to use his legal skills and practical knowledge to see if a solution is possible, and if so, to help evolve one. A primary role is to protect the client's legal interests. The lawyer must also ensure that the client is made aware of the implications of the decision he is taking. If the mediation is proceeding in a manner which is disturbing or not serving the interests of the party, the lawyer may advise terminating it.

FUNCTIONAL ROLE OF LAWYERS IN MEDIATION

Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. The role of the lawyer in mediation is functionally different from his role in litigation. The Lawyers have a proactive role to play in the mediation process and they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. The role of the lawyer commences even before the case comes to the court and it continues throughout the mediation process and even thereafter, whether the dispute has been settled or not.

The role of lawyers in mediation can be divided into three phases:

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

(I) PRE-MEDIATION

A party in case of having legal dispute first contacts a lawyer. The lawyer must first consider whether there is scope for resorting to any of the ADR mechanisms. Where mediation is considered the appropriate mode of ADR, the lawyer should educate the party about the concept, process and advantages of mediation. The lawyer helps the party to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The lawyer can help the parties to change their attitude from adversarial to collaborative.

(II) DURING MEDIATION

The role of lawyers is very important during mediation also. The participation of lawyers in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the lawyer influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, lawyers must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The lawyer must be prepared on the facts, the law and the precedents.

III) POST-MEDIATION

After conclusion of mediation also, the lawyer plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism. If a settlement between the parties has been reached before the mediator, the lawyer has to maintain and uphold the spirit of the settlement and must cooperate with the court in the execution of the order/decree passed in terms of the settlement.

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Appendix (i)

PROPOSED REFERRAL ORDER

NEXT DATE OF PROCEEDINGS IN THE

REFERRAL COURT: _____

Court Case ID: _____

Name of the referral Judge: _____

SUIT NO./CASE NO. : _____

NAME OF THE PARTIES: _____

V.

_____

(Annexed memo of parties)

DATE OF INSTITUTION OF THE CASE: _____

NATURE OF SUIT : _____

STAGE OF THE CASE AT THE TIME OF REFERRAL: _____

NO. OF HEARING(S) AT THE TIME OF REFERRAL: _____

REFERRAL ORDER

This court after conferring with the parties to the suit and ascertaining that there exists the element of settlement, and in pursuant to Section 89 of CPC refers the case to Mediation.

The concerned parties are directed to report to the **Judge In-Charge, Mediation Centre,** _____ on _____ at _____ am/pm. The concerned parties alongwith their respective advocates, if any, are also directed to participate in the mediation proceedings. Participation in Mediation is in Good Faith.

No fee shall be payable by the parties for mediation.

Mediation settlement arrived at between the parties in writing (in case of settlement), after recording the terms and conditions of the settlement, the Mediation shall report the settlement through Judge Incharge, Mediation Centre to this court for further directions and proceedings.

The Mediation proceedings are confidential. The parties and their respective advocates or any other person with parties, who is allowed to attend the mediation proceedings, shall not disclose any deliberations of mediation proceedings to any court/forum etc.

Mediator is directed to report the final outcome of the mediation on _____

Signature of the Referral Judge with date:_____

_____ _____

Signature of Plaintiff/Complainant/Petitioner/ AppellantSignature of Defendant/Respondent/ Accused

Mobile/Phone no._____ Mobile/Phone no._____

Name of the Advocate_____ Name of the Advocate _____

Mobile/Phone no._____ Mobile/Phone no._____

Appendix (ii)

CURICULAUM OF MEDIATON AWARENESS PROGRAMME

DURATION : (1 DAY)

Suggested Reading : Mediation Training Mannual for Awarness Programme

TIME	SESSIONS	STUDY TOPIC
10.30 PM TO 12.00 Noon	SESSION I	**ADR** : Relevance with special reference to Section 89, Code of Civil Procedure, 1908: Types of ADR **Mediation :** Definition & Concept Benefits and Advantages of Mediation Difference between mediation and other processes
12.00 Noon TO 1.30 PM	SESSION II	Role of Mediators Role of Referral Judges Important Guidelines for Referral Judges
2.15 PM TO 3.15 PM	SESSION III	ROLE OF LAWYERS IN MEDIATION
3.15 PM TO 3.30 PM	SESSION IV	SCREENING OF DOCUMENTARY
3.30 PM TO 4.30 PM	SESSION V	INTERACTIVE SESSION WITH THE PARTICIPANTS

Note : Lunch : 1.30 PM TO 2.15 PM

CHAPTER-3.3

MEDIATION TRAINING MANUAL FOR CAPSULE COURSE

CHAPTER-3.3.1
INTRODUCTION

Buddha said "Mediation bring wisdom, lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom."

Mediation originated in the United States and turning point occurred in 1976 at a Nationwide Conference of Lawyers, Jurists and Educators, popularly known as Pound Conference. The Court annexed mediation remained at the experimental stage in the1970's and1980's and expanded significantly in1990's.

In India, the dramatic expansion of commerce, trade and industry, liberalization of economic policies and the inadequate infrastructural facilities to meet the challenge, exposed the inability of the existing judicial system to handle the caseloads efficiently and effectively. A need was felt to evolve mechanisms which may supplement the judicial system.

Towards that end, section 89 was inserted in the Code of Civil Procedure 1908, through the CPC (Amendment) Act 1999, brought into force with effect from 1st July 2002. Section 89 paved way for compulsory resort to the ADR mechanisms.

The Constitutional validity of section 89 CPC has been upheld by the Supreme Court in Salem Bar Association, Tamil Nadu v. Union of India (2003)1SCC 49.

Mediation and Conciliation Project Committee (MCPC) was constituted by the Supreme Court on 09th April, 2005 to evolve policy guidelines relating to the mediation. The Committee has undertaken mediation training programme, referral judges training programme, awareness programme and training of trainers programme throughout the country. Under the aegis of the Mediation and Conciliation Project Committee of the Supreme Court, mediation training has been imparted to the Judicial Officers, Advocates, Bureaucrats and Senior Officers of the Government, Chartered Accountants, Doctors and others. Training for trainers has also been imparted to the Judicial Officers and Advocates of various States so that they may conduct mediation trainings in their States in their local language.

All the High Courts in India have also constituted Mediation Committees or the Board of Governors for supervising the mediation in their respective states and all the mediation related activities are conducted in those States under the guidance and supervision of these Committees or Board.

Mediation is a voluntary process where the parties to mediation arrive at acceptable settlement for themselves with the help of trained mediators, who take the parties through process to settlement. It saves time, money and has procedural flexibility. The parties to the dispute identify their needs and the solution to it.

Mediation has an edge over the other ADR mechanisms mentioned in Section 89 CPC as it has various fundamental advantages which the other ADR mechanisms do not have. Some of the advantages of Mediation are:

- Speedy -time bound
- Economical
- no additional cost
- Simple and flexible
- flexibility of time
- flexibility of procedure
- Informal environment
- Maximum participation of parties
- presenting their case in their own words
- determining the scope of mediation
- bringing out an outcome
- Confidentiality
- non disclosure of the proceedings
- non disclosure of the confidential information given by the parties without the consent of the party
- Creative solutions
- Non traditional remedies on the basis of underline interest.
- Non determination of guilt or fault.
- Settlement of other connected cases.
- Finality
- Refund of court fee
- Enhancement of substantial peace and harmony.

The Supreme Court in Vikram Bakshi & Ors. v.Sonia Khosla (2014) 2015SCC 80 has numerated the nature and benefits of Mediation.

Mediation however requires maintaining the purity of process, impartiality, confidentiality to achieve greater heights and to establish itself independent of the courts.

CHAPTER-3.3.2

PERCEPTIONS

Assumptions, Perceptions and Expectations

Assumptions, Perceptions and Expectations are important in mediation. They have an impact on the dispute. They shape the responses to a conflicting situation. They define how we perceive a conflict.

How Conflict is addressed?

A conflict is addressed by:

- examining our own and the other persons assumptions, perceptions and expectations
- by assessing as to how they affect the working relationship.

Assumption

- a thing that is assumed to be true.
- may not be individual to the person concerned.

Perception

- a way of regarding, understanding or interpreting something.
- fundamentally individual to each person.
- may be divergent based on
    - assumptions
    - expectations
    - experiences
    - history

Expectations

- belief that something will happen or to be the case.
- normal to have expectations.
- based on life experiences.
    - general
    - specific to a particular situation.
- when expectations are not met they
- may cause a sense of frustration
- give a feeling of disregard/ disrespect.

In conflicts

- significant misunderstanding of each others
    - perceptions

- needs
- feelings

Factors that influence responses to the situation/conflict management

1. **Culture, race and ethnicity**
   - provide rules for appropriate and acceptable/ desirable behaviour
   - in the form of values, beliefs, norms.
   - hold certain beliefs about social structure.
   - value substantive procedural and psychological needs, differently.
2. **Gender and sexuality**
   - Men and women perceive situation differently.
   - based on their
     - experiences
     - socialization pattern
     - different mindsets.
3. **Knowledge**
   - knowledge about the issue
     - may be general
     - may be situation specific
4. **Impression of the messenger**
   - influence how the messenger is perceived.
   - a powerful- threat.
   - Credibility and integrity
     - if lacking- no respect
     - if credible -listen with respect.
5. **Previous experiences**
   - play an important role.
   - life experiences
     - fearful-lacking trust and reluctant to take risk
     - confident- take chances and experience the unknown.

Biases in Perceptions

- confirmation bias
  - favour information that confirms your hypothesis what we are looking for.

- overvalues personality based explanation of observed behaviour.
- undervalues situational explanation to that behaviour.

Individuals use

- Different strategies.
- To handle conflict.

- Depending on the perception of the situation.

CHAPTER - 3.3.3

CONFLICT MANAGEMENT

NATURE OF CONFLICT

It is appropriate to begin the study of mediation with an examination of the nature of conflict and the principles of conflict resolution which underlie the mediation process. We will first attempt to understand conflict, and then examine the need to manage conflict through negotiation and finally study mediation as assisted negotiation to resolve conflict effectively. This becomes necessary because how we understand conflict determines the way we will mediate.

Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreement unresolved becomes dispute. Unresolved disputes become conflicts. Unresolved conflicts can lead to violence and even war. This is called the continuum of tension and is often illustrated by the following chart:

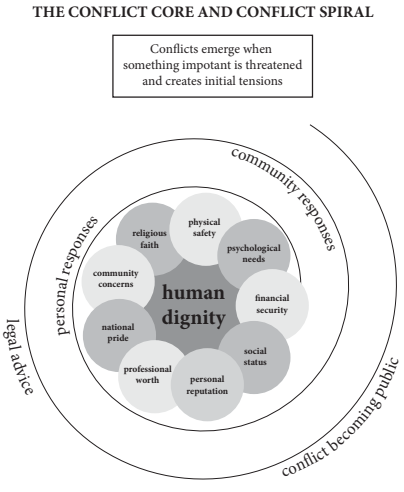
CONTINUUM OF TENSION

We will study the nature of Conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral). (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle).Understanding these dimensions will help us understand our own approaches to conflict as well as those of the parties we deal with.

DIMENSIONS OF CONFLICT

1) THE CONFLICT CORE

The Conflict Core diagram shows how at the very core of any conflict, there lies a sense of threat concerning individuals, groups, communities or nations. This sense of threat emerges when any disagreement, annoyance, competition or inequity threatens any aspect of human dignity, personal psychological needs, professional worth, social status, financial security, community concerns, religious membership or national pride. This list is not exhaustive and only indicates broad areas of threat. By the time parties get to the negotiating or mediation table, they are threatened both by the opposite side



and within themselves! There is fear, suspicion, helplessness, frustration, embarrassment, anger, hurt, humiliation, distrust, desperation, vengeance and a host of mixed emotions that need to be addressed. Failure to address these emotions will prevent the parties from resolving their dispute.

2) THE CONFLICT SPIRAL

When a given conflict intensifies, the initial tensions start spiraling outwards, affecting individuals, relationships, tasks, decisions, organizations and communities. This outward manifestation of the conflict is called the Conflict Spiral.

Personal responses. The stress of conflict provokes strong feelings of anxiety, anger, hostility, depression, and even vengeance in relationships. Every action or in-action of the other side becomes suspect. People become increasingly rigid in how they see the problem and in the solutions they demand. It can be difficult for them to think clearly. Hence what the parties really need is a forum which will understand and address their emotions and not just their dispute. Without emotions being addressed it is difficult to find real solutions.

Community responses. Emotions have a vital community and cultural context, even though individual responses may not always be the same for all members of the same culture or community. Any dispute takes colour from its community and cultural context. When the dispute begins to affect those around it, people may take sides or leave. Communities and families get polarized when the dispute involves a family or community member. However, a solution for a family dispute in one part of the country may not necessarily be perceived to be the solution in another part of the country. Similarly, a solution in the context of a metropolitan urban city may not be the same as for a rural area. A solution for a voluntary organization working with education may not be the solution for an information technology firm.

Legal advice. Legal advice often becomes important in a conflict. This may add to the increasing tensions and inability of parties to control the situation themselves. Through process of interaction between the parties, assisted by a neutral person,. a possible solution acceptable to all can be evolved.

Conflict becoming public

Sometimes the conflict becomes public. Each side develops rigid positions and gathers allies for the cause. The conflict may spread beyond the original protagonists' control. It may also attract public and media attention. The relationships of the old and new protagonists become more complicated. Resolving the original conflict therefore becomes more difficult.

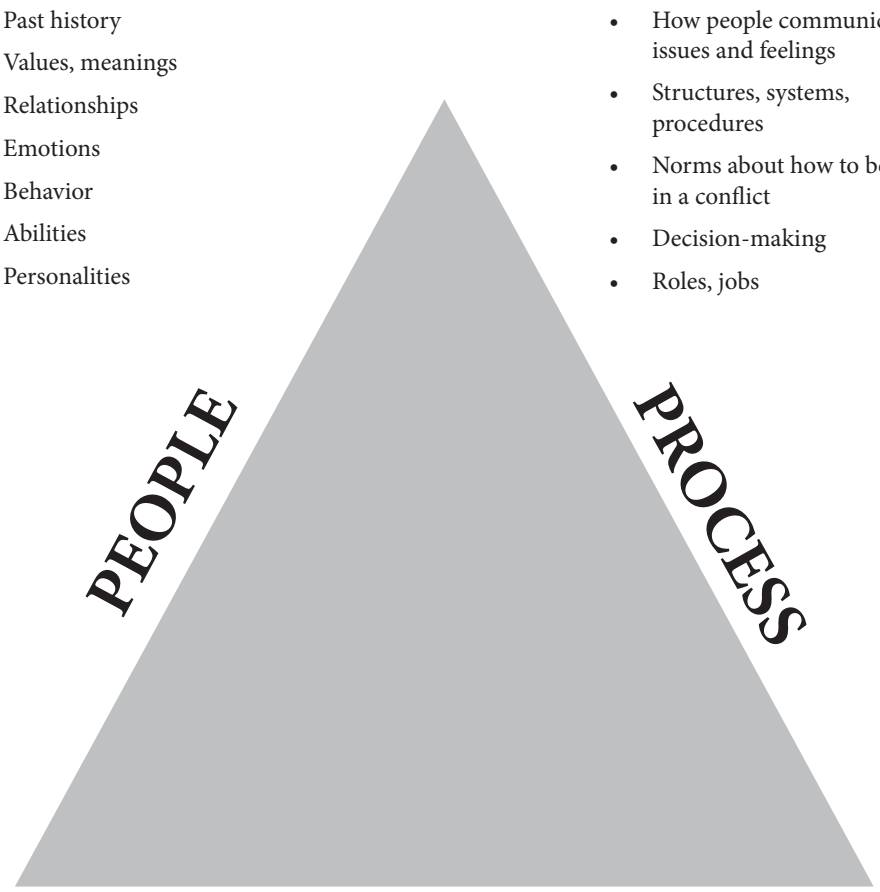
3) THE CONFLICT TRIANGLE

The Conflict Triangle arranges the three primary aspects of Conflict namely: the People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the Acknowledgement of concepts and ideas of the Conflict Core, Spiral and Triangle : 'The Mediator's Handbook' by Jennifer E. Beer with Eileen Stief developed by Friends Conflict resolution programs, revised and expanded 3rd.Edition,. New Society publishers basic framework to understand and address conflict. Elements of each side of this Conflict Triangle differ from person to person, situation to situation and problem to problem requiring different solutions.

1. People. Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.
2. Process.Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.
3. Problem. Every conflict has its own content. This comprises of all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

GOING BEYOND MERE

THE CONFLICT TRIANGLE - 1



PROBLEM-SOLVING

If the parties are able to address each side of the conflict triangle, easing their emotional state, changing their ways of interacting and addressing the problems which threatened their core interests, then the conflict is not merely resolved but mindsets and hearts change.It is in this sense that mediation at its best goes beyond mere problem-solving or managing a conflict

CAUSES OF CONFLICT AND ADDRESSING THEM

The first step in resolving conflict is identifying its cause. Once the cause has been identified, the next step is to evolve a strategy to address it. The following are some examples of causes of conflict and strategies to address them.

CAUSES Information	**STRATEGY**
• Lack of information	• Agree on what data are important
• Misinformation	• Agree on process to collect data
• Different interpretations of information	• Agree on considering all interpretations
Interests and Expectations of information	
• Goals, needs	• Shift focus from positions to interests
• Perceptions Relationships	• Expand options
• Find creative solutions	• Clarify perceptions
• Poor communication	• Establish ground rules
• Repetitive negative behaviour	• Clarify misconceptions
• Misconceptions, stereotypes	• Improve communication
• Distrust	• Agree on processes and procedures
• History of conflict Structural Conflicts	• Keep your word
• Focus on improving the future, not dissecting the past	
• Resources	• Reallocate ownership and control
• Power	• Establish fair, mutually acceptable
• Time constraints Values decision-making process	
• Clearly define, change roles	• Different criteria for evaluating ideas
• Search for super-ordinate goals	• Different ways of life, ideology and
• Allow parties to agree and to disagree	• Build common loyalty
Religion	

CHAPTER-3.3.4

MEDIATION- DEFINITION & CONCEPT

1. Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation.. the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

   1.1 Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

   1.2 Mediation is a party-centered negotiation process. The parties and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

   1.3 Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process. The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.

   1.4 Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/ commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

   1.5 Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

   1.6 Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation the mediator assists the parties in resolving their dispute. The mediator is a guide who helps the parties to find their own solution to the dispute. The mediator's

personal preferences or perceptions do not have any bearing on the dispute resolution process.

1.7 In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator evaluates when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.

1.8 The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.

1.9 Mediation is a private process, which is not open to the public. Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.

1.10 Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties.

1.11 In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say not settled

1.12 The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.

Chapter-III

1.13 Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.

1.14 Mediation in a particular case need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

ADVANTAGES OF MEDIATION

1. The parties have CONTROL over the mediation in terms of 1) its scope (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome (i.e., the right to decide whether to settle or not and the terms of settlement.)

1.1. Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

1.2. The process is VOLUNI'ARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

1.3. The procedure is SPEEDY, EFFIOENT and ECONOMICAL.

1.4. The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

1.5. The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.

1.6. Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

1.7. The process is CONFIDENTIAL.

1.8. The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.

1.9. Mediation helps to maintain/ improve/ restore relationships between the parties.

1.10. Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process- in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

1.11. In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL SETTLEMENT.

1.12. A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

1.13. Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

1.14. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

1.15. Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

1.16. REFUND OF COURT FEES is permitted as per rules in the case of settlement in a court referred mediation.

CHAPTER-3.3.5

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person,. the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role

of the mediator is to remove obstacles in communication,. assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OFA MEDIATOR

The functions of a mediator are to:-

(i) facilitate the process of mediation; and

(ii) assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.
- motivating the parties to agree on mutually acceptable settlement.
- assisting parties to reduce the agreement into writing.

(ii) EVALUATIVEROLE

A mediator performs an evaluative role by-

- helping and guiding the parties to evaluate their case through reality-testing.
- assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(I) Mediator and Conciliator

The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case throug h reality testing and assisting the parties to evaluate the options for settlement. But in the process of a conciliation, the conciliator himself can evaluate the cases of the parties and the options for settlement for the purpose of suggesting the terms of settlement.

The role of a mediator is not to give judgment on the merits of the case or to give advice to the parties or to suggest solutions to the parties.

(ii) Mediator and Adjudicator

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act,1996.

(C) QUALITIES OF A MEDIATOR

It is necessary that a mediator must possess certain basic qualities which include:

i. complete, genuine and unconditional faith in the process of mediation and its efficacy.

ii. ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

iii. sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

iv. highest standards of honesty and integrity in conduct and behavior.

v. neutrality, objectivity and non-judgmental.

vi. ability to be an attentive, active and patient listener.

vii. a calm, pleasant and cheerful disposition.

viii. patience, persistence and perseverance.

ix. good communication skills.

x. open mindedness and flexibility.

xi. empathy.

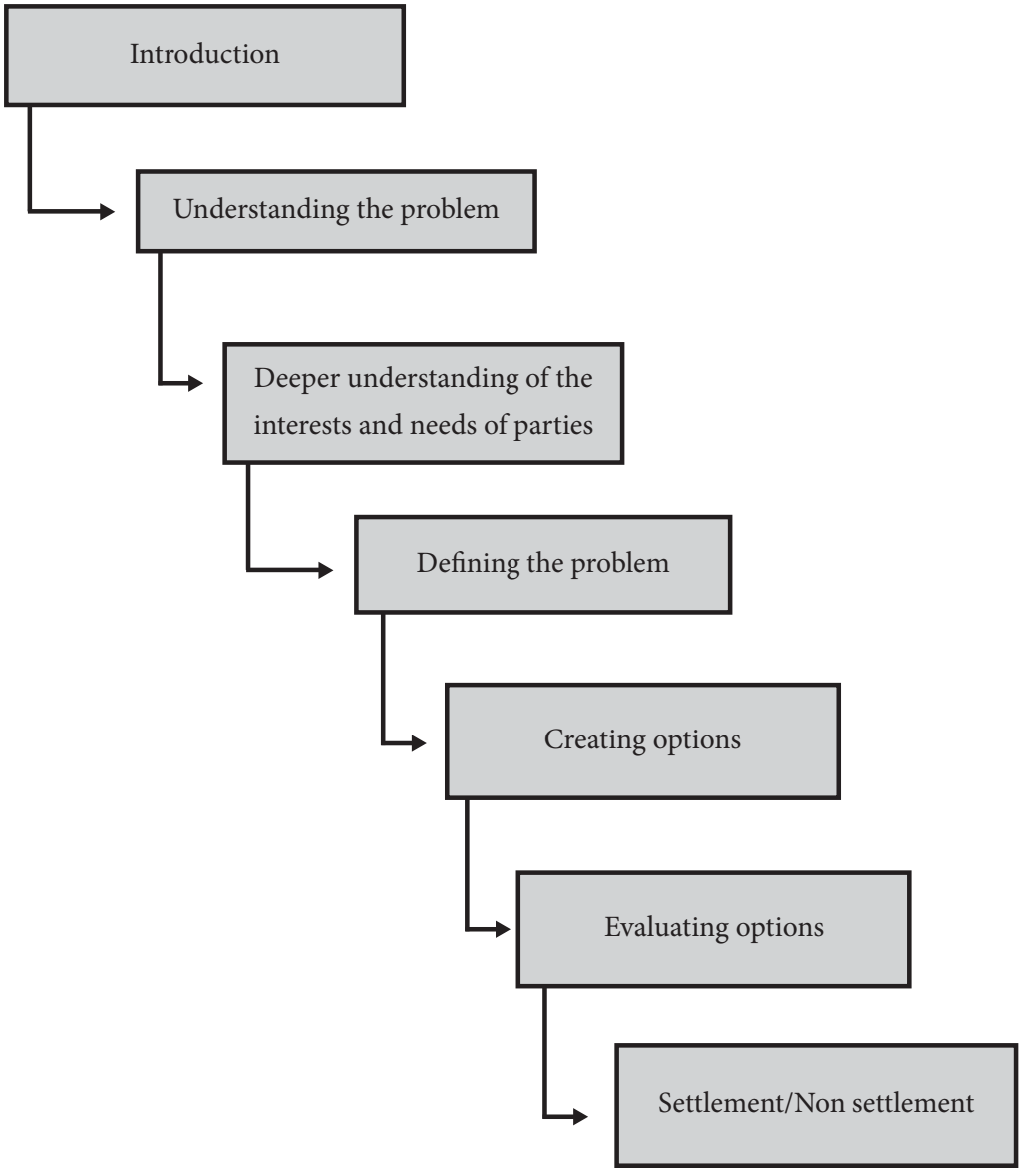
xii. Creativity.

CHAPTER-3.3.6

MEDIATION PROCESS

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely,(i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) dosing.

These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.



Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished before moving to the next phase.

CHAPTER-3.3.7

MEDIATION: THE STAGES

The functional stages of the mediation process are:

1) Introduction and Opening Statement

2) Joint Session

3) Separate Session(s)

4) Closing

STAGE 1 : INTRODUCTION AND OPENING STATEMENT

- OBJECTIVES
- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

Seating Arrangement in the Mediation Room

At the commencement of the mediation process, the mediator shall ensure that the parties and/ or their counsel are present and proper/appropriate seating arrangement is made for them.

Introduction and Opening Statement:

The mediator commences with the opening statement which must be simple, and in the language the parties can understand.

To Welcome & great the parties and their representatives.

- Introduces himself, his standing, training and successful experience as a mediator
- Declares he has no connection with either of parties and has no interest in the dispute
- Asks the parties to introduce themselves and welcomes their lawyers
- Asks parties which language they would prefer to be addressed in
- Enquire about their previous experience in any mediation process
- Discuss impartiality and neutrality by using appropriate words and body language
- Emphasizes the voluntary nature of the process
- Emphasizes on the non - adversarial aspect of the process like absence of recording of evidence or pronouncement of award or order
- Informs he can go beyond pleadings and may cover other disputes
- States the mediation process and possibility of having private sessions
- Explain the procedures where there is settlement or no settlement
- Informs that court fee is refunded on settlement

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

STAGE 2 : JOINT SESSION

OBJECTIVES

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

PROCEDURE

The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/ claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/ respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.

- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.
- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.
- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.
- The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.
- The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.
- During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

STAGE 3 : SEPARATE SESSION

Objectives

- Understand the dispute at a deeper level

- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

Procedure

(i) RE-AFFIRMING CONFIDENTIALITY

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

(ii) GATHERING FURTHER INFORMATION

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);
- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

(iii) REALITY-TESTING

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in REALITY-TESTING. Reality testing may involve any or all of the following:

(a) A detailed examination of specific elements of a claim, defense, or a perspective;

(b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;

(c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;

(d) Examination of the monetary and non-monetary costs of litigation and continued conflict;

(e) Assessment of witness appearance and credibility of parties;

(f) Inquiry into the chances of winning/losing at trial; and

(g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:

1. Asking effective questions,
2. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or
3. Considering the consequences of any failure to reach an agreement (BATNA/WATNA/MLATNA analysis).

1. ASKING EFFECTIVE QUESTIONS

Mediator may ask parties questions that can gather information, clarify facts or alter perceptions of the parties with regard to their understanding and assessment of the case and their expectations.

Examples of Effective Questions:

OPEN-ENDED QUESTIONS like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business'. 'What were your reasons for including that term in the contract?'

CLOSED QUESTIONS, which are specific, concrete and which bring out specific information. For example, 'it is my understanding that the other driver was going at 60 kilometers per hour a the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who built this building?'

QUESTIONS THAT BRING OUT FACTS: 'Tell me about the background of this matter'. 'What happened next?'

QUESTIONS THAT BRING OUT POSITIONS: 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'

QUESTIONS THAT BRING OUT INTERESTS: 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business/personal/family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(II) DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OFTHE PARTIES

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as,

'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?

(III) CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA/MLATNA ANALYSIS)

BATNA	Best Alternative to Negotiated Agreement
WATNA	Worst Alternative to Negotiated Agreement
MLATNA	Most Likely Alternative to Negotiated Agreement

(IV) BRAIN STORMING

Brain Storming is a technique used to generate options for agreement. There are 2stages to the brain storming process:

1. Creating options
2. Evaluating options

1. **Creating options:-** Parties are encouraged to freely create possible options for agreement. Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.
2. **Evaluating options:-** After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained.

This information further helps to find terms that are mutually acceptable to both parties. Brainstorming requires lateral thinking more than linear thinking.

Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement.

Linear thinking: Linear thinking is logical, traditional, rational and fact based. Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(V) SUB-SESSIONS

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub- sessions with only the advocate (s) or the party or any member(s) of the party.

a) Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.

b) If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub- session(s) with parties having common interest, to facilitate negotiations. Tills type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

(VI) EXCHANGE OF OFFERS

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

STAGE 4 : CLOSING

(A) Where there is a settlement

Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

1. Mediator orally confirms the terms of settlement
2. Such terms of settlement are reduced to writing;
3. The agreement is signed by all parties to the agreement and the counsel if any representing the parties;
4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
5. A copy of the signed agreement is furnished to the parties;
6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
8. The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

THE WRITTEN AGREEMENT SHOULD:

1 clearly specify all material terms agreed to;

2 be drafted in plain, precise and unambiguous language;

3 be concise;

4 use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);

5 use language and expression which ensure that neither of the parties feels that he or she has 'lost';

6 ensure that the terms of the agreement are executable in accordance with law; be complete in its recitation of the terms;

7 avoid legal jargon, as far as possible use the words and expressions used by the parties;

8 as far as possible state in positive language what each parties agrees to do;

9 as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) Where there is no settlement

If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.

The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

CHAPTER -3.3.8

COMMUNICATON IN MEDIATION

Communication in Mediation

1.1 Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.

1.2 Communication is not just TALKING and LISTENING. Communication is a process of information transmission.

1.3 The intention of communication is to convey a message.

1.4 The purpose of communication could be any or all of the following:

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

1.5 Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.

1.6 Communication is also information sent by one to another to be understood by the receiver in the same way as it was intended to be conveyed.

1.7 Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and

attributing thoughts, feelings/ideas to the message. It evokes a response in the Receiver who conveys the same to the sender through words/gestures/acts/expressions.

1.8 Consequently, a communication would involve :-

A Sender - person who sends a message.

A Receiver - person who receives the message.

Channel - the medium through which a message is transmitted which could be words or gestures or expressions.

Message - thoughts/feelings/ideas/emotions/knowledge/information that is sought to be communicated.

CHAPTER-3.3.9

COMMUNICATON SKILLS

Communication skills in mediation include:-

(A) Active Listening

(B) Listening with Empathy

(C) Body Language

(D) Asking the Right Questions

(A) ACTIVE LISTENING:

Parties participate in mediation with varying degree of optimism, apprehension, distress, anger, confusion, fear etc. If the parties understand that they will be listened to and understood, it will help in trust building and they can share the responsibility to resolve the dispute.

In active listening the listener pays attention to the speaker's words, body language, and the context of the communication.

An active listener listens for both what is said and what is not said.

An active listener tries to understand the speaker's intended message, notwithstanding any mistake, mis-statement or other limitations of the speaker's communication.

An active listener controls his inner voices and judgments which may interfere with his understanding the speaker's message.

Active listening requires listening without unnecessarily interrupting the speaker. Parties must be given uninterrupted time to convey their message. There is a difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one also understands the meaning of what has been said. Listening is an active process.

Following are the commonly used techniques of active listening by the mediator:

1. **Summarizing:** This is a communication technique where the mediator outlines the main points made by a speaker. The summary must be accurate, complete and worded neutrally .It must capture the essential points made by the speaker. Parties feel understood and repetition by them is minimized.

2. **Reflecting:** Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is a restatement of feelings and emotions in terms of the speaker's experience, e.g. "So, you are feeling frustrated". Reflecting usually demonstrates empathy.

3. **Re-framing:** Re-framing is a communication technique used by the mediator to help the parties move from Positions to Interests and thereafter, to problem solving and possible solutions. It involves removal of charged and offensive words of the speaker. It accomplishes five essential tasks:

    1. Converts the statement from negative to positive.
    2. Converts the statement from the past to the future.
    3. Converts the statement from positions to interests.
    4. Shifts the focus from the targeted person to the speaker.
    5. Reduces intensity of emotions.

    Example:

    Party: "My boss is cruel and indifferent. It is impossible to talk to him. I should be able to meet him at least once a day. He doesn't make any time for me and always ignores me."

    Mediator Re-frames: "You want regular access and communication with your boss and you want him to be considerate, is that right?" This re-frame has converted the employee's complaint from negative to positive, past to future, position to interest and shifted the focus back to the employee's needs/interests.

    NOTE:

    Position: A position is a perception ("my boss is cruel and indifferent") or a claim or demand or desired outcome ("I should be able to meet him at least once a day").

    Interest: An interest is what lies beneath and drives a person's demands or claims. It is a person's real need, concern, priority, goal etc. It can be tangible (e.g. property, money, shares etc.) and/ or intangible (e.g. communication, consideration, recognition, respect, loyalty etc.).

4. Acknowledging: In acknowledgment the mediator verbally recognizes what the speaker has said without agreeing or disagreeing. Example "I see your point" or "I understand what you are saying. This way mediator assures the speaker that he has been heard and understood.

5. Deferring: A specialized communication technique where the mediator postpones the discussion of a topic until later. While deferring a mediator should write down the topic he has deferred and re-initiate the discussion of the topic at the right time.

6. Encouraging: The mediator can encourage parties when they need reassurance, support or help in communicating. Example : "what you said makes things clear" or "this is useful information"

7. Bridging: A technique used by a mediator to help a party to continue communication. Example :"And---" "And then--", The word "And" encourages communication whereas the word "But" could discourage communication.

8. Restating : In this the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker. Example : "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."

9. Paraphrasing : Is a communication technique where the mediator states in his own words the statements of the speaker conveying the same meaning?

10. Silence: A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts.

11. Apology: It is an acknowledgment of hurt and pain caused to the other party and not necessarily an admission of guilt. Parties should be carefully and adequately prepared by the mediator when a party chooses to apologize.

    Example: "I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you"

12. Setting an agenda: In order to facilitate better communication between the parties the mediator effectively structures the sequence or order of topics, issues, position, claims, defenses, settlement terms etc. It may be done in consultation with the parties or unilaterally.

For example, when tensions are high it is preferable to select the easy issue to work on first. The mediator may determine what is to be addressed first so as to provide ground work for later decision making.

BARRIERS TO ACTIVE LISTENING:

(i) Distractions: - They may be external or internal. The sources of external distractions are noise, discomfort, interruptions etc. The sources of internal distractions are tiredness, boredom, preoccupation, anxiety, impatience etc.

(ii) Inadequate time:-There should be sufficient time to facilitate attentive and patient listening.

(iii) Pre-judging:-A mediator should not prejudge the parties and their attitude, motive or intention.

(iv) Blaming:--A mediator should not assign responsibility to any party for what has happened.

(v) Absent Mindedness:-The mediator should not behalf-listening or inattentive.

(vi) Role Confusion:-The mediator should not assume the role of advisor or counselor or adjudicator.

(vii) He should only facilitate resolution of the dispute.

(viii) ArguingIimposing own views: -The mediator should not argue with the parties or try to impose his own views on them.

(ix) Criticizing

(x) Counseling

(xi) Moralizing

(xii) Analyzing

(B) LISTENING WITH EMPATHY

In the mediation process, empathy means the ability of the mediator to understand and appreciate the feelings and needs of the parties, and to convey to them such understanding and appreciation without expressing agreement or disagreement with them.

Empathy shown by the mediator helps the speaker to become less emotional and more practical and reasonable. Mediator should understand that Empathy is different from Sympathy, in empathy the focus of attention is on the speaker whereas in sympathy the focus of attention is on the listener.

Example:

Wife: "I had such a hard day at work"

Husband:"I am so sorry you had a hard day at work"

(focus is on listener/ husband) - Sympathy

Husband: "You had a hard day at work, mine was worse" - Sympathy

(focus on listener/husband)

Husband : "You feel it was hard for you at work today. Would you like to talk about it?"

(focus on speaker/wife) - Smpathy

Reflecting is a good communication technique used to express empathy.

(C) BODY LANGUAGE:

The appropriate body language of the listener indicates to the speaker that the listener is attentive. It conveys to the speaker that the listener is interested in listening and that the listener gives importance to the speaker.

In the case of mediators the following can demonstrate an appropriate body language:-

(i) Symmetry of posture - It reflects mediator's confidence and interest.

(ii) Comfortable look - It increases the confidence of the parties.

(iii) Smiling face - It puts the parties at ease.

(iv) Leaning gently towards the speaker - It is a sign of attentive listening.

(v) Proper eye contact with the speaker - It ensures continuing attention.

(D) ASKING THE RIGHT QUESTIONS

In mediation questions are asked by the mediator to gather information or to clarify facts, positions and interests or to alter perception of parties. Questions must be relevant and appropriate. However, questioning is a tool which should be used with discretion and sensitivity. Timing

and context of the questioning are important. Different types of questions will be appropriate at different times and in different context. Appropriate questioning will also demonstrate that the mediator is listening and is encouraging the parties to talk. However, the style of questioning should not be the style of cross examination. Questions should not indicate bias, partiality, judgment or criticism. The right questions help the parties and the mediators to understand what the issues are.

TYPES OF QUESTIONS:

(a) Open Questions : These are questions which will give a further opportunity to the party to provide more information or to clarify his own position, retaining control of the direction of discussion and maintaining his own perspective. They are broad and general in scope.

Examples:

"Can you tell me more about the subject?"

"What happened next?"

"What is your claim?"

"What do you really want to achieve?"

(b) Closed Questions: These questions are limited in scope, specific, direct and focused.

They are fact-based in content and tend to elicit factual information. The response to these questions may be 'Yes' or 'No' or a very short response and may close the discussion on the particular issue.

Examples:

"What colour shirt was the man wearing?" "On which date was the contract signed?"

"What is the total amount of your medical bills?"

"Were you present in the market when the event occurred?"

(c) Hypothetical Questions: Hypothetical questions are Questions which allow parties to explore new ideas and options.

Examples:

"What if the disputed property is acquired by Government?" "What if your husband offers to move out of the parental house and live separately?"

Other types of questions like Leading Questions and Complex Questions are not ordinarily asked in mediation, as they may not help the mediation process.

CHAPTER-X

NEGOTIATION AND BARGAINING MEDIATION

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of negotiation. Negotiation refers to the process of communication that occurs when parties are trying to find a mutually acceptable solution to the dispute. Negotiation may involve different types of bargaining.

What is Negotiation?

Negotiation is an important form of decision making process in human life. Negotiation is communication for the purpose of persuasion. Mediation in essence is an assisted negotiation process. In mediation, negotiation is the process of back and forth communication aimed at reaching an agreement between the parties to the dispute. The purpose of negotiation in mediation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem solving and interest based approach. The mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called 1Shuttle Diplomacy1 Any negotiation that is based on merits and the interest of both parties is Principled Negotiation and can result in a fair agreement, preserving and enhancing the relationship between the parties. The mediator facilitates negotiation by resorting to reality-testing, brainstorming, exchanging of offers, breaking impasse etc.

Why does one negotiate?

a. To put across one1s view points, claims and interests.

b. To prevent exploitation/harassment.

c. To seek cooperation of the other side.

d. To avoid litigation.

e. To arrive at mutually acceptable agreement.

NEGOTIATION STYLES

1) **Avoiding Style** — **Unassertive and Uncooperative:** The participant does not confront the problem or address the issues.

2) **Accommodating Style** — **Unassertive and Cooperative:** He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice.

3) **Compromising Style** — **Moderate level of Assertiveness and Cooperation:** He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands. Emphasis will be on apparent equality.

4) **Competing Style** — **Assertive and Uncooperative:** The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.

5) **Collaborating Style** — **Assertive, Cooperative and Constructive:** He values not only his own interests but also the interests of others. He actively participates in the negotiation and works towards a deeper level of understanding of the issues and a mutually acceptable solution satisfying the interests of all to the extent possible.

What is bargaining?

Bargaining is a part of the negotiation process. It is a technique to handle conflicts. It starts when the parties are ready to discuss settlement terms.

TYPES OF BARGAINING USED IN NEGOTIATION

There are different types of Bargaining. Negotiation may involve one or more of the types of bargaining mentioned below:

(i) Distributive Bargaining

(ii) Interest based Bargaining.

(iii) Integrative Bargaining.

(i) Distributive Bargaining: is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probates estate, etc.). In distributive bargaining the parties may not necessarily understand their own or the other's interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win lose result or a compromise where neither party is particularly satisfied with the outcome. Distributive bargaining is often referred to as 11zero sum game11 where any gain by one party results in an equivalent loss by the other party. The two forms of distributive bargaining are:

Positional Bargaining: Positional Bargaining is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining. the parties simply trade positions, without discussing their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic form of negotiation and is often the first method people adopt. Each side takes a position and argues for it and may make concessions to reach a compromise. This is a competitive negotiation strategy. In many cases, the parties will never agree and if they agree to compromise, neither of them will be satisfied with the terms of the compromise.

Example: Varun and Vivek are quarrelling in a room. Varun wants window open Vivek wants it shut They continue to argue about how much to leave open-a crack, halfway, three quarter way.

Rights-Based Bargaining: This form of bargaining focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, "Your client was negligent. Therefore, s/he owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages."

Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining (e.g., "Your client was negligent, so she owes my client X amount in compensation.) Rights-Based Bargaining can lead to an impasse when the parties differ in the interpretation of their respective rights and obligations.

Negative consequences of Distributive Bargaining are:

(a) By taking rigid stands the relationship is often lost.

(b) Creative solutions are not explored and the interests of both parties are not fully met.

(c) Time consuming.

(d) Both parties take extreme positions often resulting in impasse.

Interest-Based Bargaining: A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie. Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised incases where the parties have on-going relationships and/or interests they want to preserve.

Example: The story of two sisters quarrelling over one orange. They decide to cut the orange in half and share its although both are not happy as it would not adequately satisfy their interest. The mother comes in to enquire what is the real interest of each one. One says that she needs the juice of one orange and the other says that she needs the peel of one orange. The same orange could satisfy the interest of both parties. Both sisters go away happy.

There are three essential steps in interest-based bargaining.

(a) Identifying the interests of parties.

(b) Prioritizing the parties' interests.

(c) Helping the parties develop terms of agreement/settlement that meets their most important interests.

(iii) Integrative Bargaining: Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

To continue the earlier example of Varun and Vivek quarrelling in the room. Ashok comes into the room and enquires about the quarrel. Vivek says that the cold air blowing on his face is making him uncomfortable. Varun says that the lack of air circulation is making the room stuffy and he is uncomfortable. Ashok opens the window of the adjoining room and keeps the connecting door open. Both parties are happy. The cold air is not directly blowing into Varun's face and Vivek is comfortable as there is adequate air circulation in the room.

As the interests and needs of both parties have been identified, it is easier to integrate the interests of both parties and find a mutually acceptable solution.

Another example of integrative bargaining. A car salesman may reach an impasse with a customer on the issue of the price of a new car. Instead of losing the deathe car salesman will offer to throw in fancy leather seats as part of the deal while maintaining the price on the car. If necessary the salesman may also agreeto help the customer to sell his old carat a good price.

The fancy leather seats and the offer to help in the sale of the old car are integrative terms because they result from an exploration of whether additional terms or trade-offs could be of interest to the customer. Similarly, the Mediator can help parties avoid or overcome an impasse by actively exploring the possibility and desirability of additional terms and trade-offs.

NOTE:

Position: A position is a perception ('my boss is cruel and indifferent') or a desired outcome ('My boss should meet with me once a day to talk').The claim or demand, itself, is a position.

Interest: An interest is a person's true need, concern, priority, goal etc.. It can even be intangible (not easily perceivable) e.g. respect, loyalty, dependability, timing, etc. An interest is what lies beneath and drives a person's demands or claims.

BARRIERS TO NEGOTIATION

1) Strategic Barriers.
2) Principal and Agent Barriers.
3) Cognitive Barriers (Perception Barriers).

1) Strategic Barriers:

A Strategic Barrier is caused by the strategy adopted by a party to achieve his goal. For example with a view to make the husband agree for divorce the wife files a false complaint against her husband and his family members alleging an offence underSection498 A of the Indian Penal Code.

A mediator helps the parties to overcome strategic barriers by encouraging the parties to reveal information about their underlying interests and understanding the strategy of the party.

2) Principal and Agent Barriers:

The behaviour of an agent negotiating for the principal may fail to serve interests of the principal. There may be conflict of interests between the principal and his agent. An agent may not have full information required for negotiation or necessary authority to make commitments on behalf of the principal. In all such contingencies the mediator helps the parties to overcome the 'Principal and Agent Barrier' by bringing the real decision maker (Principal) to the negotiating table.

3) Cognitive Barriers (Perception Barriers)

Parties while negotiating make decisions based on the information they have. But sometimes there could be limitation to the way they process information. There could be perceptional limitations which could occur due to human nature, psychological factors and/or the limits of our senses. These perceptional limitations are called cognitive barriers and can impede negotiation. It is important a mediator to identify Cognitive Barriers and use communication techniques to overcome it.

Example of Cognitive Barriers

Risk Aversion : People tend to be averse to risk regarding gain and would rather have a certain gain than an uncertain larger gain. They are ready to bear risk with regard to loss. They would avoid a certain loss and take a risk of greater loss. For example, some parties would rather postpone a certain loss through settlement at mediation for an uncertain outcome of the trial in the future. A good mediator will assist the parties in addressing these realities.

Assimilation bias : The tendency of negotiators to ignore any unfavorable information. For example, a court decision which could prejudice the case. To counter this, repeat the important information, provide documentary and other tangible evidence and reduce information to writing.

Inattentional blindness: Negotiators sometimes fail to focus on the entire picture and instead focus only on specific details. To counter this, the mediator may frequently shift focus from the specific to the larger picture.

Reactive devaluation : People in conflict have a tendency to minimize the value of offers from the other side. To counter this, mediator can change the focus from the source of the offer to the terms of the offer. For example, instead of saying 11the plaintiff offers 5lakhs11 the mediator may say " will you be satisfied with something like 5 lakhs".

Endowment effect: The tendency for people with property or interests in something to over value it. (their house, their land, a lawyer 1s evaluation of their case etc.) .To counter this, the mediator may enquire about the actual value, use objective criteria like the Sub-registrar 1s valuation, ask for the latest Court judgment supporting the submission etc.

Psychological impediments:

People make unwarranted assumptions about the motives and intentions of the other parties. Anchor Price, Aspiration Price and Reservation Price

To facilitate meaningful and successful negotiation the mediator should be aware of the Anchor Price, the Aspiration Price and the Reservation Price.

Anchor Price is a base number or a set of terms or an opening offer that has to be assessed by the mediator from the information given by the parties. This will serve as a parameter in the negotiation. If the anchor price is defined appropriately, parties tend to treat it as a real and valid bench mark against which subsequent adjustments are made. It must be based on complete information and if not it can be misleading. Mistaken or misguided anchor prices can increase the chance of impasse and can have unintended consequences in a negotiation.

Aspiration Price is the price that a party aspires to obtain from the negotiation. Reservation Price is the lowest a party may be open to receive.

ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate the parties from the problem

A mediator should help the parties to separate themselves from the problem.

For example, if Aparna has been consistently late to work for the past 2weeks,a perception may develop that "The problem is Aparna." Viewed in this manner the only way to get rid of the problem is to get rid of (dismiss, transfer etc.) Aparna. This is an example of merging the people with the problem and illustrates how it limits the range of options that are available for resolving the problem. To separate people from the problem, the key is to focus on the problem itself, independent of the person. In the above example, the employer might frame the problem as lack of punctuality. The employer can ask Aparna about her record of being on time for many years and the reasons for the recent two weeks of late arrival enquiring specifically whether there are circumstances that are resulting in Aparna's late arrivals. She may answer that she was involved in a motor vehicle accident recently and her vehicle repairs will be completed shortly. She might say that she had to change the route to work due to road repair, or she might say that she has to ride in a car pool to work and the driver has a temporary problem that caused the delay. By focusing on the problem itself, the employer has opened the door to understanding the root of the problem, which may lead to various options for handling it.

(b) Be hard on the issues and soft on the people

In being hard on the issues, the Mediator will request documentation on damages, verify the accuracy of numbers and confirm the evidence provided by both parties. At the same time, the mediator will encourage the parties to be polite and cordial with each other and the mediator will demonstrate the same qualities during mediation.

(c) Focus on interests

In negotiation, focus must be on interests rather than on positions. Hence the mediator should help the parties to shift the focus from their positions to their interests.

(d) Create variety of options

The Mediator is required to facilitate generation of various options and selection of the option most acceptable to the parties.

(e) Rely on objective criteria

When perceptions of the parties differ, in appropriate cases objective criteria like expert1s opinion, scientific data, valuation report, assessor 1s report etc. can be relied on by the parties to examine the options and arrive at a settlement.

CHAPTER-XI

IMPASSE- CONCEPT AND MANAGEMENT

During mediation sometimes parties reach an impasse. In mediation, impasse means and includes a stalemate, standoff, deadlock, bottleneck, hurdle, barrier or hindrance. Impasse may be due to various reasons. It may be due to an overt conflict between the parties. It may also be due to resistance to workable solutions, lack of creativity, exhaustion of creativity etc. Impasse may be used as a tactic to put pressure on the opposite party. There may also be valid or legitimate reasons for the impasse.

TYPES OF IMPASSE

There are three types of impasse depending on the causes for impasse namely

(i) Emotional impasse

(ii) Substantive impasse

(iii) Procedural impasse

Emotional impasse can be caused by factors like:

- Personal animosity
- Mistrust
- False pride
- Arrogance
- Ego
- Fear of losing face
- Vengeance

Substantive impasse can be caused by factors like:

- Lack of knowledge of facts and/or law
- Limited resources, despite willingness to settle
- Incompetence (including legal disability) of the parties
- Interference by third parties who instigate the parties not to settle dispute or obstruct the settlement for extraneous reasons.
- Standing on principles, ignoring the realities
- adamant attitude of the parties

Procedural impasse can be caused by factors like:

- Lack of authority to negotiate or to settle
- Power imbalance between the parties
- Mistrust of the mediator

STAGES WHEN IMPASSE MAY ARISE

Impasse can arise at any stage of the mediation process namely introduction and opening statement, joint session, separate session and closing.

TECHNIQUES TO BREAK IMPASSE

The mediator shall make use of his/her creativity and try to break impasse by resorting to suitable techniques which may include following techniques:

(a) Reality Testing

(b) Brainstorming

(c) Changing the focus from the source of the offer to the terms of the offer.

(d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purposes.

(e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.

(f) Taking assistance of other people like spouses, relatives, common friends, well wishers,experts etc. through their presence, participation or otherwise.

(g) Careful use of good humour.

(h) Acknowledging and complementing the parties for the efforts they have already made.

(i) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse.

(j) Role-reversal, by asking the party to place himself/ herself in the position of the other party and try to understand the perception and feelings of the other party.

(k) Allowing the parties to vent their feelings and emotions.

(l) Shifting gears i.e. shifting from joint session to separate session or vice-versa.

(m) Focusing on the underlying interest of the parties.

(n) Starting all over again.

(o) Revisiting the options.

(p) Changing the topic to come back later.

(q) Observing silence.

(r) Holding hope

(s) Changing the sitting arrangement.

(t) Using hypothetical situations or questions to help parties to explore new idea and options.

Annexure-A

ROLE PLAY- I
ROBBERT V. ARUN

General Information

Arun has advertised in a newspaper about his intention to sell a car owned by him. Robbert, a good friend of Arm purchased the said car for a valuable consideration of Rs. 2 Lakhs. Robbert in a short period realized that Exhaust System is defective. Robbert became dissatisfied with the functioning of the car. He asked Arun to take back his car and refund the money of Rs.2 Lakhs. Initially, Arun promised to pay back Rs. 2 Lakhs to Robbert but later on refused to do so. Robbert has filed a suit for recovery of Rs.2 Lakhs alongwith interest@15% p.a. against Arun. Case is referred for mediation.

Confidential facts for Arun

1. Arun is a 25 years old man and is unemployed for the last one year. He is earning about Rs. 5,000/- per month from a petty job which is temporary in nature.
2. Arun decided to dispose of his car. For this purpose, he gave an advertisement in the newspaper. Robbert, one of the close friends agreed to purchase the said car despite the initial reluctance of Arun.
3. Arun did not disclose the faulty exhaust system of the car. Arun sold the car for a price of Rs. 2 Lakhs. It is very difficult for the Arun to pay back the entire money of Rs.2 Lakhs but he may consider to get the faulty exhaust system repaired from a mechanic and to pay repair charges.
4. Arun is also interested to maintain future relations with Robbert.

Confidential facts for Robbert

1. Robbert is 25 years old. He recently got a job in a reputed company. Robbert's office is situated about 25 km away from his residence. He needs a car for transportation. Robbert cannot purchase a new car from the market. Robbert thought that the car owned by Arun should be in a good condition. Arun was not inclined to sell the car earlier but due to repeated requests, he sold the car to Robbert for a consideration of Rs.2 Lakhs. Arun also said to one of the common friend that "Well, now all my headaches are gone."
2. Robbert within the short span of time understand the Arun's comments. Robbert began to develop headache and nosia from the fumes which filled the car at the time of driving. Car was examined by a mechanic. After inspection, he suggested that entire exhaust system is required to be replaced which may cost around Rs. 50,000/-. Thereafter, the car will be in perfect working condition.
3. Arun did not disclose the said fact to Robbert and only talked about some minor problems in the engine of the car. This type of behaviour was not expected by Robbert from his close friend Arun.

4. Robbert contacted Arun and requested him to pay back his money. Initially, Arun agreed to pay back money but later on he refused. Robbert is only interested in the money. He does not want to have any future relation with Arun.

ROLE PLAY - II
MOHAN V. SOFT DRINK LIMITED

General Information

Ram is running a restaurant in a posh colony of Delhi. He used to purchase Soft Drinks from a manufacturer Soft Drinks Ltd.

About 6 months back, Mohan visited !he restaurant owned by Ram. He ordered for soft drink. Ram supplied the soft drinks prepared by Soft Drinks Ltd. It was supplied in a dark opaque glass bottle. It was opened by Mohan. Mohan found foreign article in !he bottle which he could not notice before drinking. He suffered from severe gastric problems and could not attend his office for 10 days. He lost his job. Mohan initiated legal proceedings against Soft Drinks Ltd. and claimed damages of Rs. 5lakhs due to mental pain, agony, loss of job and illness. Soft Drink Company appeared in the court and expressed willingness to settle disputes through Mediation. Referral Judge referred case for Mediation.

Confidential Information for Mohan

1. Mohan remained ill due to !he gastric problem for a period of 10 days. He was employed as an assistantinaGeneraiMerchantShop.Helosthisjobduetoabsenceoftendays.
2. Mohan does not want any action against Ram because he thinks that Ram was not at fault.
3. Mohan wants to initiate legal action only against the Soft Drinks Company. He thinks that Soft Drink Company should have proper system to prevent entry of foreign articles into the bottles.
4. When Mohan tried to contact concerned officials of !he Soft Drinks Company about !he incident, they misbehaved him. This really angered him.
5. Mohan obtained legal advice. As per the legal advice, the litigation in India is costly and time consuming. Mohan may not get the damages within the reasonable time.
6. Mohan needs money to invest in new business. If he gets suitable damages from Soft Drinks Company, he can invest money in new business.
7. Mohan is also interested in the job if offered by the Soft Drinks Company.

Confidential instructions for Soft Drinks Ltd.

1. Soft Drinks Company is manufacturing soft drinks for the last 15 years. It is a multi-national company and is enjoying global reputation.
2. Soft Drinks is facing competition in Indian Markets from other manufacturers. If case is made public then the Soft Drinks Company Ltd. May lost business in Indian Markets.
3. It was a bonafide mistake. Soft Drinks company is having modern machines for filling the bottles.
4. Law of damages in India is now developing. The Courts are awarding damages in such cases.

5. Soft Drinks company is willing to pay Rs.1 Lakh to Mohan to settle the dispute.
6. Soft Drinks company also received legal advise and as per legal advise, damage shall be payable to Mohan.
7. The forensic report is also against the Soft Drinks Company. The foreign article was found to be decomposed snail.

ROLE PLAY - III
RAM V. SUNIL

General Information

Ram and Sunil has been next door neighbour for ten years. Both have children. The families had a friendly relationship in the past. However things have deteriorated when six months ago, Sunil bought a black labrador and kept in courtyard. Dog was large and aggressive. Dog used to bark frequently when people approached either Sunil's home or neighbouring home. Ram has complained to Sunil many time. Two months ago, dog has dug a hole underneath the wooden fence that separated Sunil ad Ram backyard. Dog crawled through the hole into Ram backyard and damaged some of the flowers. Ram called Sunil and complained. Ram was very much concerned about the prize winning roses in the far comer of the yard which the dog did not damage. Sunil filled the hole under the fence. A week later dog once again got into Ram's yard and tore up two of the rose bushes. Ram became hysterical, chased the dog with a broom and hit it. The startled dog barked and bit Ram on the hand. Sunil went to rescue and calm down both the dog and Ram. Sunil took the dog back home. Ram had demanded that Sunil pay Rs.4000/- an doctor's bill for four stitches from the dog bite and Rs.10,000/- for the two rose bushes, which Ram valued at Rs. 5,000/- each, Rs.6000/ for nuisance and deprivation of sleep and Rs.30,000/-for shock and pain due to dog bite. Sunil refused. Ram then filed a suit for recovery of Rs. 50, 000/-.

Referral Judge referred the case to mediation.

Confidential facts for Sunil

1. Sunil was sick of being lectured by Ram who is acting completely unreasonably about dog issue.
2. Sunil moved to the suburbs due to have a dog for kids.
3. Sunil bought dog because to have a watchdog and to feel safe.
4. The dog is a good watchdog and only barks when a stranger comes to front porch.
5. Dog does not bark whenever anyone passed by in front of the house or when a person is at a neighbouring house.
6. The dog bite was entirely due to Ram's fault. He should not have beaten the dog with a broom. Sunil is sorry that the dog got into Ram's yard again, but instead of attacking dog, he should have picked up the telephone and called Sunil.
7. Sunil will not pay for the doctor bill since the dog only bit Ram after being hit with a broom.
8. Sunil may buy new rose seeds so Ram can replant the rose bushes. There is no way to pay Rs. 5,000/- for each bush to Ram. Sunil has seen rose bushes at the nursery for less than Rs. 200/-.

9. Privately, Ram is willing to tell the mediator that he feels bad that the dog has got into Ram's yard two times and damaged the roses. Ram seemed really upset about the roses. Sunil is willing to do something to avoid having the dog get into Ram's yard again and may put up a higher fence.
10. Sunil will consider paying all or part of Ram's medical bills if the mediator asks Sunil to reconsider that issue.

Confidential facts for Ram

1. Ram is very upset about dog situation. Over the last six months, Ram has asked Sunil to quiet the dog down on numerous occasions, but to no avail.
2. The dog's loud bark and terrifying growl scare your two young children of Ram.
3. The dog goes ballistic every time someone approaches Ram's house an scares the guests.
4. The dog barks intermittently at night and wakes Ram up and due to this Ram has a hard time falling back to sleep.
5. Ram is furious about the damage caused to your prize-winning rose bushes. Ram has already won blue ribbons for first place in the country rose competition for the last two years in a row. Ram desired to be paid back for the damage to the two rose bushes (although no amount of money can repay for the expert care and attention which Ram has given to the rose bushes).
6. Ram is also very fearful that the dog will re-enter your yard and damage the four remaining rose bushes.
7. Ram is also terrified of the dog, since he brutally attacked and bit him. Ram cannot tolerate this dangerous animal around him and his children.
8. Ram has asked Sunil to get rid of the dog and pay Rs.50,000/- which includes medical bills (Rs. 4000/-) two rose bushes (Rs. 10,000/-)nuisance and deprivation of sleep (Rs.6,000/-) pain and suffering from the dog bite (Rs.30,000/-).

Annexure B

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3. Aditya Chandershekhar Pandit & Ors. V/s State of NCT of Delhi & Another W.P. (Crl.) 603/2012 decided on 01/08/2012 by Hon'ble Mr. Justice A.K. Pathak.
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16. K. Prabhavathy v. Director General of Police, ILR 2012 (3) Ker 922
17. K. Srinivas Rao vs D.A. Deepa on 22 February, 2013 Bench: Aftab Alam, Ranjana Prakash Desai CIVIL APPEAL N0.17940F 2013(Arising out of Special Leave Petition (Civil) No.4782 of 2007)
18. Marabasappa -vs- Ningappa = (2010) 15 sec 286 by Hon'ble Mr. Justice G.S. Singhvi & HMJ H.L. Dattu.
19. Mohd. Shamim v. Nahid Begum, (2005) 3 SCC 302

20. Moli Ram -vs- Ashok Kumar= (2011) 1 SCC 466.by HMJ Markandey Katju & HMJ Gyan Sudha Misra (on confidentiality and duties of Mediator)

21. Naresh Chand Jain v. K.M. Tayal (2012) ILR III Del

22. Naveen Kumarv vs Smt. Khilya Devi &Another = CS (OS) No. 2248/2010 decided on 01/09/2011 by Hon'ble Mr. Justice A.K. Pathak.

23. P.T. Thomas -vs- Thomas Job = (2005) 6 SCC 478. By HMJ Ruma Pal & HMJ Dr A.R. Lakshmanan (on binding nature of settlements in mediation and lok adalats).

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25. Ruehl Aggarwal v. Amit Aggarwal = 2015 (1) ALT (Allahabad Law Times) 42 (SC) also see JT 2004 (10) SC 475

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27. Salem Advocate Bar Association TN -vs- Union of India (2005) 6 Supreme Court Cases 344. (Validity of Section 89 CPC)

28. Shyamalika Das V/s General Manager, GRIDCO & Another ....STPL (Web) 780 SC, Supreme Court of India.

29. Shyamalika Das v.General Manager,GRIDCO, (2010) 15 SCC 268

30. State of Punjab & Another -vs- Jalour Singh & Others by HMJ K.G. Balkrishnan; HMJ G.P. Mathur & HMJ R.V. Raveendran (Validity of settlernent of Lok Adalat & Mediation)

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32. Surinder Kaur & Others V/s Pritam Singh & Others ... 154 (2008) DLT 598.R. Manjula -vs- Raja= (2009) 2 SCC 511. By HMJ Arijit Pasayat & HMJ A.K. Ganguly.

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34. Vipin Luthra v.Vikram Kumar Jain (2011) 161 PLR 790

Annexure C

REFERENCES

- Mediation and Conciliation Rules (Rules framed by the High Courts)
- Mediation Training Manual of India-MCPC Supreme Court of India

Books:

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1. F.M. Ibrahim Kalifulla J. -An Endeavour : Mandatory application of mediation by Civil Courts In pending litigations, Paper presented at Tamil Nadu State judicial Academy on 23.02.2013.

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4. R.V. Raveendran J.-Section890'C: Need for an urgent re-look, (2007)4SCC 0)23.

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6. Sanjay Kishan Kaul J. -Challenges, Obstacles and Solution In the implementation of Mediation.

7. F.M. Ibrahim Kalifulla J. - An Endeavour : Mandatory Application of Mediation by Civil Courts in Pending Litigation

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9. Rao, Jagannatha J., Concepts of Conciliation and Mediation and their Differences.

CURRICULUM OF 20 HRS. CAPSULE COURSE

Duraton : (3 Days)
Day - 1

Suggested Reading : Mediation Training Manual for Capsule Course

TIME	Sessions	Study Topics
10.00 AM to 11.30 AM	SESSION – I	1. Perceptions 2. Conflict Management (Chapters: I&II)
11.45 AM to 1.00 PM	**SESSION – II**	**Mediation : Definition & Concept** • Advantages of Mediation • Role of Mediators • Mediator Distinguished from Conciliator And Adjudicator • Qualities of a Mediator (Chapters: IV&V)
1.30 PM to 5.00 PM	**SESSION – III**	**Mediation : Process & Stages** • Introduction & Opening Statement • Joint Session • Caucus • Closin a. Settlement b. Non Settlement **ROLE PLAY - I** (Robert V Arun) (Chapters: VI&VII)

Note : Tea Breaks : 11.30 AM to 11.45 AM
: 03.45 PM to 04.00 PM
Lunch Break : 1.15 PM to 02.15 PM

Day - 2

TIME	Sessions	Study Topics
10.00 AM to 3.00 PM	SESSION – I	**A. COMMUNICATION IN MEDIATION** 1. Definition and Process 2. Verbal and Non Verbal Communication 3. Barriers to Communication **B. COMMUNICATION SKILLS** 1. Active Listening 2. Listening with Empathy 3. Body Language 4. Asking the Right Questions **ROLE PLAY – II** (Mohan Vs. Soft Drinks) (Chapters : VIII & IX)
3.00 PM to5.00 PM	SESSION – II	**NEGOTIATION AND BARGAINING** Negotiation Negotiation Styles (Chapter : X)

Note : Tea Breaks : 11.30 AM to 11.45 AM
: 03.45 PM to 04.00 PM
Lunch Break : 1.15 PM to 02.15 PM

Day - 3

TIME	Sessions	Study Topics
10.00 AM to 12.30 PM	**SESSION – I**	Bargaining Types of Bargaining Barriers to Negotiation Principled Negotiation **ROLE PLAY- III** (Ram V Sunil) (Chapter : X)
12.30 PM to 4.00 PM	**SESSION – II**	**IMPASSE : CONCEPT AND MANAGEMENT** Definition Types of Impasse Stages of Impasse Techniques to Break Impasse (Chapter : XI)

Note : Tea Breaks : 11.30 AM to 11.45 AM
: 03.45 PM to 04.00 PM
Lunch Break : 1.15 PM to 02.15 PM

CHAPTER-3.4

MEDIATION TRAINING MANUAL FOR REFERRAL JUDGES

CHAPTER-3.4.1
INTRODUCTION

Justice Delivery System in India is described by technical procedures with characteristics of the adversarial system with accompanying delays, arrears and taxing cost. Justice Delivery System reliance on win - lose situation leads to repeated use of the legal process. The unwarranted delays in dispensation of justice undermine the credibility of entire justice delivery system of the country. It leads to instances where people are settling disputes on their own, resulting in emergence of criminal syndicates and mob justice indicative of loss of confidence of the people in the rule of law and constitutional mechanisms. The adversarial system may be the appropriate method where authoritative interpretation or establishment of rights is required. To make rule of law a reality, assurance of speedy justice should be extended to citizens. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays. Justice Delivery System in India is under stress mainly because of the huge pendency of cases in courts. It emphasizes the desirability to take advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of conventional trial. In a developing country like India with major economic reforms, Alternative Dispute Resolution Mechanism could be one of the best strategies for quicker resolution of disputes to lessen the burden on the courts and to provide suitable mechanism for expeditious resolution of disputes.

In Indian Legal System, appropriate methods of disputes resolution are available, such as arbitration, conciliation, mediation and Lok adalat etc. These methods are less formal, encourage disputants to communicate and participate in the search for solutions, focus better on the root causes of the conflict, salvage relationships, and have significant savings in time and cost.

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of mediating in and promoting the settlement of Industrial disputes." Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Legislature also enacting The Legal Services Authorities Act, 1987 which provides constitution of the National Legal Services Authority as a Central Authority which is also vested with duties to encourage the settlement of disputes by way of negotiations, arbitration and conciliation.

The Parliament also enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties. In 1999, the Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

The Supreme Court upheld the Constitutional validity of newly inserted Section 89 in CPC in **Salem Advocate Bar Association, T. N. V Union Of India, (2003) l Supreme Court Cases 49**. **(Relevant Para: 9, 10 & 11)** A Committee was also constituted to devise case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The Supreme Court also directed respective High Courts to take appropriate steps for making rules which have been finalized by the Committee in exercise of rule making power subject to modifications, if any, which may be considered relevant and prior to finalization, the same should be circulated to the High Courts, subordinate courts, the Bar Council of India, State Bar Councils and the Bar Associations, seeking their responses.

The Supreme Court in **Salem Advocate Bar Association, T. N. V Union Of India, (2005) 6 Supreme Court Cases 344** also clarified possible conflict between Section 89 and Order 10 Rule 1-A and observed that Section 89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. **(Relevant Para: 54 & 55)** The Supreme Court also held that the court is not involved in the actual mediation/conciliation and Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. There is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. It was also observed that the parties need not to incur extra expenditure for resorting ADR modes as it is likely to act as a deterrent for adopting these methods.

The Supreme Court of India in **Afcons Infrastructure Limited And Another V CherianVarkey Construction Co. (P) Ltd., (2010) 8 Supreme Court Cases 24** also clarified anomalies in Section 89 and interchanged the definitions of "Mediation" and "Judicial Settlement" as given in Section 89. **(Relevant Para: 11 to 13)** It was also clarified that there is no requirement to formulate the terms of settlement as per mandate of Section 89. **(Relevant Para: 14 to 19)**

The Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) on 09.04.2005 which in its meeting held on 11.07.2005 had decided to initiate a pilot project on Judicial Mediation in Tis Hazari Courts in Delhi. 30 Judicial Officers were imparted 40 hours training on "Techniques of Mediation" by the experts invited from ISDLS. In Delhi District Courts, formal Judicial Mediation was started w.e.f. 13.09.2005 with six judicial officers functioning as trained mediators. MCPC is implementing mediation at national level.

CHAPTER- 3.4.2

MEDIATION: DEFINITION AND CONCEPT

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

- **Mediation is voluntary.** The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.
- **Mediation is a party-centred negotiation process.** The parties and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. The parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.
- Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process. The mediation process is structured and formalized with a degree of flexibility.
- Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/ legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests.
- Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.
- Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute.
- In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator evaluates when he assists each party to analyze the merits of a claim/ defence, and to assess the possible outcome at trial.

- The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.
- Mediation is a private process, which is not open to the public. Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties.
- Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".
- The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.
- Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.
- Mediation in a particular case need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

CHAPTER - 3.4.3

ADVANTAGES OF MEDIATION

1) The parties have CONTROL over the mediation in terms of 1) its scope (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome (i.e., the right to decide whether to settle or not and the terms of settlement.)
2) Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.
3) The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.
4) The procedure is SPEEDY, EFFICIENT and ECONOMICAL.
5) The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.
6) The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.
7) Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.
8) The process is CONFIDENTIAL.
9) The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.
10) Mediation helps to maintain/ improve/ restore relationships between the parties.

11) Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process - in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

12) In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIALSETTLEMENT.

13) A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

14) Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and nonconventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

15) When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

16) Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

17) REFUND OF COURT FEES is permitted as per rules in the case of settlement in court referred mediation.

CHAPTER - 3.4.4

COMPARISON BETWEEN JUDICIAL PROCESS, ARBITRATION AND MEDIATION

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1.	Judicial process is an adjudicatory process where a third party (judge/ other authority) decides other authority) decides	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
2.	Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3.	The decision is binding on the parties.	The award in arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
4.	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.

5.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
6.	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
7.	Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
8.	No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
9.	Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

COMPARISON BETWEEN MEDIATION, CONCILIATION AND LOKADALAT

	MEDIATION	CONCILIATION	LOK ADALAT
1.	Mediation is a non-adjudicatoryprocess.	Conciliation is a non- adjudicatory process.	Lok Adalat is non- adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
2.	Voluntary process.	Voluntary process.	Voluntary process.
3.	Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
4.	Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
5.	Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In LokAdalat, the scope of negotiation is limited.
6.	The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
7.	The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to LokAdalat.
8.	The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/ order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of LokAdalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
9.	Not appealable.	Decree/ order not appealable.	Award not appealable.
10.	The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in LokAdalat is on the past and the present.
11.	Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of LokAdalat involves only discussion and persuasion.

12.	In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In LokAdalat, parties are not actively and directly involved so much.
13.	Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in LokAdalat.

CHAPTER - V

MEDIATION: FUNCTIONAL STAGES

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional stages are used in an informal and flexible manner.

STAGE I : INTRODUCTION AND OPENING STATEMENT OBJECTIVES

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

INTRODUCTION

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the caseto him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.
- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues

- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

OPENING STATEMENT

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

- Concept and process of mediation
- Stages of mediation
- Role of the mediator
- Role of advocates
- Role of parties
- Advantages of mediation
- Ground rules of mediation

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator
- Finality
- Possibility of settling related disputes
- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

- Ordinarily, the parties/counsel may address only the mediator
- While one person is speaking, others may refrain from interrupting
- Language used may always be polite and respectful
- Mutual respect and respect for the process may be maintained
- Mobile phones may be switched off
- Adequate opportunity may be given to all parties to present their views

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

STAGE 2: JOINT SESSION OBJECTIVES

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

PROCEDURE

- The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/ petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/ respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.
- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.
- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.
- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.
- The mediator shall identify the areas of agreement and disagreement between the parties andthe issues to be resolved.
- The mediator should be in control of the proceedings and must ensure that parties do not 'takeover' the session by aggressive behaviour, interruptions or any other similar conduct.
- During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/ petitioner. The timing of holding the separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

STAGE 3 : SEPARATE SESSION OBJECTIVES

- Understand the dispute at a deeper level

- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

PROCEDURE

- During the separate session each of the parties and his counsel talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.
- The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-
- Parties vent personal feelings of pain, hurt, anger etc.
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);
- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

STAGE 4: CLOSING

(A) WHERE THERE IS A SETTLEMENT

Once the parties have agreed upon the terms of settlement, the parties and their advocates re¬assemble and the mediator ensures that the following steps are taken:

1. Mediator orally confirms the terms of settlement;
2. Such terms of settlement are reduced to writing;
3. The agreement is signed by all parties to the agreement and the counsel if any representingthe parties;

4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
5. A copy of the signed agreement is furnished to the parties;
6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
8. The mediator thanks the parties for their participation in the mediation and, congratulate sail parties for reaching a settlement.

THE WRITTEN AGREEMENT SHOULD :

- clearly specify all material terms agreed to;
- be drafted in plain, precise and unambiguous language;
- be concise;
- use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN,
- WHERE and HOW (passive voice does not clearly identify who has an obligation to perform
- a task pursuant to the agreement);
- use language and expression which ensure that neither of the parties feels that he or she has
- 'lost';
- ensure that the terms of the agreement are executable in accordance with law;
- be complete in its recitation of the terms;
- avoid legal jargon, as far as possible use the words and expressions used by the parties;
- as far as possible state in positive language what each parties agrees to do;
- as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) WHERE THERE IS NO SETTLEMENT

If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.

The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

CHAPTER - 3.4.6

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

(i) Facilitate the process of mediation; and

(ii) Assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

- A mediator facilitates the process of mediation by-
- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.
- motivating the parties to agree on mutually acceptable settlement.
- assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

- A mediator performs an evaluative role by-
- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) MEDIATOR AND CONCILIATOR

The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case through reality testing and assisting the parties to evaluate the options for settlement. Butin the process of conciliation, the conciliator himself can evaluate the cases of the parties andthe options for settlement for the purpose of suggesting the terms of settlement.The role of a mediator is not to give judgment on the merits of the case or to give advice to theparties or to suggest solutions to the parties.

(ii) MEDIATOR AND ADJUDICATOR

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

CHAPTER - 3.4.7

ROLE OF REFERRAL JUDGES

Judges who refer the cases for settlement through any of the ADR methods are known as Referral Judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

A) REFERENCE TO ADR AND STATUTORY REQUIREMENT

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

The cases which are not suitable for ADR process should not be referred for ADR process including mediation. The court has to form an opinion regarding suitability of a case for being

referred to ADR process. Having regard to the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, the Court may choose not to refer to an ADR process. If the case is unsuited for reference to any of the ADR process, the court shall briefly record the reasons for not referring the case to any of the settlement procedures prescribed under section 89 of the Code. It is mandatory for the Courts to consider recourse to ADR process under section 89 of the Code but actual reference to an ADR process in all cases is not mandatory. If the case falls under an excluded category then it should not be refer to ADR process but in all other case reference to ADR process is mandatory. (Relevant Para of Af cons: 24 & 26)

B) STAGE OF REFERRAL

The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/or their authorized representatives. (Relevant Para of Af cons: 24,41 & 42)

C) CONSENT

Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly the court can refer the case for conciliation under section 89 CPC only with the consent of all theparties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation. (Relevant Para of Af cons: 36)

D) AVOIDING DELAY OF TRIAL

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

E) CASES SUITABLE FOR REFERENCE

As held by the Supreme Court of India in Af cons case, having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process.

a) Representative suits under Order I Rule 8 CPC which involves public interest or interest of numerous persons who are not parties before the court.

b) Disputes relating to election to public offices.

c) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

d) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

e) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

a) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts(including all money suits)
- disputes relating to specific performance
- disputes between suppliers and customers
- disputes between bankers and customers
- disputes between developers/builders and customers
- disputes between landlords and tenants/licensor and licensees
- disputes between insurer and insured

b) All cases arising from strained or soured relationships, including

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

c) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.)
- disputes between employers and employees
- disputes among members of societies/ associations/apartment owners' associations

d) All cases relating to tortious liability, including

e) claims for compensation in motor accidents/ other accidents

f) All consumer disputes, including disputes where a trader/ supplier/ manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity

The above enumeration of "suitable" and "unsuitable" categorization of cases is not exhaustive or rigid and is illustrative. The types of cases including criminal cases which can be referred to

ADR processes are subjected to just exceptions or addition by the courts/ tribunals exercising its jurisdiction/ discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

(Relevant Para of Af cons: 27, & 28)

F) MOTIVATING AND PREPARING THE LAWYERSS AND PARTIES FOR MEDIATION

The referral judge plays the most crucial role in motivating the lawyers and parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

ROLE OF LAWYERS IN MEDIATION

Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. The role of the lawyer in mediation is functionally different from his role in litigation. The Lawyers have a proactive role to play in the mediation process and they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. The role of the lawyer commences even before the case comes to the court and it continues throughout the mediation process and even thereafter, whether the dispute has been settled or not.

The role of lawyers in mediation can be divided into three phases:

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

(i) PRE - MEDIATION

A party in case of having legal dispute first contacts a lawyer. The lawyer must first consider whether there is scope for resorting to any of the ADR mechanisms. Where mediation is considered the appropriate mode of ADR, the lawyer should educate the party about the concept, process and advantages of mediation. The lawyer helps the party to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The lawyer can help the parties to change their attitude from adversarial to collaborative.

(ii) DURING MEDIATION

The role of lawyers is very important during mediation also. The participation of lawyers in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the lawyer influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, lawyers must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The lawyer must be prepared on the facts, the law and the precedents.

iii) POST-MEDIATION

After conclusion of mediation also, the lawyer plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism. If a settlement between the parties has been reached before the mediator, the lawyer has to maintain and uphold the spirit of the settlement and must cooperate with the court in the execution of the order/decree passed in terms of the settlement.

ROLE OF PARTIES IN MEDIATION

Mediation is a process in which the parties have a direct, active and decisive role in arriving at an amicable settlement of their dispute. Though the parties get the assistance of their advocate and the neutral mediator, the final decision is of the parties. Though consent of the parties is not mandatory for referring a case to mediation and though the parties are required to participate in the mediation, mediation is voluntary as the parties retain their authority to decide whether the dispute should be amicably settled or not and what should be the terms of the settlement. The parties are free to avail of the services of lawyers in connection with mediation.

G) REFERRAL ORDER

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of / mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/mediator, the time limit for completing the mediation, quantum of fee/ remuneration if payable and contact address and telephone numbers of the parties and their advocates.

H) ROLE AFTER CONCLUSION OF MEDIATION

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation, the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential

orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court.

If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation.

If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. The court should apply the principles of Order 23 Rule 3 of the Code and make a decree/ order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/ disputes which are not the subject matter of the suit/ proceedings, the court will have to direct that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective. (Relevant Para of Af cons: 37 to 40)

To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

CHAPTER - 3.4.8

IMPORTANT GUIDELINES FOR REFERRAL JUDGES

1) As per Section 89 and Rule 1-A of Order 10, the court should explore the possibility of referral to ADR processes after the pleadings are complete and before framing the issues when the case is taken up for preliminary hearing for examination of parties under Order 10 of the Code. If for any reason, the court could not considered and referred the matter to ADR processes before framing issues, the case can be refer even after framing of the issues.

   In family disputes or matrimonial cases, the ideal stage for mediation would be immediately after service of respondent and before filing of objections/written statements. In such cases, the relationship between concerned parties becomes hostile on account of the various allegations in the petition. The hostility would be further aggravated by the counter-allegations madein written statement or objections.

2) After completion of the pleadings and before framing of the issues, the court shall fix a preliminary hearing for appearance of parties to acquaint itself with the facts of the case and the nature of the dispute between the parties.

3) The court should first consider whether the case is not fit to be referred to any ADR processes. If the case is not suitable for any ADR process then court should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. If case can be referred to ADR processes, the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

4) The court should first ascertain regarding choice of parties for arbitration and should inform the parties that arbitration is an adjudicatory process and reference to arbitration will permanently take the suit outside the ambit of the court.

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

6) If parties are not agreeable for arbitration and conciliation, the court after taking into consideration the preferences/options of parties, refer the matter to any one of the other three other ADR processes:

   (a) Lok Adalat;

   (b) Mediation by a neutral third party facilitator or mediator; and

   (c) A judicial settlement, where a Judge assists the parties to arrive at a settlement.

7) If the case is simple or relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties, the court may refer the matter to LokAdalat.

8) If the case is complicated and requires negotiations, the court should refer the case to mediation. If the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the case can be refer to another Judge for attempting settlement.

9) If ADR process is not successful, then court shall proceed with hearing of the case. If case is settled, then court shall examine the settlement and shall make a decree in terms of itkeeping in view the legal principles of Order 23 Rule 3 of the Code.

10) If the settlement includes terms and conditions which are not the subject matter of the suit, the settlement shall be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a LokAdalat or by mediation which is a deemed Lok Adalat).

11) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

12) The court shall record the mutual consent of the parties if the case is referred to arbitration or conciliation.

    If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. The Referral Order should not be an elaborate order.

13) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

14) If the Presiding Judge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is, therefore, advisable to refer cases proposed for Judicial Settlement to another Judge.

15) If the court refers the case to an ADR process (other than Arbitration), it should keep track of the case by fixing a hearing date for the ADR Report. The period allotted for the ADR process should not exceed from the period as permitted under applicable Mediation Rules.

The Court should take precaution that under no circumstances the ADR process shall be used as a tool in the hands of an unscrupulous litigant to delay the trial of the case.

16) The court should not send the original judicial record of the case at the time of referring the case for an ADR forum, however only copies of relevant papers of the judicial record should be annexed with referral order. If the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

CHAPTER - 3.4.9

CHECK LIST FOR REFERRAL JUDGES

Dos

- Ensure presence of the parties or authorized representatives at the time of referral
- Assess relevant facts of the case
- Interact and motivate the parties
- Ascertain willingness of the parties
- Explain Role of Mediator
- Explain Right to Self Determination and Confidentiality
- Select appropriate cases.
- Encourage Advocates and Litigants to choose Mediation
- Ensure Authority of Government Officials
- Obtain free consent of the parties for referral
- Find reasons if parties are not ready for Mediation
- Explain benefits of Mediation
- Pass appropriate Referral Order
- Obtain signatures of parties on Referral Order
- Fix date and time for appearance before Mediator
- Fix Schedule of Trial

DON'T

- Do not refer Ex-parte case
- Do not refer cases involving complex legal issues, multiple parties, Constitutional matters, Public Policies
- No delay of Trial
- No reference for sake of reference
- No reference without objective assessment
- Do not refer a case barred by Statutory Provisions
- No communication with Mediator

PROPOSED REFERRAL ORDER

NEXT DATE OF PROCEEDINGS IN THE

REFERRAL COURT: .....

Court Case ID : .....

Name of the referral Judge : .....

SUIT NO/CASE NO. : .....

NAME OF THE PARTIES : .....

V.

.....

(Annexed memo of parties)

DATE OF INSTITUTION OF THE CASE : .....

NATURE OF SUIT : .....

STAGE OF THE CASE AT THE TIME OF REFERRAL : .....

NO. OF HEARING (S) AT THE TIME OF REFERRAL : .....

REFERRAL ORDER

This court after conferring with the parties to the suit and ascertaining that there exists the element of settlement, and in pursuant to Section 89 of CPC refers the case to Mediation.

The concerned parties are directed to report to the **Judge In-Charge, Mediation Centre**, ... on ..... at ..... am/pm. The concerned parties alongwith their respective advocates, if any, are also directed to participate in the mediation proceedings. Participation in Mediation is in Good Faith.

No fee shall be payable by the parties for mediation.

Mediation settlement arrived at between the parties in writing (in case of settlement), after recording the terms and conditions of the settlement, the Mediation shall report the settlement through Judge Incharge, Mediation Centre to this court for further directions and proceedings.

The Mediation proceedings are confidential. The parties and their respective advocates or any other person with parties, who is allowed to attend the mediation proceedings, shall not disclose any deliberations of mediation proceedings to any court/forum etc.

Mediator is directed to report the final outcome of the mediation on .....

Signature of the Referral Judge with date : .....

.....

Signature of Plaintiff/Complainan/Petitioner/Appellant Signature of Defendantf Respondent Accused

Mobile/Phone no. ..... Mobile/Phone no. .....

Name of the Advocate ..... Name of the Advocate .....

Mobile/Phone no. ..... Mobile/Phone no. .....

CURRICULUM FOR REFERRAL JUDGES SENSITIZATION PROGRAMME

Suggested Reading : Mediation Training Manual for Referral Judges

Duration – One day

10.00 am - 11.00 am	11.00-11.15 am	11.15 am - 01.15 pm	01.15-02.00 p.m	02.00 pm - 4.00 pm	4.00-4.15 p.m	4.15 pm - 05.30 pm
Session - I		Session - II		Session - III		Session - IV
ADR: Relevance with special reference to Section 89, Code of Civil Procedure, 1908 (INTRODUCTION)	TEA BREAK	Mediation : 1. Definition and Concept 2. Advantages of Mediation 3. Comparison between Judicial Process, Arbitration and Mediation 4. Comparison between Mediation, Conciliation and Lok Adalat 5. Mediation : Functional Stages 6. Role of Mediators	LUNCH BREAK	Role of Referral Judges 1. Reference to ADR 2. Stage of referral 3. Consent 4. Avoiding delay of trial 5. Cases suitable for reference 6. Motivating and preparing the lawyers and parties for mediation 7. Referral Order 8. Role after conclusion of mediation proceedings	TEA BREAK	1. Guidelines for referral Judges and Check List INTERACTIVE SESSION
[Chapter - I]		[Chapter II to VI]		[Chapter VII]		[Chapter VIII & IX]

❑❑❑

CHAPTER-3.5

MEDIATION TRAINING MANUAL FOR REFRESHER COURSE

CHAPTER-3.5.1
INTRODUCTION

— Steps to Peace —

The Worlds problems will never cease without mediators & adversaries for peace
Our mission will not be complete until it's achieved
please Take a step with me
In the direction of where we want to be
In the world of Peace.

Ronney

INDIA has rich inheritance of Justice Delivery System. The role of our Judiciary, as protector of our fundamental rights and guardian of constitution of India is immense. To supplement the judicial system over the years, various alternate dispute resolution mechanisms like arbitration, conciliation, Lok adalats, etc have been promoted to address the ever growing quantum of disputes/conflicts of parties. And, the recent in this line of approach has been the introduction of 'Mediation', a mechanism which focuses on resolving disputes/conflicts by addressing the deficit of mutual understanding and trust between parties.

Though introduced over a decade back, Mediation as an effective dispute/conflict resolution mechanism has gained credible traction lately. With multitude of disputes having been settled, Mediation as a dispute resolution platform is already on the ascent!

Mediation centres with trained mediators across the nation have been set up. And to support an effective roll out, the MEDIATION AND CONCILIATION PROJECT COMMITTEE (MCPC), SUPREME COURT OF INDIA has structured and conducted several 40 Hours training programmes to train mediators, Awareness programmes, Capsule training programmes, Training of Trainers programmes and Training for Referral Judges have been conducted to stabilize mediation in India.

In pursuit to revisit and refresh mediators of their knowledge, learning and experiences on mediation concept and process, MCPC has structured 20 hours REFRESHER COURSE PROGRAMME to be imparted to all mediators across nation.

Conflict is inevitable but combat is optional

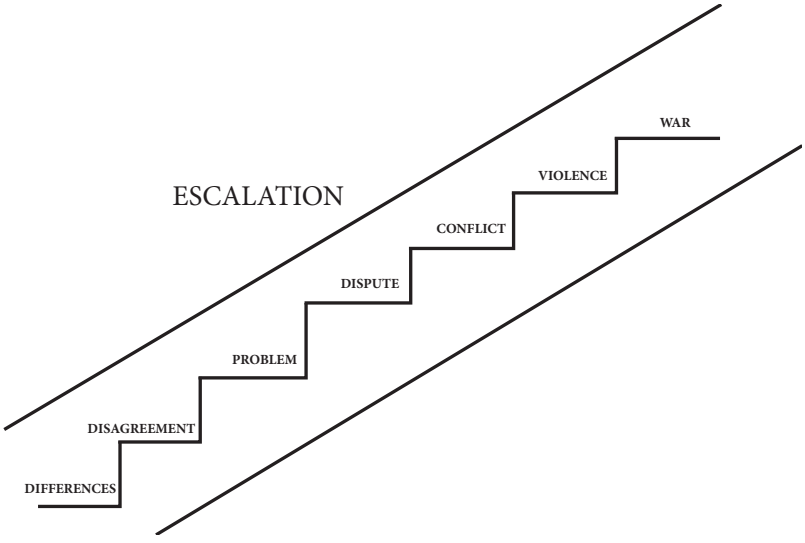
- Max Lucado

CHAPTER-3.5.2

CONFLICT: CAUSES, MANAGEMENT AND RESOLUTION

THE NATURE OF CONFLICT

Examination of the nature of conflict and the principles of conflict resolution which underlie the mediation process becomes necessary because how we understand conflict determines the way we will mediate. The phenomenon of conflict is so much a part of human life. The understanding one has of a conflict is strongly influenced by the way one thinks about the Nature of Conflict. Life comprises of several different -persons, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreement unresolved becomes dispute. Unresolved disputes become conflicts. Unresolved conflicts can lead to violence and even war. This is called the continuum of tension and is often. Illustrated by the following chart:



CONTINUUM OF TENSION

We will study the nature of Conflict in three broad dimensions. (1) The sense of threat which drives it (the Conflict Core). (2) What happens when it escalates (the Conflict Spiral). (3) The three primary aspects of conflict that mediation needs to address (the Conflict Triangle). Understanding these dimensions will help us understand our own approaches to conflict as well as those of the parties we deal with.

THE DIMENSIONS OF CONFLICT

1) THE CONFLICT CORE

The Conflict Core diagram shows how at the very core of any conflict, there lies a sense of threat concerning individuals, groups, communities or nations. This sense of threat emerges when any disagreement, annoyance, competition or inequity threatens any aspect of human dignity, personal reputation, physical safety, psychological needs, professional worth, social status, financial security, community concerns, religious membership or national pride. This list is not exhaustive and only indicates broad areas of threat. By the time parties get to the negotiating or mediation table, they are threatened both by the opposite side and within themselves! There is fear, suspicion, helplessness, frustration, embarrassment, anger, hurt, humiliation, distrust,

desperation, vengeance and a host of mixed emotions that need to be addressed. Failure to address these emotions will prevent the parties from resolving their dispute.

2) THE CONFLICT SPIRAL

When a given conflict intensifies, the initial tensions start spiralling outwards, affecting individuals, relationships, tasks, decisions, organizations and communities. This outward manifestation of the conflict is called the Conflict Spiral.

Personal responses. The stress of conflict provokes strong feelings of anxiety, anger, hostility, depression, and even vengeance in relationships. Every action or in-action of the other side becomes suspect. People become increasingly rigid in how they see the problem and in the solutions they demand. It can be difficult for them to think clearly. Hence what the parties really need is a forum which will understand and address their emotions and not just their dispute. Without emotions being addressed it is difficult to find real solutions.

Community responses. Emotions have a vital community and cultural context, even though individual responses may not always be the same for all members of the same culture or community. Any dispute takes colour from its community and cultural context. When the dispute begins to affect those around it, people may take sides or leave. Communities and families get polarized when the dispute involves a family or community member. However, a solution for a family dispute in one part of the country may not necessarily be perceived to be the solution in another part of the country. Similarly, a solution in the context of a metropolitan urban city may not be the same as for a rural area. A solution for a voluntary organisation working with education may not be the solution for an information technology firm.

Legal advice. Legal advice often becomes important in a conflict. This may add to the increasing tensions and inability of parties to control the situation themselves. Through process of interaction between the parties, assisted by a neutral person, a possible solution acceptable to all can be evolved. Conflict becoming public

Sometimes the conflict becomes public. Each side develops rigid positions and gathers allies for the cause. The conflict may spread beyond the original protagonists' control. It may also attract public and media attention. The relationships of the old and new protagonists become more complicated. Resolving the original conflict therefore becomes more difficult.

3) THE CONFLICT TRIANGLE

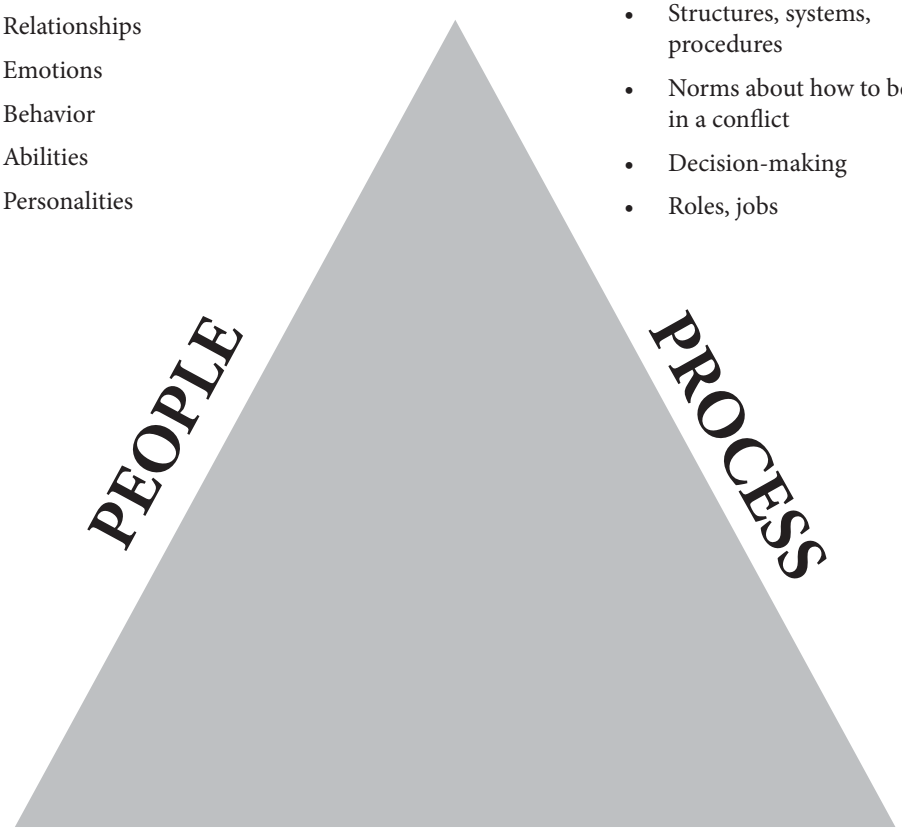
The Conflict Triangle arranges the three primary aspects of Conflict namely: the People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the basic framework to understand and address conflict. Elements of each side of this Conflict Triangle differ from person to person, situation to situation and problem to problem requiring different solutions.

1. People. Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.

2. Process. Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.

3. Problem. Every conflict has its own content. This comprises of all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

THE CONFLICT TRIANGLE



CAUSES OF CONFLICT AND ADDRESSING THEM

The first step in resolving conflict is identifying its cause. Once the cause has been identified, the next step is to evolve a strategy to address it. The following are some examples of causes of conflict and strategies to address them.

CAUSES	STRATEGY
Information	
Lack of information of information	Agree on what data are important Agree on process to collect data Agree on considering all interpretations Misinformation
Different interpretations of information	
Interests and Expectations	**Shift focus from positions to interests**
Goals, needs	Expand options
Perceptions	Find creative solutions
	Clarify perceptions
Relationships	
Poor communication	Establish ground rules
Repetitive negative behavior	Clarify misconceptions
Misconceptions, stereotypes	Improve communication
Distrust	Agree on processes and procedures
History of conflict	Keep your word
	Focus on improving the future, not dissecting the past
Structural Conflicts	Reallocate ownership and control
Resources	Establish fair, mutually acceptable
Power	decision-making process
Time constraints	Clearly define, change roles
Values	
Different criteria for evaluating ideas	Search for super-ordinate goals
Different ways of life, ideology and	Allow parties to agree and to disagree religion
	Build common loyalty

Conflict Management is the process of limiting negative aspect of conflict while increasing the positive aspect of conflict.

Exercise I - Engage two or more participants to demonstrate how two disputants enter into a conflict.

Make other participants to watch them so as to understand Nature of Conflict, behavior of disputants in conflict, their inability to resolve it.

Role of Third Person: Whether he can understand their problem & behaviour & make attempt to resolve it.

Raise your thoughts not your fists

- Matshona Dhilwayyo

CHAPTER-3.5.3

MEDIATION: SALIENT FEATURES AND CONCEPT

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties n amicably resolving their dispute by using specialized communication ad negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

1. **Mediation is voluntary.** The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.
2. **Mediation is a party**- centred negotiation process. The parties and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.
3. Though the mediation process is informal, this means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process . The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.
4. Mediation in essence is an assisted negotiation process. Mediation addresses both the factual legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.
5. Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.
6. Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute. The mediator is a guide who helps the parties to find their own solution to the dispute. The mediator's personal preferences or perceptions do not have any bearing on the dispute resolution process.

7. In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator evaluates when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.

8. The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.

9. Mediation is a private process, which is not open to the public. Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties. Any statement made or information furnished by either of the parties, and any document produced or prepared for/ during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process, is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared.

10. Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties.

11. In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".

12. The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation process.

13. Mediation in a particular case, need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

TYPES OF MEDIATION

1. **COURT- REFERRED MEDIATION**- It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

2. **PRIVATE MEDIATION** - In private mediation, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

ADVANTAGES OF MEDIATION

1. The parties have CONTROL over the mediation in terms of 1) its scope (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its outcome (i.e., the right to decide whether to settle or not and the terms of settlement.)

2. Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

3. The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

4. The procedure is SPEEDY, EFFICIENT and ECONOMICAL.

5. The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

6. The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.

7. Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

8. The process is CONFIDENTIAL.

9. The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.

10. Mediation helps to maintain/ improve/ restore RELATIONSHIPS between the parties.

11. Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process - in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

    1.11. In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIAL SETTLEMENT.

    1.12. A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

    1.13. Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and non conventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

    1.14. When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

    1.15. Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

    1.16. REFUND OF COURT FEES is permitted as per rules in the case of settlement in a court referred mediation.

Peace cannot be kept by force; it can only be achieved by understanding.

- Albert Einstein

CHAPTER-3.5.4

CHARACTERISTICS OF VARIOUS ADR PROCESSES & COMPARISION

JUDICIAL PROCESS	ARBITRATION	MEDIATION
Judicial process is an adjudicatory process where a third party (judge/ other authority) decides the outcome	Mediator/06/12/2016Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
The decision is binding on the parties	The award in an arbitration is binding on the parties	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
Personal appearance or active participation of parties is not always required	Personal appearance or active participation of parties is not always required	Personal appearance and active participation of the parties are required.
A formal proceeding held in public and follows strict procedural stages	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
Decision is appealable	Award is subject to challenge on specified grounds.	Decree/ Order in terms of the settlement is final and is not appealable.
No opportunity for parties to community directly with each other	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator

Involves payment of court fees	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

MEDIATION	CONCILIATION	LOK ADALAT
Mediation is a non adjudicatory process.	Conciliation is a non adjudicatory process	Lok Adalat is non -adjudicatory if it is established under Section 19 of the legal Services Authorities Act, 1987. Lok Adalat is conci liatory and adjudicatory if it is conciliatory and adjudicatory if it is established under section 22B of the Legal Service Authorities Act, 1987.
Voluntary process.	Voluntary process.	Voluntary process.
Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
Service of lawyer is available	Service of lawyer is available	Service of lawyer is available
Mediator is party centred negotiation	Conciliation is party centred negotiation	In Lok Adalat, the scope of negotiation is limited.
The function of the Mediator is mainly facilitative	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is Persuasive.
The consent of the parties is not mandatory for referring a case to mediation	The consent of the parties is mandatory for referring a case to conciliation	The consent of the parties is not mandatory for referring a case to Lok Adalat
The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act 1996	The award of Lok Adalat is deemed to be a decree of the Civil court and is executed as per Section 21 of the Legal Service Authorities Act, 1987
Not appealable	Decree/order not appealable	Award not appealable
The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future	The focus in Lok Adalat is on the past and the present.
Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages	The process of Lok Adalat involves only discussion and persuasion
In mediation, parties are actively and directly involved	In conciliation, parties are actively and directly involved	In Lok Adalat, parties are not actively and directly involved so much.
Confidentiality is the essence of mediation	Confidentiality is the essence of conciliation	Confidentiality is not observed in Lok Adalat.

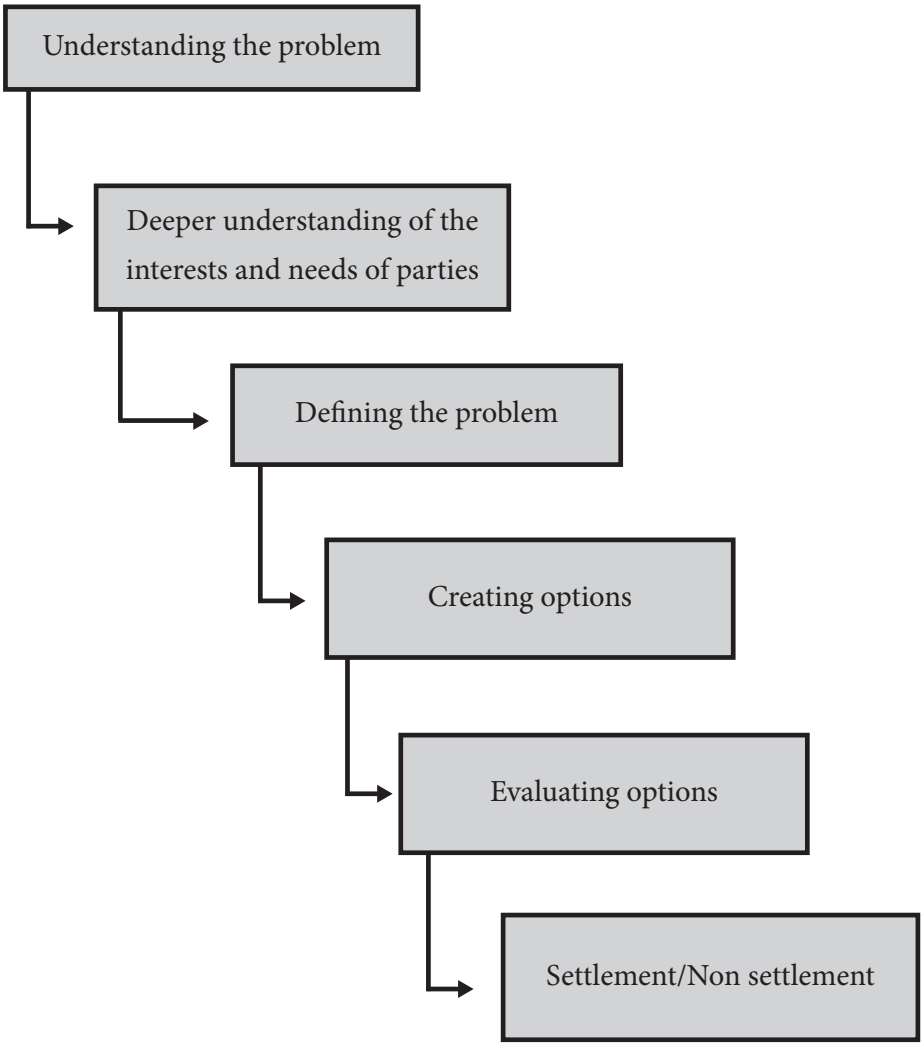
The world is an arena where things represent things. it is a stage where the same thing is seen from different lenses as a different thing.

- Ernest Agyemany Yeboah

CHAPTER-3.5.5

MEDIATION : THE PROCESS

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional stages are used in an informal and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below.



Each of the above phases reflects an essential pre-requisite in the dynamics of the mediation process which must be accomplished before moving to the next phase.

Begin challenging your own assumption, your assumptions are your windows on the world. scrub them off every once in a while or the light wont come in.

–Alan Alda

CHAPTER-3.5.6

MEDIATION : THE STAGES

The functional stages of the mediation process are :

1) Introduction and Opening Statement
2) Joint Session
3) Separate Session(s)
4) Closing

STAGE 1 : INTRODUCTION AND OPENING STATEMENT

OBJECTIVES

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

Seating Arrangement in the Mediation Room

At the commencement of the mediation process, the mediator shall ensure that the parties and/or their counsel are present and proper/appropriate seating arrangement is made for them.

Introduction and Opening Statement:

The mediator commences with the opening statement which must be simple, and in the language the parties can understand.

i) To Welcome & great the parties and their representatives.
ii) Introduces himself, his standing, training and successful experience as a mediator
iii) Declares he has no connection with either of parties and has no interest in the dispute
iv) Asks the parties to introduce themselves and welcomes their lawyers
v) Asks parties which language they would prefer to be addressed in Enquire about their previous experience in any mediation process
vii) Discuss impartiality and neutrality by using appropriate words and body language
viii) Emphasizes the voluntary nature of the process

ix) Emphasizes on the non - adversarial aspect of the process like absence of recording of evidence or pronouncement of award or order

x) Informs he can go beyond pleadings and may cover other disputes

xi) States the mediation process and possibility of having private sessions

xii) Explain the procedures where there is settlement or no settlement

xiii) Informs that court fee is refunded on settlement

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

STAGE 2 : JOINT SESSION

OBJECTIVES

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard PROCEDURE

The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/ respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.

The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.

The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.

The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.

Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.

The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.

The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.

During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate session may

be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

STAGE 3 : SEPARATE SESSION

Objectives

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable Procedure

(i) RE - AFFIRMING CONFIDENTIALITY

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

(ii) GATHERING FURTHER INFORMATION

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);
- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

(iii) REALITY - TESTING

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in REALITY-TESTING. Reality-testing may involve any or all of the following:

(a) A detailed examination of specific elements of a claim, defense, or a perspective;

(b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;

(c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;

(d) Examination of the monetary and non-monetary costs of litigation and continued conflict;

(e) Assessment of witness appearance and credibility of parties;

(f) Inquiry into the chances of winning/losing at trial; and

(g) Consequences of failure to reach an agreement. Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:

1. Asking effective questions,
2. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or
3. Considering the consequences of any failure to reach an agreement (BATNAAVATNA / MLATNA analysis).

(I) ASKING EFFECTIVE QUESTIONS

Mediator may ask parties questions that can gather information, clarify facts or alter perceptions of the parties with regard to their understanding and assessment of the case and their expectations.

Examples of Effective Questions:

OPEN-ENDED QUESTIONS like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business'. 'What were your reasons for including that term in the contract?'

CLOSED QUESTIONS, which are specific, concrete and which bring out specific information.

For example, 'it is my understanding that the other driver was going at 60 kilometers per hour a the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who built this building?'

QUESTIONS THAT BRING OUT FACTS: 'Tell me about the background of this matter'. 'What happened next?'

QUESTIONS THAT BRING OUT POSITIONS: 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'

QUESTIONS THAT BRING OUT INTERESTS: 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important

to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(II) DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OF THE PARTIES

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as, 'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?

(III) CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA /MLATNA ANALYSIS)

BATNA	Best Alternative to Negotiated Agreement
WATNA	Worst Alternative to Negotiated Agreement
MLATNA	Most Likely Alternative to Negotiated Agreement

(IV) BRAIN STORMING

Brain Storming is a technique used to generate options for agreement. There are 2 stages to the brain storming process:

1. Creating options
2. Evaluating options

1. **Creating options:-** Parties are encouraged to freely create possible options for agreement. Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.

2. **Evaluating options:-** After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained. This information further helps to find terms that are mutually acceptable to both parties. Brainstorming requires lateral thinking more than linear flunking. Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement.

   Linear thinking: Linear thinking is logical, traditional, rational and fact based. Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(V) SUB-SESSIONS

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub- sessions with only the advocate (s) or the party or any member(s) of the party.

A Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.

b If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub- session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

(VI) EXCHANGE OF OFFERS

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

STAGE 4: CLOSING

(A) Where there is a settlement

Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

1. Mediator orally confirms the terms of settlement
2. Such terms of settlement are reduced to writing;
3. The agreement is signed by all parties to the agreement and the counsel if any representing the parties;
4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
5. A copy of the signed agreement is furnished to the parties;
6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
8. The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

THE WRITTEN AGREEMENT SHOULD:

1 clearly specify all material terms agreed to;

2 be drafted in plain, precise and unambiguous language;

3 be concise;

4 use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement); use language and expression which ensure that neither of the parties feels that he or she has 'lost';

5 ensure that the terms of the agreement are executable in accordance with law; be complete in its recitation of the terms;

6 avoid legal jargon, as far as possible use the words and expressions used by the parties;

7 as far as possible state in positive language what each parties agrees to do;

8 as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) Where there is no settlement

If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.

The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

Nothing is more indispensable to the religiosity
than a mediator that links us with divinity

CHAPTER-3.5.7

ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

(i) facilitate the process of mediation; and

(ii) assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-creating a conducive environment for the mediation process, explaining the process and its ground rules.

facilitating communication between the parties using the various communication techniques.

identifying the obstacles to communication between the parties and removing them, gathering information about the dispute, identifying the underlying interests.

maintaining control over the process and guiding focused discussion, managing the interaction between parties, assisting the parties to generate options. motivating the parties to agree on mutually acceptable settlement, assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

A mediator performs an evaluative role by-

- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

If there is no communication then there is no respect if there is no respect then there is no caring if there is no caring then thre is no understanding...
So there is conflict because there is no communication!

- Shannon L. Aides

CHAPTER-3.5.8

COMMUNICATION IN MEDIATION

1.1 Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.

1.2 Communication is not just TALKING and LISTENING. Communication is a process of information transmission.

1.3 The intention of communication is to convey a message.

1.4 The purpose of communication could be any or all of the following:

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

1.5 Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.

1.6 Communication is also information sent by one to another to be understood by the receiver in the same way as it was intended to be conveyed.

1.7 Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/ acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and attributing thoughts, feelings/ideas to the message. It evokes a response in the Receiver who conveys the same to the sender through words/ gestures/acts/ expressions.

1.8 Consequently, a communication would involve :-

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

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

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

1.10 Communication may be verbal or non-verbal. Communication could be through words - spoken or written, gestures, body language, facial expressions etc. Studies reveal that in any communication, 55% of the meaning is transmitted through body language, 38% is transmitted through the attitude/demeanor of the communication, and 7% is transmitted through words.

VERBAL AND NON-VERBAL COMMUNICATION

Verbal Communication is transmission of information or message through spoken words. Non-verbal communication refers to the transmission of information or message from sender to receiver without the use of spoken words. It includes written communication, body language, tone, demeanour, attitude and other modes of non-verbal expression. It is often more spontaneous than verbal communication and takes place under less conscious control. Therefore, it can provide more accurate information. It is important for a mediator to pay adequate attention to non verbal communications that take place throughout the mediation. It is also important for a mediator to analyze the message sent by the parties through such non verbal communication.

1.11 REQUIREMENTS FOR EFFECTIVE COMMUNICATION:

i) Use simple and clear language.

ii) Avoid difficult words and phrases.

iii) Avoid unnecessary repetition.

iv) Be precise and logical.

v) Have clarity of thought and expression.

vi) Respond with empathy, warmth and interest.

vii) Ensure proper eye contact.

viii) Be patient, attentive and courteous.

ix) Avoid unnecessary interruptions.

x) Have good listening abilities and skills.

xi) Avoid making statements and comments or responses that could cause a negative effect.

1.12 CAUSES OF INEFFECTIVE COMMUNICATION:

i) Differences in perception i.e. where the Sender's message is not understood correctly by the Receiver.

ii) Misinterpretation and distortion of the message by the Receiver.

iii) Differences in language and expression.

iv) Poor listening abilities and skills.

v) Lack of patience.

vi) Withholding or distortion of valuable information by a third party/intermediary, where a message is transmitted by the sender to the receiver through such third party/intermediary.

1.13 BARRIERS TO COMMUNICATION:

PHYSICAL BARRIERS:

i) lack of congenial atmosphere.

ii) lack of proper seating arrangements.

iii) presence of third parties.

iv) lack of sufficient time.

EMOTIONAL BARRIERS:

i) temperaments of the parties and their emotional quotient.

ii) feelings of inferiority, superiority, guilt or arrogance.

iii) fear, suspicion, ego, mistrust or bias.

iv) hidden agenda.

v) conflict of personalities.

COMMUNICATION SKILLS IN MEDIATION

Communication skills in mediation include :-

(A) Active Listening.

(B) Empathy with Neutrality.

(C) Body Language.

(D) Asking the Right Questions.

(A) ACTIVE LISTENING:

Parties participate in mediation with varying degree of optimism, apprehension, distress, anger, confusion, fear etc. If the parties understand that they will be listened to and understood, it will help in trust building and they can share the responsibility to resolve the dispute. In active

listening the listener pays attention to the speaker's words, body language, and the context of the communication.

An active listener listens for both what is said and what is not said.

An active listener tries to understand the speaker's intended message, notwithstanding any mistake, mis¬statement or other limitations of the speaker's communication.

An active listener controls his inner voices and judgments which may interfere with his understanding the speaker's message.

Active listening requires listening without unnecessarily interrupting the speaker. Parties must be given uninterrupted time to convey their message. There is a difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one also understands the meaning of what has been said. Listening is an active process.

Following are the commonly used techniques of active listening by the mediator:

1. **Summarising:** This is a communication technique where the mediator outlines the main points made by a speaker. The summary must be accurate, complete and worded neutrally. It must capture the essential points made by the speaker. Parties feel understood and repetition by them is minimized.
2. **Reflecting:** Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is are statement of feelings and emotions in terms of the speaker's experience, e.g. "So, you are feeling frustrated". Reflecting usually demonstrates empathy.
3. **Re-framing:** Re-framing is a communication technique used by the mediator to help the parties move from Positions to Interests and thereafter, to problem solving and possible solutions. It involves removal of charged and offensive words of the speaker. It accomplishes five essential tasks:
    1. Converts the statement from negative to positive.
    2. Converts the statement from the past to the future.
    3. Converts the statement from positions to interests.
    4. Shifts the focus from the targeted person to the speaker.
    5. Reduces intensity of emotions.
4. **Acknowledging:** In acknowledgment the mediator verbally recognizes what the speaker has said without agreeing or disagreeing. Example "I see your point" or "I understand what you are saying. This way mediator assures the speaker that he has been heard and understood.
5. **Encouraging :** The mediator can encourage parties when they need reassurance, support or help in communicating. Example:" what you said makes things clear" or "this is useful information"
6. **Bridging:** A technique used by a mediator to help a party to continue communication. Example: "And—", "And then ", The word "And" encourages communication whereas the word "But" could discourage communication.

7. **Restating:** In this the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker. Example: "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."

8. **Paraphrasing:** Is a communication technique where the mediator states in his own words the statements of the speaker conveying the same meaning.

9. **Silence:** A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts.

10. **Setting an agenda:** In order to facilitate better communication between the parties the mediator effectively structures the sequence or order of topics, issues, position, claims, defences, settlement terms etc. It may be done in consultation with the parties or unilaterally.

BARRIERS TO ACTIVE LISTENING:

(i) **Distractions :—** They may be external or internal. The sources of external distractions are noise, discomfort, interruptions etc. The sources of internal distractions are tiredness, boredom, preoccupation, anxiety, impatience etc.

(ii) **Inadequate time:-** There should be sufficient time to facilitate attentive and patient listening.

(iii) **Pre-judging:—** A mediator should not prejudge the parties and their attitude, motive or intention.

(iv) **Blaming:—** A mediator should not assign responsibility to any party for what has happened.

(v) **Absent Mindedness:-** The mediator should not be half-listening or inattentive.

(vi) **Role Confusion:—** The mediator should not assume the role of advisor or counselor or adjudicator. He should only facilitate resolution of the dispute.

(vii) **Arguing/ imposing own views:—** The mediator should not argue with the parties or try to impose his own views on them.

(viii) **Criticising**

(ix) **Counseling**

(x) **Moralising**

(xi) **Analysing**

(B) EMPATHY WITH NEUTRALITY

In the mediation process, empathy means the ability of the mediator to understand and appreciate the feelings and needs of the parties, and to convey to them such understanding and appreciation without expressing agreement or disagreement with them.

Empathy shown by the mediator helps the speaker to become less emotional and more practical and reasonable. Mediator should understand that Empathy is different from Sympathy. In

empathy the focus of attention is on the speaker whereas in sympathy the focus of attention is on the listener.

Reflecting is a good communication technique used to express empathy.

(C) BODY LANGUAGE

The appropriate body language of the listener indicates to the speaker that the listener is attentive. It conveys to the speaker that the listener is interested in listening and that the listener gives importance to the speaker.

In the case of mediators the following can demonstrate an appropriate body language :-

(I) Symmetry of posture - It reflects mediator's confidence and interest.

(ii) Comfortable look - It increases the confidence of the parties.

(iii) Smiling face - It puts the parties at ease.

(iv) Leaning gently towards the speaker - It is a sign of attentive listening.

(v) Proper eye contact with the speaker - It ensures continuing attention.

(D) ASKING THE RIGHT QUESTIONS

In mediation questions are asked by the mediator to gather information or to clarify facts, positions and interests or to alter perception of parties. Questions must be relevant and appropriate. However, questioning is a tool which should be used with discretion and sensitivity. Timing and context of the questioning are important. Different types of questions will be appropriate at different times and in different context. Appropriate questioning will also demonstrate that the mediator is listening and is encouraging the parties to talk. However, the style of questioning should not be the style of cross examination. Questions should not indicate bias, partiality, judgment or criticism. The right questions help the parties and the mediators to understand what the issues are.

Let us move from the era of confrontation to the era of negotiation.

- Richard M. Nixon

CHAPTER-3.5.9

NEGOTIATION AND BARGAINING IN MEDIATION

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of negotiation. Negotiation may involve different types of bargaining.

What is Negotiation?

Negotiation is an important form of decision making process in human life. Negotiation is communication for the purpose of persuasion. Mediation in essence is an assisted negotiation process. In mediation, negotiation is the process of back and forth communication aimed at reaching an agreement between the parties to the dispute. The purpose of negotiation in mediation is to help the parties to arrive at an agreement which is as satisfactory as possible to both parties. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem

solving and interest based approach. The mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called 'Shuttle Diplomacy'.

NEGOTIATION STYLES

1)	**Avoiding Style**	**Unassertive and Uncooperative:** The participant does not confront the problem or address the issues.
2)	**Accommodating Style**	**Unassertive and Cooperative:** He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice.
3)	**Compromising Style**	**Moderate level of Assertiveness and Cooperation:** He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands. **Emphasis will be on apparent equality.**
4)	**Competing Style**	**Assertive and Uncooperative:** The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.
5)	**Collaborating Style**	**Assertive, Cooperative and Constructive:** He values not only his own interests but also the interests of others. He actively participates in the negotiation and works towards a deeper level of understanding of the issues and a mutually acceptable solution satisfying the interests of all to the extent possible.

What is Bargaining?

Bargaining is a part of the negotiation process. It is a technique to handle conflicts. It starts when the parties are ready to discuss settlement terms.

TYPES OF BARGAINING USED IN NEGOTIATION

There are different types of Bargaining. Negotiation may involve one or more of the types of bargaining mentioned below:

(i) Distributive Bargaining

(ii) Interest based Bargaining.

(iii) Integrative Bargaining.

(i) **Distributive Bargaining:** is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.). In distributive bargaining the parties may not necessarily understand their own or the other's interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome.

Positional Bargaining: Positional Bargaining, is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining, the parties simply trade positions, without discussing their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic form of negotiation

and is often the first method people adopt. Each side takes a position and argues for it and may make concessions to reach a compromise. This is a competitive negotiation strategy. In many cases, the parties will never agree and if they agree to compromise, neither of them will be satisfied with the terms of the compromise.

Rights-Based Bargaining: This form of bargaining focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, "Your client was negligent. Therefore, s/he owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages."

Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining (e.g., "Your client was negligent, so she owes my client X amount in compensation.) Rights-Based Bargaining can lead to an impasse when the parties differ in the interpretation of their respective rights and obligations.

(ii) **Interest-Based Bargaining:** A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., "win-win". It has the potential to combine the interests of parties, creating joint value or enlarging the pie.

Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have on-going relationships and / or interests they want to preserve.

(iii) **Integrative Bargaining:** Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining the parties "expand the pie" by integrating the interests of both parties and exploring additional options and possible terms of settlement. The parties think creatively to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

BARRIERS TO NEGOTIATION

1) Strategic Barriers.
2) Principal and Agent Barriers.
3) Cognitive Barriers (Perception Barriers).

1) **Strategic Barriers:**

A Strategic Barrier is caused by the strategy adopted by a party to achieve his goal. For example with a view to make the husband agree for divorce the wife files a false complaint against her husband and his family members alleging an offence under Section498 A of the Indian Penal Code.

A mediator helps the parties to overcome strategic barriers by encouraging the parties to reveal information about their underlying interests and understanding the strategy of the party.

2) **Principal and Agent Barriers:**

The behaviour of an agent negotiating for the principal may fail to serve interests of the principal. There may be conflict of interests between the principal and his agent. An agent may not have full information required for negotiation or necessary authority to make commitments on behalf of the principal. In all such contingencies the mediator helps the parties to overcome the 'Principal and Agent Barrier' by bringing the real decision maker (Principal) to the negotiating table.

3) **Cognitive Barriers (Perception Barriers).**

Parties while negotiating make decisions based on the information they have. But sometimes there could be limitation to the way they process information. There could be perception limitations which could occur due to human nature, psychological factors and/ or the limits of our senses. These perception limitations are called cognitive barriers and can impede negotiation. It is important a mediator to identify Cognitive Barriers and use communication techniques to overcome it.

Life is constanly teaching us that we are mirror of one another and that no one is an island.

- Auliq Ice

CHAPTER-3.5.10

IMPASSE

During mediation sometimes parties reach an impasse. In mediation, impasse means and includes a stalemate, standoff, deadlock, bottleneck, hurdle, barrier or hindrance. Impasse may be due to various reasons. It may be due to an overt conflict between the parties. It may also be due to resistance to workable solutions, lack of creativity, exhaustion of creativity etc. Impasse may be used as a tactic to put pressure on the opposite party. There may also be valid or legitimate reasons for the impasse.

TYPES OF IMPASSE

There are three types of impasse depending on the causes for impasse namely

(i) Emotional impasse

(ii) Substantive impasse

(iii) Procedural impasse

Emotional impasse can be caused by factors like: Personal animosity

- Mistrust
- False pride
- Arrogance
- Ego
- Fear of losing face
- Vengeance

Substantive impasse can be caused by factors like:

- Lack of knowledge of facts and / or law Limited resources, despite willingness to settle

- Incompetence (including legal disability) of the parties

- Interference by third parties who instigate the parties not to settle dispute or obstruct the
- settlement for extraneous reasons.
- Standing on principles, ignoring the realities
- adamant attitude of the parties

Procedural impasse can be caused by factors like:

Lack of authority to negotiate or to settle

Power imbalance between the parties

Mistrust of the mediator

STAGES WHEN IMPASSE MAY ARISE

- Impasse can arise at any stage of the mediation process namely introduction and opening
- statement, joint session, separate session and closing.

TECHNIQUES TO BREAK IMPASSE

The mediator shall make use of his/her creativity and try to break impasse by resorting to suitable techniques which may include following techniques:

(a) Reality Testing

(b) Brainstorming

(c) Changing the focus from the source of the offer to the terms of the offer.

(d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purposes.

(e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.

(f) Taking assistance of other people like spouses, relatives, common friends, well wishers, experts etc. through their presence, participation or otherwise.

(g) Careful use of good humour.

(h) Acknowledging and complementing the parties for the efforts they have already made.

(i) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse.

(j) Role-reversal, by asking the party to place himself / herself in the position of the other party and try to understand the perception and feelings of the other party.

(k) Allowing the parties to vent their feelings and emotions.

(1) Shifting gears i.e. shifting from joint session to separate session or vice-versa.

(m) Focusing on the underlying interest of the parties.

(n) Starting all over again.

(o) Revisiting the options.

(p) Changing the topic to come back later.

(q) Observing silence.

(r) Holding hope

(s) Changing the sitting arrangement.

(t) Using hypothetical situations or questions to help parties to explore new idea and options.

It is very humbling to see my own character defects in someone who annoy me. At the end of the day, I realize they have actually prompted positive change in me.

- Auliqlce

CHAPTER-3.5.11

RELATED TOPICS

A) ROLE OF ADVOCATES IN MEDIATION

The role of advocates in mediation can be divided into three phases:

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

(i) Pre-Mediation

Where Mediation is considered the appropriate mode of ADR, Advocate prepares his client to opt for Mediation explaining and educating the party about the concept, process and advantages of mediation. The advocate is best placed to assist his client to understand the role of the mediator as a facilitator. He helps the client to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The lawyer can help the parties to change their attitude from adversarial to collaborative. While helping the party to understand the legal position and to assess the strength and weakness of his case and possible outcome of litigation, the advocate makes him realize his real needs and underlying interest which can be better satisfied through mediation.

(ii) During Mediation

The role of advocates is very important during mediation also. The participation of advocates in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the advocate influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, advocates must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The advocate

must himself observe the ground rules of mediation explained by the mediator and advise the party also to observe them. The lawyer must be prepared on the facts, the law and the precedents. At the same time, he must enable and encourage the party to present his case before the mediator. Considering that the party may not always be able to state the complete and correct facts or refer to the relevant documents, the lawyer must be alert and vigilant to supplement them. With the help of reality-testing, using the BATNA/ WATNA/ MLATNA analysis, the advocate must constantly evaluate the case of the parties and the progress of mediation and must be prepared to advise the party to change position, approach, demands and the extent of concessions. When it is felt necessary to have a sub-session with the advocate(s) the mediator may hold such sub-session with the advocate(s) and the advocate(s) must cooperate with the mediator to carry forward the process and arrive at a settlement. Such sub-sessions with the advocate(s) can be held by the mediator also at the request of the party or the advocate. The advocate participates in finalizing and drafting the settlement between the parties. He must ensure that the settlement recorded is complete, clear and executable. He must also explain to his client and make him understand every term of the settlement,

(iii) Post-Mediation

After conclusion of mediation also, the advocate plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism. If a settlement between the parties has been reached before the mediator, the advocate has the responsibility to reassure his client about the appropriateness of the client's decision and to advise against any second thoughts. To maintain and uphold the spirit of the settlement, the advocate must cooperate with the court in the execution of the order/ decree passed in terms of the settlement.

B) ROLE OF PARTIES IN MEDIATION

Mediation is a process in which the parties have a direct, active and decisive role in arriving at an amicable settlement of their dispute. Though the parties get the assistance of their advocate and the neutral mediator, the final decision is of the parties. As far as the parties are concerned, the whole process of mediation is voluntary. Though consent of the parties is not mandatory for referring a case to mediation and though the parties are required to participate in the mediation, mediation is voluntary as the parties retain their authority to decide whether the dispute should be amicably settled or not and what should be the terms of the settlement. Neither the mediator nor the advocates can take the decision for the parties and they must recognize and respect the right of self-determination of the parties.

Mediation is about communicating, persuading and being persuaded for a settlement. Hence, each party needs to communicate its view to the other party and should be open to receive such communication in return. Both speaking and listening are equally important. The attempt must not be to argue and defeat but to know and inform. Parties may have to change their position and align it with their best interest.

A settlement duly arrived at between the parties in mediation is binding on the parties and the parties are bound to cooperate in the execution of the order / decree passed in terms of the settlement.

C) ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. Avoid conflict of interest

A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest.

Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated.

A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. Awareness about competence and professional role boundaries

Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience. Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. Practice Neutrality

Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even handed approach.

4. Ensure Voluntariness

The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. Maintain Confidentiality

Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless;

a. the mediator is specifically given permission to do so by the party concerned; or

b. the mediator is required by law to do so.

6. Do no harm

Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process

(e.g. meet the parties separately or meet the counsel only) and if necessary withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

7. Promote Self-determination

Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

8. Facilitate Informed Consent

Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

9. Discharge Duties to third parties

Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

10. Commitment to Honesty and Integrity

For a mediator, honesty means, among other things, full and fair disclosure of:

a. his qualifications and prior experience;

b. direct or indirect interest if any, in the outcome of the dispute;

c. any fees that the parties will be charged for the mediation; and

d. any other aspect of the mediation which may affect the party's willingness to participate in the process.

Honesty also means telling the truth when meeting the parties separately, e.g. if party 'A' confidentially discloses his minimum expectation and party 'B' asks the mediator whether he knows the opponent's minimum expectation, saying 'No' would be dishonest. Instead, the mediator could say that he has discussed many things with party 'A' on a confidential basis and, therefore, he is at liberty to respond to the question, just as he would be precluded from disclosing to party

A certain things what was told by party 'B1. When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. He must not abuse the trust the parties placed in him, even if he believes that bending the truth will further the cause of settlement.

Apart from the fee/remuneration/honorarium, if any, prescribed under the rules, the mediator shall not seek or receive any amount or gift from the parties to the mediation either before or after the conclusion of the mediation process.

Where the mediator is a judicial officer he shall not mediate any dispute involved in or connected with a case pending in his Court.

D) APOLOGY

It is an acknowldgment of hurt and pain caused to the other party and not necessarily an admission of guilt. Parties should be carefully and adequately prepared by the mediator when a party choosen to apologise.

An apology is the Super Glue of Life, it can repair just about anything.

- Lynn Johnstin

Recommended Readings :-

1. Section 89 and Order X Rule 1-A, IB and 1C of Civil Procedure Code 1908 (CPC).
2. Saleem Advocate Bar Association Vs. Union of India MANU/SC/0912/2002
3. Saleem Advocate Bar Association Vs. Cherian Varkey Construction Co. (P) Ltd. and Ors. (2010) 8 SCCC 24

Annexure-A

CURRICULUM OF REFRESHER COURSE

Day - 1

Suggested Reading : Mediation Training Manual for Refresher Course

TIME	SESSIONS	STUDY TOPIC
10.00 AM to 11.30 AM	SESSION - I	**Conflict** 1. Causes Management & Resolution **Exercise - I** (Chapter - II)
11.45 AM to 01.15 PM	SESSION - II	**Mediation : Salient Feature** • ADR Mechanism u/s 89, Civil Procedure Code - Advantages • Role of Mediators (Chapter - III, IV & VII)
02.15 PM to 03.45 PM	SESSION - III	**Mediation : Process** • Introduction • Joint Session • Private Session (Chapter - V & VI)
04.00 PM to 05.00 PM	SESSION - IV	**Closing** - Settlement - No - Settlement **Role Play - I** (Robbert V. Arun) (Chapter - V & VI)

Note : Tea Breaks : 11.30 AM to 11.45 AM
: 03.45 PM to 04.00 PM
Lunch Break : 1.15 PM to 02.15 PM

Day - 2

TIME	SESSIONS	STUDY TOPIC
10.00 AM to 11.30 AM	SESSION - I	COMMUNICATON MEDIATION
		Basic Element of Communication & its Process • Effective and Ineffective Communication • Verbal & Non - Verbal Communication • Barriers in Communication (Chapter - VIII)
11.45 AM to 03.45 PM	SESSION - II	COMMUNICATION SKILLS • Active Listening • Empathy with neutrality • Body Language • Questions (Chapter - VIII)
04.00 PM to 05.00 PM	SESSION - III	BARGAININGS • Distributive • Integratvie • Interests based (Chapter - IX)

Note : Tea Breaks : 11.30 AM to 11.45 AM
: 03.45 PM to 04.00 PM
Lunch Break : 1.15 PM to 02.15 PM

Day - 3

TIME	SESSIONS	STUDY TOPIC
10.00 AM to 11.30 AM	SESSION - I	NEGOTIATION
		What is Negotiation ? **Negotiation Styles** 1. Accommodating 2. Avoiding 3. Collaborating 4. Competing 5. Compromising **Barriers to Negotiations** 1. Strategic 2. Principal and Agent 3. Cognitive **Role Play - II** (Mohan V Soft Drinks)
11.45 AM to 01.15 PM	SESSION - II	**IMPASSE : Understanding and Mangaement** • Definition • Causes - Emotional - Substantive - Procedural - Techniques to Manage Impasse (Chapter - X)
02.15 PM to 03.45 PM	SESSION - III	RELATED TOPICS • Role of Advocates • Role of Parties • Ethical Principles & Code of Conduct for Mediatiors • Apology (Chapter - XI)
04.00 PM to 05.00 PM	SESSION - IV	INTERACTIVE SESSION

Note : Tea Breaks : 11.30 AM to 11.45 AM
: 03.45 PM to 04.00 PM
Lunch Break : 1.15 PM to 02.15 PM

ROLE PLAY I
ROBBERT V. ARAN

General Information

Arun has advertised in a newspaper about his intention to sell a car owned by him. Robbert, a good friend of Arun, purchased the said car for a valuable consideration of Rs. 2 Lakhs. Robbert in a short period realized that Exhaust System is defective. Robbert became dissatisfied with the functioning of the car. He asked Arun to take back his car and refund the money of Rs.2 Lakhs. Initially, Arun promised to pay back Rs. 2 Lakhs to Robbert but later on refused to do so. Robbert has filed a suit for recovery of Rs. 2 Lakhs alongwith interest @ 15% p.a. against Arun. Case is referred for mediation.

Confidential facts for Arun

1. Arun is a 25 years old man and is unemployed for the last one year. He is earning about Rs. 5,000/-per month from a petty job which is temporary in nature.
2. Arun decided to dispose of his car. For this purpose, he gave an advertisement in the newspaper. Robbert, one of the close friends agreed to purchase the said car despite the initial reluctance of Arun.
3. Arun did not disclose the faulty exhaust system of the car. Arun sold the car for a price of Rs. 2 Lakhs. It is very difficult for the Arun to pay back the entire money of Rs.2 Lakhs but he may consider to get the faulty exhaust system repaired from a mechanic and to pay repair charges.
4. Arun is also interested to maintain future relations with Robbert. Confidential facts for Robbert

1. Robbert is 25 years old. He recently got a job in a reputed company. Robbert's office is situated about 25 km away from his residence. He needs a car for transportation. Robbert cannot purchase a new car from the market. Robbert thought that the car owned by Arun should be in a good condition. Arun was not inclined to sell the car earlier but due to repeated requests, he sold the car to Robbert for a consideration of Rs.2 Lakhs. Arun also said to one of the common friend that "Well, now all my headaches are gone."
2. Robbert within the short span of time understand the Aran's comments. Robbert began to develop headache and nosia from the fumes which filled the car at the time of driving. Car was examined by a mechanic. After inspection, he suggested that entire exhaust system is required to be replaced which may cost around Rs.50,000/-. Thereafter, the car will be in perfect working condition.
3. Arun did not disclose the said fact to Robbert and only talked about some minor problems in the engine of the car. This type of behaviour was not expected by Robbert from his close friend Arun.
4. Robbert contacted Arun and requested him to pay back his money. Initially, Arun agreed to pay back money but later on he refused. Robbert is only interested in the money. He does not want to have any future relation with Arun.

ROLE PLAY II
MOHAN V. SOFT DRINK LIMITED

General Information

Ram is running a restaurant in a posh colony of Delhi. He used to purchase Soft Drinks from a manufacturer Soft Drinks Ltd.

About 6 months back, Mohan visited the restaurant owned by Ram. He ordered for soft drink. Ram supplied the soft drinks prepared by Soft Drinks Ltd. It was supplied in a dark opaque glass bottle. It was opened by Mohan. Mohan found foreign article in the bottle which he could not notice before drinking. He suffered from severe gastric problems and could not attend his office for 10 days. He lost his job. Mohan initiated legal proceedings against Soft Drinks Ltd. and claimed damages of Rs. 5 lakhs due to mental pain, agony, loss of job and illness. Soft Drink Company appeared in the court and expressed willingness to settle disputes through Mediation. Referral Judge referred case for Mediation.

Confidential Information for Mohan

1. Mohan remained ill due to the gastric problem for a period of 10 days. He was employed as an assistant in a General Merchant Shop. He lost his job due to absence of ten days.
2. Mohan does not want any action against Ram because he thinks that Ram was not at fault.
3. Mohan wants to initiate legal action only against the Soft Drinks Company. He thinks that Soft Drink Company should have proper system to prevent entry of foreign articles into the bottles.
4. When Mohan tried to contact concerned officials of the Soft Drinks Company about the incident, they misbehaved him. This really angered him.
5. Mohan obtained legal advice. As per the legal advice, the litigation in India is costly and time consuming. Mohan may not get the damages within the reasonable time.
6. Mohan needs money to invest in new business. If he gets suitable damages from Soft Drinks Company, he can invest money in new business.
7. Mohan is also interested in the job if offered by the Soft Drinks Company. Confidential instructions for Soft Drinks Ltd.

1. Soft Drinks Company is manufacturing soft drinks for the last 15 years. It is a multi-national company and is enjoying global reputation.
2. Soft Drinks is facing competition in Indian Markets from other manufacturers. If case is made public then the Soft Drinks Company Ltd. May lost business in Indian Markets.
3. It was a bonafide mistake. Soft Drinks company is having modern machines for filling the bottles.
4. Law of damages in India is now developing. The Courts are awarding damages in such cases.
5. Soft Drinks company is willing to pay Rs.l Lakh to Mohan to settle the dispute.
6. Soft Drinks company also received legal advise and as per legal advise, damage shall be payable to Mohan.
7. The forensic report is also against the Soft Drinks Company. The foreign article was found to be decomposed snail.

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CHAPTER - 4

MEDIATION REMUNERATION NOTIFICATION

S.O (RLS) / JHALSA

22/5/17
R.G.

झारखण्ड सरकार
विधि (न्याय) विभाग
झारखण्ड मंत्रालय, धूर्वा, राँची– 834004

–:: अधिसूचना ::–

अधिसूचना संख्या–बी0/झालसा–01–2016–1057 /जे0, दिनांक–19 मई, 2017

एम0सी0पी0सी0 (Mediation and Conciliation Project Committee) एवं माननीय उच्चतम न्यायालय के पत्र दिनांक–04.12.2014 के संदर्भ में सदस्य सचिव, झारखंड राज्य विधिक सेवा प्राधिकार, राँची द्वारा पत्रांक–1957 दिनांक–30.07.2016 के माध्यम से किये गये अनुरोध के आलोक में राज्य सरकार द्वारा झारखंड राज्य के मध्यस्थों (Mediators) के लिए मानदेय (Honorarium) का निर्धारण निम्नरूपेण किया जाता है:–

मध्यस्थता का प्रकार	प्रस्तावित दर
माननीय उच्च न्यायालय के स्तर पर	
सफल मध्यस्थता	3000/–
असफल मध्यस्थता	500/–
जिला न्यायालय के स्तर पर	
सफल मध्यस्थता	2000/–
असफल मध्यस्थता	350/–

6. प्रस्ताव पर माननीय मुख्य (विधि) मंत्री जी का अनुमोदन प्राप्त है।

7. प्रस्ताव पर योजना–सह–वित्त विभाग की सहमति प्राप्त है।

7. प्रस्ताव पर मंत्रिपरिषद् की दिनांक–16.05.2017 को संपन्न बैठक में मद संख्या–6 के रूप में स्वीकृति प्राप्त है।

झारखंड राज्यपाल के आदेश से,

ह0/–
(दिनेश कुमार सिंह)
प्रधान सचिव–सह–विधि परामर्शी,
विधि विभाग, झारखण्ड, राँची ।

ज्ञाप संख्या– बी0/झालसा–01–2016–1057 /जे0, दिनांक–19 मई, 2017

प्रतिलिपि:–महालेखाकार, झारखंड, पो0–डोरण्डा, राँची/महानिबंधक, झारखंड उच्च न्यायालय, राँची/माननीय मुख्यमंत्री जी के प्रधान सचिव/सरकार के सभी प्रधान सचिव/सचिव/विभागाध्यक्ष/सभी प्रमंडलीय आयुक्त/सभी उपायुक्त/प्रधान न्यायायुक्त, राँची/सभी प्रधान जिला एवं सत्र न्यायाधीश/सदस्य सचिव, झारखंड राज्य विधिक सेवा प्राधिकार, राँची/मुख्य सचिव के सचिव, झारखंड को सूचनार्थ एवं आवश्यक कार्रवाई हेतु प्रेषित ।

19/5/17

(दिनेश कुमार सिंह)
प्रधान सचिव–सह–विधि परामर्शी,
विधि विभाग, झारखण्ड, राँची ।

CHAPTER - 5

DISTRICT WISE LIST OF TRAINED MEDIATORS (ADVOCATES)

Present Place of Practice	Sl.No.	Name of Advocate
Jharkhand High Court, Ranchi	1.	Sri Mahesh Tiwari
	2.	Sri Chandra Deo Singh
	3.	Mr. Asit Baran Mahata
	4.	Mrs. Rashmi Kumar
	5.	Dr. H. Waris
	6.	Sri Atanu Banerjee
	7.	Mr. Kaushalendra Prasad
	8.	Mrs. Nitu Sinha
	9.	Mr. Pradeep Kr. Deomani
	10.	Sri Rajesh Kr. Mahata
	11.	Sri Bishram Bhagat
	12.	Sri Suraj Kumar
	13.	Sri Lalan Kumar Singh
	14.	Sri Jitendra Pandey
	15.	Mrs. Mahua Palit
	16.	Sri Tapas Roy
	17.	Ms. Vandana Bharti
	18.	Sri Satish Kumar Deo
	19.	Mr. Ramawatar Chaubey
	20.	Mr. Sudhir Kumar Mahto
	21.	Mr. M. Jalisur Rahman
	22.	Mr. Mahavir Prasad Sinha
	23.	Mr. Shubha Jha
	24.	Mr. Lakhan Sharma
	25.	Mr. Prabir Chatterjee
	26.	Mr. Dilip Kumar Chakraverty
	27.	Mr. Amrendra Kumar

Present Place of Practice	Sl.No.	Name of Advocate
	28.	Ms. Alpana Verma
	29.	Mrs. Ruby Pandey
	30.	Sri Ramjit Satender
Ranchi	31.	Sri Lakshmishwar Kumar Giri
	32.	Mrs. Neelam Kumar
	33.	Mrs. Mamta Srivastava
	34.	Sri Sushil Kumar
	35.	Sri Arun Kumar Mishra
	36.	Sri Jitendra Nath Verma
	37.	Ms. Eja Bela Ekka
	38.	Ms. Manisha Rani
	39.	Sri Bishram Bhagat
	40.	Sri Rakesh Kr. Jha
	41.	Mr. Madhusudan Ganguly
	42.	Ms. Kumari Sheela
	43.	Md. Imteyaz Ashraf
Khunti (Ranchi)	44.	Sri Dhanik Guria
	45.	Miss Anita Verma
Bokaro	46.	Sri Kalo Gopal Chatterjee
	47.	Sri Ashok Kumar Singh
	48.	Smt. Manju Lata
	49.	Sri P.C. Agrawal
	50.	Sri Aftab Alam
	51.	Sri Ashok Kumar Ray
	52.	Ms. Renu Kumari
	53.	Mr. Barun Kumar Pandey
Tenughat (Bokaro)	54.	Mrs. Mohua Karak
	55.	Sri Hari Shankar Prasad
	56.	Sri Rajiv Kumar Tiwari
	57.	Mr. Ram Ballav Mahto

Present Place of Practice	Sl.No.	Name of Advocate
Chaibasa	58.	Sri Uday Shankar Vidyarthi,
	59.	Sri Narendra Nath Pandey
	60.	Sri Santosh Kumar Gupta
	61.	Sri Pranab Kumar Daripa
	62.	Sri Augustine Kullu
	63.	Sri Amar Bakshi
	64.	Sri Subhash Chandra Mishra
	65.	Sri Thomas Antony
Chatra	66.	Shri Krishna Singh
	67.	Sri Subodh Kr. Mishra
	68.	Sri Indu Bhutan Kumar
	69.	Sri Ashok Sahu
Deoghar	70.	Shri Suman Kumar Keshri
	71.	Sri Arun Kumar Bhaiya
	72.	Smt. Anita Choudhary
	73.	Smt. Kanta Singh
	74.	Sri Rajeev Ranjan Mahto
	75.	Sri Sanjay Kumar Pandey
	76.	Smt. Nutan Singh
	77.	Sri Bam Shankar Prasad Singh
	78.	Mr. Deepak Kumar
	79.	Mr. Mukesh Kumar Pathak
Dhanbad	80.	Sri Ashwani Kumar
	81.	Sri Srikant Verma
	82.	Sri Tulsi Prasad Mandal
	83.	Sri Kam Deo Sharma
	84.	Ms. Bharti Sarkar
	85.	Smt. Manashi Mukherjee
	86.	Smt. Meena Kumari Sinha
	87.	Sri Raj Kumar Singh
	88.	Ms. Sonal Worah
	89.	Mr. Sanjiv Kumar Singh

Present Place of Practice	Sl.No.	Name of Advocate
Dumka	90.	Shri Shailendra Narain
	91.	Sri Rajendra Prasad
	92.	Sri Bhim Prasad Mandal
	93.	Sri Mantu Murmu
	94.	Smt. Kiran Tiwari
	95.	Sri Kumar Prabhat
Garhwa	96.	Shri Anil Kumar Pathak
	97.	Sri Ram Krishna Shukla
	98.	Sri Direndra Kumar Choubey
	99.	Sri Rakesh Kr. Tripathi
	100.	Sri Sanjay Kumar Singh
	101.	Sri Sanjay Kumar Bharti
Giridih	102.	Shri Kameshwar Prasad Yadav
	103.	Sri Girish Prasad
	104.	Ms. Kanchan Mala
	105.	Sri Shyam Deo Rai
	106.	Smt. Urmila Sharma
	107.	Sri Ram Ratan Sharma
	108.	Mrs. Vibha Rani Prasad
	109.	Mrs. Renu Verma
Godda	110.	Shri Dharmendra Narayan
	111.	Smt. Reena Dey
	112.	Sri Raj Kumar
	113.	Sri Ugresh Kumar Jha
	114.	Sri Ajay Prasad Sah
Gumla	115.	Shri Bundeshwar Gope
	116.	Sri Om Prakash
	117.	Sri Chhatra Pal Sahu
	118.	Sri Rajendra Sahu
	119.	Sri Sanjay Prasad Sahu
	120.	Mr. Pradip Kumar Pandey

Present Place of Practice	Sl.No.	Name of Advocate
Hazaribagh	121.	Ms. Veena Sethi
	122.	Sri Himanshu Kumar Sinha
	123.	Sri Anand Prakash Ray
	124.	Sri Bhaiya Mukesh
	125.	Md. Moazzam
	126.	Sri Gourav Sahay
	127.	Mr. Vijay Kumar Singh
	128.	Mr. Krishna Kumar Verma
Jamshedpur	129.	Sri Rajesh Dash
	130.	Sri Satyendra Kumar Singh
	131.	Smt. Ranjani Kumar Mishra
	132.	Sri Vimal Kumar Pandey
	133.	Ms. B. Kameshwari
	134.	Sri Tarit Baran Kar
	135.	Mr Kamal Kant Sinha
	136.	Mr. Shiv Shankar Prasad
Ghatsila (Jamshedpur)	137.	Smt. Nisha Sharma
	138.	Sri Rabindra Pradhan
	139.	Sri Raj Mal Tudu
	140.	Mr Dashrath Mahto
	141.	Mr. T.C. Dash
	142.	Mrs. Moon Moon Nanda
	143.	Sri Kameshwar Mahato
Jamtara	144.	Sri Soumitra Sarkar
	145.	Sri Trilochan Pandey
	146.	Sri Suresh Prasad Singh
	147.	Sri Koushik Kumar Mishra
	148.	Md. Sufian
Koderma	149.	Shri Niranjan Prasad
	150.	Sri Uday Shanker Pd. Sinha
	151.	Sri Jagdish Saluja
	152.	Sri Sanjay Kumar Singh
	153.	Sri Suresh Kumar
	154.	Sri Bhuneshwar Rana

Present Place of Practice	Sl.No.	Name of Advocate
Latehar	155.	Sri Pradeep Kumar Pandey
	156.	Sri Pankaj Kumar
	157.	Sri Sanjay Kumar
	158.	Sri Lal Arbind Nath Sahdeo
Lohardagga	159.	Sri Hement Kumar Sinha
	160.	Sri Sanjay Kr. Suman
	161.	Md. Nasim Ansari
Pakur	162.	Sri Ambuj Kumar Verma
	163.	Smt. Saleha Naz
	164.	Md. Nukimuddin Shaikh
	165.	Sri Samir Kumar Mishra
Palamau	166.	Sri Shashi Bhushan
	167.	Sri Subodh Kumar Sinha
	168.	Sri Dinesh Chandra Pandey
	169.	Smt. Veena Mishra
	170.	Mr. Hussain Warris
	171.	Sri Satyendra Kumar Singh
	172.	Sri Satish Kumar Dubey
	173.	Mr. Kumar Shivaji Singh
Sahebganj	174.	Sri Ashok Kumar Srivastava
	175.	Sri Arvind Goya
	176.	Sri Devendra Kumar Singh
Rajmahal (Sahebganj)	177.	Sardar Anand Gopal Singh
	178.	Sri Niraj Rameshwaram
Seraikella	179.	Shri Subodh Hazara
	180.	Sri Debashish Jyotish
	181.	Sri Sanjay Kumar Choudhary
	182.	Mr. Asit Kumar Sarangi
	183.	Mr. Rajesh Bihari Sahay
Simdega	184.	Sri Komal Das
	185.	Sri Paduman Singh
	186.	Sri Prabhat Kumar Srivastava

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CHAPTER - 6

LIST OF EXPERT MEDIATORS

1st Batch of Expert Mediators

Sl.No.	Name	Contact	Email
1.	Dr. Ashok Kumar Singh	9431107411	draksinghjas@gmail.com
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3.	Dr. Prakash Chandra Oraon	9431106442	prakashoraon0@gmail.com
4.	Ms. Jahan Ara	9431129978	ara.jahan76@gmail.com
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7.	Sri Panchanan Singh	9431113567	pnsjsr@gmail.com
8.	Sri Ram Pravesh Singh	9431394799	
9.	Sri Girish Malhotra	9431115729	gcm53gcm@gmail.com
10.	Sri Apurva Mohan	7631054015	apurva.mohan_advocate@rediffmail.com
11.	Dr. Jaya Moitra,	9835342894	jayamoitra@gmail.com
12.	Sri Pradeep Kumar	09431398155	Pkumar0211@gmail.com
13.	Sri N. Muralidharan	9431127791	muralidharan@rnstechno.com
14.	Dr. Hemlata S. Mohan	9431127552	bko.hsm@gmail.com
15.	Dr. Rashmi	9334702144	dr.rashmi07@gmail.com
16.	Sri Suman Kumar Shrivastava	9835103656	sumankshrivastava@gmail.com
17.	Smt. Meena Kumari	8540967776	november.bliss10@gmail.com
18.	Dr. Kaptan Singh Sengar	9431769001	drkssenger05@gmail.com
19.	Dr. Subodh K. Sinha	9470564410	drsksinha12@gmail.com
20.	Sri Ashok Kumar Saboo	9431169388	ashoksaboo78@gmail.com

2nd Batch of Expert Mediators

District	Sl.No.	Name	Contact/Email
Ranchi	1.	Sri Abhay S. Prasad	9430096005 abhayshekhar@gmail.com
	2.	Sri Arun Kumar Prabhakar	9431770661
	3.	Sri Chandrakant Raipd	9431115362
	4.	Ms. Mahua Maji	9835193111
	5.	Sri Nirmal Ranjan	9386818419
	6.	Mrs. Omi Singh	7547800777
	7.	Sri Rajiv Modi	9431103416
	8.	Sri Sanjay Mishra	9771475678
	9.	Dr. Shahid Hassan	9835191749
	10.	Sri Tapas Biswas	9031044893
Jamshedpur	11.	Sri Behram D. Bodhanwala	9934333070
	12.	Dr. Maheshwar Prasad	9431186123
	13.	Sri Rakesh Chandra	9234502247 chandra.rakesh@yahoo.co.in
	14.	Sri Ram Gopal Agarwal	9431113416 rga.fear@gmail.com
	15.	Ms. Smita Hemrom	9608758714
Ramgarh	16.	Sri I.S. Kalra	7004715338
	17.	Ms. Seema Chodhary	9835145603/9263938050
	18.	Sri Subodh Pandey	9431150000 subodhpandey50@gmail.com
Rajmahal	19.	Sri Arun Kumar Saha	9771230785/7368925041
	20.	Sri Om Prakash Singh	7903503188 opsingh1821970@gmail.com

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CHAPTER - 7

LIST OF TRAINED TRAINERS

Sl.No.	Name of Trainer
1.	Sh. Ashok Kumar Ray
2.	Sh. Barun Kumar Pandey
3.	Sh. Bhaiya Mukesh
4.	Sh. Kamal Kant Sinha
5.	Sh. L.K. Giri
6.	Sh. Madhusudan Ganguly
7.	Ms. Manisha Rani
8.	Sh. Rajesh Das
9.	Sh. Sanjeev Kumar Singh
10.	Sh. Shiv Shankar Prasad
11.	Sh. Tarit Baran Kar
12.	Ms. Urmila Sharma
13.	Sh. Vijay Kumar Singh

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CHAPTER - 8

SALIENT FEATURE OF STATE LITIGATION POLICY AS TO RESORTING ADR

1. OBJECTIVE

It was considered necessary to frame State Litigation Policy to ensure conduct of responsible litigation by the State Government with a view to addressing various areas of minimizing litigations and taking effective steps to bring litigations to a logical conclusion efficiently, efficaciously and speedily in a result-oriented manner, while ensuring justice to all. This State Litigation Policy is being constituted and adopted by the State of Jharkhand.

2. **State Litigation Policy** provides for Managing and conducting litigations in cohesive, coordinated and responsible manner ensuring that unnecessary cases are not pursued.

3. **State Litigation Policy** provides for Appointment of Nodal Officers

4. **State Litigation Policy** provides for Formation of State Empowered Committee (The State Empowered Committee will be chaired by the Advocate General of which the Director, Prosecution would be the Vice-Chairman, besides having such other members not exceeding five in number to be nominated by the Department of Law. Such members shall include an Additional Legal Remembrancer / Joint Secretary / Deputy Legal Remembrancer of Law Department as the Member Secretary of the State Empowered Committee.)

5. **State Litigation Policy** provides for extensive use of Alternative Disputes Resolution Mechanism

   - The State Government to resort to ADR mechanisms, such as Mediation, Conciliation and Lok-Adalats as essential prelude to litigation
   - The State to ensure that all service related disputes are firstly dealt with by the in-house mechanism / forum by resorting to conciliation and mediation at JHALSA
   - Half day Mediation Training Programme for the Secretaries and DCs and SPs of Jharkhand at JHALSA in AUG/SEP to present the art and benefits of Mediation

6. **State Litigation Policy** provides for Review of Pending Cases (All pending cases involving government will be reviewed. This due diligence process shall evolve drawing upon statistics of all pending matters which shall be provided for by all government departments (including PSUs). The office of Advocate General shall also be responsible for reviewing all pending cases and filtering frivolous and vexatious matters from the meritorious ones.)

JHARKHAND STATE LITIGATION POLICY

INTRODUCTION

Whereas at the Regional meeting for a prospective plan in the light of 13th Finance Commission held under the Chairmanship of Dr. M. Veerappa Moily, Minister of Law & Justice, Government of India attended by, among others, Hon'ble the Acting Chief Justice, Jharkhand High Court and Patron-in-Chief of Jharkhand State Legal Services Authority and Judicial Academy, Jharkhand, a Resolution was arrived at to formulate, inter alia, State Litigation Policy in each State in consonance with the National Litigation Policy framed by the Government of India.

And whereas the State of Jharkhand and its various agencies being the pre-dominant litigants in courts and tribunals, it was considered necessary to frame State Litigation Policy to ensure conduct of responsible litigation by the State Government with a view to addressing various areas of minimizing litigations and taking effective steps to bring litigations to a logical conclusion efficiently, efficaciously and speedily in a result-oriented manner, while ensuring justice to all.

This State Litigation Policy is being constituted and adopted by the State of Jharkhand.

I. The Vision / Mission

- Formulation of State Litigation Policy in tune with National Litigation Policy which has been announced by Hon'ble Dr. M. Veerappa Moily, Minister of Law & Justice, Government of India.
- The State Litigation Policy is based on recognition that Government and its various agencies are the pre-dominant litigants in Courts and Tribunals in the State. The purpose underlying this policy is to reduce Government Litigations in Courts and Tribunals so that valuable Court time would be spent in resolving other pending cases so as to achieve the goal in the National Legal Mission to reduce average pendency time from 15 years preferably to 3 years.
- The State Government, in its role as 'efficient and responsible litigant' shall focus on :-
  - i. Core issues involved in the litigation.
  - ii. Managing and conducting litigations in cohesive, coordinated and responsible manner ensuring that unnecessary cases are not pursued and the emphasis should be on winning viable and good cases, besides curbing the instinct that the litigation, even not worth pursuit, has to be won at any cost.
  - iii. Ensuring that false pleas and points will never be taken; nothing will be suppressed from the court; and no attempt will be made to mislead it.
  - iv. Reducing average litigation pendency time from 15 years to 3 years, identifying bottlenecks and prioritizing issues relating to welfare legislation, social reforms, weaker sections, senior citizens and other like classes.

II. Litigation Maintenance and Review Agencies:-

- The vital agencies to ensure responsible, effective and successful implementation of the State Litigation Policy are, as follow :-

1. **Nodal Officers**
2. **Heads of the Department**
3. **State and District Level Empowered Committees**
4. **Screening Committee for appointment of Panel Lawyers.**

(a) Appointment of Nodal Officers and their functions:-

- Each Department of the State Government and its agencies shall have a Nodal Officer preferably with legal background and expertise, not below the rank of Deputy Secretary, who shall be so designated by the Head of Department/Competent Authority of the concerned department/agency in consultation with the Chief Secretary of the State.
- The role and responsibility of the Nodal Officers would be to:-
  - (a) ensure collection of all the relevant data regarding the litigations against the said department and placing the same before the Law Department in a cohesive and coordinated manner.
  - (b) monitor the progress of litigations, particularly to identify the cases in which repeated adjournments are taken, and to apprise the Head of the Department about the repeated and unjustified adjournments.
  - (c) constant monitoring of cases particularly to examine whether cases have gone 'Off Track' or have been unnecessarily delayed.
- As the Nodal Officers would be in a position to pro-actively manage litigations, while making such appointments care must be taken to see that there is continuity in the incumbents holding office, and preferably Nodal Officers should not be changed or shifted at rapid interval and/or on flimsy grounds. The Nodal Officers must also be subjected to training so that they are in a position to understand what is expected of them under the State Litigation Policy.
- There must be critical appreciation of conduct and monitoring of the litigations by the Nodal Officers and, in case they are found to have acted detrimental to the interest of the State and the litigation, suitable action would be taken against them after fixing responsibility.
- There shall be a Nodal Agency at the level of the High Court consisting of a high ranking officer having background of law and sufficient experience of attending court matters, assisted by sufficient number of Assistants being law graduates.

  In the alternative, service of notices/summonses/copies of petitions shall be effected through courier services of repute.

(b) Formation of State Empowered Committee and its functions :-

- There will be a State Empowered Committee to monitor the implementation of State Litigation Policy and to fix the accountability. The State Empowered Committee will be chaired by the Advocate General of which the Director, Prosecution would be the Vice-Chairman, besides having such other members not exceeding five in

number to be nominated by the Department of Law. Such members shall include an Additional Legal Remembrancer / Joint Secretary / Deputy Legal Remembrancer of Law Department as the Member Secretary of the State Empowered Committee.

- All the Nodal Officers and the Heads of the Department will ensure that all relevant data regarding pendency of cases against the Government be sent to the State Empowered Committee. It shall be the responsibility of State Empowered Committee to receive and deal with suggestions and complaints including those from litigants and Government Departments and take appropriate measures in connection therewith.
- The State Empowered Committee shall submit its monthly report to the Department of Law and would also place all the relevant papers / details with the suggestion / recommendation for suitable action, if any, proposed against any person found to have acted mala fide and detrimental to the interest of the State.

(c) District Empowered Committee :-

- On the lines of the State Empowered Committee there shall also be an Empowered Committee at the district level known as District Empowered Committee which shall be chaired by the Deputy Commissioner of the district or an officer, not below the rank of an Additional Collector, so nominated by him to be the Chairman. The other members of the committee would be the Government Pleader, the Public Prosecutor and an officer not below the rank of Deputy Superintendent of Police so nominated by the Superintendent of Police. The Committee shall have the Deputy Collector, Incharge Legal Section as its Member Secretary.
- The District Empowered Committee shall be the counter-part of the State Empowered Committee at the district level with all the similar functions and powers of the latter exercisable at the district level. The District Empowered Committee will also monitor the proper conduct of investigation of cases by the police officers entrusted with the investigation of cases, and in case any deliberate fault is found on the part of the IOs, it shall be the duty of the Committee to make report to the controlling authority for suitable action.
- It shall be the responsibility of the District Empowered Committee to submit monthly report to the State Empowered Committee which shall, in turn, submit its monthly comprehensive report to the Department of Law. Such reports shall also be accompanied by all the relevant papers / details with the suggestion / recommendation for suitable action, if any, proposed against any person found to have acted mala fide and detrimental to the interest of the State.

(d) Formation of Screening Committee and its function :-

- The State Government will also constitute a Screening Committee for constitution of a government panel of lawyers to conduct the government cases. The Screening Committee will make their recommendations to the Department of Law with an emphasis on identifying lawyers having area of core competence, domain expertise and areas of specialization to be panel lawyers.

III. Government Representation :-

(a) Conducting litigations at the level of Supreme Court of India

- There is already a system of retaining a Standing on a monthly retainer fee and other applicable fees and Advocates-on Record before the Supreme Court. The Advocates-on-Record are responsible for filing of cases and their maintenance.
- The Standing Counsel would be an advocate of proven competence and skill and must have the capacity to keep a watch on and control of the other Counsels and Advocates-on-Record, and he would be reporting to the State's Law Secretary and would suggest regarding distribution of work among other Advocates-on-Record and engagement of Senior Advocates to the Law Secretary.
- There shall also be one or more Additional Advocate General who shall supervise and monitor the cases of the State Government and shall also render their services as Senior Advocates. The State Government may have one or more Additional Standing Counsel as per the requirement to aid and assist Standing Counsel and also to render their services as arguing counsel.
- The Department of Law of the State Government will keep regular watch on the conduct of cases and would also from time to time monitor the progress of cases being in close touch with the conducting advocates, who shall be required to submit periodical reports to the Law Department in the format to be supplied to them.
- In case any counter-affidavit or application / petition has to be submitted before the Hon'ble Apex Court, then information must be given well in advance to the Law Department, besides informing the concerned department, so that the same could be made available promptly and effectively.
- Depending on the nature of cases and the stakes involved therein such Advocates will be engaged for arguing the cases as would be required for proper conduct and defence of cases. The Law Department shall also prepare a panel of such Senior Advocates by discussing with them scales of fees applicable for certain period during which there will be no escalation of fees, and in case of urgent necessity such other Senior Advocates will also be engaged whose presence would be essential for proper defence of the case. Such other Senior Advocates, not in the panel, can be engaged only with the prior approval of Law Department.

  In addition to the team of Senior Advocates, a panel of such young and bright arguing advocates shall also be prepared who would be available for arguments at quite nominal fees.
- The conducting Advocates (including Advocates-on-Record) must inform the Law Department well in advance for engagement of a Senior Advocate, if his engagement in the case is essential, for approval of his engagement. If such Senior Advocate is not one from the panel of Senior Advocates finalized by the department, it shall be the duty of the conducting Advocates that proposal of the name of the Senior Advocate and the fee to be charged by him must be informed to the Law Department well in advance, so that the engagement and the fee of such Senior Advocate could

be approved in time so as to avoid any future complications and for availability of sufficient time for the Senior Advocate to get ready in the matter.

The selection and engagement of an arguing advocate would be the sole prerogative of the Law Department in consultation with the Standing Counsel and / or the conducting Advocates. The heads of the different departments, to which the cases relate, would not be permitted to directly contact or engage an arguing or Senior Advocate.

However, if a Senior Advocate or any Advocate other than an Advocate on the panel of the Law Department, or not previously approved by the Law Department, is engaged at the sole discretion of a Departmental Head, fees of such Advocate shall be paid by such concerned Department alone and not by the Law Department.

- Failure on the part of the Standing Counsel / conducting Advocates to abide by the above requirements, as also regarding timely submission of counter-affidavits / applications / petitions shall be viewed very seriously, specially if such failure results in any adverse result of or development in the litigation.

(b) Appointment of Government Advocates at State Level

- The State has already got the system of appointing Advocate General as per the provisions of the Constitution of India, and the other Law Officers of different categories to represent the State at the level of the High Court, Tribunals, Commissions, Arbitrators etc., who are so nominated and appointed at the recommendation of the Advocate General. The State would ensure appointment of Advocates with proven integrity and abilities to man these positions.
- The State Law Department's resolution setting out the terms and conditions of appointment/engagement, conduct and fee structure of Government advocates, by whatever nomenclature and descriptions are they known, shall be strictly adhered to by them, and any deviation from the mandatory provisions thereof, including submission of monthly statements, by the Government advocates will entail serious repercussions, such as denial / withholding of fees to them and/or their removal from the panel of advocates etc.
- In case any counter-affidavit or application / petition has to be submitted before the Hon'ble High Court, the according information must be given well in advance to the Law Department, besides informing the concerned department, so that the same could be made available promptly and effectively.
- If a Government Advocate, by whatever nomenclature or designation he may be known, shall be amenable to suitable action under law, besides the above repercussions, if he is found to have committed deliberate laches / indulgence in mala fide manner and detrimental to the interest of the State while conducting litigation.

(c) Appointment of Government Advocates at District Level

- At the district level the Government Litigations on the criminal side are conducted by Public Prosecutors, Additional Public Prosecutors, Assistant Public Prosecutors

Incharge and Assistant Public Prosecutors. On the civil side the litigations are conducted by Government Pleaders and Additional Government Pleaders. The Public Prosecutors and the Government Pleaders are responsible for control and monitoring of the work of the criminal prosecution and the civil litigations, respectively.

- Some more teeth is proposed to be given to the PPs and the GPs by framing rules whereunder they will be able to make directions to such government officials who are supposed to extend to them necessary feedback and support for the success of litigations in courts, as also to recommend suitable action against those acting in detriment to the State's interest.
- In case any application / petition has to be submitted before the concerned Courts at the district level, the according information must be given by the conducting Government Advocate well in advance to the concerned department, in case of need, so that the necessary factual feedback and information could be made available promptly and effectively.
- A Government Advocate, by whatever nomenclature or designation he may be known, shall be amenable to suitable action under law, besides the above repercussions, if he is found to have committed deliberate laches / indulgence in mala fide manner and detrimental to the interest of the State while conducting litigation.

(d) Training of Panel Lawyers :-

- The State Government will also organize training programmes, seminars, workshops and refresher courses for government advocates in the Judicial Academy Jharkhand in coordination with the premier law institutes, such as National Law University, Ranchi.
- Such training programmes, seminars, workshops and refresher courses shall be aimed at identifying and improving areas of specialization, instilling values required for effective government representation and motivational discourses.

(e) Conduct of Government litigations in District/Sub-divisional courts

- Government Pleaders and Public Prosecutors at district level shall conduct civil and criminal cases with the aid of their AGPs and APPs, respectively, in strict adherence to the Government Rules & Regulations formulated from time to time. The PPs shall, in particular, strictly adhere to the instructions/guidelines as contained in the PP Manual.
- AGPs and APPs will be amenable to the control/monitoring of the District Empowered Committee as mentioned above.
- The teams of Government Pleaders and Public Prosecutors along with their AGPs and APPs shall also receive periodical trainings and shall participate in various seminars and orientation courses from time to time in order to keep abreast with the changing scenario in the legal arena, as also to sharpen their skills for better results.

IV. Adjournments :-

- The State Government is also anxious over the frequent and unnecessary adjournments resorted to by the government lawyers. By the State Litigation Policy unnecessary and frequent adjournments will be frowned upon and infractions will be dealt with seriously. In a fresh litigation where the State Government is a defendant or respondent in the first instance, a reasonable adjournment may be applied for, for obtaining instructions. However, it must be ensured that such instructions are made available and communicated before the next date of hearing. If instructions are not forthcoming, the matter must be reported to the Nodal Officer and if necessary to the Head of the concerned Department.
- Cases in which costs are awarded against the Government as a condition of grant of adjournment, the same will be viewed very seriously. In all such cases the Head of the Department will have to give a report to the Empowered Committee of the reasons why such costs awarded. The names of persons responsible for the default entailing the imposition of the costs will be identified. Suitable action must be taken against them.
- The State Government is also serious to adopt the process that the cases or the Counter Affidavits must be filed with all necessary and relevant documents. If it is found that any such documents are not annexed and this entails adjournments, or if the court adversely comments on this, the matter will be enquired into by the Nodal Officer and reported to the Head of the Department for suitable action.

V. Pleadings / Counter Affidavits

- Suits or other proceedings by or on behalf of the Government must be drafted with precision and clarity, avoiding repetitions, misstatements and errors, besides ensuring that all necessary and relevant documents have been annexed to the pleadings/counter-affidavits. Those found not complying with these requirements would be dealt with seriously.

VI. Filing of Appeals :-

- Under the State Litigation Policy appeals will not be filed against Ex parte orders. Attempt must be made first to have the order set-aside. An appeal must be filed against an order only if the order is not set-aside and the continuation of such order causes prejudice. Usually, appeal must be filed intra court in the first instance. Direct appeal to the Supreme Court must not be resorted to except in extra-ordinary cases.

VII. Limitation: Delayed Appeals

- For curbing down the number of cases in which government could not file appeals well within the period of limitation, the State Government is considering to adopt the process that each Head of the Department will be required to call for details of cases filed on behalf of the Department and to maintain a record of cases which have been dismissed on the ground of delay. The Nodal Officer must submit a report in every individual case to the Head of the Department explaining all the reasons for such delay and identifying the person / causes responsible. Where it is found that delay was not bonafide, appropriate action must be taken against the concerned person. It shall be the responsibility of each

Head of Department to work out an appropriate system for elimination of delays and ensure its implementation.

VIII. Alternative Disputes Resolution Mechanism :-

- The State Government would encourage resort to ADR mechanisms, such as Mediation, Conciliation, Arbitration and Lok-Adalats as essential prelude to litigation, as also an integral method of disputes resolution in appropriate cases. There would be more effort to resort to these alternatives where it is not viable or feasible for a successful end to the dispute.
- The State will ensure that all service related disputes are firstly dealt with by the in-house mechanism / forum by resorting to conciliation and mediation, and in case they fail to bring out a result at the departmental level, the same may be referred to higher administrative authorities. The nodal officer of each department will firstly suggest for reference of the matter to conciliation / mediation and only in such cases where a resolution does not appear feasible by such methods, or its nature is such that it can not be so referred to for such measures, then only the State Government shall enter into litigating the dispute in courts.
- The State Government is also considering that resort to arbitration as an A.D.R. Mechanism must be encouraged at every level, but this entails the responsibility that such arbitration will be cost effective, efficacious, expeditious and conducted with high rectitude. In most cases arbitration has mirror of court litigation which must stop.
- The Head of Department will call for the data of pending arbitrations. Copies of Roznama (record of proceedings) must be obtained to find out why arbitrations are delayed and to ascertain as to who is responsible for adjournments. The advocates found to be conducting arbitration lethargically and inefficiently must not only be removed from the conduct of such cases but also not briefed in future arbitration.
- If it is found that an arbitration award goes against government, it is almost invariably challenged by way of objection filed in the arbitration. Routine challenge to the arbitration award must be discouraged; a clear formulation of reasons to challenge the award must precede the decision to file such award challenging proceedings.

IX. Miscellaneous Provisions :-

- PILs challenging public contracts must be seriously defended. If interim orders are passed stopping such projects, then appropriate condition must be insisted upon for the petitioner to pay compensation if the PIL is ultimately rejected. In cases involving vires of statutes or rules and regulations proper affidavits should be filed.
- In litigations inter se between PSUs and Government Public Sector Undertakings, every effort must be made to prevent such litigations. Before initiating any litigation the matter must be placed before the Highest authority of the Public Sector, such as C.M.D. or M.D. It will be his responsibility to endeavour to see whether the litigation can be avoided. If litigations can not be avoided then A.D.R. methods like mediations and conciliations must be considered. Section 89 of the CPC must be resorted to extensively.

X. Review of Pending Cases :-

- All pending cases involving government will be reviewed. This due diligence process shall evolve drawing upon statistics of all pending matters which shall be provided for by all government departments (including PSUs). The office of Advocate General shall also be responsible for reviewing all pending cases and filtering frivolous and vexatious matters from the meritorious ones.

  It is worth mention that the State Government is willing to adopt State Litigation Policy as per the provisions given in National Litigation Policy.

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CHAPTER-9

LANDMARK JUDGMENTS ON MEDIATION

9.1 **(2010) 8 Supreme Court Cases 24**
Afcons Infrastructure Ltd. & Anr. Vs. Cherian Varkey Construction Co. (P) Ltd. & Ors.

9.2 **(2011) 15 SCC 464**
B.S. Krishna Murthy vs. B.S. Nagaraj

9.3 **(2011) 1 SCC 466**
Moti Ram vs. Ashok Kumar

9.4 **(2005) 6 SCC 344**
Salem Advocate Bar Assn. (2) vs Union of India

9.5 **(2008) 7 Supreme Court Cases 454.**
United India Insurance Company Limited Vs. Ajay Sinha and Another

9.6 **(2008) 2 Supreme Court Cases 660**
State of Punjab & Another Vs Jalour Singh & Others

9.7 **(2005) 6 Supreme Court Cases 478**
P.T. Thomas Vs Thomas Job

9.8 **(2009) 2 Supreme Court Cases 198**
B. P. Moideen Sevamandir & Anr. Vs. A. M. Kutty Hassan.

9.9 **(2003) 1 SCC 49**
Salem Advocate Bar Association vs. Union of India

9.10 **Appeal (civil) 3143 of 2007**
Oil & Natural Gas Corporation Ltd vs City & Indust. Dev.

CHAPTER-9.1

AFCONS INFRASTRUCTURE LTD. & ANR. VS. CHERIAN VARKEY CONSTRUCTION CO. (P) LTD. & ORS.

(2010) 8 SUPREME COURT CASES 24

Bench : Hon'ble Mr. Justice R.V. Raveendran and Hon'ble Mr. Justice J.M. Panchal

Civil Appeal No. 6000 of 2010†, decided on July 26, 2010

Afcons Infrastructure Ltd. & Anr. ... Appellants
Vs.
Cherian Varkey Construction Co. (P) Ltd. & Ors. ... Respondents

A. Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Reference to ADR processes under — Preconditions, choice of ADR process and proper procedure — After completion of pleading, respondent filing application for arbitration (an adjudicatory ADR process) under S. 89 but appellant opposing the same — Reference of matter to arbitration in such situation by trial court, held, is erroneous — Reference to adjudicatory ADR processes (arbitration or conciliation) can be made only with consent of all parties — As appellant was not agreeing to arbitration, matter remanded to trial court for deciding upon appropriate non-adjudicatory ADR process — Legal Aid and ADR — Reference to ADR

B. Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Reference to ADR processes under — Appropriate stage, discussed — Present case (a money suit) distinguished from family disputes and matrimonial disputes with regard to stage for reference to ADR

The general scope of Section 89 CPC and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arose for consideration in this appeal. The respondent filed a money suit against the appellant. In the said suit an order of attachment was made. Thereafter the respondents filed an application for arbitration which was opposed by the appellants by filing a counter. The trial court by a reasoned order referred the matter to arbitration though it was opposed by the appellants. The High Court by the impugned order upheld the order of the trial court.

Allowing the appeal, the Supreme Court

Held:

A civil court exercising power under Section 89 CPC cannot refer a suit to arbitration unless all the parties to the suit agree to such reference. If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. If the reference is to any other non-adjudicatory ADR process, the court should briefly record the same. [Paras 49(ii), 44(i) and 44(ii)]

The trial court did not adopt the proper procedure while enforcing Section 89. Failure to invoke Section 89 suo motu after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous. Consequently, the orders of the trial court referring the matter to

arbitration and of the High Court affirming the said reference are set aside. The trial court will new consider and decide upon a non-adjudicatory ADR process.

[Paras 49(i), 50, 47 and 48]

Sukanya Holdings (P) Lid. v. Jayesh H. Pandya, (2003) 5 SCC 531, distinguished and clarified

The only practical way of reading Section 89 and Order 10 Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to Section 89. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial. [Paras 24, 41, 45, 43(a) to 43(d)]

However, in family disputes or matrimonial cases the ideal stage for mediation will be immediately after service of notice on the respondent and before the respondent files objections/written statements. The reason being to avert the hostility which might further aggravate by the counter-allegations made in his or her written statement or objections. (Para 42)

C. Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Interpretation — Anomalies and draftsman's errors — Practicable/proper interpretation, prescribed — Regarding Best anomaly, merely describing nature of dispute in a sentence or two, held, would be sufficient for the requirement of S. 89(1) that the court should formulate or reformulate the terms of settlement — Secondly, interchanging the definitions of "judicial settlement" and "mediation" in Ss. 89(2) (c) and (d), held, would correct the draftsmen's error — Interpretation of Statutes — Basic rules — Purposive construction — When a departure from literal rule of plain and ordinary meaning warranted — Rationale for, stated [Paras 9 to 19, 21, 25 and 44(iii)]

D. Interpretation of Statutes — Basic rules — Plain or ordinary meaning — When applicable (not as in present case), stated (Paras 20 and 21)

Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344, relied on

Black's Law Dictionary, 7th Edn., pp. 1377 and 996, referred to

Salem Advocate Bar Assn. (I) v. Union of India, (2003) 1 SCC 49; Salem Advocate Bar Assn. (II) v. Union of India. (2005) 6 SCC 344, relied on

Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344; Shri iviandir Sita Ramji v. Lt. Governor of Delhi, (1975) 4 SCC 298; Tirath Singh v. Bachittar Singh, AIR 1955 SC 830; Shamrao V. Parulekar v. District Magistrate, Thana, AER 1952 SC 324 : 1952 Cri U 1503: Molar Mai v. Kay Iron Works (P) Ltd., (2000) 4 SCC 285; Mangin v. IRC, 1971 AC 739 : (1971) 2 WLR 39 : (1971) 1 All ER 179 (PC); Stock v. Frank Jones (Tipton) Ltd, (1978) I WLR 231 : (1978) 1 All ER948 (HL), relied on

Maxwell: Interpretation of Statutes (12th Edn., p. 228); Principles of Statutory Interpretation (12th Edn. 2010, Lexis Nexis, p. 144), referred to

E. Civil Procedure Code, 1908 — S. 89, Or, 10 R, 1-A and Or. 23 R. 3 — Procedure under S. 89 r/w Or. 10 R. 1-A, elaborated — ADR processes being a non-starter in many courts, such elaboration is necessary — Therefore, (1) detailed procedure of valid reference and choosing appropriate ADR process, (2) procedure if there is a settlement or if the reference failed, (3)

procedure regarding civil court keeping track of matters referred so that non-adjudicatory ADR processes may be expedited, and (4) procedure regarding keeping or sending of original records, explained and elaborated — Arbitration and Conciliation Act, 1996 — Ss. 8,11,64,36,30 and 74 — Legal Services Authorities Act, 1987, S. 21

Held:

The ADR processes in Section 89 are being referred to elaborately because Section 89 has been a non-starter with many courts. Though the process under Section o9 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude "unfit" cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge-assisted settlement only in exceptional or special cases. [Para 45, 43(a) to 43(d) and 44(i) to 44(iii)]

If the reference to the ADR process Tails, on receipt of the report of the ADR forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3. If the settlement includes disputes which are not the subject-matter of the suit, the court may direct that the same will be governed by Section 74 of the Arbitration and Conciliation Act (if it is a conciliation settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if ii is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 CPC.

[Paras 43(h), 40 and 43(i)]

If any term of the settlement is ex facie illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability. [Para 43(j)]

If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for judicial settlement to another Judge. [Para 44(iv)]

If the court refers the matter to an ADR process (other than arbitration), it should keep track of the matter by fixing a hearing date for the ADR report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case, etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings. [Para44(v)]

Normally the court should not send the original record of the case when referring the matter to an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a court annexed mediation centre which is under the exclusive control and supervision of a judicial officer, the original file may be made available wherever necessary.

[Para 44(vi)]

F. Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Different ADR processes — Distinctive nature and procedural mode, examined — ADR processes, distinguished with reference to (1) as to whether consent of parties is required or the parties have to abide by court's discretionary order, (2) binding nature of ADR process (i.e. whether ADR process is adjudicatory

or non-adjudicatory), and (3) whether case would go out of the stream of court permanently or come back to court (Paras 32 to 38)

Salem Advocate Bar Assn. (I) v. Union of India, (2003) 1 SCC 49; Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344; Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719, relied on

P. AnandGajapathiRaju v. P.V.G. Raju, (2000)4 SCC 539, cited

G. Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Reference to ADR for proceeding under other statutory schemes, (1) categorised and (2) non-overriding effect of S. 89 and Or. 10 R. 1-A on such other schemes, clarified — Legal Aid and ADR — Legal Services Authorities Act, 1987 — S. 21 — Arbitration and Conciliation Act, 1996, S. 74

H. Civil Procedure Code, 1908 — S. 89 — Mandatory aspects — Held, consideration for reference of ADR process is mandatory, but not actual reference

I. Civil Procedure Code, 1908 — S. 89 — Applicability — Suitability for reference to ADR process — Categorised on the basis of nature of dispute/case

Held:

The object of Section 89 is that settlement should be attempted by adopting an appropriate ADR process. Neither Section 89 nor Order 10 Rule 1-A is intended to supersede or modify the provisions of the Arbitration and Conciliation Act or the Legal Services Authorities Act, 1987. Section 89 makes it clear that two of the ADR processes (i.e. arbitration and conciliation) will be governed by the AC Act, two others (i.e. Lok Adalat settlement and mediation) by the Legal Services Authorities Act, 1987 and the last of the ADR process by judicial settlement. (Para 29)

Having a hearing after completion of pleadings, to consider recourse lo ADR process under Section 89, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other cases reference to ADR process is a must. (Para 26)

The starting words of Section 89 clearly show that cases which are not suited for ADR process should not be referred under Section 89. Where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89. (Para 26)

The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature: (i) Representative suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance), (ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, associations, etc.). (iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration, (iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc. (v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government, (vi) Cases involving prosecution for criminal offences. (Para 27)

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

(i) All rases relating to trade, commerce and contracts, including disputes arising out of contracts (including all money claims); disputes relating to specific performance; disputes between suppliers and customers; disputes between bankers and customers; disputes between developers/ builders and customers; disputes between landlords and tenants/ licensor and licensees; disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including disputes relating to matrimonial causes, maintenance, custody of children; disputes relating to partition/ division among family members/coparceners/ co-owners; and disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.); (1) disputes between employers and employees; (2) disputes among members of societies/associations/apartment owners' associations;

(iv) All cases relating to tortious liability, including claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes, including disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorisation of cases is not intended to be exhaustive, or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

(Para 28)

Appeal allowed

Advocates who appeared in this case :

Krishnan Venugopal, Senior Advocate [Anil K. Bhatnagar, Amit Dhingra and Manu

Seshadri (for Dua Associates), Advocates] for the Appellants; T.L.V. Iyer, Senior Advocate (VJ. Francis, Anupam Mishra, C.N. Sreekumar, P.R.

Nayak and Dushyant Parashar, Advocates) for the Respondents.

Chronological list of cases cited

1. (2007)5 SCC 719, Jagdish Chander v.Ramesh Chander
2. (2005) 6 SCC 344, Salem Advocate Bar Assn.c(II) v. Union of India
4. (2003) 5 SCC 531, Sukanya Holdings (P) Ltd. v. Jayesh H.Pandya
5. (2003) 1 SCC 49, Salem Advocate Bar Assn. (I) v. Union of India
6. (2000) 4 SCC 539, P. Anand Gajapathi Raju v. P. V.G. Raju
7. (2000) 4 SCC 285, Molar Mai v. Kay Iron Works (P) Ltd.
8. (1978) 1 WLR 231 : (1978) 1 All ER 948 (HL), Stock v. Frank Jones (Tipton) Ltd
9. (1975) 4 SCC 29S,Shri Mandir Sita Ramji v. Lt. Governor of Delhi

10. 1971 AC 739 : (1971) 2 WLR 39 : (1971) 1 All ER 179 (PC), Mangin v.IRC

10. AIR 1955 SC 830, Tirath Singh v. Bachittar Singh

11. AIR 1952 SC 324 : 1952 Cri LJ 1503, Shamrao V. Parulekarv. District Magistrate, Thana

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J.—

Leave granted. The general scope of Section 89 of the Code of Civil Procedure (`Code' for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

2. The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20.4.2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1.8.2001. It is not in dispute that the agreement between the appellants and the first respondent did not contain any provision for reference of the disputes to arbitration.

3. The first respondent filed a suit against the appellants for recovery of Rs.210,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15.9.2004 in regard to a sum of Rs.2.25 crores. Thereafter in March 2005, the first respondent filed an application under section 89 of the Code before the trial court praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24.10.2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes under section 89 of the Code.

4. In the meanwhile, the High Court of Kerala by order dated 8.9.2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent under section 89 of the Code.

5. The trial court heard the said application under section 89. It recorded the fact that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application under section 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court.

6. The High Court by the impugned order dated 11.10.2006 dismissed the revision petition holding that the apparent tenor of section 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration. The High Court also held that the concept of pre existing arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 (`AC Act' for short) was inapplicable to references under section 89 of the Code, having regard to the decision in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya1. The said order is challenged in this appeal.

1 [2003 (5) SCC 531]

7. On the contentions urged, two questions arise for consideration :

   (i) What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?

   (ii) Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?

8. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions. The said provisions are extracted below :

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

   (a) arbitration;

   (b) conciliation;

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

   (d) mediation.

   (2) where a dispute has been referred -

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

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

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

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

   Order 10 Rule 1-A.

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

Order 10 Rule 1B.

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

Order 10 Rule 1C.

"1-C. 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."

9. If Section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short `ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits.

10. In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in Salem Advocate Bar Association v. Union of India2 [for short, Salem Bar - (I)] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In Salem Advocate Bar Association v. Union of India3 [for short, Salem Bar-(II)], this Court applied the principle of purposive construction in an attempt to make it workable.

What is wrong with section 89 of the Code?

11. The first anomaly is the mixing up of the definitions of `mediation' and `judicial settlement' under clauses (c) and (d) of sub-section (2) of section 89 of the Code. Clause (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in clause (c).

12. "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute. "Mediation" is also 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. It is also synonym of the term `conciliation'. (See : Black's Law Dictionary, 7th Edition, Pages 1377 and 996).

13. When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in section 89 with interchanged meanings

2 [2003 (1) SCC 49
3 2005 (6) SCC 344

has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word "mediation" in clause (d) and the words "judicial settlement" in clause (c) are interchanged, we find that the said clauses make perfect sense.

14. The second anomaly is that sub-section (1) of section 89 imports the final stage of conciliation referred to in section 73(1) of the AC Act into the pre-ADR reference stage under section 89 of the Code. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes.

15. If sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

16. Section 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into section 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions.

Section 73(1) of Arbitration and Conciliation Act, 1996 relating to the final stage of settlement process in conciliation	Section 89(1) of Code of Civil Procedure relating to a stage before reference to an ADR process.
"73. Settlement agreement.—(1) When it appears to the conciliator that there are 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."	"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."

17. Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a

preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

18. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, after going through the entire process of conciliation/mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

19. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. This Court therefore diluted this anomaly in Salem Bar (II)4 by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a `summary of disputes' and not `terms of settlement'.

How should section 89 be interpreted?

20. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context:

> *"6. … When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser."*

(See : Shri Mandir Sita Ramji vs. Lt. Governor of Delhi5

21. There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to

4 Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344

5 (1975) 4 SCC 298).

avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

21.1 Maxwell on Interpretation of Statutes (12th Edn., page 228), under the caption `modification of the language to meet the intention' in the chapter dealing with `Exceptional Construction' states the position succinctly:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

This Court in Tirath Singh v. Bachittar Singh6 approved and adopted the said approach.

21.2 In Shamrao V.Parulekar v. District Magistrate, Thana,7 this Court reiterated the principle from Maxwell:

".....if one construction will lead to an absurdity while another will give effect to what commonsense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided."

21.3 In Molar Mal vs. Kay Iron Works (P) Ltd.8 this Court while reiterating that courts will have to follow the rule of literal construction, which enjoins the court to take the words as used by the Legislature and to give it the meaning which naturally implies, held that there is an exception to that rule. This Court observed : (SCC p. 295, para 12)

"12. … That exception comes into play when application of literal construction of the words in the statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the statute as a whole, it requires a different meaning."

21.4 In Mangin v. Inland Revenue Commission9 the Privy Council held:

".....The object of the construction of a statute, be it to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If, therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted."

6 AIR 1955 SC 830
7 AIR 1952 SC 324 : 1952 Cri LJ 1503
8 2004 (4) SCC 285
9 1971 AC 739 (1971) 2 WLR 39 : (1971 1 All ER 179 (PC)

21.5 A classic example of correcting an error committed by the draftsman in legislative drafting is the substitution of the words `defendant's witnesses' by this Court for the words `plaintiff's witnesses' occurring in Order VII Rule 14(4) of the Code, in Salem Bar-II10. We extract below the relevant portion of the said decision : (SCC pp. 368-69, para 35)

> *"35. Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order VII Rule (4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words 'plaintiff's witnesses, would be read as 'defendant's witnesses' in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature."*

21.6 Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise "Principles of Statutory Interpretation" (12th Edn. - 2010, Lexis Nexis -page 144) from the decision of the House of Lords in Stock v. Frank Jones (Tipton) Ltd.11:

> *".....a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."*

22. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to section 89 of the Code. Therefore, in Salem Bar-II, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, this Court in Salem Bar-II12, adopted the following definition of `mediation' suggested in the model mediation rules, in spite of a different definition in section 89(2)(d) :

> *"Settlement by `mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."*

10 Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344.
11 (1978) 1 WLR 231 : (1978) 1 All ER 948 (HL)
12 Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344

23. All over the country the courts have been referring cases under section 89 to mediation by assuming and understanding `mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

24. Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

25. In view of the foregoing, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of `judicial settlement' and `mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged:

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

    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.

Whether the reference to ADR Process is mandatory?

26. Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory.

But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

27. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature :

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

28. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) All cases relating to trade, commerce and contracts, including

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

(ii) All cases arising from strained or soured relationships, including

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

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including

- claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

How to decide the appropriate ADR process under section 89?

29. Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither section 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, section 89 of the Code makes it clear that two of the ADR processes -Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat Settlement and Mediation (See : amended definition in para 18 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes – judicial settlement (See : amended definition in para 18 above), section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

30. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

31. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

Arbitration

32. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only

if there is an `arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking section 8 or section 11 of the AC Act, and there would be no need to have recourse to arbitration under section 89 of the Code. Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement.

33. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under section 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in Salem Bar-I, the case will go outside the stream of the court permanently and will not come back to the court.

34. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 of the Code. This is evident from the provisions of AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though section 89 of the Code mandates reference to ADR processes, reference to arbitration under section 89 of the Code could only be with the consent of both sides and not otherwise.

34.1 In Salem Bar (I)13, this Court held : (SCC p. 55, paras 9-10)

> *"9. It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation……*
>
> *"10. … If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial." (Emphasis supplied)*

34.2 In Salem Bar - (II)14, this Court held :

> *"54. Some doubt as to a possible conflict has been expressed in view of used of the word "may" in Section 89 when it stipulates that "the court may reformulate the terms of a possible settlement and refer the same for" and use of the word "shall" in Order 10 Rule*

13 Salem Advocate Bar Assn. (I) v. Union of India, (2003) 1 SCC 49
14 Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344

1-A when it states that "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".

55. The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A uses the word "shall" but on harmonious reading of these provisions it becomes clear that the use of the word "may" in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89.

56. One of the modes to which the dispute can be referred is "arbitration". Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in P.Anand Gajapathi Raju v. P.V.G. Raju15 the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration." (Emphasis supplied)

34.3 The position was reiterated by this Court in Jagdish Chander v. Ramesh Chander16 thus :

10 … "It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference." (Emphasis supplied)

34.4 Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration under section 89 of the Code.

Conciliation

35. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in section 62 of AC Act followed by appointment of conciliator/s as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no `conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As

15 2000 (4) SCC 539
16 2007 (5) SCC 719

contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.

The other three ADR Processes

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

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

37. When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/ enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.

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

39. Where the reference is to a neutral third party (`mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and

jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it.

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

Summation

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

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

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

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

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

c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

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

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

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/ options of parties, refer the matter to any one of the other three other ADR processes :

(a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

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

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

44. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code :

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

45. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that section 89 has been a non-starter with many courts. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude `unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases.

Conclusion

46. Coming back to this case, we may refer to the decision in Sukanya Holdings1 relied upon by the respondents, to contend that for a reference to arbitration under section 89 of the Code, consent of parties is not required. The High Court assumed that Sukanya Holdings has held that section 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. Sukanya Holdings17 does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under section 8 of the AC Act could be maintained even where a part of the subject matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to Section 89 are as under:

"18. Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be

17 Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531

resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."

47. The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under section 8 of the Act, there can be a reference under section 89 to arbitration if parties agree to arbitration. The observations in Sukanya Holdings18 do not assist the first respondent as they were made in the context of considering a question as to whether section 89 of the Code could be invoked for seeking a reference under section 8 of the AC Act in a suit, where only a part of the subject-matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement.

48. The first respondent next contended that the effect of the decision in Sukanya Holdings is that "section 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration." There can be no dispute in regard to the said proposition as Section 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under Section 89 of the Code in regard to the said four ADR processes.

49. In the light of the above discussion, we answer the questions as follows :

(i) The trial court did not adopt the proper procedure while enforcing Section 89 of the Code. Failure to invoke Section 89 suo moto after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous.

(ii) A civil court exercising power under Section 89 of the Code cannot refer a suit to arbitration unless all the parties to the suit agree for such reference.

50. Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The Trial Court will now consider and decide upon a non-adjudicatory ADR process.

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18 Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531

CHAPTER-9.2

B.S. KRISHNA MURTHY VS. B.S. NAGARAJ

(2011) 15 SCC 464

Bench : Hon'ble Mr. Justice Markandey Katju and Hon'ble Mr. Justice Gyan Sudha Misra

CIVIL APPELLATE JURISDICTION
S.L.P. Civil) No(s).2896 OF 2010 decided on 14 January 2011

B.S. Krishna Murthy
vs.
B.S. Nagaraj

Hence, the lawyers as well as litigants should follow Mahatma Gandhi's advice in the matter and try for arbitration/mediation. This is also the purpose of Section 89 of the Code of Civil Procedure.

Let the matter be referred to the Bangalore Mediation Centre. The parties are directed to appear before the Bangalore Mediation Centre on 21.02.2011.

ORDER

Heard learned counsel for the appearing parties. This is a dispute between brothers. In our opinion, an effort should be made to resolve the dispute between the parties by mediation.

In this connection, we would like to quote the following passages from Mahatma Gandhi's book 'My Experiments with Truth' :-

"I saw that the facts of Dada Abdulla's case made it a very strong indeed, and that the law was bound to be on his side. But I also saw that the litigation, if it were persisted in, would ruin the plaintiff and the defendant, who were relatives and both belonged to the same city. No one knew how long the case might go on. Should it be allowed to continue to be fought out in court, it might go on indefinitely and to no advantage of either party. Both, therefore, desired an immediate termination of the case, if possible.

I approached Tyeb Sheth and requested and advised him to go to arbitration. I recommended him to see his counsel. I suggested to him that if an arbitrator commanding the confidence of both parties could be appointed, the case would be quickly finished. The lawyers' fees were so rapidly mounting up that they were enough to devour all the resources of the clients, big merchants as they were. The case occupied so much of their attention that they had no time left for any other work. In the meantime mutual ill-will was steadily increasing. I became disgusted with the profession. As lawyers the counsel on both sides were bound to rake up points of law in support of their own clients. I also saw for the first time that the winning party never recovers all the costs incurred. Under the Court Fees Regulation there was a fixed scale of costs to be allowed as between party and party, the actual costs as between attorney and client being very

† Arising out of SLP (C) No. 17758 of 2006. From the Final Judgment and Order dated 19-6-2006 of the High Court of Jharkhand at Ranchi in Letters Patent Appeal No. 523 of 2005 : AIR 2006 Jharkhand 113.

much higher. This was more than I could bear. I felt that my duty was to befriend both parties and bring them together. I strained every nerve to bring about a compromise. At last Tyeb Sheth agreed. An arbitrator was appointed, the case was argued before him, and Dada Abdulla won. But that did not satisfy me. If my client were to seek immediate execution of the award, it would be impossible for Tyeb Sheth to meet the whole of the awarded amount, and there was an unwritten law among the Porbandar Memons living in South Africa that death should be preferred to bankruptcy. It was impossible for Tyeb Sheth to pay down the whole sum of about £ 37,000 and costs. He meant to pay not a pie less than the amount, and he did not want to be declared bankrupt. There was only one way. Dada Abdulla should allow him to pay in moderate installments. He was equal to the occasion, and granted Tyeb Sheth installments spread over a very long period. It was more difficult for me to secure the concession of payment by instalments than to get the parties to agree to arbitration. But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the the practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder.

The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby-not even money, certainly not my soul." In our opinion, the lawyers should advise their clients to try for mediation for resolving the disputes, especially where relationships, like family relationships, business relationships, are involved, otherwise, the litigation drags on for years and decades often ruining both the parties.

Hence, the lawyers as well as litigants should follow Mahatma Gandhi's advice in the matter and try for arbitration/mediation. This is also the purpose of Section 89 of the Code of Civil Procedure.

Let the matter be referred to the Bangalore Mediation Centre. The parties are directed to appear before the Bangalore Mediation Centre on 21.02.2011.

List after receiving report from the Mediation Centre.

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CHAPTER-9.3

MOTI RAM VS. ASHOK KUMAR

(2011) 1 SCC 466

Bench : Hon'ble Mr. Justice Markandey Katju, Hon'ble Mr. Justice Gyan Sudha Misra

(Civil Appeal No. 1095 of 2008) decided on 7 December, 2010

Moti Ram vs. Ashok Kumar

In this connection, we would like to state mediation proceedings are totally confidential proceeding. This is unlike proceedings in Court which are conducted openly in the public gaze.

If the mediation succeeds, by both the parties to the Court without mentioning what transpired during the mediation proceedings.

If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the `Mediation has been unsuccessful'. Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process.

We are compelled to observe this because the mediators should know what kind of reports they should send to the Courts. The report sent in this core should not have mentioned the proposals made by the parties, but should only have stated that the mediation was unsuccessful

ORDER

On 31st August, 2010, we had referred the matter for mediation to the Mediation Centre at Chandigarh to attempt to resolve the dispute between the parties.

Today, when the matter was called out, our Court Secretary placed before us the Report dated 29th September, 2010 received from the Mediator, which is as follows:

"Mr. Ashok Kumar states that he would be ready and willing to vacate the shop on receipt of 1/3rd of the value of the shop which according to him is worth approximately 50 Lacs and he be paid an amount of 15 Lacs (approx.). The appellant-landlord is not ready and willing to offer the said amount and has extended the concession by giving up on the pending rent only which according to him is pending for last 28 years. Tenant has also expressed his willingness to purchase the property for an amount of Rs. 30 Lacs but the landlord has refused to dispose of the same on the ground of personal necessity.

In this connection, we would like to state mediation proceedings are totally confidential proceeding. This is unlike proceedings in Court which are conducted openly in the public gaze.

If the mediation succeeds, by both the parties to the Court without mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the `Mediation has been

unsuccessful'. Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process.

We are compelled to observe this because the mediators should know what kind of reports they should send to the Courts. The report sent in this core should not have mentioned the proposals made by the parties, but should only have stated that the mediation was unsuccessful.

Let a copy of this order be sent to the Supreme Court Mediation Centre and the Mediation Centres in all the High Courts and District Courts in the country, including the Chandigarh Mediation Centre.

So far as this case is concerned, at the request of the counsel for the appellants, list this matter in January 2011.

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CHAPTER-9.4

SALEM ADVOCATE BAR ASSN. (2) VS UNION OF INDIA

(2005) 6 SCC 344

Bench : Hon'ble Mr. Justice Y.K. Sabharwal, Hon'ble Mr. Justice D.M. Dharmadikhari, Hon'ble Mr. Justice Tarun Chatterjee

Writ Petition (civil) 496 of 2002 decided on 2 August, 2005

Salem Advocate Bar Assn. (2) vs Union of India

"Some doubt as to a possible conflict has been expressed in view of use of the word 'may' inSection 89 when it stipulates that 'the Court may reformulate the terms of a possible settlement and refer the same for' and use of the word 'shall' in Order X, Rule 1A when it states that 'the Court shall direct the parties to the suit to opt either mode of settlements outside the Court as specified in sub-section (1) of Section 89'. As can be seen from Section 89, its first part uses the word 'shall' when it stipulates that the 'court shall formulate terms of settlement'. The use of the word 'may' in later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or other of the said modes. Section 89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89."

"A doubt has been expressed in relation to clause (d) of Section 89 (2) of the Code on the question as to finalisation of the terms of the compromise. The question is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, Arbitration, Conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be the action of persons or institutions outside the Court and not before the Court. Order X, Rule 1C speaks of the 'Conciliation forum' referring back the dispute to the Court. In fact, the court is not involved in the actual mediation/conciliation. Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards if no settlement is arrived at between the parties."

"When the parties come to a settlement upon a reference made by the Court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the Court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the Court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without decree. In such eventuality, nothing prevents them in informing the Court that the suit may be dismissed as a dispute has been settled between the parties outside the Court. Regarding refund of the court fee where the matter is settled by the reference to one of the modes provided in Section 89 of the Act, it is for the State Governments to amend the laws on the lines of amendment made in Central Court Fee Act by 1999 Amendment to the Code. The State Governments can consider making similar amendments in the State Court Fee legislations."

JUDGMENT

Y.K. Sabharwal, J.

The challenge made to the constitutional validity of amendments made to the Code of Civil Procedure (for short, 'the Code') by Amendment Acts of 1999 and 2002 was rejected by this Court {Salem Advocates Bar Association, T.N. v. Union of India [(2003) 1 SCC 49]}, but it was noticed in the judgment that modalities have to be formulated for the manner in which Section 89 of the Code and, for that matter, the other provisions which have been introduced by way of amendments, may have to be operated. For this purpose, a Committee headed by a former Judge of this Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternate Disputes Resolution (ADR) referred to in Section 89. It was also observed that the model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to Section 89(2)(d) of the Code. Further, it was observed that if any difficulties are felt in the working of the amendments, the same can be placed before the Committee which would consider the same and make necessary suggestions in its report. The Committee has filed the report.

The report is in three parts. Report 1 contains the consideration of the various grievances relating to amendments to the Code and the recommendations of the Committee. Report 2 contains the consideration of various points raised in connection with draft rules for ADR and mediation as envisaged by Section 89 of the Code read with Order X Rule 1A, 1B and 1C. It also contains model Rules. Report 3 contains a conceptual appraisal of case management. It also contains the model rules of case management.

First, we will consider Report 1 which deals with the amendments made to the Code.

Report No.1 Amendment inserting sub-section (2) to Section 26 and Rule 15(4) to Order VI Rule 15.

Prior to insertion of aforesaid provisions, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in

Section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading [Order VI Rule 15(4)]. It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings. We are unable to agree. The affidavit required to be filed under amended Section 26(2)and Order VI Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof. Amendment of Order XVIII Rule 4 The amendment provides that in every case, the examination-in- chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order XVIII Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 has been examined and its validity upheld in Salem Advocates Bar Association's case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in Salem Advocates Bar Association's case, it has been held that the trial court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross-examination and re- examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witness. That may be so but, In our view, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order XVIII Rule 4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner. The report notices that in some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. We would, however, leave it to the High Courts to examine this aspect and decide to adopt or not such a procedure. Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, we feel that generally the

expenses incurred towards the fee payable to the Commissioner is likely to be less than expenditure incurred for attending the Courts on various dates for recording evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden.

Amendment to Order XVIII Rule 5(a) and (b) was made in 1976 whereby it was provided that in all appealable cases evidence shall be recorded by the Court. Order XVIII Rule 4 was amended byAmendment Act of 1999 and again by Amendment Act of 2002. Order XVIII Rule 4(3) enables the commissioners to record evidence in all type of cases including appealable cases. The contention urged is that there is conflict between these provisions.

To examine the contention, it is also necessary to keep in view Order XVIII Rule 19 which was inserted by Amendment Act of 1999. It reads as under:

"Power to get statements recorded on commission.Notwithstanding anything contained in these rules, the Court may, instead of examining witnesses in open Court, direct their statements to be recorded on commission under rule 4A of the Order XXVI."

The aforesaid provision contains a non-obstante clause. It overrides Order XVIII Rule 5 which provides the court to record evidence in all appealable cases. The Court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well. Further, Order XXVI Rule 4-A inserted by Amendment Act of 1999 provides that notwithstanding anything contained in the Rules, any court may in the interest of justice or for the expeditious disposal of the case or for any other reason, issue Commission in any suit for the examination of any person resident within the local limits of the court's jurisdiction. Order XVIII Rule 19 and Order XXVI Rule 4-A, in our view, would override Order XVIII Rule 5(a) and (b). There is, thus, no conflict. The next question that has been raised is about the power of the Commissioner to declare a witness hostile. Order XVIII Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. Order XVIII Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission thereunder. The discretion to declare a witness hostile has not been conferred on the Commissioner. Under Section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act to declare a witness hostile.

If a situation as to declaring a witness hostile arises before a Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the commission so as to itself record remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party. Another aspect is about proper care to be taken by the Commission of the original documents. Undoubtedly, the Commission has to take proper care of the original documents handed over to him either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and

proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in case long adjournments are granted and for taking back the documents before the adjourned date. Additional Evidence In Salem Advocates Bar Association's case, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e., 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just. Order VIII Rule 1 Order VIII Rule 1, as amended by Act 46 of 1999 provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. The rigour of this provision was reduced by Amendment Act 22 of 2002 which enables the Court to extend time for filing written statement, on recording sufficient reasons therefor, but the extension can be maximum for 90 days. The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order VIII Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time even in an exceptionally hard case.

It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view. In Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur [AIR 1965 SC 895], a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

In Sangram Singh v. Election Tribunal Kotah & Anr. [AIR 1955 SC 425], considering the provisions of the Code dealing with the trial of the suits, it was opined that:

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle. "

In Topline Shoes Ltd. v. Corporation Bank [(2002) 6 SCC 33], the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice. In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having

said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1. Section 39 Section 39(1) of the Code provides that the Court which passed a decree may, on the application of the decree-holder send it for execution to another court of competent jurisdiction.By Act 22 of 2002, Section 39(4) has been inserted providing that nothing in the section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The question is whether this newly added provision prohibits the executing court from executing a decree against a person or property outside its jurisdiction and whether this provision overrides Order XXI Rule 3 and Order XXI Rule 48 or whether these provisions continue to be an exception to Section 39(4) as was the legal position before the amendment. Order XXI Rule 3 provides that where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure. Likewise, under Order XXI Rule 48, attachment of salary of a Government servant, Railway servant or servant of local authority can be made by the court whether the judgment-debtor or the disbursing officer is or is not within the local limits of the court's jurisdiction. Section 39 does not authorise the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be effected by Section 39(4) of the Code. Section 64(2) Section 64(2) in the Code has been inserted byAmendment Act 22 of 2002. Section 64, as it originally stood, has been renumbered as Section 64(1). Section 64(1), inter alia, provides that where an attachment has been made, any private transfer or delivery of property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. Sub-section (2) protects the aforesaid acts if made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. The concept of registration has been introduced to prevent false and frivolous cases of contracts being set up with a view to defeat the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid. If it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in sub-section (2) of Section 64. Order VI Rule 17 Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision. Service through Courier Order V Rule 9, inter alia, permits service of summons by party or through courier. Order V Rule 9(3) and Order V Rule 9-A permit service of summons by courier or by the plaintiff. Order V Rule 9(5) requires the court to declare that the summons had been duly served on the defendant on the contingencies mentioned in the provision. It is in the nature of deemed service. The apprehension expressed is that service outside the normal procedure is likely to lead to false reports of service and

passing of ex parte decrees. It is further urged that courier's report about defendant's refusal to accept service is also likely to lead to serious malpractice and abuse.

While considering the submissions of learned counsel, it has to be borne in mind that problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that the defendants have been avoiding to accept summons. There have been serious problems in process serving agencies in various courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier. There is, however, danger of false reports of service. It is required to be adequately guarded. The courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of person effecting service shall state as to who all were present at that time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be black-listed. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial courts by framing appropriate rules, order, regulations or practice directions.

Adjournments Order XVII of the Code relates to grant of adjournments. Two amendments have been made therein. One that adjournment shall not be granted to a party more than three times during hearing of the suit. The other relates to cost of adjournment. The awarding of cost has been made mandatory. Costs that can be awarded are of two types. First, cost occasioned by the adjournment and second such higher cost as the court deems fit.

While examining the scope of proviso to Order XVII Rule 1 that more than three adjournments shall not be granted, it is to be kept in view that proviso to Order XVII Rule 2 incorporating clauses (a) to (e) by Act 104 of 1976 has been retained. Clause (b) stipulates that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party. The proviso to Order XVII Rule 1 and Order XVII Rule 2 have to be read together. So read, Order XVII does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalized on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though circumstances may be beyond the control of a party, further adjournment cannot be granted because of restriction of three adjournments as provided in proviso to Order XVII Rule 1. In some extreme cases, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (Take the example of Bhopal Gas Tragedy, Gujarat earthquake and riots, devastation on account of Tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the Court would decide to grant or refuse adjournment. The provision for costs and higher costs has been made because of practice having been developed to award only a nominal cost even when adjournment on payment of

costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic and as far as possible actual cost that had to be incurred by the other party shall be awarded where the adjournment is found to be avoidable but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason. Further, to save proviso to Order XVII Rule 1 from the vice of Article 14 of the Constitution of India, it is necessary to read it down so as not to take away the discretion of the Court in the extreme hard cases noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances which are beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the Court by resorting to the provision of higher cost which can also include punitive cost in the discretion of the Court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case. We may, however, add that grant of any adjournment let alone first, second or third adjournment is not a right of a party. The grant of adjournment by a court has to be on a party showing special and extra- ordinary circumstances. It cannot be in routine. While considering prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict grant of adjournments. Order XVIII Rule 2 Order XVIII Rule 2(4) which was inserted by Act 104 of 1976 has been omitted by Act 46 of 1999. Under the said Rule, the Court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the status quo ante. This means that law that was prevalent prior to 1976 amendment, would govern. The principles as noticed hereinbefore in regard to deletion of Order XVIII Rule 17(a) would apply to the deletion of this provision as well. Even prior to insertion of Order XVIII Rule 2(4), such a permission could be granted by the Court in its discretion. The provision was inserted in 1976 by way of caution. The omission of Order XVIII Rule 2(4) by 1999 amendment does not take away Court's inherent power to call for any witness at any stage either suo moto or on the prayer of a party invoking the inherent powers of the Court.

In Order XVIII Rule 2 sub-rules (3A) to 3(D) have been inserted by Act 22 of 2002. The object of filing written arguments or fixing time limit of oral arguments is with a view to save time of court. The adherence to the requirement of these rules is likely to help in administering fair and speedy justice.

Order VII Rule 14 Order VII Rule 14 deals with production of documents which are the basis of the suit or the documents in plaintiff's possession or power. These documents are to be entered in the list of documents and produced in the Court with plaint. Order VII Rule 14(3) requires leave of Court to be obtained for production of the documents later. Order VII Rule 14(4) reads as under:

"Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

In the aforesaid Rule, it is evident that the words 'plaintiff's witnesses' have been mentioned as a result of mistake seems to have been committed by the legislature. The words ought to be 'defendant's witnesses'. There is a similar provision in Order VIII Rule 1A(4) which applies to a defendant. It reads as under: "Nothing in this rule shall apply to documents

(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory."

Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced

by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order VII Rule (4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words 'plaintiff's witnesses, would be read as 'defendant's witnesses' in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature. Costs Section 35 of the Code deals with the award of cost and Section 35A with award of compensatory costs in respect of false or vexatious claims or defences. Section 95 deals with grant of compensation for obtaining arrest, attachment or injunction on insufficient grounds. These three sections deal with three different aspects of award of cost and compensation. UnderSection 95 cost can be awarded upto Rs.50,000/- and under Section 35A, the costs awardable are upto Rs.3,000/-. Section 35B provides for award of cost for causing delay where a party fails to take the step which he was required by or under the Code to take or obtains an adjournment for taking such step or for producing evidence or on any other ground. In circumstances mentioned in Section 35-B an order may be made requiring the defaulting party to pay to other party such costs as would, in the opinion of the court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of the suit or the defence. Section 35 postulates that the cost shall follow the event and if not, reasons thereof shall be stated. The award of the cost of the suit is in the discretion of the Court. In Sections 35 and 35B, there is no upper limit of amount of cost awardable. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.

Section 80 Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two months period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in

few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80. These provisions cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices underSection 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him. Section 115 of the Code vests power of revision in the High Court over courts subordinate to it. Proviso to Section 115(1) of the Code before the amendment by Act 46 of 1999 read as under : "Provided that the High Court shall not, under this section vary or reverse any order made, or may order deciding an issue, in the course of a suit or other proceeding except where

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

Now, the aforesaid proviso has been substituted by the following proviso. :

"Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

The aforesaid clause (b) stands omitted. The question is about the constitutional powers of the High Courts under Article 227 on account of omission made in Section 115 of the Code. The question stands settled by a decision of this Court in Surya Dev Rai v. Ram Chander Rai & Ors. [2003 (6) SCC 675] holding that the power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under Section 115 of the Code does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists, untrammeled by the amendment in Section 115 and is available to be exercised subject to rules of self-discipline and practice which are as well settled.

Section 148 The amendment made in Section 148 affects the power of the Court to enlarge time that may have been fixed or granted by the Court for the doing of any act prescribed or allowed by the Code. The amendment provides that the period shall not exceed 30 days in total. Before amendment, there was no such restriction of time. Whether the Court has no inherent power to extend the time

beyond 30 days is the question. We have no doubt that the upper limit fixed inSection 148 cannot take away the inherent power of the Court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of Court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to fully operate. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for the reasons beyond the control of the party. We are not dealing with a case where time for doing an act has been prescribed under the provisions of the Limitation Act which cannot be extended either under Section 148 or Section 151. We are dealing with a case where the time is fixed or granted by the Court for performance of an act prescribed or allowed by the Court.

In Mahanth Ram Das v. Ganga Das [AIR 1961 SC 882], this Court considered a case where an order was passed by the Court that if the Court fee was not paid by a particular day, the suit shall stand dismissed. It was a self-operating order leading to dismissal of the suit. The party's application filed under Sections 148 and 151 of the Code for extension of time was dismissed. Allowing the appeal, it was observed: "How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory (conditional decree apart), are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time, but was set upon and robbed by thieves the day previous, he could not ask for extension of time or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians."

There can be many cases where non-grant of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice. Section 148, therefore, deserves to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the Court would have inherent power to extend time beyond 30 days.

Order IX Rule 5 The period of seven days mentioned in Order IX Rule 5 is clearly directory.

Order XI Rule 15 The stipulation in Rule 15 of Order XI confining the inspection of documents 'at or before the settlement of issues' instead of 'at any time' is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues. Judicial Impact Assessment The Committee has taken note of para 7.8.2 of Volume I of the Report of the National Commission to Review the Working of the Constitution which reads as follows : "7.8.2 Government of India should not throw the entire burden of establishing the subordinate courts and maintaining the subordinate judiciary on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State Judiciary in each of the States."

The Committee has further noticed that : "33.3 As pointed out by the Constitution Review Commission, the laws which are being administered by the Courts which are subordinate to the High Court are laws which have been made by,

(a) parliament on subjects which fall under the Entries in List I and List III of Schedule 7 to the Constitution, or

(b) State legislatures on subjects which fall under the Entries in List II and List III of Schedule 7 to the Constitution.

But, the bulk of the cases (civil, criminal) in the subordinate Courts concern the Law of Contract,Transfer of Property Act, Sale of Goods Act, Negotiable Instruments Act, Indian Penal Code, Code of Civil Procedure, Code of Criminal Procedure etc., which are all Central Laws made under List III. In addition, the subordinate Courts adjudicate cases (in civil, criminal) arising under Central Laws made under List I.

33.4 The central Government has, therefore, to bear a substantial portion of the expenditure on subordinate Courts which are now being established/maintained by the States. (The Central Government has only recently given monies for the fast track courts but these courts are a small fraction of the required number). 33.5 Under Article 247, Central Government could establish Courts for the purpose of administering Central Laws in List I. Except a few Tribunals, no such Courts have been established commensurate with the number of cases arising out of subjects in List I."

The Committee has suggested that the Central Government has to provide substantial funds for establishing courts which are subordinate to the High Court and the Planning Commission and the Finance must make adequate provisions therefore, noticing that it has been so recommended by the Constitution Review Committee. The Committee has also suggested that : "Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many Courts are necessary, how many Judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such a judicial impact assessment has never been made by any legislature or by Parliament in our country."

Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report on this Court within four months.

Report No.2 We will now take up Report No.2 dealing with model Alternative Dispute Resolution and Mediation Rules. Part X of the Code (Sections 121 to 131) contains provisions in respect of the Rules. Sections 122 and 125 enable the High Courts to make Rules. Section 128 deals with matters for which rules may provide. It, inter alia, states that the rules which are not inconsistent with the provisions in the body of the Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts. The question for consideration is about framing of the rules for the purposes of Section 89 and Order X Rules 1A, 1B and 1C. These provisions read 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 given them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for

(a) arbitration;

(b) conciliation;

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

(d) mediation.

(2) Where a dispute has been referred

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

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

(c) for judicial settlement, the Court shall refer the 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.

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 authorityWhere a suit is referred under rule 1A, 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 conciliationWhere 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."

Some doubt as to a possible conflict has been expressed in view of use of the word 'may' inSection 89 when it stipulates that 'the Court may reformulate the terms of a possible settlement and refer the same for' and use of the word 'shall' in Order X, Rule 1A when it states that 'the Court shall direct the parties to the suit to opt either mode of settlements outside the Court as specified in sub-section (1) of Section 89'. As can be seen from Section 89, its first part uses the word 'shall' when it stipulates that the 'court shall formulate terms of settlement'. The use of the word 'may' in later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or other of the said modes. Section 89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89.

One of the modes to which the dispute can be referred is 'Arbitration'. Section 89 (2) provides that where a dispute has been referred for Arbitration or Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') shall apply as if the proceedings for Arbitration or Conciliation were referred for settlement under the provisions of 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to Arbitration where there is arbitration agreement. As held in P.Anand Gajapathi Raju and Others v. P.V.G.Raju (Dead) and Others[(2000) 4 SCC 539], 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89of the Code where the Court asks the parties to choose one or other ADRs including Arbitration and the parties choose Arbitration as their option. Of course, the parties have to agree for Arbitration. Section 82 of 1996 Act enables the High Court to make Rules consistent with this Act as to all proceedings before the Court under 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to Arbitration among four ADRs is not contemplated by the 1996 Act and, therefore, Section 82 or 84 has no applicability where parties agree to go for arbitration under Section 89 of the Code. As already noticed, for the purposes of Section 89 and Order X, Rule 1A, 1B and 1C, the relevant Sections in Part X of the Code enable the High Court to frame rules. If reference is made to Arbitration underSection 89 of the Code, 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties. On the same analogy, 1996 Act in relation to Conciliation would apply only after the stage of reference to Conciliation. The 1996 Act does not deal with a situation where after suit is filed, the court requires a party to choose one or other ADRs including Conciliation. Thus, for Conciliation also rules can be made under Part X of the Code for purposes of procedure for opting for 'Conciliation' and upto the stage of reference to Conciliation. Thus, there is no impediment in the ADR rules being framed in relation to Civil Court as contemplated in Section 89 upto the stage of reference to ADR. The 1996 Act comes into play only after the stage of reference upto the award. Applying the same analogy, the Legal Services Authority Act, 1987 (for short '1987 Act') or the Rules framed thereunder by the State Governments cannot act as impediment in the High Court making rules under Part X of the Code covering the manner in which option to Lok Adalat can be made being one of the modes provided in Section 89. The 1987 Act also does not deal with the aspect of exercising option to one of four ADR methods mentioned in Section 89. Section 89makes applicable 1996 Act and 1987 Act from the stage after exercise of options and making of reference.

A doubt has been expressed in relation to clause (d) of Section 89 (2) of the Code on the question as to finalisation of the terms of the compromise. The question is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, Arbitration, Conciliation, judicial settlement including settlement through Lok Adalat and mediation are meant to be the action of persons or institutions outside the Court and not before the Court. Order X, Rule 1C speaks of the 'Conciliation forum' referring back the dispute to the Court. In fact, the court is not involved in the actual mediation/conciliation. Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit

afterwards if no settlement is arrived at between the parties. The question also is about the payment made and expenses to be incurred where the court compulsorily 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. With a view to enable the Court to refer the parties to conciliation/mediation, where parties are unable to reach a consensus on an agreed name, there should be a panel of well trained conciliators/ mediators to which it may be possible for the Court to make a reference. It would be necessary for the High Courts and district courts to take appropriate steps in the direction of preparing the requisite panels. A doubt was expressed about the applicability of ADR rules for dispute arising under the Family Courts Actsince that Act also contemplates rules to be made. It is, however, to be borne in mind that theFamily Courts Act applies the Code for all proceedings before it. In this view, ADR rules made under the Code can be applied to supplement the rules made under the Family Courts Act and provide for ADR insofar as conciliation/mediation is concerned. It seems clear from the report that while drafting the model rules, after examining the mediation rules in various countries, a fine distinction is tried 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.

When the parties come to a settlement upon a reference made by the Court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the Court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the Court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without decree. In such eventuality, nothing prevents them in informing the Court that the suit may be dismissed as a dispute has been settled between the parties outside the Court. Regarding refund of the court fee where the matter is settled by the reference to one of the modes provided in Section 89 of the Act, it is for the State Governments to amend the laws on the lines of amendment made in Central Court Fee Act by 1999 Amendment to the Code. The State Governments can consider making similar amendments in the State Court Fee legislations.

The draft rules have been finalised by the Committee. Prior to finalisation, the same were circulated to the High Courts, subordinate courts, the Bar Council of India, State Bar Councils and the Bar Associations, seeking their responses. Now, it is for the respective High Courts to take appropriate

steps for making rules in exercise of rule making power subject to modifications, if any, which may be considered relevant.

The draft Civil Procedure-Alternative Dispute Resolution and Mediation Rules as framed by the Committee read as under: "Civil Procedure ADR and Mediation Rules (These Rules are the final Rules framed by the Committee, in modification of the Draft Rules circulated earlier, after considering the responses to the Consultation paper) Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003 In exercise of the rule making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (d) of sub-section (2) of Section 89 of the said Code, the High Court of .., is hereby issuing the following Rules:

Part I Alternative Dispute Resolution Rules Rule 1: Title These Rules in Part I shall be called the 'Civil Procedure Alternative Dispute Resolution Rules 2003'.

Rule 2: Procedure for directing parties to opt for alternative modes of settlement

(a) The Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X, and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, formulate the terms of settlement and give them to the parties for their observations under sub- section (1) of Section 89, and the parties shall submit to the Court their responses within thirty days of the first hearing.

(b) At the next hearing, which shall be not later than thirty days of the receipt of responses, the Court may reformulate the terms of a possible settlement and shall direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in clauses (a) to (d) of sub-section (1) of Section 89 read with Rule 1A of Order X, in the manner stated hereunder, Provided that the Court, in the exercise of such power, shall not refer any dispute to arbitration or to judicial settlement by a person or institution without the written consent of all the parties to the suit.

Rule 3: Persons authorized to take decision for the Union of India, State Governments and others:

(1) For the purpose of Rule 2, the Union of India or the Government of a State or Union Territory, all local authorities, all Public Sector Undertakings, all statutory corporations and all public authorities shall nominate a person or persons or group of persons who are authorized to take a final decision as to the mode of Alternative Dispute Resolution in which it proposes to opt in the event of direction by the Court under Section 89 and such nomination shall be communicated to the High Court within the period of three months from the date of commencement of these Rules and the High Court shall notify all the subordinate courts in this behalf as soon as such nomination is received from such Government or authorities.

(2) Where such person or persons or group of persons have not been nominated as aforesaid, such party as referred to in clause (1) shall, if it is a plaintiff, file along with the plaint or if it is a defendant file, along with or before the filing of the written statement, a memo into the Court, nominating a person or persons or group of persons who is or are authorized to take a final decision as to the mode of alternative dispute resolution, which the party prefers to adopt in the event of the Court directing the party to opt for one or other mode of Alternative Dispute Resolution.

Rule 4: Court to give guidance to parties while giving direction to opt

(a) Before directing the parties to exercise option under clause (b) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely :

(i) that it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one or other of these modes of settlement referred to in section 89 rather than seek a trial on the disputes arising in the suit;

(ii) that, where there is no relationship between the parties which requires to be preserved, it may be in the interest of the parties to seek reference of the matter of arbitration as envisaged in clause (a) of sub-section (1) of section 89.

(iii) that, where there is a relationship between the parties which requires to be preserved, it may be in the interest of parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of section

89. Explanation : Disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

(iv) that, where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to Lok Adalat or to judicial settlement as envisaged in clause (c) of sub-section (1) of section 89.

(v) the difference between the different modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement as explained below :

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

Settlement by 'Conciliation' means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) in so far as they relate to conciliation, and in particular, in exercise of his powers under sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

Settlement by 'Mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties own responsibility for making decisions which affect them.

Settlement in Lok Adalat means settlement by Lok Adalat as contemplated by the Legal Services Authority Act, 1987.

'Judicial settlement' means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are

deemed to be the Lok Adalats under the provisions of the Legal Service Authority Act, 1987 (39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the provisions of that Act.

Rule 5 : Procedure for reference by the Court to the different modes of settlement :

(a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under clause (b) of Rule 2 and the Court shall, within thirty days of the said application, refer the matter to arbitration and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to arbitration under that Act, shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;

(b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat or where one of the parties applies for reference to Lok Adalat, the procedure envisaged under the Legal Services Act, 1987 and in particular by section 20 of that Act, shall apply.

(c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within thirty days of the direction under clause (b) of Rule 2 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Services Authority Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to Lok Adalat under that Act, shall apply as if the proceedings were referred for settlement under the provisions of that Act;

(d) Where none of the parties are willing to agree to opt or agree to refer the dispute to arbitration, or Lok Adalat, or to judicial settlement, within thirty days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

(e) (i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the application refer the matter to conciliation and thereafter the provisions of the Arbitration andConciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to conciliation under that Act, shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act;

(ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

(f) Where under clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within thirty days of the direction under clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the

case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application, and

(i) in case all the parties agree for conciliation, the Court shall refer the matter to conciliation and thereafter, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act, shall apply.

(ii) in case all the parties agree for mediation, the Court shall refer the matter to mediation in accordance with the Civil Procedure Mediation Rules, 2003 in Part II shall apply.

(iii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure-Mediation Rules, 2003, shall apply.

(g) (i) Where none of the parties apply for reference either to arbitration, or Lok Adalat, or judicial settlement, or for conciliation or mediation, within thirty days of the direction under clause (b) of Rule 2, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

(ii) After hearing the parties or their representatives on the day so fixed the Court shall, if there exist elements of a settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, refer the matter to conciliation or mediation. In case the dispute is referred to Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to Conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure Mediation Rules, 2003, shall apply.

(h) (i) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings of the Court, opt for any one of the modes of alternative dispute resolution nor shall enter into any settlement on behalf of a minor or person under disability with reference to the suit in which he acts as mere friend or guardian.

(ii) Where an application is made to the Court for leave to enter into a settlement initiated into in the alternative dispute resolution proceedings on behalf of a minor or other person under disability and such minor or other person under disability is represented by Counsel or pleader, the counsel or pleader shall file a certificate along with the said application to the effect that the settlement is, in his opinion, for the benefit of the minor or other person under disability. The decree of the Court based on the settlement to which the minor or other person under disability is a

party, shall refer to the sanction of the Court thereto and shall set out the terms of the settlement.

Rule 6 : Referral to the Court and appearance before the Court upon failure of attempts to settle disputes by conciliation or judicial settlement or mediation :

(1) Where a suit has been referred for settlement for conciliation, mediation or judicial settlement and has not been settled or where it is felt that it would not be proper in the interests of justice to proceed further with the matter, the suit shall be referred back again to the Court with a direction to the parties to appear before the Court on a specific date.

(2) Upon the reference of the matter back to the Court under sub-rule (1) or under sub-section (5) of section 20 of the Legal Services Authority Act, 1987, the Court shall proceed with the suit in accordance with law.

Rule 7 : Training in alternative methods of resolution of disputes, and preparation of manual :

(a) The High Court shall take steps to have training courses conducted in places where the High Court and the District Courts or Courts of equal status are located, by requesting bodies recognized by the High Court or the Universities imparting legal education or retired Faculty Members or other persons who, according to the High Court are well versed in the techniques of alternative methods of resolution of dispute, to conduct training courses for lawyers and judicial officers.

(b) (i) The High Court shall nominate a committee of judges, faculty members including retired persons belonging to the above categories, senior members of the Bar, other members of the Bar specially qualified in the techniques of alternative dispute resolution, for the purpose referred to in clause (a) and for the purpose of preparing a detailed manual of procedure for alternative dispute resolution to be used by the Courts in the State as well as by the arbitrators, or authority or person in the case of judicial settlement or conciliators or mediators.

(ii) The said manual shall describe the various methods of alternative dispute resolution, the manner in which any one of the said methods is to be opted for, the suitability of any particular method for any particular type of dispute and shall specifically deal with the role of the above persons in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.

(c) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of alternative dispute resolution procedures throughout the State or States over which the High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers.

(d) Persons who have experience in the matter of alternative dispute resolution procedures, and in particular in regard to conciliation and mediation, shall be given preference in the matter of empanelment for purposes of conciliation or mediation. Rule 8 : Applicability to other proceedings : The provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (66 of 1984), while dealing with matrimonial, maintenance and child custody disputes, wherever necessary, in addition to the rules framed under the Family Courts Act, (66 of 1984). PART II CIVIL PROCEDURE MEDIATION RULES Rule 1 : Title :

These Rules in Part II shall be called the Civil Procedure Mediation Rules, 2003. Rule 2 : Appointment of mediator :

(a) Parties to a suit may all agree on the name of the sole mediator for mediating between them.

(b) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.

(c) Where parties agree on a sole mediator under clause (a) or where parties nominate more than one mediator under clause (b), the mediator need not necessarily be from the panel of mediators referred to in Rule 3 nor bear the qualifications referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5.

(d) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

Rule 3 : Panel of mediators :

(a) The High Court shall, for the purpose of appointing mediators between parties in suits filed on its original side, prepare a panel of mediators and publish the same on its Notice Board, within thirty days of the coming into force of these Rules, with copy to the Bar Association attached to the original side of the High Court.

(b) (i) The Courts of the Principal District and Sessions Judge in each District or the Courts of the Principal Judge of the City Civil Court or Courts of equal status shall, for the purposes of appointing mediators to mediate between parties in suits filed on their original side, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the same on their respective Notice Board.

(ii) Copies of the said panels referred to in clause (i) shall be forwarded to all the Courts of equivalent jurisdiction or Courts subordinate to the Courts referred to in sub-clause (i) and to the Bar associations attached to each of the Courts :

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

(d) The panel of names shall contain a detailed Annexure giving details of the qualifications of the mediators and their professional or technical experience in different fields. Rule 4 : Qualifications of persons to be empanelled under Rule 3 :

The following persons shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 3, namely :

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

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status.

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

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

Rule 5 : Disqualifications of persons :

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

(i) any person who has been adjudged as insolvent or is declared of unsound mind.

(ii) or any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending, or

(iii) any person who has been convicted by a criminal court for any offence involving moral turpitude;

(iv) any person against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment.

(v) any person who is interested or connected with the subject-matter of dispute 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.

(vi) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings.

(vii) such other categories of persons as may be notified by the High Court.

Rule 6 : Venue for conducting mediation : The mediator shall conduct the mediation at one or other of the following places:

(i) Venue of the Lok Adalar or permanent Lok Adalat.

(ii) Any place identified by the District Judge within the Court precincts for the purpose of conducting mediation.

(iii) Any place identified by the Bar Association or State Bar Council for the purpose of mediation, within the premises of the Bar Association or State Bar Council, as the case may be.

(iv) Any other place as may be agreed upon by the parties subject to the approval of the Court.

Rule 7: Preference:

The Court shall, while nominating any person from the panel of mediators referred to in Rule 3, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation. Rule 8: Duty of mediator to disclose certain facts :

(a) When a person is approached in connection with his possible appointment as a mediator, the person shall disclose in writing to the parties, any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.

(b) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in clause (a). Rule 9 : Cancellation of appointment : Upon information furnished by the mediator under Rule 8 or upon any other information received from the parties or other persons, if the Court, in which the suit is filed, is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator.

Rule 10 : Removal or deletion from panel : A person whose name is placed in the panel referred to in Rule 3 may be removed or his name be deleted from the said panel, by the Court which empanelled him, if :

(i) he resigns or withdraws his name from the panel for any reason;

(ii) he is declared insolvent or is declared of unsound mind;

(iii) he is a person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;

(iv) he is a person who has been convicted by a criminal court for any offence involving moral turpitude;

(v) he is a person against whom disciplinary proceedings on charges relating to moral turpitude have been initiated by appropriate disciplinary authority which are pending or have resulted in a punishment;

(vi) he exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;

(vii) the Court which empanelled, upon receipt of information, if it is satisfied, after conducting such inquiry as it deem fit, is of the view, that it is not possible or desirable to continue the name of that person in the panel, Provided that, before removing or deleting his name, under clause (vi) and

(vii), the Court shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order.

Rule 11 : Procedure of mediation :

(a) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

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

(i) he shall fix, in consultation with the parties, a time schedule, the dates and the time of each mediation session, where all parties have to be present;

(ii) he shall hold the mediation conference in accordance with the provisions of Rule 6;

(iii) he may conduct joint or separate meetings with the parties;

(iv) each party shall, ten days before a session, provide to the mediator 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 to understand the issue; such memoranda shall also be mutually exchanged between the parties;

(v) each party shall furnish to the mediator, copies of pleadings or documents or such other information as may be required by him in connection with the issues to be resolved.

Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix.

(vi) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.

(c) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party that nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes.

Rule 12 : Mediator not bound by Evidence Act, 1872 or Code of Civil Procedure, 1908 :

The mediator shall not be bound by the Code of Civil Procedure 1908 or the Evidence Act, 1872, but shall be guided by principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

Rule 13 : Non-attendance of parties at sessions or meetings on due dates :

(a) The parties shall be present personally or may be represented by their counsel or power of attorney holders at the meetings or sessions notified by the mediator.

(b) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the Court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the Court finds that a party is absenting himself before the mediator without sufficient reason, the Court may take action against the said party by imposition of costs.

(c) The parties not resident in India, may be represented by their counsel or power of attorney holders at the sessions or meetings.

Rule 14 : Administrative assistance : In order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

Rule 15 : Offer of settlement by parties :

(a) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.

(b) Any party to the suit may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with notice to the mediator.

Rule 16 : Role of mediator :

The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which effect them; he shall not impose any terms of settlement on the parties. Rule 17 : Parties alone responsible for taking decision :

The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

Rule 18 : Time limit for completion of mediation : On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the Court, which referred the matter, either suo moto, or upon request by the mediator or 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.
Rule 19 : Parties to act in good faith:

While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute, if possible.

Rule 20 : Confidentiality, disclosure and inadmissibility of information :

(1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.

(2) when a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding the documents or what is conveyed to him orally as to what transpired during the mediation.

(3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the documents nor in regard to the oral information nor as to what transpired during the mediation.

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

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

(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

(c) proposals made or views expressed by the mediator;

(d) admission made by a party in the course of mediation proceedings;

(e) the fact that a party had or had not indicated willingness to accept a proposal;

(5) There shall be no stenographic or audio or video recording of the mediation proceedings.

Rule 21 : Privacy Mediation sessions and meetings are private; only the concerned parties or their counsel or power of attorney holders can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.

Rule 22 : Immunity :

No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

Rule 23 : Communication between mediator and the Court :

(a) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should be no communication between the mediator and the Court, except as stated in clauses (b) and (c) of this Rule.

(b) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.

(c) Communication between the mediator and the Court shall be limited to communication by the mediator :

(i) with the Court about the failure of party to attend;

(ii) with the Court with the consent of the parties;

(iii) regarding his assessment that the case is not suited for settlement through mediation;

(iv) that the parties have settled the dispute or disputes.

Rule 24 : Settlement Agreement :

(1) 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 to writing and signed by the parties or their power of attorney holder. If any counsel have represented the parties, they shall attest the signature of their respective clients.

(2) 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.

(3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said Court in writing. Rule 25 : Court to fix a date for recording settlement and passing decree :

(1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement, if it is not collusive.

(2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.

(3) If the settlement disposes of only certain issues arising in the suit, the Court shall record the settlement on the date fixed for recording the settlement and (i) if the issues are servable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, the Court may pass a decree straightaway in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled.

(ii) if the issues are not servable, the Court shall wait for a decision of the Court on the other issues which are not settled.

Rule 26 : Fee of mediator and costs :

(1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.,

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

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

(4) The expense of the mediation including the fee of the mediator, 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.

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

(6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in clauses (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the Court.

(7) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or 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.

(8) Where a party is entitled to legal aid under section 12 of the Legal Services Authority Act, 1987, the amount of fee payable to the mediator and costs shall be paid by the concerned Legal Services Authority under that Act.

Rule 27 : Ethics to be followed by mediator : The mediator shall :

(1) follow and observe these Rules strictly and with due diligence;

(2) not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;

(3) uphold the integrity and fairness of the mediation process;

(4) ensure that the parties involved in the mediation and fairly informed and have an adequate understanding of the procedural aspects of the process;

(5) satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner; (6) disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;

(7) avoid, while communicating with the parties, any impropriety or appearance of impropriety;

(8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator;

(9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

(10) recognize that mediation is based on principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;

(11) maintain the reasonable expectations of the parties as to confidentiality;

(12) refrain from promises or guarantees of results.

Rule 28 : Transitory provisions :

Until a panel of arbitrators is prepared by the High Court and the District Court, the Courts referred to in Rule 3, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 4 and is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute."

Report No.3 Report No.3 deals with the Case Flow Management and Model Rules. The case management policy can yield remarkable results in achieving more disposal of the cases. Its mandate is for the Judge or an officer of the court to set a time-table and monitor a case from its initiation to its disposal. The Committee on survey of the progress made in other countries has come to a conclusion that the case management system has yielded exceedingly good results.

Model Case Flow Management Rules have been separately dealt with for trial courts and first appellate subordinate courts and for High Courts. These draft Rules extensively deal with the various stages of the litigation. The High Courts can examine these Rules, discuss the matter and consider the question of adopting or making case law management and model rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice.

The Model Case Flow Management Rules read as under: "MODEL CASE FLOW MANAGEMENT RULES (A) Model Case Management Rules for Trial Courts and First Appellate Subordinate Courts

I. Division of Civil Suits and Appeals into Tracks

II. Original Suits

1. Fixation of time limits while issuing notice
2. Service of Summons/notice and completion of pleadings
3. Calling of Cases (Hajri or Call Work or Roll Call)
4. Procedure on the grant of interim orders
5. Referral to Alternate Dispute Resolution
6. Procedure on the failure of Alternate Dispute Resolution
7. Referral to Commissioner for recordal of evidence
8. Costs
9. Proceedings for Perjury
10. Adjournments
11. miscellaneous Applications.

III. First Appeals to Subordinate Courts

1. Service of Notice of Appeal
2. Essential Documents to be filed with the Memorandum of Appeal
3. Fixation of time limits in interlocutory matters
4. Steps for completion of all formalities (Call Work Hajri)
5. Procedure on grant of interim-orders
6. Filing of Written submissions
7. Costs

IV. Application/Petition under Special Acts V. Criminal Trial and Criminal Appeals to Subordinate Courts

(a) Criminal Trials

(b) Criminal Appeals VI. Notice under section 80 of Code of Civil Procedure VII. Note (B) Model Case Flow Management Rules in High Court I. Division of Cases into Tracks II. Writ of Habeas Corpus III. Mode of Advance Service IV. First Appeals to High Court V. Appeals to Division Bench VI. Second Appeals.

VII. Civil Revisions

VIII. Criminal Appeals IX. Note.

..High Court Rules, 2003 In exercise of the power conferred by Part X of the Code of Civil Procedure 1908, (5 of 1908) and .. High Court Act, and all other powers enabling, the . High Court hereby makes the following Rules, in regard to case flow management in

the subordinate courts. (A) Model Rules for Trial Courts and First Appellate Subordinate Courts I. Division of Civil Suits and Appeals into Tracks

1. Based on the nature of dispute, the quantum of evidence to be recorded and the time likely to be taken for the completion of suit, the suits shall be channeled into different tracks. Track I may include suits for maintenance, divorce and child custody and visitation rights, grant of letters of administration and succession certificate and simple suits for rent or for eviction (upon notice under Section 106 of Transfer of Property Act). Track 2 may consist of money suits and suits based solely on negotiable instruments. Track 3 may include suits concerning partition and like property disputes, trademarks, copyrights and other intellectual property matters. Track 4 may relate to other matters. All efforts shall be taken to complete the suits in track 1 within a period of 9 months, track 2 within 12 months and suits in track 3 and 4 within 24 months.

   This categorization is illustrative and it will be for the High Court to make appropriate categorization. It will be for the judge concerned to make an appropriate assessment as to which track any case can be assigned.

2. Once in a month, the registry/administrative staff of each Court will prepare a report as to the stage and progress of cases which are proposed to be listed in next month and place the report before the Court. When the matters are listed on each day, the judge concerned may take such decision as he may deem fit in the presence of counsel/parties in regard to each case for removing any obstacles in service of summons, completion of pleadings etc. with a view to make the case ready for disposal.

3. The judge referred to in clause (2) above, may shift a case from one track to another, depending upon the complexity and other circumstances of the case.

4. Where computerization is available, the monthly data will be fed into the computer in such a manner that the judge referred to in clause (2) above, will be able to ascertain the position and the stage of every case in every track from the computer screen. Over a period, all cases pending in his Court will be covered. Where computerization is not available, the monitoring must be done manually.

5. The judge referred to in clause (2) above, shall monitor and control the flow or progress of every case, either from the computer or from the register or data placed before him in the above manner or in some other manner he may innovate.

II. ORIGINAL SUIT :

1. Fixation of time limits while issuing notice :

   (a) Wherever notice is issued in a suit, the notice should indicate that the Code prescribes a maximum of 30 days for filing written statement (which for special reasons may be extended upto 90 days) and, therefore, the defendants may prepare the written statement expeditiously and that the matter will be listed for that purpose on the expiry of eight weeks from the date of issue of notice (so that it can be a definite date). After the written statement is filed, the replication (if any, proposed and permitted),

should be filed within six weeks of receipt of the written statement. If there are more than one defendant, each one of the defendant should comply with this requirement within the time-limit.

(b) The notice referred to in clause (a) shall be accompanied by a complete copy of the plaint and all its annexure/enclosures and copies of the interlocutory applications, if any.

(c) If interlocutory applications are filed along with the plaint, and if an ex-parte interim order is not passed and the Court is desirous of hearing the respondent, it may, while sending the notice along with the plaint, fix an earlier date for the hearing of the application (than the date for filing written statement) depending upon the urgency for interim relief.

2. Service of Summons/notice and completion of pleadings :

(a) Summons may be served as indicated in clause (3) of Rule 9 of Order V.

(b) In the case of service of summons by the plaintiff or a courier where a return is filed that the defendant has refused notice, the return will be accompanied by an undertaking that the plaintiff or the courier, as the case may be, is aware that if the return is found to be false, he can be punished for perjury or summarily dealt with for contempt of Court for abuse of the provisions of the Code. Where the plaintiff comes forward with a return of 'refusal', the provisions of Order 9A Rule (4) will be followed by re-issue of summons through Court.

(c) If it has not been possible to effect service of summons under Rule 9 of Order V, the provisions of Rule 17 of Order V shall apply and the plaintiff shall within 7 days from the date of its inability to serve the summons, to request the Court to permit substituted service. The dates for filing the written statement and replication, if any, shall accordingly stand extended.

3. Calling of Cases (Hajri or Call Work or Roll Call) :

The present practice of the Court-master or Bench-clerk calling all the cases listed on a particular day at the beginning of the day in order to confirm whether counsel are ready, whether parties are present or whether various steps in the suit or proceeding has been taken, is consuming a lot of time of the Court, sometimes almost two hours of the best part of the day when the judge is fresh. After such work, the Court is left with very limited time to deal with cases listed before it. Formal listing should be first before a nominated senior officer of the registry, one or two days before the listing in Court. He may give dates in routine matters for compliance with earlier orders of Court. Cases will be listed before Court only where an order of the Court is necessary or where an order prescribing the consequences of default or where a peremptory order or an order as to costs is required to be passed on the judicial side. Cases which have to be adjourned as a matter of routine for taking steps in the suit or proceeding should not be unnecessarily listed before Court. Where parties/counsel are not attending before the Court-officer or are defiant or negligent, their cases may be placed before the Court. Listing of cases on any day before a Court should be based on a reasonable estimate of time and number of cases that can be disposed of by the Court in a particular day. The Courts shall, therefore, dispense with the

practice of calling all the cases listed adjourned to any particular day. Cases will be first listed before a nominated senior officer of the Court, nominated for the purpose.

4. Procedure on the grant of interim orders:

   (a) If an interim order is granted at the first hearing by the Court, the defendants would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

   (b) If the Court passes an ad-interim ex-parte order in an interlocutory application, and the reply by the defendants is filed, and if, thereafter, the plaintiff fails to file the rejoinder (if any) without good reason for the delay, the Court has to consider whether the stay or interim order passed by the Court should be vacated and shall list the case with that purpose. This is meant to prevent parties taking adjournment with a view to have undue benefit of the ad interim orders. The plaintiff may, if he so chooses, also waive his right to file a rejoinder. A communication of option by the plaintiff not to file a rejoinder, made to the registry will be deemed to be the completion of pleadings in the interlocutory application.

5. Referral to Alternate Dispute Resolution: (In the hearing before the Court, after completion of pleadings, time limit for discovery and inspection, and admission and denials, of documents shall be fixed, preferably restricted to 4 weeks each) After the completion of admission and denial of documents by the parties, the suit shall be listed before the Court (for examination of parties under Order X of the Civil Procedure Code. A joint statement of admitted facts shall be filed before the said date.) The Court shall thereafter, follow the procedure prescribed under the Alternative Dispute Resolution and Mediation Rules, 2002.

6. Procedure on the failure of Alternate Dispute Resolution :

   On the filing of report by the Mediator under the Mediation Rules that efforts at Mediation have failed, or a report by the Conciliator under the provisions of the Arbitration and Conciliation Act, 1996, or a report of no settlement in the Lok Adalat under the provisions of the Legal Services Authority Act, 1987 the suit shall be listed before the registry within a period of 14 days. At the said hearing before the registry, all the parties shall submit the draft issues proposed by them. The suit shall be listed before the Court within 14 days thereafter for framing of issues.

   When the suit is listed after failure of the attempts at conciliation, arbitration or Lok Adalat, the Judge may merely inquire whether it is still possible for the parties to resolve the dispute. This should invariably be done by the Judge at the first hearing when the matter comes back on failure of conciliation, mediation or Lok Adalt. If the parties are not keen about settlement, the Court shall frame the issues and direct the plaintiff to start examining his witnesses. The procedure of each witness filing his examination- in-chief and being examined in cross or re- examination will continue, one after the other. After completion of evidence on the plaintiff's side, the defendants shall lead evidence likewise, witness after witness, the chief examination of each witness being by affidavit and the witness being then cross-examined or re-examined. The parties shall keep he

affidavit in chief-examination ready whenever the witness's examination is taken up. As far as possible, evidence must be taken up day by day as stated in clause (a) of proviso to Rule 2 of Order XVII. The parties shall also indicate the likely duration for the evidence to be completed, and for the arguments to be thereafter heard. The Judge shall ascertain the availability of time of the Court and will list the matter for trial on a date when the trial can go on from day to day and conclude the evidence. The possibility of further negotiation and settlement should be kept open and if such a settlement takes place, it should be open to the parties to move the registry for getting the matter listed at an earlier date for disposal.

7. Referral to Commissioner for recordal of evidence :

(a) The High Court shall conduct an examination on the subjects of the Code of Civil Procedure and Evidence Act. Only those advocates who have passed an examination conducted by the High Court on the subjects of 'Code of Civil Procedure' and Evidence Act, - shall be appointed as Commissioners for recording evidence. They shall be ranked according to the marks secured by them.

(b) It is not necessary that in every case the Court should appoint a Commissioner for recording evidence. Only if the recording of evidence is likely to take a long time, or there are any other special grounds, should the Court consider appointing a Commissioner for recording the evidence. The Court should direct that the matter be listed for arguments fifteen days after the Commissioner files his report with the evidence.

The Court may initially fix a specific period for the completion of the recording of the evidence by the Commissioner and direct the matter to be listed on the date of expiry of the period, so that Court may know whether the parties are co-operating with the Commissioner and whether the recording of evidence is getting unnecessarily prolonged.

(c) Commissioners should file an undertaking in Court upon their appointment that they will keep the records handed over to them and those that may be filed before them, safe and shall not allow any party to inspect them in the absence of the opposite party/counsel. If there is delay of more than one month in the dates fixed for recording evidence, it is advisable for them to return the file to the Court and take it back on the eve of the adjourned date.

8. Costs :

So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory in as much as the liberal attitude of the Courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary

costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.

9. Proceedings for Perjury :

If the Trial Judge, while delivering the judgment, is of the view that any of the parties or witnesses have willfully and deliberately uttered blatant falsehoods, he shall consider (at least in some grave cases) whether it is a fit case where prosecution should be initiated for perjury and order prosecution accordingly.

10. Adjournments :

The amendments to the Code have restricted the number of adjournments to three in the course of hearing of the suit, on reasonable cause being shown. When a suit is listed before a Court and any party seeks adjournment, the Court shall have to verify whether the party is seeking adjournment due to circumstances beyond the control of the party, as required by clause (b) of proviso to Rule 2 of Order XVII. The Court shall impose costs as specified in Rule 2 of Order XVII.

11. Miscellaneous Applications :

The proceedings in a suit shall not be stayed merely because of the filing of Miscellaneous Application in the course of suit unless the Court in its discretion expressly thinks it necessary to stay the proceedings in the suit. III. First Appeals to Subordinate Courts

1. Service of Notice of Appeal :

First Appeals being appeals on question of fact and law, Courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected at the admission stage under Rule 11 of Order XLI. In view of the amended CPC, a copy of the memorandum of appeal is required to be filed in the subordinate Court. It has been clarified by the Supreme Court that the requirement of filing a copy of appeal memorandum in the sub-ordinate Court does not mean that appeal memorandum cannot be filed in the Appellate Court immediately for obtaining interim orders.

Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party who appeared in the sub-ordinate Court so as to enable the respondents to appear if they so choose, even at the first hearing stage.

2. Essential Documents to be filed with the Memorandum of Appeal :

The Appellant shall, as far as possible, file, along with the appeal, copies of essential documents marked in the suit, for the purpose of enabling the appellate Court to understand the points raised or for purpose of passing interim orders.

3. Fixation of time limits in interlocutory matters :

Whenever notice is issued by the appellate Court in interlocutory matters, the notice should indicate the date by which the reply should be filed. The rejoinder, if any, should be filed within four weeks of receipt of the reply. If there are more parties than one who are Respondents, each one of the Respondent should comply with this requirement within

the time limit and the rejoinder may be filed within four weeks from the receipt of the last reply.

4. Steps for completion of all formalities/ (Call Work) (Hajri) :

The appeal shall be listed before the registry for completion of all formalities necessary before the appeal is taken up for final hearing. The procedure indicated above of listing the case before a senior officer of the appellate Court registry for giving dates in routine matters must be followed to reduce the 'call work' (Hajri) and only where judicial orders are necessary, such cases should be listed before Court.

5. Procedure on grant of interim-orders : If an interim order is granted at the first hearing by the Court, the Respondents would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

If the Court passes an ad-interim ex-parte order, and if the reply is filed by the Respondents and if, without good reason, the appellant fails to file the rejoinder, Court shall consider whether it is a fit case for vacating the stay or interim order and list the case for that purpose. This is intended to see that those who have obtained ad interim orders do not procrastinate in filing replies. The appellant may also waive his right to file the rejoinder. Such choice shall be conveyed to the registry on or before the date fixed for filing of rejoinder. Such communication of option by the applicant to the registry will be deemed to be completion of pleadings.

6. Filing of Written submissions :

Both the appellants and the respondents shall be required to submit their written submissions two weeks before the commencement of the arguments in the appeal. The cause-list should indicate if written submissions have been filed or not. Wherever they have not been filed, the Court must insist on their being filed within a particular period to be fixed by the Court and each party must serve a copy thereof on the opposite side before the date of commencement of arguments. There is no question of parties filing replies to each other's written submissions.

The Court may consider having a Caution List/Alternative List to take care of eventualities when a case does not go on before a court, and those cases may be listed before a court where, for any reason, the scheduled cases are not taken up for hearing.

7. Costs :

Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude if the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the appellate Court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.

IV. Application/Petition under Special Acts This chapter deals with applications/petitions filed under Special Acts like the Industrial Disputes Act, Hindu Marriage Act, Indian Succession Actetc. The Practise directions in regard to Original Suits should mutatis mutandis apply in respect of such applications/petitions.

V. Criminal Trials and Criminal Appeals to Subordinate Courts

(a) Criminal Trials

1. Criminal Trials should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment, rape and cases involving sexual offences or dowry deaths should be kept in Track I. Other cases where the accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy and food adulteration cases, etc. should be kept in Track III. Offences which are tried by special courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V all other offences.

   The endeavour should be to complete Track I cases within a period of nine months, Track II and Track III cases within twelve months and Track IV within fifteen months.

2. The High Court may classify criminal appeals pending before it into different tracks on the same lines mentioned above.

(b) Criminal Appeals

3. Wherever an appeal is filed by a person in jail, and also when appeals are filed by State, as far as possible, the memorandum appeal may be accompanied by important documents, if any, having a bearing on the question of bail.

4. In respect of appeals filed against acquittals, steps for appointment of amicus curie or State Legal Aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the registry/(State Legal Services Authority) immediately after completion of four weeks of service of notice. It shall be presumed that in such an event the accused is not in a position to appoint counsel.

5. Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the subordinate Court, so as to enable the other party to appear if they so choose even at the first hearing stage.

VI. Notice issued under S.80 of Code of Civil Procedure :

Every public authority shall appoint an officer responsible to take appropriate action on a notice issued under S.80 of the Code of Civil Procedure. Every such officer shall take appropriate action on receipt of such notice. If the Court finds that the concerned officer, on receipt of the notice, failed to take necessary action or was negligent in taking the necessary steps, the Court shall hold such officer responsible and recommend appropriate disciplinary action by the concerned authority. VII. Note Whenever there is any inconsistency between these rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure 1973 or the High Courts Act or any other Statutes, the provisions of such Codes and Statutes shall prevail.

(B) Model Case Flow Management Rules in High Court ..High Court Rules, 2003 In exercise of the power conferred by Article 225 of the Constitution of India, and Chapter X of the Code of Civil Procedure, 1908 (5 of 1908) and Section .. of the .. High Court Act and all other powers enabling it, the High Court hereby makes the following Rules : I. Division of Cases into different tracks :

1. Writ Petitions : The High Court shall, at the stage of admission or issuing notice before admission categorise the Writ Petitions other than Writ of Habeas Corpus, into three categories depending on the urgency with which the matter should be dealt with : the Fast Track, the Normal Track and the Slow Track. The petitions in the Fast Track shall invariably be disposed of within a period not exceeding six months while the petitions in the Normal Track should not take longer than a year. The petitions in the Slow Track, subject to the pendency of other cases in the Court, should ordinarily be disposed of within a period of two years.

   Where an interim order of stay or injunction is granted in respect of liability to tax or demolition or eviction from public premises etc. shall be put on the fast track. Similarly, all matters involving tenders would also be put on the Fast Track. These matters cannot brook delays in disposal.

2. Senior officers of the High Court, nominated for the purpose, shall at intervals of every month, monitor the stage of each case likely to come up for hearing before each Bench (Division Bench or Single Judge) during that month which have been allocated to the different tracks. The details shall be placed before the Chief Justice or Committee nominated for that purpose as well as the concerned Judge dealing with cases.

3. The Judge or Judges referred to in Clause (2) above may shift the case from one track to another, depending upon the complexity, (urgency) and other circumstances of the case.

4. Where computerization is available, data will be fed into the computer in such a manner that the court or judge or judges, referred to in Clause (2) above will be able to ascertain the position and stage of every case in every track from the computer screen.

5. Whenever the roster changes, the judge concerned who is dealing with final matters shall keep himself informed about the stage of the cases in various tracks listed before him during every week, with a view to see that the cases are taken up early.

6. Other matters : The High Court shall also divide Civil Appeals and other matters in the High Court into different tracks on the lines indicated in sub-clauses (2) to (5) above and the said clauses shall apply, mutatis mutandis, to the civil appeals filed in the High Court. The High Court shall make a subject-wise division of the appeals/revision application for allocation into different tracks.

   (Division of criminal petitions and appeals into different tracks is dealt with separately under the heading 'criminal petitions and appeals'.) II. Writ of Habeas Corpus :

   Notices in respect of Writ of Habeas Corpus where the person is in custody under orders of a State Government or Central Government shall invariably be issued by the Court at the first listing and shall be made returnable within 48 hours. State Government or Central Government may file a brief return enclosing the relevant documents to justify the detention. The matter shall be listed after notice on the fourth working day after

issuance of notice, and the Court shall consider whether a more detailed return to the Writ is necessary, and, if so required, shall give further time of a week and three days' time for filing a rejoinder. A Writ of Habeas Corpus shall invariably be disposed of within a period of fifteen days. It shall have preference over and above fast-track cases. III. Mode of Advance Service :

The Court rules will provide for mode of service of notice on the standing counsel for Respondents wherever available, against whom, interim orders are sought. Such advance service shall generally relate to Governments or public sector undertakings who have Standing Counsel. FIRST APPEALS TO HIGH COURT

1. Service of Notice of Appeal :

First Appeals being appeals on questions of fact and law, Courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected under Order XLI Rule 11 at the admission stage. In view of the amended CPC, a copy of the appeal is required to be filed in the Trial Court. It has been clarified by the Supreme Court that the requirement of filing of appeal in the Trial Court does not mean that the party cannot file the appeal in the appellate Court (High Court) immediately for obtaining interim orders.

In addition to the process for normal service as per the Code of Civil Procedure, advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the Trial Court itself so as to enable them to inform the parties to appear if they so choose even at the first hearing stage.

2. Filing of Documents :

The Appellant shall, on the appeal being admitted, file all the essential papers within such period as may be fixed by the High Court for the purpose the High Court understanding the scope of the dispute and for the purpose of passing interlocutory orders.

3. Printing or typing of Paper Book :

Printing and preparation of paper-books by the High Court should be done away with. After service of notice is effected, counsel for both sides should agree on the list of documents and evidence to be printed or typed and the same shall be made ready by the parties within the time to be fixed by the Court. Thereafter the paper book shall be got ready. It must be assured that the paper books are ready at lease six months in advance before the appeal is taken up for arguments. (Cause lists must specify if paper books have been filed or not).

4. Filing of Written Submissions and time for oral arguments :

Both the appellants and the respondents shall be required to submit their written submissions with all the relevant pages as per the Court paper- book marked therein within a month of preparation of such paper-books, referred to in para 3 above.

Cause list may indicate if written submissions have been filed. If not, the Court must direct that they be filed immediately. After the written submissions are filed, (with due service of copy to the other side) the matter should be listed before the Registrar/Master for the parties to indicate the time that will be taken for arguments in the appeal. Alternatively, such matters may be listed before a judge in chambers for deciding the time duration and thereafter to fix a date of hearing on a clear date when the requisite extent of time will be available. In the event that the matter is

likely to take a day or more, the High Court may consider having a Caution List/Alternative List to meet eventualities where a case gets adjourned due to unavoidable reasons or does not go on before a court, and those cases may be listed before a court where, for one reason or another, the scheduled cases are not taken up for hearing.

5. Court may explore possibility of settlement :

At the first hearing of a First Appeal when both parties appear, the Court shall find out if there is a possibility of a settlement. If the parties are agreeable even at that stage for mediation or conciliation, the High Court could make a reference to mediation or conciliation for the said purpose.

If necessary, the process contemplated by Section 89 of CPC may be resorted to by the Appellate Court so, however, that the hearing of the appeal is not unnecessarily delayed. Whichever is the ADR process adopted, the Court should fix a date for a report on the ADR two months from the date of reference.

V. Appeals to Division Bench from judgment of Single Judge of High Court [Letter Patent Appeals (LPA) or similar appeals under High Courts Acts] :

An appeal to a Division Bench from judgment of a Single Judge may lie in the following cases:

(1) Appeals from interlocutory orders of the Single Judge in original jurisdiction matters including writs; (2) appeals from final judgments of a Single Judge in original jurisdiction; (3) other appeals permitted by any law to a Division Bench.

Appeals against interlocutory orders falling under category (1) above should be invariably filed after advance notice to the opposite counsel (who has appeared before the Single Judge) so that both the sides will be represented at the very first hearing of the appeals. If both parties appear at the first hearing, there is no need to serve the opposite side by normal process and at least in some cases, the appeals against interlocutory orders can be disposed of even at the first hearing. If, for any reason, this is not practicable, such appeals against interim orders should be disposed of within a period of a month. In cases referred to above, necessary documents should be kept ready by the counsel to enable the Court to dispose of the appeal against interlocutory matter at the first hearing itself.

In all Appeals against interim orders in the High Court, in writs and civil matters, the Court should endeavour to set down and observe a strict time limit in regard to oral arguments. In case of Original Side appeals/LPAs arising out of final orders in a Writ Petition or arising out of civil suits filed in the High Court, a flexible time schedule may be followed.

The practice direction in regard to First Appeal should mutatis mutandis apply in respect of LPAs/Original Side appeals against final judgments of the Single Judge.

Writ Appeals/Letters Patent Appeals arising from orders of the Single Judge in a Writ Petition should be filed with simultaneous service on the counsel for the opposite party who had appeared before the Single Judge or on service of the opposite party.

Writ Appeals against interim orders of the Single Judge should invariably be disposed of early and, at any rate, within a period of thirty days from the first hearing. Before Writ Appeals against final orders in Writ Petitions are heard, brief written submissions must be filed by both parties within such time as may be fixed by the Court.

VI. Second Appeals :

Even at the stage of admission, the questions of law with a brief synopsis and written submissions on each of the propositions should be filed so as to enable the Court to consider whether there is a substantial question of law. Wherever the Court is inclined to entertain the appeal, apart from normal procedure for service as per rules, advance notice shall be given to the counsel who had appeared in the first appeal letter Court. The notice should require the respondents to file their written submissions within a period of eight weeks from service of notice. Efforts should be made to complete the hearing of the Second Appeals within a period of six months.

VII. Civil Revision :

A revision petition may be filed under Section 115 of the Code or under any special statute. In some High Courts, petitions under Article 227 of the Constitution of India are registered as civil revision petitions. The practise direction in regard to LPAs and First Appeals to the High Courts, should mutatis mutandis apply in respect of revision petitions.

VIII. Criminal Appeals :

Criminal Appeals should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment cases, rape, sexual offences, dowry death cases should be kept in Track I. Other cases where the accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy, food adulteration cases, offences of sensitive nature should be kept in Track III. Offences which are tried by special courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V all other offences.

The endeavour should be to complete Track I cases within a period of six months, Track II cases within nine months, Track III within a year, Track IV and Track V within fifteen months. Wherever an appeal is filed by a person in jail, and also when appeals are filed by State, the complete paper-books including the evidence, should be filed by the State within such period as may be fixed by Court.

In appeals against acquittals, steps for appointment of amicus curie or State Legal Aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the Registry/(State Legal Services Committee) immediately after completion of four weeks of service of notice. It shall be presumed that in such an event the accused is not in a position to appoint counsel, and within two weeks thereafter counsel shall be appointed and shall be furnished all the papers.

IX. Note Wherever there is any inconsistency between these rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973 or the High Court Act, or any other statute, the provisions of such Codes and statute, the provisions of such Codes and statutes shall prevail."

Before concluding, we wish to place on record our sincere gratitude and appreciation for the members of the Committee, in particular Hon'ble Mr.Justice M. Jagannadha Rao, Chairman of the Committee and Law Commission of India who as usual has taken great pains in examining the whole issue in detail and going into depth of it and has filed the three Reports above referred which we hope will go a long way in dispensation of effective and meaningful administration of justice to the litigating public. We hope that the High Courts in the country would be in a

position to examine the aforesaid rules expeditiously and would be able to finalise the Rules within a period of four months.

Further, we place on record our deep appreciation for very useful assistance rendered by Senior Advocates Mr.K.Parasaran and Mr.Arun Mohan who on request from this court readily agreed to render assistance as Amicus Curie. We also record our appreciation for useful assistance rendered by Mr.Gulam Vahnavati, learned Solicitor General on behalf of Union of India and the Attorney General of India and Mr.T.L.V. Iyer, Senior Advocate on behalf of Bar Council of India. A copy of this judgment shall be sent to all the High Courts through Registrar Generals, Central Government through Cabinet Secretary and State Governments/Union Territories through Chief Secretaries so that expeditious follow up action can be taken by all concerned. The Registrar Generals, Central Government and State/Union Territories shall file the progress report in regard to the action taken within a period of four months.

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CHAPTER-9.5

UNITED INDIA INSURANCE COMPANY LIMITED VERSUS AJAY SINHA AND ANOTHER

(2008) 7 SUPREME COURT CASES 454

Bench : Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice V.S. Sirpurkar

Civil Appeal No. 3537 of 2008†, decided on May 13, 2008

United India Insurance Company Limited .. Appellant;
Versus
Ajay Sinha and Another .. Respondents.

A. Legal Aid — Legal Services Authorities Act, 1987 — S. 22-C (1) first proviso; Ss. 22-C(2), 22-C(8) and 22-E — Exclusion of jurisdiction of Permanent Lok Adalat — "Any matter relating to an offence not compoundable under any law" — Insurance claim for theft — Fact of theft disputed by Insurance Company — Held, the case was beyond conciliatory jurisdiction of Permanent Lok Adalat — Provisos must be interpreted in an expansive manner — Hence term "relating to an offence" in first proviso should be interpreted broadly

This case was a dispute between an Insurance Company (the appellant) and an insured (the respondent) v/ho, a few days before expiry of insurance contract, filed an FIR complaining theft of insured goods. His case was that electronic goods worth Rs 11,14,597 were stolen. The Insurance Company disputed the insurance claim. Respondent filed a claim of Rs 18,45,697.50 before District Consumer Forum, which rejected the claim on the ground that the claim did not fall within the Forum's jurisdiction because it was not a case of deficiency in service but of enforcement of a commercial contract. The respondent then approached Permanent Lok Adalat wherein he filed claim for Rs. 9,80,000 only (i.e. less than rupees ten lakhs).

The Permanent Lok Adalat overruled the appellant's objection based on jurisdiction. The appellant's writ was allowed by the Single Judge of High Court on ground that offences under Sections 479/467 IPC being not compoundable, the Permanent Lok Adalat had no jurisdiction. The Division Bench allowed the respondent's appeal, holding that the Lok Adalat is not required to go into the question whether the offence is compoundable or not. The appellant approached the Supreme Court thereagainst. The appellant Insurance Company took the stand that Permanent Lok Adalat did not have conciliatory jurisdiction by virtue of first proviso to Section 22-C of the Legal Services Authorities Act, 1987, which provides that Permanent Lok Adalat, for the purposes of "settlement of dispute" will not have jurisdiction "in respect of any matter relating to an offence not compoundable under any law." The Insurance Company also connected that Permanent Lok Adalat, by virtue of second proviso to Section 22-C, did not have pecuniary jurisdiction in matters where value of property exceeded Rs. Ten lakhs. Besides the Insurance Company's contention was that the respondent had put up a false claim that burglary had taken place.

Allowing the appeal, the Supreme Court

Held:

Section 22-C(l) read with Sections 22-C(2), 22-C(8) and 22-E of the Legal Services Authorities Act, 1987, exclude the jurisdiction of civil courts by providing that when an application is made by either party to the Permanent Lok Adalat to settle a dispute at the pre-litigation stage, die Adalat is obliged to do so, and other party is precluded from approaching civil court in such a case. Provisos appended to Section 22-C(1) limit jurisdiction of Permanent Lok Adalat. These provisos must be interpreted in an expansive manner. With respect to public utility services, the main purpose behind Section 22-C(8) seems to be that most of the petty cases which ought not go in the regular courts, would be setded in the pre-litigation stage itself. Therefore, the terra "relating to an offence" appearing in first proviso must be interpreted broadly, and as the determination before Permanent Lok Adalat will involve question as to whether or not offence, which is non-compoundable, has indeed been committed, this case falls outside the jurisdiction of Permanent Lok Adalat. (Paras 37 to 40)

Ajay Sinha v. United India Insurance Co. Ltd, AIR 2006 Jharkhand 113, reversed

B. Legal Aid — Legal Services Authorities Act, 1987 — Chap. VI-A — Ss. 22-C(1), (4), (5) and (8) — Conciliation by Permanent Lok Adalat — Scope of conciliation in the absence of its definition in the Act — Comparison with conciliation under the Arbitration and Conciliation Act, 1996 and CPC — Held, conciliation in the Act achieves a different purpose — Conciliation, if fails, is followed by compulsory determination under S. 22-C(8) — Conciliator in such a situation assumed the role of adjudicator — Arbitration and Conciliation Act, 1996, Part III, Ss. 67 and 73 — Civil Procedure Code, 1908 — S. 89(1) — UNCITRAL Model Law on International Commercial Arbitration

Held:

The term "conciliation" is not defined in the Legal Services Authorities Act, 1987. It should, therefore, be considered from the perspective of the Arbitration and Conciliation Act, 1996. In order to understand what Parliament meant by "conciliation", it is necessary to refer to the functions of a "conciliator" as visualised by Part III of the 1996 Act. Section 67 describes the role of a conciliator. Under Section 73, conciliator can formulate terms of a possible settlement if he feels that there exists element of settlement. The provisions of the 1996 Act make it clear that the conciliator apart from assisting the parties to arrive at a settlement, is also permitted to make proposals for a settlement and to formulate the terms of a possible settlement or reformulate the terms. This is Uncitral concept. Section 89 CPC, also talks of resolution of dispute through mutual settlement. However, Chapter VI-A of the Legal Services Authorities Act, 1987, seeks to achieve different purpose. It not only speaks of conciliation qua conciliation but conciliation qua determination. Jurisdiction of Permanent Lok Adalat, although limited is of wide amplitude. This is however subject to the two exceptions laid down in two provisos to Section 22-C. (Paras 22 to 24)

Chapter VI-A stands independently. Whereas the heading of the Chapter talks of pre-litigation, conciliation and settlement, Section 22-C(8) of the Act speaks of determination. It creates another adjudicatory authority, the decision of which by a legal fiction would be a decision of a civil court. It has the right to decide a case.- The term "decide" means to determine; to form a definite opinion; to render judgment Any award made by die Permanent Lok Adalat is executable as a decree. No appeal lies against it. The decision of the Permanent Lok Adalat is final and binding on the parties. Whereas on

the one hand, keeping in view the parliamentary intent, settlement of all disputes through negotiation, conciliation, mediation, Lok Adalat and judicial settlement are required to be encouraged, it is equally well settled that where the jurisdiction of a court is sought to be taken away, the statutory provisions deserve strict construction. A balance is thus required to be struck. A court of law can be created under a statute. It must have the requisite infrastructure therefor. Independence and impartiality of Tribunal being a part of human right is required to be taken into consideration for construction of such a provision. When a court is created, the incumbents must be eligible to determine the lis.

(Para 25)

Advanced Law Lexicon, 3rd Edn., 2005, p. 1253, quoted

Section 22-C(l) speaks of settlement of disputes. The authority has to take recourse to conciliation mechanism. One of the essential ingredients of the conciliation proceeding is that nobody shall be forced to take part therein. It has to be voluntary in nature. The proceedings are akin to one of the recognised ADR mechanism Which is made of Medola. It may be treated on a par with conciliation and arbitration. In such a case the parties agree for settlement of dispute by negotiation, conciliation or mediation. The proceedings adopted are not binding ones, whereas the arbitration is a binding procedure. Even in relation to arbitration, an award can be the subject-matter of challenge. The provisions of the Arbitration and Conciliation Act, 1996 shall apply thereto. The jurisdiction in terms of Section 34 of the Arbitration and Conciliation Act, 1996 is wide. The court in exercise of the said jurisdiction may not enter into the merit of the case but would be entitled to consider as to whether the arbitrator was guilty of misconduct. If he is found to be biased, his award would be set aside. The scope of voluntary settlement through the mechanism of conciliation is also limited. If the parties in such a case can agree to come to settlement in relation to the principal issues, no exception can be taken thereto as the parties have a right of self-determination of the forum, which shall help them to resolve the conflict, but when it comes to some formal differences between the parties, they may leave the matter to the jurisdiction of the conciliator. The conciliator only at the final stage of the proceedings would adopt the role of an arbitrator. Permanent Lok Adalat does not simply adopt role of an arbitrator whose award could be the subject-matter of challenge but the role of an adjudicator. Parliament has given the authority to the Permanent Lok Adalat to decide the matter. It has an adjudicating role to play. (Paras 27 and 28)

Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1, relied on

C. Legal Aid — Legal Services Authorities Act, 1987 — S. 22-B(l) — Public utility service — Insurance service — Held, is a public utility service (Para 9)

D. Legal Aid — Legal (Services Authorities Act, 1987 — Ss. 22-C(1), 22-C(4) and 22-C(8) — Formulation of questions by Permanent Lok Adalat — Dual role of conciliator and adjudicator — Permanent Lok Adalat must avoid the impression that it has adjudicator's role from the very beginning

The Court must guard against construction of a statute which confers a wide power on Permanent Lok Adalat, having regard to Section 22-C(8). The Permanent Lok Adalat must at the outset formulate the questions. It must exercise its power with due care and caution. It must not give an impression to any of the disputants that it, from the very beginning has an adjudicatory role to play in relation-to its jurisdiction without going into the statutory provisions and restrictions imposed thereunder.

(Para 41)

Stale of Punjab v. Jalour Singh, (2008) 2 SCC 660 : (2008^ 1 SCC (Cri) 524 : (2C;3) 1 SCC (L&S) 535, relied on

E. Civil Procedure Code, 1908 — S. 9 — Civil court — Exclusion of jurisdiction — Held, any such provision has to be construed strictly (Para 35)

Dhulabhai v. State of M.P., AIR 1969 SC 78; Dwarka Prasad Agarwal v. Ramesh Chander Agarwal, (2003) 6 SCC 220; Bhagubhai Dhanabhai Khalasi v. State of Gujarat, (2007) 4 SCC 241 : (2007) 2 SCC (Cri) 260 : (2007) 5 Scale 357; Bhagwat Singh v. State of Rajastlian, AIR 1964 SC 444; Raichand Amulakh Shah v. Union of India, AIR 1964 SC 1268; Kasturi and Sons (P) Ltd v. N. Salivateswaran, AIR 1958 SC 507; Upper Doab Sugar Mills Ltd. v. Shahdara (Delhi) Saharanpur Light Railway Co. Ltd., AIR 1963 SC 217, relied on

Swamy Atmananda v. Sri Ramakrishna Tapovanam, (2005) 10 SCC 51, referred to

G.P. Singh: Principles of Statutory Interpretation, 9th Edn., p. 630, referred to

Advocates who appeared in this case :

Raju Ramachandran, Senior Advocate (M.K. Dua and Kishore Rawat, Advocates, for the Appellant;

Nitish Massey, Ajit Kr. Sinha, Amit Kumar and Ritesh Ratnam, Advocates, for the Respondents.

Chronological list of cases cited

1. (2008) 3 SCC 1, Anuj Garg v. Hotel Assn. of India
2. (2008) 2 SCC 660 : (2008) 1 SCC (Cri) 524 : (2008) 1 SCC (L&S) 535, State of Punjab v. Jalour Singh
3. (2007) 4 SCC 241 : (2007) 2 SCC (Cri) 260 : (2007) 5 Scale 357, Bhagubhai Dhanabhai Khalasi v. Stale of Gujarat
4. (2005) 10 SCC 51, Swamy Atmananda vs. Sri Ramakrishna Tapovanam
5. (2003) 6 SCC 220, Dwarka Prasad Agarwal v. Ramesh Chander Agarwal
6. AIR 1964 SC 78, Dhulabhai v. State of M.P.
7. AIR 1964 SC 1268, Raichand Amulakh Shah v. Union of India
8. AIR 1964 SC 444, Bhagwat Singh, v. State of Rajasthan
9. AIR 1963 SC 217, Upper Doab Sugar Mills Ltd. V. Shahdara (Delhi) Saharanpur Light Railway Co. Ltd.
10. AIR 1958 SC 507, Kasturi and Sons (P) Ltd. v. N. Salivateswaran

The Judgment of the Court was delivered by

S.B. SINHA, J.—

Leave granted.

2. Legal Services Authorities Act, 1987 (the Act) was enacted to constitute Legal Services Authorities to provide for free and competent legal service to the weaker sections of the society, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or

other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

3. The Act was enacted with a view to give effect to the provisions of Article 39A of the Constitution of India which mandates that State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability.

4. If we are to look at the history of grant of legal aid, it may be noticed that the Law Commission of India in its 14th report on 'reform of Judicial Administration' published in 1958, strongly advocated the need for rendering legal aid to poor litigants and categorically stated that' the rendering of legal aid to the poor litigants is not a minor problem of procedural law but a question of fundamental character'.

5. The committee under the Chairmanship of Hon'ble Mr Justice V.R. Krishna Iyer, then a Member of the Law Commission, constituted by the Government of India Order dated 27th October, 1972 to consider the question of making available to the weaker sections of the community and persons of limited means in general and citizens belonging to the socially and educationally backward class in particular, facilities for

   (a) legal advice so as to make them aware of their constitutional and legal rights and obligations; and

   (b) legal aid in proceedings before Civil, Criminal and Revenue Courts so as to make justice more easily available to all sections of the community.

6. With a view to implement the report of the Bhagwati Committee and in fulfillment of its constitutional obligations under Article 39-A of the Constitution, a committee known as the "Committee for Implementing Legal Aid Schemes (CILAS) was being constituted by the Government of India at the very beginning under the Chairmanship of Hon'ble Mr. Justice P.N. Bhagwati. This Committee formulated a broad pattern of the legal aid programme to be set up in the country. It gave stress on preventive legal aid programme with a view to creating legal awareness amongst the people. It also suggested dynamic and activist programmes to carry legal services to the doorsteps of the rural population, to promote community mobilization and rights enforcement through public interest litigations and other statutes. The Committee also framed a model scheme for establishment of State Legal Aid and Advice Boards, as also, Committees at the High Court, District and Tahasil levels to cater legal services to the people at large.

7. In the year 1987 the Legal Services Authorities Act was enacted by the parliament with a view to provide free and competent legal services and to ensure opportunity for securing justice to the downtrodden class of the society. The Statement of Objects and Reasons for enacting the Amendment Act is as under :-

> *"The Legal Services Authorities Act, 1987 was enacted to constitute legal services authorities for providing free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice were not denied to any citizen by reason of economic or other disabilities and to organize Lok Adalats to ensure that the operation of the legal system promoted justice on a basis of equal opportunity. The system of Lok Adalat, which is an innovative mechanism for alternate dispute*

resolution, has proved effective for resolving disputes in a spirit of conciliation outside the courts."

8. We may have a look to the relevant statutory provisions for the purpose of this case.

9. Section 22-A of the Act defines "Permanent Lok Adalat" to mean a Permanent Lok Adalat established under sub-section (1) of Section 22 B. "Public utility service"" inter alia means insurance service, and includes any service which the Central Government or the State Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purposes of this Chapter. Section 22-B. provides for establishment of Permanent Lok Adalats. Section 22-C delineates the jurisdiction of Permanent Lok Adalat to take cognizance of cases filed before it, the relevant provisions whereof are as under :-

"22-C.- Cognizance of cases by Permanent Lok Adalat :-(1) Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:

Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:

Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

Provided also that the Central Government, may, by notification, increase the limit of ten lakh rupees specified in the second proviso in consultation with the Central Authority.

(2) After an application is made under sub-section (1) to the Permanent Lok Adalat, no party to that application shall invoke jurisdiction of any court in the same dispute.

(3)-(4)

(5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

(6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.

(7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(8) Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute."

10. The Permanent Lok Adalat, in terms of Section 22-D of the Act, while conducting conciliation proceedings or deciding a dispute on merit is not bound by the provisions of the Code of Civil

Procedure, 1908 and the Indian Evidence Act, 1872 but guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice.

11. Section 22-E of the Act makes an Award of Permanent Lok Adalat to be final and binding on all the parties, which would be deemed to be a decree of a civil court. Jurisdiction of the civil court to call in question any Award made by the Permanent Lok Adalat is barred. It has the jurisdiction to transfer any Award to a civil court and such civil court is mandated to execute the order as if it were the decree by the court.

12. Interpretation of the aforesaid provisions in the light of the Statement of Objects and Reasons for which they have been enacted calls for our consideration. Before, however, we embark thereupon we may briefly notice the factual matrix involved herein.

13. First respondent carries on business in electrical goods. He is an authorized distributor of Sony products. He entered into a contract of insurance with the appellant company; the period covered thereunder being 29th August, 2001 to 31st August, 2002. Allegedly, a burglary took place in his godown in the night of 18th /19th August, 2002. He lodged a First Information Report with Doranda Police Station, Ranchi. He also submitted a claim with the appellant alleging that in the said burglary, goods worth Rs.11,14,597/- had been stolen away.

14. Appellant denied and disputed the said claim which refuted the claims by a letter dated 12th August, 2004 interlia stating :-

    a) The surveyor has observed that the loss cannot be assessed since the quantity claimed by you is not verifiable especially as the authenticity of the documents provided by you creates doubt.

    b) The surveyor has noticed that there is movement of stock from the godown without proper billing and proper entry which was found by the surveyor on their random inspection of the godown on 27.7.2003.

    c)-d)

    e) The Chartered Accountant who accompanied the surveyor had made an inspection of the financial statements as provided by you and found various discrepancies in your accounts. For these reasons the accounts provided by you cannot be relied upon. It was found by the said Chartered Accountant that there was difference in closing stock, Opening Balance of Sundry Debtors etc. and such the credibility of the accounts submitted by you is doubtful.

    f) The Dy. Superintendent of Police in his supervision note has recorded that the alleged crime has been done by people who are closely associated with the Company under a high hatched conspiracy and also having the capacity to sell the alleged stolen products in the market.

    g) It is also observed that neither the FIR nor during investigation by the police you ever disclosed that there was a common watchman in that area where the godown is located which creates doubt about the genuineness of the incident. Furthermore not providing any security/watchman with respect to the said godown also amounts to violation of the terms of the Policy coupled with misrepresentation."

(Emphasis supplied)

15. The Investigating Officer in the criminal case filed a final report. It was, however, opposed by the insurance company. We have not been informed as to whether the cognizance of the alleged offence has been taken by a competent court or not.

16. We may, however, notice that respondent being aggrieved by and dissatisfied with the purported repudiation of his claim filed an application before the District Consumer Forum claiming a sum of Rs.18,45,697.50 from the appellant. It was not entertained on the premise that deficiency in service had occurred in connection with a commercial contract.

17. First respondent, thereafter, filed an application for the Permanent Lok Adalat claiming a sum of Rs.9,80,000/-. Appellant filed an objection raising the question of jurisdiction of the Permanent Lok Adalat. By reason of an order dated 4th January, 2005, the said objection was overruled stating that it had the pecuniary jurisdiction over the matter and only because a criminal case is pending in the Court of Chief Judicial Magistrate, Ranchi, the same was not relevant stating :-

> *"However, the finding of criminal court is not binding on this court and this court has to decide as to whether burglary had taken place or not. After taking independent evidences of the parties, so far finding of Surveyor is concerned, it is regarding merit of the claim which this P.L.A. has to decide after taking evidence. If the claim cannot be refused on the basis of surveyor report at this stage."*

18. Appellant filed a writ application challenging the validity of the said order before the Jharkhand High Court. A learned Single Judge of the High Court allowed the said writ application opining that as Sections 479/461 of the Indian Penal Code being not compoundable, the Permanent Lok Adalat had no jurisdiction to entertain the claim opining:-

> *"9 In my considered opinion, the Permanent Lok Adalat has committed great error of law in holding that it has jurisdiction inspite of the fact that the matter relates to an offence not compoundable under any law. The Permanent Lok Adalat has further committed serious error in holding that the finding of the criminal Court in non-compoundable offence is not binding on it.*

10. No doubt Chapter VI-A has been inserted in the Legal Services Authority Act, 1987 by Amendment Act of 2002 for constitution of Permanent Lok Adalat for the purpose of pre-litigation, conciliation and settlement, but the whole object of the Act is to provide free legal and competent legal services to the weaker section of the Society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. The amended provision of the Act does not confer power to the Permanent Lok Adalat even to entertain the disputes which related to a criminal offence non compoundable in law."

19. An intra court appeal was preferred there against. The Division Bench of the High Court by reason of the impugned judgment and order dated 29th March, 2006 allowed the appeal of the first respondent holding that the pendency of a criminal case has nothing to do with the exercise of jurisdiction by the Permanent Lok Adalat as it was not concerned as to who had committed the burglary but was only concerned with the fact as to whether burglary had taken place or not stating :-.

> *"So far as the case before the Permanent Lok Adalat is concerned, the Adalat is to determine whether burglary had taken place or not, after taking into consideration the independent evidence of the parties. It is not required to determine as to who has committed burglary nor it is required to determine whether an accused is guilty for*

the charges or not. Therefore, for the purpose of determination of the issue and claim in question, the Permanent Lok Adalat is not required to determine whether offence committed by an accused is 'compoundable' or not. Thus, as in this case such issue is not required to be determined by the Permanent Lok Adalat, we hold that the Permanent Lok Adalat has jurisdiction to decide the claim as made by the appellant, on merit, after hearing the parties and on appreciation of evidence on record. Learned Single Judge has failed to notice the aforesaid facts while determining the issue in question."

20. Mr. Raju Ramachandran, learned Senior counsel appearing on behalf of the appellant would submit :-

(i) Chapter VI-A of the Act will have no application in a case of this nature which involves complicated questions of fact and law.

(ii) The question as to whether the burglary has been committed or not being pending before the criminal court, Permanent Lok Adalat had no jurisdiction in relation thereto.

(iii) As the contract of insurance had been repudiated, it was not a case which was fit for settlement within the meaning of Section 22-B of the Act.

(iv) Claim of first respondent is mala fide as he had artificially reduced the claim to bring the same within the jurisdiction of the Permanent Lok Adalat, although initially he claimed a sum higher than Rs. 10 lakhs.

21. Mr. Amit Kumar, learned counsel appearing on behalf of the respondent, on the other hand, would urge :-

(i) That the value of the property being less than Rs.10 lakhs, the Permanent Lok Adalat had jurisdiction in regard to the dispute in question.

(ii) The restrictions imposed in regard to the offences cannot be applied to civil dispute between the parties arising out of any offence as the same relates to the claim of the respondent against the appellant.

(iii) Jurisdiction of the Permanent Lok Adalat being confined to determination of the amount of loss caused to the first respondent on account of burglary, Permanent Lok Adalat is not required to decide the case between the accused of burglary and the State.

(iv) For invoking the jurisdiction of Permanent Lok Adalat, the question as to whether the offence is compoundable or not is not relevant.

(v) Proviso appended to sub-section (5) of Section 22 of the Act should be construed in a manner which would widen the scope and ambit of the Act, rather accentuate the same.

(vi) The object of the legislation is to promote resolution of the dispute by conciliation and, therefore, it is for the welfare of the general public that construction which would achieve the object of the beneficial legislation should be preferred.

22. The term "conciliation" is not defined under the Act. It should, therefore, be considered from the perspective of Arbitration and Conciliation Act, 1996. In order to understand what Parliament meant by `Conciliation', we have necessarily to refer to the functions of a `Conciliator' as visualized by Part III of the 1996 Act. Section 67 describes the role of a conciliator. Sub-section (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by

principles of objectivity, fairness and justice, giving consideration, among other things, to 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. Sub-section (3) states that he shall take into account "the circumstances of the case, the wishes the parties may express, including a request for oral statements". Sub-section (4) is important and permits the `conciliator' to make proposals for a settlement. This section is based on Article 7 of UNICTRAL Conciliation Rules.

23. Section 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels that there exists elements of settlement. He is also entitled to `reformulate the terms' after receiving the observations of the parties. The above provisions in the 1996 Act make it clear that the `Conciliator' under the said Act, apart from assisting the parties to arrive at a settlement, is also permitted to make "proposals for a settlement" and "formulate the terms of a possible settlement" or "reformulate the terms". This is indeed the UNCITRAL concept.

24. Section 89 of the Code of Civil Procedure inter alia was enacted to promote resolution of disputes through mutual settlement. Chapter VI-A of the Act seeks to achieve a different purpose. It not only speaks of conciliation qua conciliation but conciliation qua determination. Jurisdiction of Permanent Lok Adalat, although is limited but they are of wide amplitude. The two provisos appended to Section 22-C (1) of the Act curtail the jurisdiction of the Permanent Lok Adalat which are as under :-

"Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:

Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

25. Chapter VI-A stands independently. Whereas, the heading of the Chapter talks of pre-litigation, conciliation and settlement, Section 22-C (8) of the Act speaks of determination. It creates another adjudicatory authority, the decision of which by a legal fiction would be a decision of a civil court. It has the right to decide a case. The term `decide' means to determine ; to form a definite opinion ; to render judgment. (See Advanced Law Lexicon 3rd Edition 2005 at 1253). Any award made by the Permanent Lok Adalat is executable as a decree. No appeal thereagainst shall lie. The decision of the Permanent Lok Adalat is final and binding on parties. Whereas on the one hand, keeping in view the Parliamentary intent, settlement of all disputes through negotiation, conciliation, medication, Lok Adalat and Judicial Settlement are required to be encouraged, it is equally well settled that where the jurisdiction of a court is sought to be taken away, the statutory provisions deserve strict construction. A balance is thus required to be struck. A court of law can be created under a statute. It must have the requisite infrastructure therefor. Independence and impartiality of Tribunal being a part of human right is required to be taken into consideration for construction of such a provision. When a court is created, the incumbents must be eligible to determine the lis.

26. An option is given to any party to a dispute. It may be a public utility service provider or a public utility service recipient. The service must have some relation with public utility. Ordinarily insurance service would not come within the public utility service. But having regard to the statutory scheme, it must be held to be included thereunder. It is one thing to say that an authority is created under a statute to bring about a settlement through Alternate Dispute Resolution mechanism but it is other thing to say that an adjudicatory power is conferred on it. Chapter

VI-A, therefore, in our opinion, deserves a closure scrutiny. It a case of this nature, the level of scrutiny must also be high. {See Anuj Garg vs. Hotel Assn. of India[1]).

27. Sub-section (1) of Section 22-C speaks of settlement of disputes. The authority has to take recourse to conciliation mechanism. One of the essential ingredients of the conciliation proceeding is that nobody shall be forced to take part therein. It has to be voluntary in nature. The proceedings are akin to one of the recognized ADR mechanism which is made of Medola. It may be treated at par with Conciliation and Arbitration. In such a case the parties agree for settlement of dispute by negotiation, conciliation or mediation. The proceedings adopted are not bending ones, whereas the arbitration is a binding procedure. Even in relation to arbitration, an award can be the subject matter of challenge. The provisions of the Arbitration and Conciliation Act, 1996 shall apply thereto. The jurisdiction in terms of Section 34 of the Arbitration and Conciliation Act, 1996 is wide. The court in exercise of the said jurisdiction may not enter into the merit of the case but would be entitled to consider as to whether the arbitrator was guilty of misconduct. If he is found to be biased, his award would be set aside. The scope of voluntary settlement through the mechanism of conciliation is also limited. If the parties in such a case can agree to come to settlement in relation to the principal issues, no exception can be taken thereto as the parties have a right of self determination of the forum, which shall help them to resolve the conflict, but when it comes to some formal differences between the parties, they may leave the matter to the jurisdiction of the conciliator. The conciliation only at the final stage of the proceedings would adopt the role of an arbitrator.

28. Here, however, the Permanent Lok Adalat does not simply adopt the role of an Arbitrator whose award could be the subject matter of challenge but the role of an adjudicator. The Parliament has given the authority to the Permanent Lok Adalat to decide the matter. It has an adjudicating role to play.

29. The validity of the said provision is not in question. But then construction of such a provision must be given in such a manner so as make it prima facie reasonable. With that end in view let us consider the meaning of the word "relating to an offence". We will assume that in a given case the dispute between the service provider and the service recipient may not have anything to do with the ultimate result of the criminal case but there are cases and cases.

30. In this case, as noticed above, the genuineness of the claim itself is in dispute. Where the parties have taken extreme positions, the same prima facie may not be the subject matter of conciliation which provides for a non binding settlement.

31. For the said purpose, the dispute under the criminal procedure and/or the nature thereof would also play an important role. Whereas Respondent states that the burglary has taken place, the appellant denies and disputes the same. In a criminal case, the accused shall be entitled to raise a contention that no offence has taken place. If the criminal court form an opinion that an offence had taken place, which otherwise is a non-compoundable one, the term "relating to an offence" should be given wider meaning. The first proviso appended to section 22-B of the Act may not be of much relevance.

32. This aspect of the matter had not been argued before the Division Bench of the High Court. The counsel appearing were remiss in bringing the same to the notice of the Court the binding precedents, as regards the jurisdictional aspect of the Civil Court in the light of Section 9 of the Code of Civil Procedure.

1 (2008) 3 SCC 1

33. In Dhulabhai and Ors. vs. The State of Madhya Pradesh[2] the Court discussed the ambit of Section 9 of the CPC and laid down the following principles: (AIR p. 89, para 32)

> *"32...(1) Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.*
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statue or not."

34. In Dwarka Prasad Agarwal vs. Ramesh Chander Agarwal[3] this Court held: (SCC p. 228, para 22)

> *"22.The dispute between the parties was eminently a civil dispute and not a dispute under the provisions of the Companies Act. Section 9 of the Code of Civil Procedure confers jurisdiction upon the civil courts to determine all disputes of civil nature unless the same is barred under a statute either expressly or by necessary implication. Bar of jurisdiction of a civil court is not to be readily inferred. A provision seeking to bar jurisdiction of a civil court requires strict interpretation. The court, it is well settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil court."*

This case was cited with approval in Bhagubhai Dhanabhai Khalasi and Anr. vs. The State of Gujarat[4].

35. Therefore, it is a fundamental presumption in statutory interpretation that ordinary civil courts have jurisdiction to decide all matters of a civil nature. As a corollary,

(i) provisions excluding jurisdiction of civil courts should receive strict construction. (See Bhagwat Singh vs. State of Rajasthan[5] and Raichand Amulakh Shah vs. Union of India[6]), and

(ii) provisions conferring jurisdiction on authorities and tribunals other than civil courts (See Kasturi and Sons (P) Ltd. vs. N. Salivateswaran[7] and Upper Doab Sugar Mills Ltd. vs. Shahdara (Delhi) Saharanpur Light Railway Co. Ltd.[8])

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2 AIR 1969 SC 78
3 (2003) 6 SCC 220
4 (2007) 4 SCC 241 : (2007) 2 SCC (Cri) 260 : (2007) 5 Scale 357
5 AIR 1964 SC 444
6 AIR 1964 SC 1268
7 AIR 1958 SC 507
8 AIR 1963 SC 217

Have to be strictly construed. This principle, taken from Principles of Statutory Interpretation by G.P. Singh, 9th Edn., p. 630, was cited with approval in Swamy Atmananda v. Sri Ramakrishna Tapovanam.[9]

36. We must also take notice of a recent decision of this Court in State of Punjab vs. Jalour Singh[10] where this Court expressed its dismay with the manner in which the Lok-Adalat matters are dealt with. Chief Justice of India speaking for the Bench, upon noticing the provisions of the Legal Services Authority Act, 1987, observed that whereas Lok Adalat had to arrive at a just settlement in their conciliatory role guided by the principles of justice, equity, fair play and other legal principles, but in that case it assumed a judicial role, heard parties, ignored the absence of consensus, and increased the compensation to an extent it considered just and reasonable, by a reasoned order which is adjudicatory in nature. It arrogated to itself the appellate powers of the High Court and 'allowed' the appeal and 'directed' the respondents in the appeal to pay the enhanced compensation within a period fixed by it. It was held that such an order is not an Award.

37. Section 22-C(1) read with Section 22-C(2), Section 22-C(8) and Section 22-E of the Act, exclude the jurisdiction of the civil courts by providing that when an application is made by either party to the Permanent Lok Adalat to settle a dispute at the pre-litigation stage, the PLA shall do so, and the other party is precluded from approaching the civil court in such a case.

38. Section 22-C(1) contains certain Provisos which limit the jurisdiction of the PLA. Given the principle of statutory interpretation stated earlier, these Provisos, as a corollary, must be interpreted in an expansive manner.

39. What is important to note is that with respect of public utility services, the main purpose behind Section 22-C(8) seems to be that "most of the petty cases which ought not to go in the regular Courts would be settled in the pre-litigation stage itself."

40. Therefore, in the instant case, the terms "relating to" an "offence" appearing in Proviso 1 must be interpreted broadly, and as the determination before the Permanent Lok Adalat will involve the question as to whether or not an offence, which is non-compoundable in nature, has indeed been committed, this case falls outside the jurisdiction of the Permanent Lok Adalat.

41. We must guard against construction of a statute which would confer such a wide power in the Permanent Lok Adalat having regard to sub-section (8) of Section 22-Cof the Act. The Permanent Lok Adalat must at the outset formulate the questions. We however, do not intend to lay down a law, as at present advised, that Permanent Lok Adalat would refuse to exercise its jurisdiction to entertain such cases but emphasise that it must exercise its power with due care and caution. It must not give an impression to any of the disputants that it from the very beginning has an adjudicatory role to play in relation to its jurisdiction without going into the statutory provisions and restrictions imposed thereunder.

42. For the reasons abovementioned the order of the High Court cannot be sustained and is set aside accordingly. The appeal is allowed. In the facts and circumstances of the case, there shall be no order as to costs.

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9 (2005) 10 SCC 51 : AIR 2005 SC 2392

10 (2008) 2 SCC 660 : (2008) 1 SCC (Cri) 1 SCC (L&S) 535 : JT (2008) 2 SC 83

CHAPTER-9.6

STATE OF PUNJAB & ANOTHER VERSUS JALOUR SINGH & OTHERS

(2008) 2 SUPREME COURT CASES 660

Bench : Hon'ble Mr. Justice K.G. Balakrishnan, C.J. and Hon'ble Mr. Justice G.P. Mathur and Hon'ble Mr. Justice R.V. Raveendran

Civil Appeal No. 522 of 2008†, decided on January 18, 2008

State of Punjab & Another ... PETITIONER:
Versus
Jalour Singh & Others ... RESPONDENT:

A. Legal Aid — Lok Adalats — Jurisdiction, powers and functions of Lok Adalat — Nature and scope — Meaning of words "award" and "determination" used in context of Lok Adalat in Ss. 19 to 22, Legal Services Authorities Act, 1987 — Held, Lok Adalats have no adjudicatory or judicial functions — Their functions relate purely to conciliation and must be based on compromise or settlement between the parties — Lok Adalat cannot enter into an adversarial adjudication akin to a court of law — Lok Adalat "award" not based on a compromise or settlement would be void — In case no compromise or settlement can be arrived at, case record must be returned to the court from which it was received, for disposal by the said court in accordance with law — Civil Procedure Code, 1908 — S. 89 — Legal Services Authorities Act, 1987 — Ss. 19 to 22 — Alternate Dispute Resolution — Conciliation

Allowing the appeal, the Supreme Court

Held:

Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and puts its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject-matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by the principles of justice, equity and fair play. When the LSA Act refers to "determination" by the Lok Adalat and "award" by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The "award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision-making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat. (Para 8)

Many sitting or retired Judges, while participating in the Lok Adalats as members, tend to conduct the Lok Adalats like courts, by hearing parties, and imposing their views as to what is just and equitable, on the parties. Sometimes they get carried away and proceed to pass orders on merits, as in this case, even though there is no consensus or settlement. Such acts; instead of fostering alternative dispute resolution through the Lok Adalats, wiH drive the litigants away from the Lok Adalats. The Lok Adalats should resist their temptation to play the part of judges and constantly strive to function as conciliators. The endeavour and effort of the Lok Adalats should be to guide and persuade the parties, with reference to principles of justice, equity and fair play to compromise and settle the dispute by explaining the pros and cons, strengths and weaknesses, advantages and disadvantages of their respective claims. (Para 9)

The order of the Lok Adalat in this case (extracted in part; 3), shows that it assumed a judicial role, heard parties, ignored the absence of consensus, and increased the compensation to an extent it considered just and reasonable, by a reasoned order which is adjudicatory in nature. It arrogated to itself the appellate powers of the High Court and "allowed" the appeal and "directed" the respondents in the appeal to pay the enhanced compensation of Rs 62,200 within two months. The order of the Lok Adalat was nut passed by consent of parties or in pursuance of any compromise or settlement between the parties. Such an order is not an award of the Lok Adalat. Being contrary to law and beyond the power and jurisdiction of the Lok Adalat, it is void in the eye of the law. (Para 10)

B. Legal Aid — Lok Adalats — Proper award of Lok Adalat (one based on compromise and settlement between parties) — Finality of — Remedy against — Normally a proper Lok Adalat award is final and binding and becomes executable like a civil court decree, and no appeal lies there against — However, a Lok Adalat award can be challenged on very limited grounds under Arts. 226/227 of the Constitution — Legal Services Authorities Act, 1987 — S. 20 — Constitution of India — Arts. 226 and 227

C. Legal Aid — Lok Adalats — Improper "award" of Lok Adalat (one not based on compromise and settlement between parties) — Non-finality of — Remedy against — Award itself permitting parties to approach court in appeal in case of disagreement with award — Such an award not being a Lok Adalat award proper, cannot be challenged under Art. 227 of the Constitution — In such a situation, court concerned should hear and dispose of the appeal on merits — Legal Services Authorities Act, 1987 — S. 20 — Constitution of India — Arts. 226 and 227 — Alternate Dispute Resolution — Conciliation

Where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise, In such a situation, the High Court ought to hear and dispose of the appeal on merits. (Para 12)

Advocates who appeared in this case:

Pahul Malik and Rohit Wlacha (for Ajay Pal) Advocates, for the Appellants;

Neeraj Kr. Jain and Ugra Shankar Prasad, Advocates, for the Respondents;

The Judgment of the Court was delivered by

K.G. BALAKRrSHNAN, CJ.—

Delay condoned. Leave granted. Heard the learned counsel.

2. Respondents 1 and 2 herein, the husband and son of one Amarjit Kaur who died in a motor accident involving a Punjab Roadways bus, filed a claim petition before the Motor Accidents Claims Tribunal, Faridkot. As against the compensation of Rs 5 lakhs claimed, the Tribunal, on 1-12-1998 awarded a compensation of Rs 1,44,000. Not being satisfied with the quantum of compensation, Respondents 1 and 2 filed FAO No. 1549 of 1999'L-efore the Punjab and Haryana High Court. The said appeal was referred to the Lok Adalat organised by the High Court, for settlement.

3. The High Court Lok Adalat took up the case on 3-8-2001. The parties were not present. Their counsel were present. After hearing them the Lok Adalat passed the following order:

"FAO No. 1549 of 1999

After hearing counsel forethe parties, we propose to increase the amount of compensation, which is considered just and reasonable in this case.

The accident took place on March 4, 1997. Amarjit Kaur, aged about 32 years, died in the accident. Her husband and minor son claimed compensation. The Tribunal granted Rs 1,44,000 along with 12 per cent per annum interest. Feeling dissatisfied, they are in appeal.

The deceased was doing household work and also looking after some cattle and selling milk. The tribunal fixed earning capacity at Rs.900/- and dependency at Rs.600/- Applying multiplier of 15, compensation was worked out at Rs.1,08,000/-. To this a sum of Rs.28,253 on account of medical expenses, Rs.2147/- towards incidental charges and Rs.5600/- towards hospital charges were allowed. We are of the opinion that the earning capacity of the household wife has been determined on the lower side. An ordinary labourer gets Rs.1200/- per mensem and at the lowest at least Rs.1200/- should have been determined the earning capacity of the deceased and dependency of the claimants at Rs.800/-. The multiplier of 15 applied in this case is also on the lower side. Since the deceased was aged 32 years, as per Schedule attached to the Motor Vehicles Act, multiplier should have been 17. Thus, compensation worked out at Rs.1,63,200/- (Rs.800/- x 12 x 17). To this a sum of Rs.7,000/- is added i.e. Rs.2,000/- towards funeral expenses and Rs.5,000/- towards loss of consortium, payable to the husband, making total compensation payable at Rs.1,70,200/-. The Tribunal under this head allowed compensation of Rs.1,08,000/- i.e. under this head the claimants would get Rs.62,200/- over and above that amount. The compensation granted under other heads is considered just and reasonable.

Thus, while allowing the appeal, we grant compensation of Rs.62,200/- over and above the amount awarded by the Tribunal to the appellants, who would share it equally. On this amount they will get interest at the rate of 12 percent per annum from the date of filing of the claim petition i.e. July 28, 1997, till payment. Two months time is allowed to the respondents to make the payment.

If the parties object to the proposed order as above, they may move the High Court within two months for disposal of the appeal on merits according to law.

Copies of the order be supplied to the counsel for the parties." (emphasis supplied)

4. Punjab Roadways (second appellant herein) filed an application dated 15.1.2002 (CM No.13988-CII of 2002 in FAO No.1549/1999) to set aside order dated 3.8.2001 passed by the Lok Adalat, as it was passed without their consent. The said application was rejected by a learned Single Judge by a short order dated 11.9.2002 on the ground that such objections were not maintainable or entertainable, having regard to its decision in Charanjit Kaur v. Balwant Singh (CM No.13988-CII of 2002 in FAO No.1827/1999 decided on 30.7.2002) and other cases. In Charanjit Kaur, the learned single Judge had held that an order passed by the Lok Adalat can be challenged only by a petition under Article 227 of the Constitution, as all proceedings before the Lok Adalat are deemed to be judicial proceedings and Lok Adalat is deemed to be a civil court under section 22(3) of Legal Services Authorities Act, 1987.

5. The appellants, therefore, filed a petition under Article 227 of the Constitution (Civil Revision Petition No.970/2004) challenging the order dated 3.8.2001 of the Lok Adalat. The said petition was rejected by another single Judge of the High Court by the following order dated 26.2.2003 :

> *"The instant petition has been filed under Article 227 of the Constitution seeking necessary directions quashing the order dated 3.8.2001 passed by the Lok Adalat enhancing the compensation in favour of the claimant-respondents to the tune of Rs.62,000/-. The order of the Lok Adalat specifically indicated that if the parties were not satisfied, they could file objections within a period of two months for the disposal of the appeal on merits in accordance with law. The petitioners-State had filed objections which were dismissed on 11.9.2002 and the order of the Lok Adalat dated 3.8.2001 had attained finality.*

Now the instant petition has been filed against challenging the order of the Lok Adalat dated 3.8.2001. Nothing has been pointed out showing that such a petition under Article 227 of the Constitution is maintainable. Apart from the fact that the Lok Adalat has granted time for filing the objections and the objections have been dismissed, the meager increase in the amount of compensation does not warrant any interference.

In view of the above, the petition is dismissed being not maintainable."(emphasis supplied)

The said order is under challenge in this appeal by special leave.

6. We are rather dismayed at the manner in which the entire matter has been dealt with, undermining the very purpose and object of Lok Adalats. At every stage the Lok Adalat and the High Court have acted in a manner contrary to law.

7. A reference to relevant provisions will be of some assistance, before examination of the issues involved. Section 19 of the Legal Services Authorities Act, 1987 ('LSA Act' for short) provides for organisation of Lok Adalats. Section 19(5)(i) of LSA Act provides that a Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any case pending before any court for which the Lok Adalat is organised. Section 20 relates to cognizance of cases by Lok Adalats. Sub-section (1) refers to Lok Adalats taking cognizance of cases referred to by courts and sub-section (2) refers to Lok Adalats taking

cognizance of matters at pre-litigation stage. The relevant portions of other sub-sections of section 20, relating to cases referred by courts, are extracted below :

"20. (3) Where any case is referred to a Lok Adalat under sub-section (1)….. the Lok Adalat shall proceed to dispose of the case and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

* * *

(7) Where the record of the case is returned under sub-section (5) to the court, such court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1)]" (emphasis supplied)

8. It is evident from the said provisions that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.

9. But we find that many sitting or retired Judges, while participating in Lok Adalats as members, tend to conduct Lok Adalats like courts, by hearing parties, and imposing their views as to what is just and equitable, on the parties. Sometimes they get carried away and proceed to pass orders on merits, as in this case, even though there is no consensus or settlement. Such acts, instead of fostering alternative dispute resolution through Lok Adalats, will drive the litigants away from Lok Adalats. Lok Adalats should resist their temptation to play the part of Judges and constantly strive to function as conciliators. The endeavour and effort of the Lok Adalats should be to guide and persuade the parties, with reference to principles of justice, equity and fair play to compromise and settle the dispute by explaining the pros and cons, strength and weaknesses, advantages and disadvantages of their respective claims.

10. The order of the Lok Adalat in this case (extracted above), shows that it assumed a judicial role, heard parties, ignored the absence of consensus, and increased the compensation to an extent it considered just and reasonable, by a reasoned order which is adjudicatory in nature. It arrogated to itself the appellate powers of the High Court and 'allowed' the appeal and 'directed' the respondents in the appeal to pay the enhanced compensation of Rs.62,200/- within two months. The order of the Lok Adalat was not passed by consent of parties or in pursuance of any compromise or settlement between the parties, is evident from its observation that "if the parties object to the proposed order they may move the High Court within two months for disposal of the appeal on merits according to law". Such an order is not an award of the Lok Adalat. Being contrary to law and beyond the power and jurisdiction of the Lok Adalat, it is void in the eye of law. Such orders which "impose" the views of the Lok Adalats on the parties, whatever be the good intention behind them, bring a bad name to Lok Adalats and legal services.

11. The travails of the parties did not end with the Lok Adalat. Because the Lok Adalat directed the aggrieved party to move the High Court for disposal of appeal on merits if they had objection to its order, the appellants moved the High Court by an application in the appeal, stating that they had not agreed to the enhancement proposed by Lok Adalat and praying that the order of the Lok Adalat increasing the compensation by Rs.62,200 may be set aside as there was no settlement or compromise. The learned single Judge failed to notice that there was no settlement or compromise between the parties; that the order made by the Lok Adalat was not an award in terms of any settlement as contemplated under the LSA Act; that the Lok Adalat had clearly stated that the parties may either agree to it, or move the High Court for disposal of the appeal on merits in accordance with law; and that in the absence of any settlement and 'award', the appeal before the High Court continued to be pending and could not have been treated as finally disposed of. The learned single Judge instead of perusing the order of the Lok Adalat and hearing the appeal on merits, proceeded on a baseless assumption that the order dated 3.8.2001 of the Lok Adalat was a binding award and therefore an application to hear the appeal, was not maintainable and the only remedy for the appellants was to challenge the order of the Lok Adalat by filing a writ petition under Article 227 of the Constitution.

12. It is true that where an award is made by Lok Adalat in terms of a settlement arrived at between the parties, (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondent to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits.

13. But the travails continued. In view of the order dated 11.9.2002 passed by the learned single Judge holding that a petition under Article 227 has to be filed to challenge the order of the Lok Adalat, the appellants filed a petition under Article 227. But the said petition was dismissed by another single Judge on the ground that the order of Lok Adalat passed on 3.8.2001 had attained

finality as the objections to it were dismissed on 11.9.2002 and a petition under Article 227 was not maintainable to challenge the order of Lok Adalat. He failed to notice that the order dated 3.8.2001 was neither a decision nor had it attained finality. He also failed to notice that the objections to the order were not rejected by the High Court after consideration on merits. He also overlooked the fact that the learned Judge who decided the appellants' application, had directed that the order of the Lok Adalat should be challenged by filing a petition under Article 227. Be that as it may.

14. Thus we find that the Lok Adalat exercised a power/jurisdiction not vested in it. On the other hand, the High Court twice refused to exercise the jurisdiction vested in it, thereby denying justice and driving the appellants to this Court. In this process, a simple appeal by the legal heirs of the deceased for enhancement of compensation, has been tossed around and is pending for more than eight years, putting them to avoidable expense and harassment.

15. We therefore allow this appeal and quash the order dated 3.8.2001 of the Lok Adalat as also set aside the orders dated 11.9.2002 and 26.2.2003 of the High Court. As a consequence, the High Court shall hear and dispose of FAO No.1549/1999 which continues to be pending on its record, on merits in accordance with law. The High Court is requested to dispose of the appeal expeditiously. Parties to bear their respective costs.

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CHAPTER-9.7

P.T. THOMAS VERSUS THOMAS JOB

(2005) 6 SUPREME COURT CASES 478

Bench : Hon'ble Mr. Justice Ruma Pal and Hon'ble Mr. Justice Dr. A.R. Lakshmanan

Civil Appeal No. 4677 of 2005†, decided on August 4, 2005

P.T. Thomas ... Petitioner :
Versus
Thomas Job ... Respondent;

A. Legal Aid — Legal Services Authorities Act, 1987 — S. 21 — Nature and blading effect of Lok Adalat award — Held, though a Lok Adalat award is not the result of a contest on merits, it is as equal and on a par with a decree on compromise and will have the same binding effect and be conclusive — It is final and permanent, is equivalent to a decree executable, and is an ending to the litigation among the parties — Civil Procedure Code, 1908, Ss. 89,11,96(3) and Or. 23 R. 3 (Paras 25,26 and 28)

B. Civil Procedure Code, 1908 — Or. 23 R. 3, Ss. 11 and 89 — Decree by consent or compromise — Binding effect of — Approach to be taken by court — Held, a judgment by consent is as effective an estoppel between the parties as a judgment whereby court exercises its mind on a contested case — Court's attempt should be to give life and enforceabifity to compromise award and not to defeat it on technical grounds (Paras 25,26 and 28)

Sailendra Narayan Bhanja Deo v. State ofOrissa, 1956 SCR 72: AIR 1956 SC 346; Kinch v. Walcou, 1929 AC 482 : 1929 All ER Rep 720: 98 UPC 129 (PC), relied on

South American and Mexican Co.. ex p Bank of England, In re, (1895) 1 Ch 37 : (1891-94) All ER Rep 680 : 71 LT 594 (CA); Secy, of State for India in Council v. Ateendranath Das, ILR (1936) 63 Cal 550; Bhaishanker Nanabhai v. Moraji Keshavji & Co., ILR (1912) 36 Bom 283 : 12 Bom LR 950; Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy CVcy.ILR (1912) 35 Mad 75 21 MLI 709,approved

C. Legal Aid — Legal Services Authorities Act, 1987 — S. 21(2) — Lok Adalat award — Final nature of — Lok Adalat award being passed with consent of parties, no appeal shall lie therefrom as provided under S. 96(3) CPC — Furthermore, the same cannot be challenged under any of the remedies available under law, including by invoking Art 226 of the Constitution — Judicial review cannot be invoked in such awards, especially , on grounds amounting to a challenge to the factual findings or appraisal of evidence — Civil Procedure Code, 1908 — Ss. 96(3), 114, 115 and 89 — Constitution of India — Art. 226 (Paras 16, 21 to 23)

Punjab National Bank v. Laxmichand Rai, A[R 2000 MP 301; Board of Trustees of the Port of Yisakhapatnam v. Presiding Officer, Permanent, Lok Adalat-cum-Secy., District Legal Services Authority, (2000) 5 An LT 577, approved

D. Legal Aid — Legal Services Authorities Act, 1987 — Ss. 21 and 22 — Power of (executing) court in relation to Lok Adalat award — Power to extend time — Held, (executing) court has all the powers in relation to Lok Adalat award as it has in relation to a decree passed by itself — This

includes power to extend time in appropriate cases — Civil Procedure Code, 1908 — Ss. 89,9,47 and 148 (Paras 16 and 28)

E. Legal Aid — Legal Services Authorities Act, 1987 — Ss. 19,21 and 22 —Benefits of Lok Adalat — Enumerated — Benefits being in relation to absence of court fees, procedural flexibility and speedy trial, direct interaction of parties with the judge, binding nature of award and non-appealability thereof — Civil Procedure Code, 1908, S. 89 (Para 19)

F. Legal Aid — Legal Services Authorities Act, 1987 — Ss. 21 and 22 — Nature and mode of adjudication to be followed by Lok Adalat, explained, and laid down (Paras 23 and 24)

G. Civil Procedure Code, 1908 — S. 115 —Jurisdiction under — Scope — Investigation into questions of fact and appraisal of evidence, held, not contemplated (Paras 7 and 10)

H. Legal Aid — Legal Services Authorities Act, 1987 — S. 21 — Execution of Lok Adalat award — Propriety — Obligations of parties — Appellant obtaining decree of ejectment against respondent — Pending appeal there against, Lok Adalat making award on reference thereto — Lok Adalat award providing for execution of sale deed by respondent on payment of Rs9.5 lakhs by appellant within two years of award — On failure to pay on time, appellant to forego said that and be atitled to only Rs 3.5 lakhs from respondent — Respondent not executing sale deed within time fixed, despite repeated requests by appellant and steadfastly refusing to accept service of appellant's legal notices — On appellant's application, executing court overruling objections of respondent and granting time to appellant —- Appellant depositing the Rs 9.5 lakhs within time given therefor by executing court — However, High Court in revision setting aside execution petition — Propriety — Held, from the facts it is evident that appellant decree-holder had all along expressed his readiness and willingness to deposit amount as per award and get sale deed executed — High Court has misunderstood terms of award — Obligation was on respondent to evince his willingness to execute sale deed within two years and not vice versa — There was already a decree of ejectment against him Settlement was a concession in favour of respondent to give him time to give vacant possession — Therefore initiative had to come from respondent Not only did respondent not take the initiative as required, he adopted delaying tactics — Hence interference by High Court, not proper — Further held, this is a fit case for awarding costs — Respondent directed to execute sale deed within two weeks of this order — Civil Procedure Code, 1908 — Ss. 89,35 and Or. 23 R. 3 (Paras 7, 10 to 14,28 and 29)

I. Civil Procedure Code, 1908 — Or. 5 Rr. 9 and 9-A — Deemed service of notice — When obtains — Notice correctly addressed and despite intimation by post office, not accepted and returned unserved — Held, in such circumstances it is presumed that notice has been served — Evidence Act, 1872 — Ss. 114 III. (e) and 16 — General Clauses Act, 1897, S. 27

(Paras 14 and 15)

J. Posts and Telegraph — Post Office Act, 1898 — S. 27 — Applicability Deemed service of notice — Presumption under Post Office Act, 1898 as distinguished from that under S. 114 III. (e), Evidence Act, 1872 — Operation of — Endorsement made by postman on notice issued — Nevertheless respondent not accepting notice and it being returned unserved — Held, there was no obligation cast on appellant to examine postman as assumed by High Court — Presumption under S. 114 111. (e), Evidence Act, 1872 operates apart from that under Post Office Act — In any

case, requirement of S. 27, Post Office Act, 1898 had been complied with — Civil Procedure Code, 1908 — Or. 5 Rr. 9 and 9-A— General Clauses Act, 1897, S.27 (Para 15)

Appeal allowed

Advocates who appeared in this case :

T.L.V. Iyer, Senior Advocate (T.G. Narayanan Nair, Advocate, with him) for the Appellant;

M.P. Vinod, Ajay K. Jain and P. Sajith, Advocates, for the Respondent.

Chronological list of cases cited

1. (2000) 5 An LT 577, Board of Trustees of the Port of Visakhapatnam v.Presiding Officer, Permanent, Lok Adalat-cum-Secy., District Legal Services Authority
2. AIR 2000 MP 301, Punjab National Bank v. Laxmichand Rat
3. 1956 SCR72 : AIR 1956 SC 346, Sailendra Narayan Bhanja Deo v. State Of Orissa
4. ILR (1936) 63 Cal 550, Secy, of State for India in Council v. Ateendranath Das
5. 1929 AC 482 : 1929 All ER Rep 720 : 98 UPC 129 (PC), Kinch v. Walcott
6. ILR (1912) 36 Bom 283 . 12 Bom LR 950, Bhaishanker Nanabhai v. Moraji Keshavji & Co.
7. ILR (1912) 35 Mad 75 : 21 MLJ 709, Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Ramasamy Chetty
8. (1395) 1 Ch 37 : (1891-94) All ER Rep 680 : 71 LT 594 (CA), South American and Mexican Co., ex p Bank of England, In re

The Judgment of the Court was delivered by

Dr. A. R. LAKSHMANAN,J.—

Leave granted.

2. The above appeal is directed against the final order of the High Court of Kerala at Ernakulam dated 27.8.2003 in CRP No. 1136/2003 allowing the Revision Petition filed by the Respondent herein.

3. The Appellant and the Respondent are brothers, Respondent being the elder. They have another brother who is well employed in the United States. The three brothers partitioned the property left behind by their father by metes and bounds. The Respondent was running a theatre. A part of the theatre fell in the property allotted to the appellant. Since Respondent did not vacate and give vacant possession to the Appellant, he was constrained to file a suit for a mandatory injunction for removal of the building and to surrender vacant possession. The Appellant also prayed for a decree for recovery of possession.

4. The appellant's suit was decreed as prayed for. When the matter was pending in appeal at the instance of the Respondent in the District Court, the dispute was referred to the Lok Adalat constituted under the Legal Services Authorities Act for resolution of the dispute. The matter was settled in the Lok Adalat. The award of the Lok Adalat dated 5.10.1999 provided for sale to the Appellant or his nominee of the property scheduled to the award after a period of one year and within a period of two years on payment of a sum of Rs. 9.5 lakhs to the Respondent and on default of the Respondent to execute the document, the appellant could get it executed through

court. On the other hand, in case of default on the part of the appellant, he had to give up his aforesaid right and instead be entitled to be paid to Rs. 3.5 lakhs by the Respondent.

5. The Respondent did not execute the sale deed within the time fixed despite repeated requests by the Appellant. The Appellant, therefore, sent a lawyer's notice on 3.10.2001 to the Respondent calling upon him to execute the sale deed. Respondent did not receive the notice and the notice was returned unserved to the Appellant. The Appellant thereafter sent a telegram on 26.10.2001 requiring the Respondent to execute the sale deed and also sent him a copy of his earlier notice dated 3.10.2001 by certificate of posting. There was no response from the Respondent. The Appellant was, therefore, constrained to move for execution of the award by filing petition in the Trial Court, which was opposed on various grounds. The Subordinate Judge overruled all the objections and the appellant was directed to deposit a sum of Rs. 9.5 lakhs within three days i.e., on or before 8.4.2003. The Appellant, however, deposited the amount one day earlier on 7.4.2003 the next working day. But, the High Court allowed the Revision filed by the Respondent and dismissed the execution petition on grounds, which according to the Appellant, are irrelevant and incorrect. Hence, the Appellant preferred the above special leave petition.

6. We have heard Mr. TLV Iyer, learned senior counsel for the Appellant and Mr. M.P.Vinod, learned counsel for the Respondent and perused the pleadings, orders passed by the courts below and the Annexures filed along with the appeal.

7. Mr. TLV Iyer, learned senior counsel appearing for the Appellant submitted that the High Court has exceeded its jurisdiction under Section 115 C.P.C in entering into the investigation of questions of fact and appraisal of evidence in setting aside the well considered order of the Executing Court. He further submitted that the High Court is in error in holding that the Appellant did not have the funds with him to have the deed of sale executed in his favour and the reasoning and the premises on which such a conclusion is based are faulty and fallacious besides being beyond jurisdiction. It is further submitted that the Respondent had not performed his obligations by evincing his willingness to execute the sale deed on receipt of the amount of Rs. 9.5 lakhs. Concluding his arguments, Mr Iyer submitted that the view taken by the High Court would totally defeat the object and purposes of the Legal Services Authorities Act and render the decisions of the Lok Adalat meaningless.

8. Per contra, Mr. Vinod, learned counsel for the Respondent submitted that the appellant has not paid the sum of Rs. 9.5 lakhs after one year from the date of the award, namely, 5.10.1999 and at any rate within two years therefrom. It is further submitted that the appellant also did not deposit the amount before filing the execution petition as contemplated in the award. Even when he was examined in court on 22.2.2003, he had not deposited the said amount. According to Mr. Vinod, the award of the Lok Adalat cannot be equated with a decree and it only incorporates an agreement between the parties and that in case of any violation of the said agreement, or the terms of the compromise recorded in the award, the parties lose their right to get the same executed and the compromise stands withdrawn. It is further argued that the Appellant admittedly had not produced any material to show that the Appellant had the resources to pay the said amount at any relevant point of time or that the said amount was ever offered to the respondent at any point of time and, therefore, the appellant is not entitled to any relief in this appeal.

9. It is further submitted that there is no effective service of any notice on the Respondent before 5.10.1999 and the only endorsement is that the Respondent was absent. It is submitted that

the Appellant never had the money with him and the belated payment after the order of the executing court will not improve the case of the Appellant to prove his readiness and willingness to deposit a sum of Rs. 9.5 lakhs as agreed upon by him, and on the date specified, on the basis on which the matter was compromised before the Lok Adalat and an award was passed. Concluding his arguments, learned counsel submitted that there is no merit whatsoever in the grounds raised in this appeal and therefore, the appeal, which is clearly without any merits, deserves to be dismissed.

10. We have carefully considered the rival submissions made by both the learned counsel. We do not find any merit in the submissions made by learned counsel for the Respondent. From the evidence and the documents filed, we see bona fides on the part of the appellant in giving effect to the compromise arrived at between parties in the Lok Adalat. We also see absolute merits on the submissions made by learned senior counsel, Mr. T.L.V. Iyer.

11. It is seen from the records that the Appellant was compelled to file the suit for recovery of possession of Plot No. 2 since the Respondent herein refused to comply with the terms of the compromise arrived at between the parties. The suit was decreed on 26.7.1990 and appeal was filed by the Judgment Debtor Respondent before the District Court and during the pendency of the appeal the matter was compromised between parties on 5.10.1999. We have already extracted the terms of compromise in paragraph supra. It is thus clear that the decree holder Appellant has approached the executing court on the ground that the Judgment debtor/Respondent failed to execute the sale deed after receiving Rs. 9.5 lakhs from the decree holder. Therefore the Appellant prayed before the Executing Court that he should be permitted to deposit Rs. 9.5 lakhs in that court and get the documents executed through court if the Judgment debtor failed to do so on issuance of notice for the purpose by the executing court. The respondent submitted that the compromise arrived at is a conditional one and Judgment debtor is liable to execute the sale deed in favour of the decree holder only if he remits the amount as agreed, and since decree holder has failed to comply with the conditions the Judgment debtor is not bound by the terms of the compromise. On the other hand the respondent/J.D. was ready and willing to deposit Rs.3.5 lakhs before the executing court as per the terms of the compromise.

12. Before the executing Court witnesses were examined on both sides and Exhibit A1 to A8 and B1 were produced by the respective parties. The executing court, accepting the evidence of PW 1 came to the conclusion that the notice issued requiring the respondent to execute the document as submitted in the award was not received by the Judgment debtor and it has been returned unclaimed. It is seen that notice was an attempt to be served on the Judgment debtor on 4.10.2001 and since he was absent, intimation regarding the notice has been given and the above notice has been returned as unclaimed on 19.10.2001. The Appellant after return of the Exhibit A2 notice immediately sent a telegram to the Judgment debtor on 26.1.2001. The receipt issued for the telegram and certified true copy of the telegram was marked as Exhibit A3 and A4. The Original telegram was produced on the side of the Respondent and marked as an Exhibit. By the telegram the Judgment debtor was intimated that the notice sent by the decree holder through his Advocate on 3.10.2001 was returned unclaimed and copy of that notice was being forwarded by certificate of posting and that he was always ready and willing to pay Rs. 9.5 lakhs and get the sale deed executed in terms of the award. The copy of the Exhibit A2 notice is marked as A5, the certificate of posting obtained for issuing the copy of notice along with the copy of the telegram is marked as Exhibit A6. Thus, it is clearly seen that the appellant decree

holder has expressed his readiness and willingness to deposit the amount as per the award and get the document executed.

13. It is argued on the side of the Respondent that the Appellant has not sufficient fund to fulfill the obligation as per the award and that the Appellant had issued a notice and telegram so as to create some records in his favour that he is always willing and ready to pay the amount as per the award. It is submitted that it is only due to the default of the Appellant the execution of the sale deed has not taken place and therefore, the Appellant is not entitled to any relief in this appeal. The learned Subordinate Judge on a consideration of the entire evidence placed on record granted the Appellant three days time to deposit Rs. 9.5 lakhs before the said court upon which he could get the sale deed through court as stipulated in the award. The appellant as directed by the learned Subordinate Judge deposited the entire sum of Rs. 9.5 lakhs in the sub-court on 7.4.2003 as could be seen from Annxure 6.

14. We have also perused the order of the learned Single Judge of the High Court in revision. The learned Single Judge, in our view, has misunderstood the terms of the award. The obligation was on the Respondent to evince his willingness to execute the sale deed within two years and not vice-versa as assumed by the High Court. There was already a decree of ejectment against the Respondent in the suit in the trial Court and it was his appeal that was sought to be settled in the Lok Adalat. The settlement was a concession in his favour giving a breathing time to vacate and give vacant possession. Therefore, the initiative had to come from the Respondent after offering to execute the sale deed where upon it became necessary to comply with his obligations. However, without taking any initiative the Respondent has adopted the delaying tactics by alleging that the appellant was not able to provide the requisite funds for purchase and forgetting the facts that the Appellant's brother is in USA and providing the requisite funds for purchase. It was he, in fact, who had provided the amount which was deposited on 7.4.2003 and not on 8.4.2003 as assumed by the High Court. It is, thus, seen that the Appellant has performed his obligation. He had sent the notice on 3.10.2001 and it was 4.10.2001 well before the expiry of time on 5.10.2001. Though the notice was correctly addressed and despite the intimation by the post office, the notice was not accepted by the Respondent and was returned unserved. In such circumstances, the presumption of law is that the notice has been served on the Respondent.

15. The High Court, in our view, has also misinterpreted Section 27 of the Post Office Act. The requirement of Section has been complied with in this case. The reasoning of the High Court on this issue is not correct and not in accordance with factual position. In the notice issued, the Postman has made the endorsement. This presumption is correct in law. He had given notice and intimation. Nevertheless, the respondent did not receive the notice and it was returned unserved. Therefore, in our view, there is no obligation cast on the appellant to examine the Postman as assumed by the High Court. The presumption under Section 114 of the Evidence Act operates apart from that under the Post Office Act, 1898.

16. In our opinion, the award of the Lok Adalat is fictionally deemed to be decrees of Court and therefore the courts have all the powers in relation thereto as it has in relation to a decree passed by itself. This, in our opinion, includes the powers to extend time in appropriate cases. In our opinion, the award passed by the Lok Adalat is the decision of the court itself though arrived at by the simpler method of conciliation instead of the process of arguments in court. The effect is the same. In this connection, the High Court has failed to note that by the award what is put an end to is the appeal in the District Court and thereby the litigations between brothers forever.

The view taken by the High Court, in our view, will totally defeat the object and purposes of the Legal Services Authorities Act and render the decision of the Lok Adalat meaningless.

17. Section 21 of the Legal Services Authorities Act, 1987 reads as follows :-

> *"21. AWARD OF LOK ADALAT. 2[(1)] Every award of the Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred on it under sub-section (1) of Sec.20, the court fee paid in such cases shall be refunded; in the manner provided under the Court Fees Act, 1870 (7 of 1870)*
>
> (2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award.

Section 22 reads thus :-

> *"22. POWERS OF LOK ADALATS - (1) The Lok Adalat shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely :*
>
> (a) the summoning and enforcing the attendance of any witness and examining him on oath;
>
> (b) the discovery and production of any document ;
>
> (c) the reception of evidence on affidavits ;
>
> (d) the requisitioning of any public record or document or copy of such record or document from any Court or Office; and
>
> (e) such other matters as may be prescribed.
>
> (2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.
>
> (3) All Proceedings before a Lok Adalat shall be deemed to be judicial proceedings within the meaning of Secs. 193, 219 and 228 of the Indian Penal Code (45 of 1860) and every Lok Adalat shall be deemed to be a Civil Court for the purpose of Sec. 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2) of 1974)."

18. **What is Lok Adalat? :**

"The "Lok Adalat" is an old form of adjudicating system prevailed in ancient India and it's validity has not been taken away even in the modern days too. The word 'Lok Adalat' means 'People Court'. This system is based on Gandhian Principles. It is one of the components of ADR system. As the Indian Courts are over burdened with the backlog of cases and the regular Courts are to decide the cases involve a lengthy, expensive and tedious procedure. The Court takes years together to settle even petty cases. Lok Adalat , therefore provides alternative resolution or devise for expedious and inexpensive justice.

In Lok Adalat proceedings there are no victors and vanquished and, thus, no rancour.

Experiment of 'Lok Adalat' as an alternate mode of dispute settlement has come to be accepted in India, as a viable, economic, efficient and informal one.

LOK ADALAT is another alternative to JUDICIAL JUSTICE. This is a recent strategy for delivering informal, cheap and expeditious justice to the common man by way of settling disputes, which are pending in Courts and also those, which have not yet reached Courts by negotiation, conciliation and by adopting persuasive, common sense and human approach to the problems of the disputants, with the assistance of specially trained and experienced Members of a Team of Conciliators."

19. **Benefits Under Lok Adalat:**

1. There is no Court fee and if Court fee is already paid the amount will be refunded if the dispute is settled at Lok Adalat according to the rules.
2. The basic features of Lok Adalat are the procedural flexibility and speedy trial of the disputes. There is no strict application of procedural laws like Civil Procedure Code and Evidence Act while assessing the claim by Lok Adalat.
3. The parties to the dispute can directly interect with the Judge through their Counsel which is not possible in regular Courts of law.
4. The award by the Lok Adalat is binding on the parties and it has the status of a decree of a Civil Court and it is non-appealable which does not causes the delay in the settlement of disputes finally.

In view of above facilities provided by the 'Act' Lok Adalats are boon to the litigating public they can get their disputes settled fast and free of cost amicably.

AWARD OF LOK ADALAT :-

20. The Lok Adalat shall proceed and dispose the cases and arrive at a compromise or settlement by following the legal principles, equity and natural justice. Ultimately the Lok Adalat passes an award, and every such award shall be deemed to be a decree of Civil Court or as the case may be which is final.

AWARD OF LOK ADALAT SHALL BE FINAL :-

21. The Lok Adalat will passes the award with the consent of the parties, therefore there is no need either to reconsider or review the matter again and again, as the award passed by the Lok Adalat shall be final. Even as under Section 96(3) of C.P.C. that "no appeal shall lie from a decree passed by the Court with the consent of the parties". The award of the Lok Adalat is an order by the Lok Adalat under the consent of the parties, and it shall be deemed to be a decree of the Civil Court, therefore an appeal shall not lie from the award of the Lok Adalat as under Section 96(3) C.P.C.

22. In Punjab National Bank vs. Lakshmichand Rai[1] (AIR at p. 304, para 9), the High Court held that

> *"The provisions of the Act shall prevail in the matter of filing an appeal and an appeal would not lie under the provisions of Section 96 C.P.C. Lok Adalat is conducted under an independent enactment and once the award is made by Lok Adalat the right of appeal shall be governed by the provisions of the Legal Services Authorities Act when it has been specifically barred under Provisions of Section 21(2), no appeal can be filed against the award under Sec.96 C.P.C."*

The Court further stated that : (AIR p. 304-05, para 14)

1 AIR 2000 Madhya Pradesh 301

"14. It may incidentally be further seen that even the Code of Civil Procedure does not provide for an appeal under Section 96(3) against a consent decree. The Code of Civil Procedure also intends that once a consent decree is passed by Civil Court finality is attached to it. Such finality cannot be permitted to be destroyed, particularly under the Legal Services Authorities Act, as it would amount to defeat the very aim and object of the Act with which it has been enacted, hence, we hold that the appeal filed is not maintainable."

23. The High Court of Andhra Pradesh held that, in Board of Trustees of the Port of Visakhapatnam vs. Presiding Officer, Permanent, Lok Adalat-cum-Secretary, District Legal Services Authority[2] the award is enforceable as a decree and it is final. In all fours, the endeavour is only to see that the disputes are narrowed down and make the final settlement so that the parties are not again driven to further litigation or any dispute. Though the award of a Lok Adalat is not a result of a contest on merits just as a regular suit by a Court on a regular suit by a Court on a regular trial, however, it is as equal and on par with a decree on compromise and will have the same binding effect and conclusive just as the decree passed on the compromises cannot be challenged in a regular appeal, the award of the Lok Adalat being akin to the same, cannot be challenged by any regular remedies available under law including invoking Article 226 of the Constitution of India challenging the correctness of the award on any ground. Judicial review cannot be invoked in such awards especially on the grounds as raised in this writ petition.

24. The award of Lok Adalat is final and permanent which is equivalent to a decree executable, and the same is an ending to the litigation among parties.

25. In Sailendra Narayan Bhanja Deo vs. The State of Orissa[3] the constitution Bench held as follows: (SCR p. 82)

A Judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the court exercises its mind on a contested case. (South American and MExican Co., 'ex p Bank of England, In re[4] & Kinch v. Walcott[5])

"In South American and Mexican Co., Ex. Parte Bank of England' In re[2] it has been held that a judgment by consent or default is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case. Upholding the judgment of Vaughan Williams,J Lord Herschell said (Ch p. 50) :

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

To the like effect are the following observations of the Judicial Committee in 'Kinch v. Walcott[5]

"First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent , not discharged by mutual

2 2000(5) ALT 577
3 1956 SCR 72 : AIR 1956 SC 346
4 (1895) 1 Ch 37 : (1891-94) All ER Rep 680 : 71 LT 594 (CA)
5 1929 AC 482 : 1929 All ER Rep 720 : 98 LJPC 129 (PC)

agreement, and remaining unreduced , is as effective as an order of the Court made otherwise than by consent and not discharged on appeal."

26. The same principle has been followed by the High Courts in India in a number of reported decisions. Reference need only be made to the cases of Secy. Of State v. Ateendranath Das[6] Bhaishanker v. Moraji Keshavji & Co.[7], and Raja Kumara Venkata Perumal Raja Bahadur', v. Thatha Ramasamy Chetty[8]'. In the Calcutta case after referring to the English decisions the High Court observed as follows :

"On this authority it becomes absolutely clear that the consent order is as effective as an order passed on contest, not only with reference to the conclusion arrived at in the previous suit but also with regard to every step in the process of reasoning on which the said conclusion is founded. When we say "every step in the reasoning" we mean the findings on the essential facts on which the judgment or the ultimate conclusion was founded. In other words the finding which it was necessary to arrive at for the purpose of sustaining the judgment in the particular case will operate as estoppel by judgment."

27. The Civil Procedure Code contains the following provisions:

"Order 23 Rule 3 provides for compromise of suit where it is proved to the satisfaction of the Court that a suit has been adjusted wholly in part by any lawful agreement or compromise, written and signed by the parties. The Court after satisfying itself about the settlement, it can convert the settlement into a judgment decree."

28. We have already discussed about the steps taken by the appellant to serve notice on the respondent and the steps taken by him to perform his obligations and sending of the notice and telegram etc. would not have been done unless the appellant was ready with his obligations and the money all along. The appellant had waited till almost the last day for the respondent to perform his obligations. The High Court, in our view, has failed to note that the courts attempt should be to give life and enforceability to the compromise award and not to defeat it on technical grounds. This is a fit case, in our view, where the Respondent ought to have been directed to execute the sale deed by the extended time, if necessary. The High Court is also not correct in holding that the Court has no jurisdiction to extend the time. In our view, the learned Subordinate Judge has rightly extended the time for depositing the money which the High Court has wrongly interfered with.

29. We, therefore, hold that the order passed by the High Court in C.R.P. 1136/2003 is liable to be set aside. We do so accordingly. We direct the Respondent herein to execute the sale deed within two weeks from today failing which the Appellant could get the sale deed executed though court as stipulated in the award. The respondent is now entitled to withdraw Rs. 9.5 lakhs from the Sub-Court Alapuzha. Though this is a fit case for awarding cost, we refrain from doing so in view of the relationship between the parties.

30. The appeal is allowed. No costs.

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6 ILR (1936) 63 Cal 550
7 ILR (1912) 36 Bom 283 : 12 Bom LR 950
8 ILR (1912) 35 Mad 75 : 21 MLJ 709

CHAPTER-9.8

B. P. MOIDEEN SEVAMANDIR & ANR. VS. A. M. KUTTY HASSAN

(2009) 2 SUPREME COURT CASES 198

Bench : Hon'ble Mr. Justice R.V. Raveendran and Hon'ble Mr. Justice D.K. Jain

Civil Appeal Nos. 7282-83 of 2008†, decided on December 12, 2008

B. P. Moideen Sevamandir & Anr. Appellants
Vs.
A. M. Kutty Hassan. Respondent

A. Civil Procedure Code, 1908 — Or. 17 Or. 1 & 2 and S. 100 — Adjournment — Prejudice — Adjournment refused by mixing up unrelated issues — Sustainability — Appellant-defendant's counsel seeking adjournment on the ground of sudden illness in the post-lunch session, though she was ready in the pre-lunch session — High Court in second appeal, refusing adjournment on the ground that the appellant-defendant was cantankerous and unreasonable before the Lok Adalat for which a amicable settlement could not be reached — The issue of adjournment and conduct of appellant-defendant in the Lok Adalat, held, have no relation to each other and such dismissal can only be attributed to prejudice — Second appeal, therefore, restored and directed to be disposed of on merits :— Practice and Procedure — Adjournment (Paras 20 and 22)

B. Civil Procedure Code, 1908 — Ss. 100 and 89 — Second appeal — Factual relevance of conduct of party before Lok Adalat or other ADR for a — When a case is heard and decided on merits, the conduct of party before any ADR fora, howsoever stubborn or unreasonable, held, is totally irrelevant — Legal Services Authorities Act, 1987, S. 22 (Paras 17 and 19)

C. Legal Services Authorities Act, 1987 — Ss. 22-E and 21 — Award when finding — Final and tentative award, distinguished — He'd, there cannot be an award when there is no settlement or only a tentative settlement — Observation by High Court that parties having arrived at a settlement (tentative settlement) before the Lok Adalat, could not refuse to file a compromise petition in court, held, therefore erroneous — Civil Procedure Code, 1908, Ss. 100,89 and Or. 22 R. 3 (Paras 8, 9, 11, 21 and 19)

D. Legal Services Authorities Act, 1987 — Ss. 22, 21, 20(5) and 2(d) — Lok Adalat and ADR fora — Powers, purpose, scope and procedure of compromise — Either award on the basis of compromise or return of matter to court — No third course open for any directions by the conciliator — Directions determining rights/obligations/title of parties prior to any settlement, held, are not permissible - Civil Procedure Code, 1908 — S. 89 — Arbitration and Conciliation Act, 1996, Ss. 67,73,74,76 and 80 (Paras 8, 11 and 7)

It is unfortunate that the members of the Lok Adalat and the Single Judge totally lost sight of the purpose and scope of Lok Adalats. When a case is referred to the Lok Adalat for settlement, two courses are open to it: (a) if a compromise or a settlement is arrived at between the parties, to make an award, incorporating such compromise or settlement (which when signed by the parties

and countersigned by the members of the Lok Adalat, has the force of a decree); or (b) if there is no compromise or settlement, to return the record with a failure report to the court. There can be no third hybrid order by the Lok Adalat containing directions to the parties by way of final decision, with a further direction to the parties to settle the case in terms of such directions. (Paras 7 and 8)

E. Legal Services Authorities Act, 1987 — S. 20(5) — Application — Voluntary/amicable negotiations and settlement — No punishment for failing to agree on a settlement — Duty of Judges regarding, stated — Role of Judges as statutory conciliators distinguished from their judicial role — Civil Procedure Code, 1908 — S. 89 — Arbitration and Conciliation Act, 1996, Ss. 67,73,74,76 and 80 (Paras 10 and 14 to 18)

State of Punjab v. Jalour Singh, (2008) 2 SCC 660 : (2008) 1 SCC (Cri) 524 : (2008) 1 SCC (L&S) 535, relied on

F. Legal Services Authorities Act, 1987 — S. 20(l)(ii) — Reference of cases to Lok Adalat by-court — When proper — Each and every case, held, cannot be referred — Judicial training to avoid mechanical reference suggested — Examples of mechanical reference cited

Judges require some training in selecting and referring cases to Lok Adalats or other ADR processes. Mechanical reference to unsuited mode of ADR process may well be counterproductive. A plaintiff who comes to court alleging unlawful encroachment by a neighbour may well ask what kind of settlement he should have with an encroacher in a Lok Adalat. He cannot obviously be asked to sacrifice a part of his land for purposes of amicable settlement thereby perpetuating the illegality of an encroachment. A plaintiff alleging fraud and forgery of documents against a defendant may well ask what settlement he can have with a fraudster or forger through ADR process as any settlement may mean yielding to or accepting fraud or forgery. (Paras 15 and 16)

G. Lok Adalats — Need of uniform law and functioning — Directions regarding, given to National Legal Services Authority — Legal Services Authorities Act, 1987 — Ss. 21 & 22 — Arbitration and Conciliation Act, 1996, Ss. 67,73,74,76 and 80

It is suggested that the National Legal Services Authority as the apex body, should issue uniform guidelines for the effective functioning of the Lok Adalats. As an award of a Lok Adalat is an executable decree, it is necessary for the Lok Adalats to have a uniform procedure, prescribed registers and standardised formats of awards and permanent record of the award to avoid misuse or abuse of the ADR process. The principles underlying following Sections 67, 75 and 86 in the Arbitration and Conciliation Act, 1996 relating to conciliators may also be treated as guidelines to members of Lok Adalats till uniform guidelines are issued. Each Adalat adopts its own procedure. Strange orders by the Lok Adalats are the result of lack of fixed/appropriate rules or guidelines. Many members of the Lok Adalats are not judicially trained. Lok Adalats even pass "orders", issuing "directions" and even granting declaratory relief, which are purely in the realm of courts or specified tribunals, that too when there is no settlement. (Paras 13 and 12)

Appeals allowed

Advocates who appeared in this case :

P. Krishnamoorthy, Senior Advocate (Sajith P. Warrier and M.P. Vinod, Advocates) for the Appellants;

C.S. Rajan, Senior Advocate (A. Raghunath, Advocate) for the Respondent.

Chronological list of cases cited

1. (2008) 2 SCC 660 : (2008) 1 SCC (Cri) 524 : (2008) 1 SCC (L&S) 535, State of Punjab vs. Jalour Singh

The Order of the Court was delivered by

R.V.RAVEENDRAN, J.—Leave granted. Mr. A. Raghunath, learned counsel accepts notice for the sole respondent. Heard by consent.

2. The appellants were the defendants in a suit for declaration and mandatory injunction. Having lost before the trial court and the first appellate court, the appellants filed a second appeal before the High Court of Kerala on 6.2.2005. The appeal was admitted and an interim stay of execution was granted in the said appeal on 1.6.2005. The pending second appeal was referred to the Lok Adalat organized by the Kerala High Court Legal Services Committee on 25.5.2007. Before the Lok Adalat, parties apparently arrived at a tentative settlement. The Lok Adalat consisting of two retired Judges of the High Court purported to pass the following `award' dated 25.5.2007 in the appeal :

"AWARD"

Counsel for the parties and the appellants and respondent present.

The parties have settled the dispute and agreed to file a memorandum of settlement before the High Court to obtain orders for disposal of this appeal and for refund of court fee.

A plan of the property is produced by the appellant and it is received. The plan used will *form part of this order. The appellant will vacate the buildings in plot A to the respondent on or before 31st July, 2007. On such surrender, plot B will belong to the appellant and ..... A compromise deed to this effect will be drawn by the parties and file before the court."*

Post before the court on or before 31st July, 2007" [emphasis supplied]

3. The appellants allege that the parties could not finalise the terms of settlement as it was found that there was no access to the portion to which they had to move, and therefore no compromise petition was drawn up or filed. As the settlement was not reported, the High Court, by order dated 10.4.2008 made a second reference to the Lok Adalat. The parties and counsel again appeared before Lok Adalat. Further negotiations were unsuccessful and the Lok Adalat sent the following failure report dated 3.4.2008 to the court :

> *"We have discussed the matter with the counsel and their parties and considering the nature of demand made by the appellants, there is no chance of settlement."*
>
> *[emphasis supplied]*

4. The second appeal was thereafter listed for the final hearing on 19.8.2008 before a learned Single Judge. When the matter reached hearing in the post-lunch session, an advocate attached to the office of the appellants' counsel submitted that the appeal was to be argued by his colleague Mrs. Sarita, that due to personal inconvenience she could not be present during that session, and that therefore the matter may be adjourned to the next day. The learned Single Judge rejected the request and dismissed the appeal. The operative portion of the order dated 19.8.2008 is extracted below :

> *"I see no reason why any further adjournment is to be granted in the appeal of 2005 when the parties are willfully abstaining from arriving at any settlement despite an*

award passed at the Adalath on agreement.In the result, I dismiss this appeal for default." (emphasis supplied)

5. The very next day, that is on 20.8.2008, an application was filed for restoration of the appeal supported by the affidavit of the counsel (Mrs. Saritha) giving the following reason for her absence at the post-lunch session on 19.8.2008 :

> *"I am an advocate attached to the office of the counsel for the petitioner. I was entrusted to argue the aforementioned second appeal and I was prepared for the same since the matter was listed. The case was taken up as item no.504 in Court I-C in the afternoon session on 19.8.2008. I was present in the court in the forenoon session and unfortunately I developed severe ear pain and had to leave the court. I had entrusted my colleague to appear before the Hon'ble Court and requested a day's adjournment on account of this personal inconvenience and he had submitted the same."*

The said application was dismissed by the learned Single Judge on 29.8.2008. The relevant portion of the said order is extracted below :

> *"The order passed on 25.5.2007 by the mediators show that the parties and already settled the dispute and they only wanted to file a memorandum of settlement before this Court to obtain orders disposing of the appeal refunding court fee and it is after having agreed to the terms as stated in the award that untenable and unreasonable contentions are advanced now and that too coming forward with a petition to restore the appeal when the appeal itself was dismissed for reason of absence of counsel. I see no reason to allow the MJC in the circumstances, so as to enable a cantankerous litigant to continue protracting the litigation even after an award is passed at the Adalat."*
> *(emphasis supplied)*

6. The said orders dated 19.8.2008 and 29.8.2008 of the High Court are challenged in these appeals by special leave. We have heard Sri P.Krishna Murthy, learned senior counsel for appellants and Sri C.S.Rajan, learned senior counsel for respondent.

7. It is unfortunate that the learned members of the Lok Adalat and the learned Single Judge totally lost sight of the purpose and scope of Lok Adalats. We may conveniently recall what this Court has said about the scope of Lok Adalats, (after referring to the relevant provisions of the Legal Services Authorities Act, 1987), in State of Punjab vs. Jalour Singh[1] [2008 (2) SCC 660] :-

> *"8. It is evident from the said provisions that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination,*

1 (2008) 2 SCC 660 : (2008) 1 SCC (Cri) 524 : (2008) 1 SCC (L&S) 535

but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat."

8. When a case is referred to the Lok Adalat for settlement, two courses are open to it : (a) if a compromise or a settlement is arrived at between the parties, to make an award, incorporating such compromise or settlement (which when signed by the parties and countersigned by the members of the Lok Adalat, has the force of a decree); or (b) if there is no compromise or settlement, to return the record with a failure report to the court. There can be no third hybrid order by the Lok Adalat containing directions to the parties by way of final decision, with a further direction to the parties to settle the case in terms of such directions. In fact, there cannot be an `award' when there is no settlement. Nor can there be any `directions' by the Lok Adalat determining the rights/obligations/title of parties, when there is no settlement. The settlement should precede the award and not vice versa.

9. When the Lok Adalat records the minutes of a proceeding referring to certain terms and directs theparties to draw a compromise deed or a memorandum of settlement and file it before the court, it means thatthere is no final or concluded settlement and the Lok Adalat is only making tentative suggestions for settlement; and such a proceeding recorded by the Lok Adalat, even if it is termed as an `award', is not an `award of the Lok Adalat'.

10. Although the members of Lok Adalats have been doing a commendable job, sometime they tend to act as Judges, forgetting that while functioning as members of Lok Adalats, they are only statutory conciliators and have no judicial role. Any overbearing attitude on their part, or any attempt by them to pressurize or coerce parties to settle matters before the Lok Adalat (by implying that if the litigant does not agree for settlement before the Lok Adalat, his case will be prejudiced when heard in court), will bring disrepute to Lok Adalats as an alternative dispute resolution process (for short `ADR process') and will also tend to bring down the trust and confidence of the public in the Judiciary.

11. In this case the proceedings dated 25.5.2007 is termed as an `award'. It is also described as an `order' and `directs' the appellant to vacate certain buildings on or before 31.7.2007 and further directs that on such surrender, another portion shall belong to the appellants. Such an `award' could have been made by the Lok Adalat only when there was a final settlement between the parties. The procedure adopted by the Lok Adalat on 25.5.2007, was clearly erroneous and illegal. The learned counsel for the respondent stated that the Lok Adalat followed the said procedure of passing an `Award' dated 25.5.2007 and directing parties to file a compromise in the court, only to enable the appellants to get refund of court fee. We fail to understand how the question of refund of court fee can have any bearing on the compliance with the statutory requirements relating to a settlement and award by a Lok Adalat.

12. Such strange orders by Lok Adalats are the result of lack of appropriate rules or guidelines. Thousands of Lok Adalats are held all over the country every year. Many members of Lok Adalats are not judicially trained. There is no fixed procedure for the Lok Adalats and each

Adalat adopts its own procedure. Different formats are used by different Lok Adalats when they settle the matters and make awards. We have come across Lok Adalats passing `orders', issuing `directions' and even granting declaratory relief, which are purely in the realm of courts or specified Tribunals, that too when there is no settlement.

13. As an award of a Lok Adalat is an executable decree, it is necessary for the Lok Adalats to have an uniform procedure prescribed Registers and standardized formats of awards and permanent record of the awards, to avoid misuse or abuse of the ADR process. We suggest that the National Legal Services Authority as the apex body, should issue uniform guidelines for the effective functioning of the Lok Adalats. The principles underlying following provisions in the Arbitration and Conciliation Act, 1996 relating to conciliators, may also be treated as guidelines to members of Lok Adalats, till uniform guidelines are issued section 67 relating to role of conciliators; section 75 relating to confidentiality; and section 86 relating to admissibility of evidence in other proceedings.

14. Lok Adalats should also desist from the temptation of finding fault with any particular litigant, or making a record of the conduct of any litigant during the negotiations, in their failure report submitted to the court, lest it should prejudice the mind of the court while hearing the case. For instance, the observation in the failure report dated 3.4.2008 of the Lok Adalat in this case (extracted in para 3 above) that there is no chance of settlement on account of the "nature of demands made by the appellants", implied that such demands by the appellant were unreasonable. This apparently affected the mind of the learned Single Judge who assumed that the appellants were cantankerous, when the second appeal and application for restoration came up for hearing before the court.

15. We may now turn to the role of courts with reference to Lok Adalats. Lok Adalats is an alternative dispute resolution mechanism. Having regard to section 89 of Code of Civil Procedure, it is the duty of court to ensure that parties have recourse to the Alternative Dispute Resolution (for short `ADR') processes and to encourage litigants to settle their disputes in an amicable manner. But there should be no pressure, force, coercion or threat to the litigants to settle disputes against their wishes. Judges also require some training in selecting and referring cases to Lok Adalats or other ADR processes.

16. Mechanical reference to unsuited mode of ADR process may well be counter productive. A plaintiff who comes to court alleging unlawful encroachment by a neighbour may well ask what kind of settlement he should have with an encroacher in a Lok Adalat. He cannot obviously be asked to sacrifice a part of his land for purposes of amicable settlement thereby perpetuating the illegality of an encroachment. A plaintiff alleging fraud and forgery of documents against a defendant may well ask what settlement he can have with a fraudster or forger through ADR process as any settlement may mean yielding to or accepting fraud or forgery.

17. When a case is to be heard and decided on merits by a court, the conduct of the party before the Lok Adalat or other ADR fora, howsoever stubborn or unreasonable, is totally irrelevant. A court should not permit any prejudice to creep into its judicial mind, on account of what it perceives as unreasonable conduct of a litigant before the Lok Adalat. Nor can its judgment be `affected' by the cantankerous conduct of a litigant. It cannot carry `ill-will' against a litigant, because he did not settle his case. It is needless to remind the oath of office, which a Judge takes when assuming office. He is required to perform his duties without fear or favour, affection or

ill-will. Any settlement before the Lok Adalat should be voluntary. No party can be punished for failing to reach the settlement before the Lok Adalat.

18. Section 20(5) of the Act statutorily recognizes the right of a party whose case is not settled before the Lok Adalat to have his case continued before the court and have a decision on merits.

19. Any admission made, any tentative agreement reached, or any concession made during the negotiation process before the Lok Adalat cannot be used either in favour of a party or against a party when the matter comes back to the court on failure of the settlement process. To deny hearing to a party on the ground that his behaviour before the Lok Adalat was cantankerous or unreasonable would amount to denial of justice. When deciding a matter on merits of a case, if a court carries any prejudice against a party on account of his conduct before an ADR forum, it will violate the inviolable guarantee against prejudice or bias in decision making process. Such conduct can neither be permitted nor be tolerated and requires to be strongly deprecated. Every Judge should constantly guard against prejudice, bias and prejudging, in whatever form. Judges should not only be unbiased, but seem to be unbiased. Judiciary can serve the nation only on the trust, faith and confidence of the public in its impartiality and integrity.

20. When a counsel who is ready in the pre-lunch session, seeks accommodation in the post-lunch session on the ground of a sudden illness or physical ailment, the court cannot refuse a short accommodation and dismiss the appeal on the ground that his client was cantankerous and unreasonable before the Lok Adalat. The two issues have no relation to each other and such dismissal can only be attributed to prejudice.

21. The observation by the High Court that the parties having arrived at a settlement before the Lok Adalat, could not refuse to file a compromise petition in court, is also erroneous. If there was a final settlement before the Lok Adalat, there would have been an award and there was no need for the matter to come before the court for further hearing. If parties state that before the Lok Adalat that they will enter into an agreement and file it before the court, it only means that there was only a tentative settlement before the Lok Adalat.

22. In view of the above, the appeals are allowed. The impugned orders of the High Court are set aside. The second appeal is restored to the file of the High Court for being disposed of on merits in accordance with law. We request the Hon. Chief Justice to assign the appeal to some other learned Judge of the High Court. Whatever is stated above is not intended to be a reflection on the judicial integrity of the learned Judge, nor intended to impute any personal prejudice or bias.

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CHAPTER-9.9

SALEM ADVOCATE BAR ASSOCIATION VS. UNION OF INDIA

(2003) 1 SCC 49

Bench : Hon'ble Mr. Justice B.N. Kirpal Cj, Hon'ble Mr. Justice Y.K. Sabharwal, Hon'ble Mr. Justice Arijit Passayat

Writ Petition (civil) 496 of 2002 decided on 25 October, 2002

Salem Advocate Bar Association

vs.

Union Of India

"89. Settlement of disputes outside the Court.- Keeping in mind the laws delays and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) Mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2) (d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

-- there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

JUDGMENT

The Judgment was delivered by

KIRPAL, CJI.

Rule.

2. These writ petitions have been filed seeking to challenge amendments made to the Code of Civil Procedure by the Amendment Act 46 of 1999 and Amendment Act 22 of 2002.

3. Writ Petition @ No. 496 of 2002 was filed by the Salem Advocate Bar Association and after notice was issued the petitioner sought leave of this Court to withdraw the writ petition. By order dated 16th September, 2002, the prayer to withdraw the writ petition was declined, as the petition had been filed in public interest. At the request of the Court, Shri C.S. Vaidyanathan, Sr.

Adv. assisted by Shri K.V. Vishwanathan, Advocate agreed to assist the Court as Amicus Curiae and they have rendered assistance to the Court for dealing with the case. The Court records its appreciation for the assistance given.

4. In the petitions, the amendments which were sought to be made by the aforesaid Amendment Acts, have been challenged, but we do not find that the said provisions are in any way ultra vires the Constitution. Neither Mr. Vaidyanathan nor any other learned counsel made any submissions to the effect that any of the amendments made were without legislative competence or violative of any of the provisions of the Constitution. We have also gone through the provisions by which amendments have been made and do not find any constitutional infirmity in the same.

5. Mr. Vaidyanathan, however, drew our attention to some of the amendments which have been made with a view to show that there may be some practical difficulties in implementing the same. He also contended that some clarifications may be necessary. We shall deal with the said provisions presently.

6. Amendment has been made to Section 27 dealing with summons to the defendant which, after the amendment, reads as follows:

"Summons to Defendants - Where a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond thirty days from the date of the institution of the suit."

7. It was submitted by Mr. Vaidyanathan that the words" on such day not beyond thirty days from the date of the institution of the suit" seem to indicate that the summons must be served within thirty days of the date of the institution of the suit. In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears, fix outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, of the suit is instituted, for example, on 1st January, 2002, then the correct addresses of the defendants and the process fee must be filed in the court within thirty days so that summons be issued by the court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, compliance with the provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the court to issue the summons.

8. Our attention was then drawn to a new Section 89 which has been introduced in the Code of Civil Procedure. This provides for settlement of disputes, etc., and reads as under:

"89. Settlement of disputes outside the Court.- (1) Where it appears to the Court that there exist elements 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 observation of the parties, the Court may reformulate the terms of a possible settlement and refer the same for -

(a) arbitration;

(b) conciliation;

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

(d) mediation.

(2) Where a dispute has been referred-

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

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

(c) for judicial settlement, the Court shall refer the 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."

9. It is quite obvious that the reason why Section 89 has been inserted is to try to see that cases, which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of Judges which are available, it has now become imperative that resort should be had to Alternative Dispute Resolution Mechanism with a view to bring to an end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) Mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2) (d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

10. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

11. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for settling the disputes, this has not really reduced the burden on the courts. It does appear to us that modalities have to be formulated for the manner in which Section 89 and,

for that mater, the other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a Committee is constitution so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

12. In our opinion, the suggestion so made merits a favourable consideration. With the constitution of such a Committee, any creases which require to be ironed out can be identified and apprehensions which may exist in the minds of the litigating public or the lawyers clarified. As suggested, the Committee will consist of a Judge sitting or retired nominated by the Chief Justice of India and the other members of the Committee will be Mr. Kapil Sibal, Senior Advocate, Mr. Arun Jaitley, Senior Advocate, Mr. C.S. Vaidyanathan, Senior Advocate and Mr. D. V. Subba Rao, Chairman, Bar Council of India. This Committee will be at liberty to co-opt any other member and to take assistance of any member of the Bar or Association. This Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The Model rules, with or without modification, which are formulated may be adopted by the High Court concerned for giving effect to Section 89(2)(d).

13. Mr. Vaidyanathan drew our attention to Section 100A which deals with intra-court appeals. This Section reads as follows:

"100A. No further appeal in certain cases. - Notwithstanding anything contained in any Letters Patent for any High Court or in any other Instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge or a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

14. It was submitted by Mr. Vaidyanathan that where the original decree is reversed by a Single Judge of the High Court, there should be a provision for filing a Letters Patent Appeal.

15. Section 100A deals with two types of cases which are decided by a Single Judge. One is where the Single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not. Even at present upon the value of the case, the appeal from original decree is either heard by a Single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard be Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provided for the regular first appeal to be heard by a Single Judge. In such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved in large. In such a case, the High Court by Rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100A.

16. Our attention has been drawn to Order 7 Rule 11 to which clauses (e) and (f) have been added which enable the court to reject the plaint where it is not filed in duplicate or where the plaintiff fails to comply with the provisions of Rule 9 of Order 7. It appears to us that the said clauses

being procedural would not require the automatic rejection of the plaint at the first instance. If there is any defect as contemplated by Rule 11 (e) or non-compliance as referred to in Rule 11(f), the court should ordinarily give an opportunity for rectifying the defects and in the event of the same not being done the court will have the liberty or the right to reject the plaint.

17. In Order 18, Rule 4 has substituted and sub-rule (1) provides that in every case examination-in-chief of the witnesses shall be on affidavits and copies thereof shall be supplied to the opposite parties by the part who calls them for evidence. It was contended by Mr. Vaidyanathan that it may not be possible for the party calling the witness to compel the witness to file an affidavit. It often happens that the witness may not be under the control of the party who wants to rely upon his evidence and that witness may have to be summoned through court. Order 16 Rule 1 provides for list of witnesses being filed and summons being issued to them for being present in court for recording their evidence. Rule 1A, on the other hand, refers to production of witnesses without summons where any party to the suit may bring any witness to give any evidence or to produce documents. Reading the provisions of Order 16 and Order 18 together, it appears to us that Order 16 Rule IA, i.e. where any party to a suit, without applying for summoning under Rule 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in court but shall be in the form of an affidavit.

18. In cases where the summons have to be issued under Order 16 Rule 1, the stringent provision of Order 18 Rule 4 may not apply. When summons are issued, the court can give an option to the witness summoned either to file an affidavit by way of examination-in-chief or to be present in court for the examination. In appropriate cases, the court can direct the summoned witness to file an affidavit by way of examination-in-chief. In other words, with regard to the summoned witnesses the principle incorporated in Order 18 Rule 4 can be waived. Whether a witness shall be directed to file affidavit or be required to be present in court for recording of his evidence is a matter to be decided by the court in its discretion having regard to the facts of each case.

19. Order 18 Rule (42) gives the court the power to decide as to whether evidence of a witness shall be taken either by the court or by the Commissioner. An apprehension was raised to the effect that the court has no discretion and once it decides that the evidence will be recorded by the Commissioner then evidence of other witnesses cannot be recorded in court. We do not think that is the correct interpretation of sub-rule 4(2). Under the said sub-rule, the court has the power to direct either all the evidence being recorded in court or all the evidence being recorded by the Commissioner or the evidence being recorded partly by the Commissioner and partly by the court. For example, if the plaintiff wants to examine 10 witnesses, then the court may direct that in respect of five witnesses evidence will be recorded by the Commissioner while in the case of other five witnesses evidence will be recorded in court. In this connection, we may refer to Order 18 Rule 4(3), which provides that the evidence may be recorded either in writing or mechanically in the presence of the Judge or the Commissioner. The use of the word 'mechanically' indicates that the evidence can be recorded even with the help of the electronic media, audio or audio-visual, and in fact whenever the evidence is recorded by the Commissioner it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses so as to obviate any controversy at a later stage.

20. Mr. Vaidyanathan drew our attention to the fact that by amendment in 1976, Rule 17A had been inserted in Order 18 which gave an opportunity to a party to adduce additional evidence under

the circumstances mentioned therein. He submitted that by the Amendment Act 22 of 2002, this sub-rule has been deleted which may cause hardship to the litigants.

21. We find that in the Code of Civil Procedure, 1908, a provision similar to Rule 17A did not exist. This provision, as already noted, was inserted in 1976. The effect of the deletion of this provision in 2002 is merely to restore status quo ante, that is to say, the position which existed prior to the insertion of Rule 17A in 1976. The remedy, if any, that was available to a litigant with regard to adducing additional evidence prior to 1976 would be available now and no more. It is quite evident that Rule 17A has been deleted with a view that unnecessarily applications are not filed primarily with a view to prolong the trial.

22. Lastly, Mr. Vaidyanathan drew our attention to Rule 9 which was inserted in Order 41 which reads as follows:

"Registry of memorandum of appeal. (1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.

(2) Such book shall be called the register of appeal."

23. The apprehension was that this rule requires the appeal to be filed in the court from whose decree the appeal is sought to be filed. In our opinion, this is not so. The appeal is to be filed under Order 41 Rule 1 in the court in which it is maintainable. All that Order 41 Rule 9 requires is that a copy of memorandum of appeal which has been filed in the appellate court should also be presented before the court against whose decree the appeal has been filed and endorsement thereof shall be made by the decreeing court in book called the Register of Appeals. Perhaps, the intention of the Legislature was that the court against whose decree an appeal has been filed should be made aware of the factum of the filing of the appeal which may or not be relevant at a future date. Merely because a memorandum of appeal is not filed number Order 41 Rule 9 will not, to our mind, make the appeal filed in the appellate court as a defective one.

24. No other contentions were raised. As already observed, if any difficulties are felt, these can be placed before the Committee constituted hereinabove. The Committee would consider the said difficulties and make necessary suggestions in its report. It is hoped that the amendments now made in the Code of Civil Procedure would help in expeditious disposal of cases in the trial courts and the appellate courts.

25. It would be open to the Committee to seek directions. The Committee is requested to file its report within a period of four months. To consider the report, list these petitions after four months. Copies of this judgment be sent to the Registrars of all the High Courts so that necessary action can be taken by the respective High Courts and any writ petition pending in those High Courts can be formally disposed of.

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CHAPTER-9.10

OIL & NATURAL GAS CORPORATION LTD VS CITY & INDUST. DEV.

APPEAL (CIVIL) 3143 OF 2007

Bench : Hon'ble Mr. Justice Dr. Arijit Pasayat, Hon'ble Mr. Justice Lokeshwar Singh Panta

(Arising out of SLP (C) No. 21047 of 2004)
DATE OF JUDGMENT: 20/07/2007

Oil & Natural Gas Corporation Ltd
Vs
City & Indust. Dev.

"14. Under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or CPC that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. In the case of disputes between public sector undertakings and the Union of India, this Court in Oil and Natural Gas Commission v. CCE (1992 Supp(2) SCC 432) called upon the Cabinet Secretary to handle such matters. In Oil and Natural Gas Commission v. CCE (1992 Supp (4) SCC 541) this Court directed the Central Government to set up a committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

The facts of this appeal, noticed above, make out a strong case that there is a felt need of setting up of similar committees by the State Government also to resolve the controversy arising between various departments of the State or the State and any of its undertakings. It would be appropriate for the State Governments to set up a committee consisting of the Chief Secretary of the State, the Secretaries of

the departments concerned, the Secretary of Law and where financial commitments are involved, the Secretary of Finance. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the Government."

"Undoubtedly, the right to enforce a right in a court of law cannot be effaced. However, it must be remembered that courts are overburdened with a large number of cases. The majority of such cases pertain to Government Departments and/or public sector undertakings. As is stated in Chief Conservator of Forests' case [2003] 3 SCC 472 it was not contemplated by the framers of the Constitution or the Civil Procedure Code that two departments of a State or Union of India and/or a department of the Government and a public sector undertaking fight a litigation in a court of law. Such a course is detrimental to public interest as it entails avoidable wastage of public money and time. These are all limbs of the Government and must act in co-ordination and not confrontation. The mechanism set up by this court is not, as suggested by Mr. Andhyarujina, only to conciliate between Government Departments. It is also set up for purposes of ensuring that frivolous disputes do not come before courts without clearance from the High Powered Committee. If it can, the High Powered Committee will resolve the dispute. If the dispute is not resolved the Committee would undoubtedly give clearance.

However, there could also be frivolous litigation proposed by a department of the Government or a public sector undertaking. This could be prevented by the High Powered Committee. In such cases there is no question of resolving the dispute. The Committee only has to refuse permission to litigate. No right of the Department/public sector undertaking is affected in such a case. The litigation being of a frivolous nature must not be brought to court. To be remembered that in almost all cases one or the other party will not be happy with the decision of the High Powered Committee. The dissatisfied party will always claim that its rights are affected, when in fact, no right is affected. The Committee is constituted of highly placed officers of the Government, who do not have an interest in the dispute, it is thus expected that their decision will be fair and honest. Even if the Department/public sector undertaking finds the decision unpalatable, discipline requires that they abide by it. Otherwise the whole purpose of this exercise will be lost and every party against whom the decision is given will claim that they have been wronged and that their rights are affected. This should not be allowed to be done."

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench of the Bombay High Court dismissing the Civil Writ Petition No.4036 of 2001 with Civil Application No.1583 of 2004. It was held that with reference to several judgments of this Court the writ jurisdiction should not be exercised in contractual matters. It was also held that there was no reason whatsoever for which a Government of India undertaking shall bypass the alternative remedy of a civil suit.

3. Background facts in a nutshell are as follows:

   A writ petition was filed by the appellant alleging inaction on the part of the City & Industrial Development Corporation of Maharashtra Limited (hereinafter referred to as 'CIDCO') in not executing the agreement of lease with the appellant- company. Prayer in the writ petition was

for a direction by issuance of an appropriate writ requiring the CIDCO to execute the agreement in respect of the possession of plots covered by the agreements. Prayer essentially was (i) to hand over the possession of plot of land admeasuring 24 hectares demarcated in favour of the appellant situated at Bhandkhal (Navghar), Taluka Uran alongwith approach road and water supply till the boundary of the said plot of land; (ii) execute a lease agreement for the period set out more particularly in the letter of allotment dated 5th March, 1984 in respect of the said plot of land; (iii) issue appropriate writ in respect of demand for service charge contained in the letter dated 24th July, 1990 and (iv) other reliefs.

4. The High Court referred to several correspondence exchanged between the parties but ultimately held that the issues related to contractual matters and the writ petition was not the appropriate remedy. Findings were also recorded regarding maintainability of the writ petition.

5. In support of the appeal, learned counsel for the appellant submitted that the High Court has lost sight of the fact that the dispute involved two public bodies. It was highlighted by learned counsel for the appellant that this Court in M/s Popcorn Entertainment & Anr. V. City Industrial Development Corpn. & Anr. (JT 2007 (4) SC 70) held in para 15 about the maintainability of the writ petition. In paragraph 42 of the judgment it was noted that there was no dispute and in fact there was concession regarding maintainability of the writ petition. Reference has also been made to National Highways Authority of India v. Ganga Enterprises and Anr. (2003 (7) SCC 410) and Rajureshwar Associates v. State of Maharashtra (2004 (6) SCC 362) to contend that in all contractual matters a writ application can be entertained. The three circumstances wherein relating to contractual matters writ applications can be entertained were set out in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. (1998 (8) SCC 1).

6. Mr. Altaf Ahmad, learned senior counsel on the other hand submitted that in a dispute of this nature, the course indicated by this Court in Oil and Natural Gas Commission and Anr. V. Collector of Central Excise (1992 Supp (2) SCC 432) can be applied.

7. In the instant case, CIDCO is a State entity and the appellant is a central entity. The desirability of having a committee to sort out differences between pubic sector undertakings, State Governments, different Govt. departments have been highlighted by this Court in several cases. In Chief Conservator of Forests, Govt. of A.P. v. Collector and Ors. (2003 (3) SCC 472) it was inter alia as follows:

> *"14. Under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or CPC that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or*

a juristic person. The States/Union of India must evolve a mechanism to set at rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. In the case of disputes between public sector undertakings and the Union of India, this Court in Oil and Natural Gas Commission v. CCE (1992 Supp(2) SCC 432) called upon the Cabinet Secretary to handle such matters. In Oil and Natural Gas Commission v. CCE (1992 Supp (4) SCC 541) this Court directed the Central Government to set up a committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

15. The facts of this appeal, noticed above, make out a strong case that there is a felt need of setting up of similar committees by the State Government also to resolve the controversy arising between various departments of the State or the State and any of its undertakings. It would be appropriate for the State Governments to set up a committee consisting of the Chief Secretary of the State, the Secretaries of the departments concerned, the Secretary of Law and where financial commitments are involved, the Secretary of Finance. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the Government."

8. In Punjab and Sind Bank v. Allahabad Bank and Ors. (2006 (4) SCC 780) it was observed as follows:

"6. The matter was again examined in the case of Chief Conservator of Forest v. Collector (2003 (3) SCC 472). In Para 14 and 15 it was noted as follows:

"Under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or the C.P.C. that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all inter- departmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. In the case of

disputes between public sector undertakings and Union of India, this Court in Oil and Natural Gas Commission v. Collector of Central Excise (1992 Suppl. (2) SCC 432) called upon the Cabinet Secretary to handle such matters. In Oil and Natural Gas Commission & Anr. v. Collector of Central Excise (1995 Suppl. (4) SCC 541), this Court directed the Central Government to set up a Committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor dispute between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

The facts of this appeal, noticed above, make out a strong case that there is felt need of setting up of similar committees by the State Government also to resolve the controversy arising between various departments of the State or the State and any of its undertakings. It would be appropriate for the State Governments to set up a Committee consisting of the Chief Secretary of the State, the Secretaries of the concerned departments, the Secretary of Law and where financial commitments are involved, the Secretary of Finance. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the Government. "

7. The directions as noted above were quoted in Mahanagar Telephone Nigam Ltd. v. Chairman, Central Board, Direct Taxes and another (2004(6) SCC 431) and were adopted in paragraph 8. It was noted as follows:

"Undoubtedly, the right to enforce a right in a court of law cannot be effaced. However, it must be remembered that courts are overburdened with a large number of cases. The majority of such cases pertain to Government Departments and/or public sector undertakings. As is stated in Chief Conservator of Forests' case [2003] 3 SCC 472 it was not contemplated by the framers of the Constitution or the Civil Procedure Code that two departments of a State or Union of India and/or a department of the Government and a public sector undertaking fight a litigation in a court of law. Such a course is detrimental to public interest as it entails avoidable wastage of public money and time. These are all limbs of the Government and must act in co-ordination and not confrontation. The mechanism set up by this court is not, as suggested by Mr. Andhyarujina, only to conciliate between Government Departments. It is also set up for purposes of ensuring that frivolous disputes do not come before courts without clearance from the High Powered Committee. If it can, the High Powered Committee will resolve the dispute. If the dispute is not resolved the Committee would undoubtedly give clearance.

However, there could also be frivolous litigation proposed by a department of the Government or a public sector undertaking. This could be prevented by the High Powered Committee. In such cases there is no question of resolving the dispute. The Committee only has to refuse permission to litigate. No right of the Department/public

sector undertaking is affected in such a case. The litigation being of a frivolous nature must not be brought to court. To be remembered that in almost all cases one or the other party will not be happy with the decision of the High Powered Committee. The dissatisfied party will always claim that its rights are affected, when in fact, no right is affected. The Committee is constituted of highly placed officers of the Government, who do not have an interest in the dispute, it is thus expected that their decision will be fair and honest. Even if the Department/public sector undertaking finds the decision unpalatable, discipline requires that they abide by it. Otherwise the whole purpose of this exercise will be lost and every party against whom the decision is given will claim that they have been wronged and that their rights are affected. This should not be allowed to be done."

8. The ONGC I to III cases (supra), Chief Conservator's case (supra) and Mahanagar Telephone's case (supra) deal with disputes relating to Central Government, State Government and Public Sector Undertakings. They have no application to the facts of these cases as the High Court has not indicated any reason for its abrupt conclusion that the writ petitioners are Public Sector Undertakings. In the absence of a factual determination in that regard, the decisions can have no application."

9. The position has also been examined in U.P. SEB and Anr. V. Sant Kabir Sahakari Katai Mills Ltd. (2005 (7) SCC 576) and Mahanagar Telephone Nigam's case (supra).

10. The matter is pending since 1990. Considering the nature of the controversy which is a recurring feature we direct that a committee be formed to sort out the differences between the Central Government and the State Government entities. The composition of such committee shall be as follows:

    (1) The Cabinet Secretary of the Union; (2) Chief Secretary of the State; (3) Secretaries of the concerned departments of Union and the State; and (4) Chief Executive Officers of the concerned undertakings.

11. As the matter is pending since long, we direct that the Committee shall be constituted forthwith to take a decision within 4 months from the date of receipt of copy of this judgment.

12. The appeal is disposed of with no order as to costs.

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CHAPTER-11

HIGH COURT CIRCULAR TO TAG LEGAL AID INFO

J.H.C. Sch. (1-7)

Ambuj Nath
Registrar General
High Court of Jharkhand
Ranchi-834033

Phone: Office: 0651-2481449
Fax No.: 0651-2481116

Letter No.: 640 /R&S
Dated: 27th July, 2017

To

All Principal District & Sessions Judges
of the State of Jharkhand,
including Judicial Commissioner, Ranchi.

Sir,

I am directed to circulate copies of approved -

i. Order dated 26.07.2017 with pamphlet issued by Jharkhand State Legal Authority, Ranchi regarding provision of legal services to various categories of beneficiaries;

ii. Order dated 26.07.2017 regarding minimum reference of suitable cases to ADR mechanism in continuation to Court's Order no. 1/R&S dated 31.01.2012, and;

iii. Order dated 26.07.2017 regarding utilisation of funds allotted to District Legal Service Authority,

for its strict compliance.

I am further to request you to send quarterly report with respect to (ii) above and monthly report with respect to (iii) above latest by the 15th day of the month following the end of the quarter/preceding month, as the case may be, to this Court for information and needful.

Yours faithfully,
27.7.17
Registrar General

Enclosures: As above (4 Sheets)

Memo no. 641/R&S dated 27-07-17

Copy forwarded to Member Secretary, Jharkhand State Legal Authority, Ranchi.

Jharkhand High Court, Ranchi

ORDER

Women, children, persons belonging to SC/ST community, prisoners, differently abled persons, industrial worksman, victim of trafficking, victims of undeserved want, persons with income less than rupees one lac per annum etc are entitled to free and competent legal services under Section 12 of the Legal Services Authorities Act 1987 .

Likewise, persons with income up to rupees five lacs per annum are entitled to legal services at Jharkhand High Court level under Jharkhand High Court Middle Income Group Legal Aid Scheme ,2016.

All persons, irrespective of their income , are entitled to paid legal services in all Jharkhand Courts under the Paid Legal Services Scheme for the Persons of Specified Categories, 2017.

The Noticee/Warrantee are required to be informed about availability of legal services to him/her/them under the aforesaid Schemes, so that , they may know and avail the legal services from the very beginning. The benefit of Mediation may also be informed to them.

Therefore, it is ordered that pamphlet as to benefit of Mediation and availability of legal services shall be tagged with all the Notices or Warrants isuued by all the Courts including the High Court.

Date : 26th July, 2017

Acting Chief Justice

Jharkhand High Court, Ranchi

ORDER

In continuation of Order No. 1/R & S dated 31-1-2012 in relation to reference of cases to ADR mechanism, it is ordered that the number of minimum reference of suitable cases by each of the referral Judges of Ranchi, Jamshedpur, Bokaro, Dhanbad, Hazaribagh and Deoghar may be fixed at seven cases per referral Judge and same for referal Judges of the other Districts may be fixed at four cases per referral Judge. This may be strictly complied. Registrar General will seek explanation from the Referal Judge for non-compliance and place the same for needful.

Date : 26th July, 2017

Acting Chief Justice

Jharkhand High Court, Ranchi

ORDER

The funds allotted to the District Legal Services Authorities of Jharkhand is for providing free and competent legal services to children, women, persons belonging to SC/ST Community, Industrial Workman, victims of undeserved want, prisoners, differently abled persons, persons with income less than rupees one lac per annum. Fund remaining unspent and surrendered amount to depriving a deserving person of his rightful entitlement of free and competent legal services which is very serious situation.

Likewise, the remuneration/honorarium of Panel Lawyer, remand Advocate, Retainer lawyer, Mediator and Para Legal Volunteers ought to be paid timely per month.

It is ordered that the funds allotted to the District Legal Services Authorities shall be required to be utilized totally as well as properly Every DLSA is ordered to send data per month in the format as follows:

Legal services Personnel	Remuneration/Honorarium due to be paid ,including arrear, if any	Remuneration/Honorarium paid in the month	Fund remaining with DLSA
Mediator			
PLV			
Retainer Lawyer			
Remand Advocate			
Panel Lawyer			

It shall be the responsibility of the Principal District judge cum Chairman, DLSA to ensure payment to Mediator, Panel Lawyer, PLV, Remand Advocate and Retainer Advocate per month.

Date : 26th July, 2017

Acting Chief justice

झारखण्ड राज्य विधिक सेवा प्राधिकार, राँची

मुफ्त एवं सक्षम विधिक सेवाओं हेतु योजनाएँ

1. विधिक सेवा प्राधिकार अधिनियम, 1987 की धारा-12 के तहत बच्चे (18 वर्ष से कम), महिलाएँ, अनुसूचित जाति, जनजाति के लोग, औद्योगिक कर्मकार, प्राकृतिक अथवा मानवजनित आपदा, कारागार में बंद व्यक्ति जिनकी आय एक लाख रूपया वार्षिक अथवा इससे कम है, वे सभी मुफ्त तथा सक्षम विधिक सेवा के हकदार हैं।

   - विधिक सेवा के अन्तर्गत किसी भी न्यायालय में केस दायर करने के लिए अथवा किसी ने केस दायर कर दिया है तो उसमें उपस्थित होकर अपना पक्ष रखने के लिए वकील तथा कोर्टफीस मुफ्त में दिया जाता है। कागज तैयार करने तथा नकल निकालने में भी सारा खर्च विधिक सेवा प्राधिकार करती है।

   - अनुमंडल न्यायालय/जिला न्यायालय/उच्च न्यायालय में केस करने अथवा अपना प्रतिरक्षा करने के लिए सचिव, अनुमंडल न्यायालय, जिला न्यायालय, उच्च न्यायालय विधिक सेवा समिति से सम्पर्क किया जा सकता है।

   - किसी भी तरह की जानकारी अथवा मदद के लिए सचिव, उच्च न्यायालय विधिक सेवा समिति (9431100488), उप सचिव (9431387340) अथवा सदस्य सचिव (8986601912) झारखण्ड राज्य विधिक सेवा प्राधिकार (झालसा) से सम्पर्क किया जा सकता है। झालसा में Toll Free No.- 18003457019 से भी 10.00 बजे दिन से 9.00 बजे रात्रि तक कोई भी मदद लिया सकता है। झालसा का ईमेल है - jhalsaranchi@gmail.com तथा वेबसाइट www.jhalsa.org.

2. **झारखण्ड उच्च न्यायालय मध्यम वर्ग विधिक सहायता योजना -** माननीय झारखण्ड उच्च न्यायालय में केस करने अथवा अपना प्रतिरक्षा के लिए बेहद मामूली फीस पर इस योजना के तहत बने पैनल के विद्वान अधिवक्ता की सेवाएँ ली जा सकती हैं। फीस की दर है।

   यह योजना सालाना 5 लाख या कम आय वर्ग के लोगों के लिए है। इस योजना के तहत फीस की दर है।

ड्राफ्टिंग/फाइलिंग के लिए	**वादी**	**प्रतिवादी**
	4000/-	3000/-
सुनवाई तथा निष्पादन तक	1500/- रूपया प्रति दिन जबकि प्रभावी सुनवाई हुई हो तथा अधिकतम रूपया 4500/-	

जमानत	अग्रिम जमानत याचिका तैयार करना तथा दायर करना रूपया एक हजार
जमानत/अग्रिम जमानत याचिका में सुनवाई तथा अंतिम निर्णय	1500/- रूपया
वरीय अधिवक्ता के लिए मानदेय याचिका /जवाब तैयार करने में सलाह हेतु	रूपया दो हजार मात्र
अंतिम सुनवाई हेतु	रूपया तीन हजार प्रतिदिन जबकि प्रभावी सुनवाई हुई हो तथा अधिकतर सीमा मात्र रूपया नौ हजार।

3. **निर्धारित कैटेगरी के लोगों के लिए भुगतान करने पर विधिक सहायता योजना-2017**

सेवाक्षेत्र तथा व्यावसायिक गतिविधियों के विस्तार के कारण व्यावसायिक तथा पारिवारिक मामले सम्बंधी विवाद बढ़ गये हैं जिनमें कभी-कभी दोनों पक्ष अलग-अलग राज्यों के होते हैं माननीय उच्च न्यायालय तथा सर्वोच्च न्यायालय में स्थानान्तरण आवेदन भी दाखिल होते हैं, क्योंकि एक पक्ष दूसरे राज्य में जाकर मुकदमा लड़ने में सहज नहीं रह पाता है। चेक बाउन्स मामले, अंतराज्यीय व्यापार मामले, परिवारिक मामले में यदा-कदा दूसरे राज्य का एक पक्ष होता है। जिसे मुकदमा वाले जगह वकील साहब, परिवेश आदि की जानकारी नहीं होती। यह योजना उच्च आय वर्ग के लोगों के लिए है जो फीस देने में सक्षम हैं। उन्हें राज्य विधिक सेवा प्राधिकार के द्वारा इस योजना के तहत बनाये पैनल में से उत्कृष्ट अधिवक्ता दिये जाते हैं जो अपनी सामान्य फीस लेते हैं। पसंद के तीन अधिवक्ता चुनने की छूट होती है जिसमें से एक अधिवक्ता की सेवा उन्हें दी जाती है। सदस्य सचिव के द्वारा प्रदान किये गये अधिवक्ता उच्चतम स्तर की व्यावसायिक सेवा प्रदान करते हैं।

मध्यस्थता अपनाएँ। शीघ्र, सस्ता, सुलभ तथा सर्वोत्तम न्याय पायें

झारखण्ड उच्च न्यायालय तथा राज्य के सभी व्यवहार न्यायालय में मध्यस्थता केन्द्र हैं जहाँ प्रशिक्षित विद्वान मध्यस्थ काम कर रहे हैं। समस्त राज्य का मध्यस्थता सफलता दर 56 प्रतिशत से अधिक है। गैर सुलहनीय आपराधिक मामले तथा प्रोबेट प्रतिनिधित्ववाद जैसे कुछेक दीवानी वादों में मध्यस्थता नहीं हो सकती है, शेष हर तरह के मामले के लिए मध्यस्थता शीघ्र, सस्ता, सुलभ तथा सर्वोत्तम न्याय का सराहनीय माध्यम है। वाद में सुनवाई पश्चात् निर्णय के पूर्व अपने वाद को मध्यस्थता में अवश्य रेफर करायें अपना समय एवं पैसा बचाएँ तथा वैसा न्याय पायें जिसमें दोनों पक्षों को जीतने का अहसास हो।

CHAPTER-12

HIGH COURT CIRCULAR IN VIEW OF AFCONS CASE

JHARKHAND HIGH COURT RANCHI ORDER

No.- 01 /R&S. Dated Ranchi the 31st January, 2012

In view of the direction issued by the Hon'ble Supreme Court in the case of **Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24**, the Hon'ble the Chief Justice has been pleased to order that while adjudicating the cases as mentioned hereinafter all / the Subordinate Courts are directed to abide by the following guidelines in connection with ADR process:-

"Every court shall form an opinion for a case that whether it is one that is capable of being referred to and settled through ADR process or not. Having regard to the tenor of provisions of Rule 1 -A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 of the Code. After completion of pleadings, to consider recourse to ADR process under Section 89 of the Code, is mandatory. However, actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other cases reference to ADR process is a must.

The following categories of cases are normally considered suitable for ADR process in the light of the aforesaid decision of the Hon'ble Supreme Court:-

(i) All cases relating to trade, commerce and contract, including

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

(ii) All cases arising from strained or soured relationships, including

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

(iii) All cases where there is a need for continuation of the preexisting relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies/ associations/apartment owners' associations;

(iv) All cases relating to tortious liability/including

- claims for compensation in motor accidents /other accidents; and

(v) All consumer disputes, including

- Disputes where a trader/supplier/manufacturer/ service provider is keen to maintain his business/professional reputation and credibility or product popularity.

Following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:-

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the Court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association, etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities arid mentally challenged and suits for declaration of title against the Government.

(vi) Cases involving prosecution for criminal offences.

The above enumeration of "suitable" and "unsuitable" categorisation of case is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process."

All the Principal District Judges of Jharkhand including the Principal Judicial Commissioner, Ranchi are hereby directed to ensure the adrference of aforesaid direction and communicate all the Judicial Officers posted in the concerned judgeship. They shall follow the decision of the Hon'ble Supreme Court and the cases which are suitable for ADR process be necessarily referred to Mediation Centres of the concerned districts as per section 89 of the Code of Civil Procedure.

The Principal District Judges including the Principal Judicial Commissioner, Ranchi shall also ensure the sending of Quarterly statement to this court with regard to making reference and settlement of cases, in separate sheet, along with the quarterly statement of statistics. Be it noted that such reference and disposal by the Judicial Officer will be reflected in the Annual Confidential Report of the officer.

By order,
Sd/-
P.R.Dash,
Registrar General

Memo no. 303 - 36 R&S Dated, Ranchi the 31st Jan., 2012.

Copy forwarded to the all the Principal District and Sessions Judges, Jharkhand / the Principal Judicial Commissioner, Ranchi / Secretary, Law (Judl.)Department, Govt, of Jharkhand, Ranchi / The Director, Judicial Academy, Jharkhand, Ranchi / The Member Secretary, JHALSA, Ranchi/The Office of the Registrar General/ The Registrar (Admn.)/The Registrar (Estab.)/ The Registrar (Vigilance)/ The Joint Registrar, List & Computer/The Joint Registrar-cum-P.P.S. to Hon'ble the Chief Justice/ The Assistant Registrar (Judl.J/The Section Officer, Vigilance Cell/The Section Officer, Administrative (Appointment) Section Jharkhand High Court, Ranchi for kind information and needful.

Sd/-
Registra General

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CHAPTER-13

JHARKHAND HIGH COURT ORDER ON HOW TO MAKE REFERENCE

IN THE HIGH COURT OF JHARKHAND AT RANCHI

ARBITRATION APPEAL NO. 6 OF 2016

Vinoba Bhave University, P.O., P.S. and District-Hazaribag. ……Petitioner/Appellant
Versus
M/s Design Team Architect and Civil Engineers, North West Morabadi Maidan, Ranchi through proprietor Mayukh D. Virnave, Morabadi, P.O. and P.S. Morabadi, District-Ranchi
.....Opposite Party/Respondent

CORAM:HON'BLE MR. JUSTICE D.N. PATEL

For the Appellant:M/s Indrani S. Choudhary

For the Respondents:M/s Pandey Neeraj Rai

Mediation -Referral Order- -Having heard counsel for both sides and looking to the dispute between the parties to this Arbitration Appeal, it appears that there are chances of settlement of the dispute. I, therefore, refer the matter for mediation and direct the Member Secretary, Jharkhand State Legal Services Authority, Nyay Sadan, Doranda, Ranchi to assign this matter to an efficient mediator.

Registrar General is directed to send a photocopy of the memo of this Arbitratrion Appeal along with all annexures and affidavits to the Member Secretary, Jharkhand State Legal Services Authority, Nyay Sadan, Doranda, Ranchi.

Registrar General of this Court is further directed to send a copy of this order to all the Principal District Judges so that in turn, this type of reference may be made under Section 89 of the Code of Civil Procedure. The details of the Advocates and their parties, i.e. their names and mobile numbers, ought to be mentioned in the order referring the matter so that concerned Mediator/ Secretary, District Legal Services Authority can intimate the concerned parties to attend the mediation.

It would be pertinent to mention here that in the State of Jharkhand approximately in 15% of the matters referred to Mediation or Lok Adalat, the parties do not attend the Mediation or Lok Adalat. Such matters are known as "Non-Starter matters".These types of Non-starter Matters ought to be reduced and hence, details of Advocates, i.e. their names and mobile numbers must find a mention in the order

05/Dated 15th September, 2016

1. Learned counsels appearing for the parties have submitted that there are chances of settlement of the dispute between the parties and therefore, this matter may be referred to mediation.

2. Having heard counsel for both sides and looking to the dispute between the parties to this Arbitration Appeal, it appears that there are chances of settlement of the dispute. I, therefore, refer the matter for mediation and direct the Member Secretary, Jharkhand State Legal Services Authority, Nyay Sadan, Doranda, Ranchi to assign this matter to an efficient mediator.

3. Registrar General is directed to send a photocopy of the memo of this Arbitratrion Appeal along with all annexures and affidavits to the Member Secretary, Jharkhand State Legal Services Authority, Nyay Sadan, Doranda, Ranchi

4. It is assured by both sides that they will remain present before the mediator. Details of the parties and counsels representing them, who shall remain present before the mediator, are as under:

	Name of the parties	Counsel for the parties	Mobile No. of the counsels for the parties
Appellant	1.Mr. Subodh Kr. Sinha, Registrar, Mob. No. 9334271935 2. Mr. K.K. Sinha, Proctor, Mob. No. 9199877391	Mr. Mithilesh Singh, Advocate	Mob. 9973761921
Respondent	Mayukdhar Virnavy Mob. 9934361418	Mr. Pandey Neeraj Rai	Mob. 9835113551

5. The parties and the counsels representing them shall remain present before the Member Secretary, Jharkhand State Legal Services Authority, Nyay Sadan, Doranda, Ranchi on 8th November, 2016 between 11 am to 1 pm.

6. Registrar General of this Court is further directed to send a copy of this order to all the Principal District Judges so that in turn, this type of reference may be made under Section 89 of the Code of Civil Procedure. The details of the Advocates and their parties, i.e. their names and mobile numbers, ought to be mentioned in the order referring the matter so that concerned Mediator/ Secretary, District Legal Services Authority can intimate the concerned parties to attend the mediation.

7. It would be pertinent to mention here that in the State of Jharkhand approximately in 15% of the matters referred to Mediation or Lok Adalat, the parties do not attend the Mediation or Lok Adalat. Such matters are known as "Non-Starter matters".These types of Non-starter Matters ought to be reduced and hence, details of Advocates, i.e. their names and mobile numbers must find a mention in the order

8. This order may be circulated by the Principal District Judges to all the Judges in their respective judgeships.

9. This matter is adjourned to be listed on 24th November, 2016.

(D.N.Patel, J.)

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CHAPTER - 13

PICTORIALS OF MEDIATION

Mediation Awareness Programme at Dhanbad on 30th Nov.- 1st Dec 2013

Sri Surinder Singh, Master Trainer of Dhanbad

Sri Rajiv Mehra, Master Trainer of Dhanbad

Mediation Awareness Programme at Deoghar on 30th Nov. - 1st Dec 2013

Sri Sanjay Kumar, District Judge & Master Trainer of Deoghar

Sri Rajesh Gupta, Master Trainer of Deoghar

Refresher Course on Mediation for Referral Judges at Ranchi on 18th January, 2014

Ms. Sangita Dhingra Sehgal, Registrar General, Delhi High Court (as She then was, Now Judge, Delhi High Court), Sri Manmohan Sharma, Judicial Officer & Trainer & Ms. Jaya Goel, Advocate of Master Trainer

ARCM programme organised at Ranchi on 22nd & 23rd March, 2014

Sri Pramod Saxena, Advocate & Master Trainer

Sri Ajay Mehta, Master Trainer

Ms. Anu Malhotra, D.J. & Master Trainer

Hon'ble Judges, Dignitaries, Judicial Officers & Other participans in the programme.

Awareness Referral Coaching and Mentoring (ARCM) Programme organized at Jamshedpur on 22nd & 23rd March, 2014

Sri Alok Aggarwal, Master Trainer (Now M.S. NALSA), Sri V.P. Johri, Advocate Mediator & Sri C.J. Gupta, Adv. Mediator

13th Mediation Training Programme 17th to 21st April 2012

Sri M.A. Humayun, Master Trainer & Smt. K.R. Meena Kumari, Master Trainer

Training of Trainers (TOT) Programme for Advocate Mediators of Ranchi & Jamshedpur from 13th to 15th June, 2014 at Nyaya Sadan, Doranda, Ranchi

Dr. Sudhir Kumar Jain & Mrs. Shailendra Kaur, Master Trainer of MCPC

Dr. Sudhir Kumar Jain, Master Trainer of MCPC

Mrs. Shailendra Kaur, Master Trainer of MCPC

Advance Mediation Training Programme (20 Hours) on 27th Feb. to 1st Mar., 15 at Ranchi

Sri Rajiv Mehra & Ms.Nagina Jain, Master Trainers

Group Photograph

40 Hrs. Mediation Training Programme (For Experts, Professionals, Retired Senior Bureacrats and Retired Senior Executives) on 27th February to 2nd March, 2016

Sri V.K. Gupta, D.J. & Master Trainer

Ms. Anupama C. Narang, Master Trainer

Group photography of Hon'ble Mr. Justice D.N. Patel, Judge, High Court of Jharkhand & Executive Chairman, JHALSA (Presently Acting Chief Justice, High Court of Jharkhand), Master Trainers & Participants

20 Hours Capsule Course on Mediation on 19th - 21st Dec., 2015 at Ranchi

Sri Arun Kumar Arya, Judicial Officer & Master Trainer

Sri V.P. Johri, Advocate Mediator

Group Photograph

20 Hours Refresher Training Programme for Mediators on 22-24 August, 2016 at JHALSA

Hon'ble Mr. Justice D.N. Patel, Judge, High Court of Jharkhand & Executive Chairman, JHALSA (Presently Acting Chief Justice, High Court of Jharkhand) inaugurating the programme by lighting of lamp.

20 Hours Refresher Training Programme for Mediators on 22-24 August, 2016 at JHALSA, Ranchi

20 Hours Refresher Training Programme for Mediators on 22-24 August, 2016 at JHALSA, Ranchi

His Lordship Hon'ble Mr. Justice D.N. Patel, Judge, High Court of Jharkhand & Executive Chairman, JHALSA (Presently Acting Chief Justice, High Court of Jharkhand) alongwith Trained Trainers & Participants Mediators of Refresher Training Programme

State Level Conclave on Mediation on 16th July, 2016 at JHALSA, Ranchi

Seen in the picture are (L to R) Hon'ble Mr. Justice Virender Singh, Chief Justice, High Court of Jharkhand (Now Retired), Hon'ble Mr. Justice Anil R. Dave, Judge, Supreme Court of India (Now Retired), Hon'ble Mr. Justice T.S. Thakur, Chief Justice of India (Now Retired) & Hon'ble Mr. Justice Shiva Kirti Singh, Judge, Supreme Court of India on dias in the programme

Hon'ble Mr. Justice T.S. Thakur, Chief Justice of India (Now Retired) addressing the participants in the conclave.

20 Hrs. Refresher Programme on Mediation from 17 to 19 April, 2017

Hon'ble Mr. Justice D.N. Patel, Judge, High Court of Jharkhand & Executive Chairman, JHALSA (Presently Acting Chief Justice, High Court of Jharkhand) addressing the participants during the programme.

Participants during the programme.

Inauguration of 40 Hours Mediation Training of the 2nd Batch of Experts (Retd IAS, IPS, IFS, CA, Doctor, Engineer, Businessmen etc) & Annual Felicitation Programme for District Best, Divisional Best & State Best Mediators of Jharkhand on 9th July, 2017 at JHALSA, Nyaya Sadan, Ranchi

Seen in the picture are (L to R) Hon'ble Mr. Justice Aparesh Kumar Singh, Judge, High Court of Jharkhand, Hon'ble Mr. Justice D.N. Patel, Acting Chief Justice, High Court of Jharkhand & Executive Chairman, JHALSA, Hon'ble Mr. Justice Madan B. Lokur, Judge, Supreme Court of India, Hon'ble Mr. Justice H.C. Mishra, Judge, High Court of Jharkhand & Chairman, HCLSC

Seen in the picture are Hon'ble Mr. Justice D.N. Patel, Acting Chief Justice, High Court of Jharkhand & Executive Chairman, JHALSA & Hon'ble Mr. Justice Madan B. Lokur, Judge, Supreme Court of India during the programme

झारखण्ड सरकार

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This Mediation Manual is also available on official website of JHALSA ***"www.jhalsa.org"***