CHAPTER II  
MEDIATION

1. THE CONCEPT OF MEDIATION

Mediation in its plain and simple form is nothing but facilitated negotiation.\(^1\) However, comprehensively mediation may be defined as a voluntary process of dispute resolution where a neutral\(^2\) third party (the mediator) with the use of effective and specialized communication and negotiation techniques\(^3\) aids the parties in arriving at an amicable settlement.\(^4\)

The word mediation is derived from the latin word ‘mediare’ which means ‘to be in the middle.’\(^5\) Mediation is therefore a process aimed at finding a middle path amidst the dispute between the parties so that a mutually acceptable solution can be worked out. It is a non adversarial approach towards dispute resolution and is a well recognized ADR process all over the globe.

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\(^2\) Neutrality of the mediator is considered a necessary condition not only for conducting proper mediation but also for the very existence of the process called mediation. See Ronit Zamir, "The Disempowering Relationship between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic", 11 Pepperdine Disp. Res. L. J. 467 (2011); "Non-neutral mediator," therefore, is an oxymoron. See Christine E. Harrington & Sally Engle Merry, "Ideological Production: The Making of Community Mediation", 22 Law and Soc’y Rev. 709 (1988).


\(^4\) Black’s Law Dictionary defines Mediation as a method of non binding dispute resolution involving a neutral third party who tries to help the disputing parties to reach a mutually agreeable solution. See Bryan A. Garner (Ed.), Black’s Law Dictionary 1003 (West Publishing Company, St. Paul, Minnesota, 8th Edn., 2004); Mediation is therefore a facilitative process in which “disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. See Henry J. Brown and Arthur L. Mariot, ADR Principles and Practice (Sweet & Maxwell, London, 2nd Edn.,1997).

Mediation is in fact a successful management technique for resolving complex disputes.\(^6\) The object of the process is to reduce acrimony and posturing, enable the parties to realize and understand their priorities and interests and steer them towards a self determined and mutually acceptable resolution. The mediator induces and facilitates the parties to enter into a positive dialogue, attempts to break the impasse and enables them to visualize their own solutions in a pragmatic manner. The idea is to assist people to communicate in a rational and problem solving manner, clarify issues and to help negotiations by bringing realism and objectivity to a dispute.\(^7\) Mediation is therefore in a sense empowering the parties to think for themselves and choosing what is right for them so that they own the responsibility of arriving at their own decisions.\(^8\) In short it is a professionally and scientifically managed negotiation process.\(^9\)

2. THE MEDIATION PROCESS

The agreement to mediate is the genesis of mediation. Unfortunately there is no legislation governing mediation in general in India and therefore there is no statutory indication as to how mediation is to be initiated and conducted by the parties in general. The agreement to mediate is therefore generally an ad hoc agreement which emerges after a dispute has arisen and where under the parties jointly agree to refer the existing dispute to mediation

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\(^6\) Ashwanie Kumar Bansal, *Arbitration and ADR* 20 (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005); Mediators are responsible for managing conflict in such a way as to create the conditions that enable individuals to manage the responsibility they have for their own behaviour. See Tony Whatling, “Conflict Matters - Managing Conflict and High Emotion in Mediation”, 1(10) *The Indian Arbitrator* 2 (November 2009).


\(^8\) Rajiv Chelani, “Promoting Mediation as a Conflict Resolution Tool”, 1(4) *The Indian Arbitrator* 9 (May 2009)

\(^9\) R.V. Raveendran, “Mediation – An Introduction”, available at: http://bombayhighcourt.nic.in/mediation/index_articles.htm (last visited on 11.04.2012); It has been said that MEDIATION stands for M: Managing and Maneuvering Dispute resolution; E: Empathetic listening; D: Dedicated efforts; I: Ingenuity; A: Attitude, the right one; T: Tactful handling; I : Intense involvement ; O: Optimistic and open approach; N : Negotiated settlement. See Rashmi Desai, “Mediation as a form of ADR”, XLI (3) *ICA Arbitration Quarterly* 1 (October – December 2006).
by a third party. It is however a normal phenomenon for parties to incorporate mediation clauses in their contracts thereby agreeing to refer future disputes to mediation also, although even in that eventuality, there is still a requirement for the parties to be ad idem for actually referring the matter to mediation after the dispute has in fact arisen.

Mediation therefore commences only when both the parties agree to resolve their disputes by taking recourse to mediation and a neutral and independent mediator is jointly appointed for facilitating the process. The actual mediation process follows thereafter under the guidance of the mediator to be suitably moulded in light of the needs, aspirations, desires, preferences and goals of the parties.

Mediation is described as a structured process of consensual dispute resolution. Traditionally the mediation process involves different stages viz. introduction, joint session, caucus, agreement, etc. As far as the Indian scenario is concerned there is no statutory mandate to follow a particular procedure, however it is the experience for years together which has been crystallized into conventions, which require the mediator to preferably follow a structured process. The stages of a conventional mediation process are, therefore neither rigid nor inflexible and can be modulated to achieve the desired outcome. Procedural flexibility is an inbuilt advantage in mediation which is untrammeled by any structural specifications and the mediator may devise a tailor made procedure to suit the requirements of the parties and the attending circumstances, with the necessity of finding a consensual resolution being the primary guiding factor.

Yet the ground reality is that invariably the de facto process adopted by a specially trained mediator, in substance turns out to be the conventional

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10 See Delhi High Court Mediation and Conciliation Centre, Mediator’s Tool Box (Volume I); See also Jeff & Hesha Abrams, “Anatomy of a Mediation: What to Expect, How to Prepare & How to Win”, 2(3) The Indian Arbitrator (March 2010).

structured mediation process comprising of pre defined stages or permutations and combinations thereof. The idea of specifying a pre fabricated structured process is avoidance of hit and trial methods and unnecessary experimentation so as to introduce consistency and efficacy in the process and reap benefits of the best practices, experiences and research of professionals and intellectuals. The fact of the matter is that the structure of mediation process creates an efficient convention for mediators and parties to follow in multiple iterations; however, adjustments may be desirable, indeed even necessary in many cases\textsuperscript{12} and such adjustments are quite permissible.

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\textsuperscript{12} Hiram E. Chodosh, “Mediating Mediation in India”, available at: http://lawcommissionofindia.nic.in (last visited on 01.03.2011).
2.1 INTRODUCTION (OPENING STATEMENT)

The mediation process starts with an opening statement wherein the mediator briefs the parties about the purpose and benefits of mediation, the role of the mediator and the general details about the mediation process. It is a sort of an introduction or a prologue to the mediation process. The opening statement therefore sets the tone for mediation.\textsuperscript{13}

The mediator gives an overview to the parties as to how mediation and the mediation process function, emphasizing the voluntary fabric of mediation and explaining that the parties in mediation not only control the process but also the outcome of the process. He further explains the ground rules and ultimately generates momentum towards open discussions.\textsuperscript{14} The opening statement also gives the parties an opportunity to familiarize themselves with the mediator, understand the nature and disposition of the mediator and assures the parties of a confidential, secure and amiable ambiance for a positive dialogue.

The object of the opening statement of the mediator is also to commence to develop credibility and trust relationship with the parties and a bonding between the mediator and the parties.\textsuperscript{15} It is therefore important to explain the elements of voluntariness, confidentiality and party autonomy associated with the mediation process and to project the mediator as a friend, philosopher and guide of the parties who is there to help the parties to help themselves. The mediator must therefore square the circle and create an inoffensive presence.\textsuperscript{16}

\textsuperscript{13} See Delhi High Court Mediation and Conciliation Centre, Mediator’s Tool Box (Volume I).
\textsuperscript{14} See Bombay High Court, “Mediation – At a Glance” available at http://bombayhighcourt.nic.in/mediation/MediationConcept_and_Articles/at_a_glance.pdf (last visited on 11.04.2012).
\textsuperscript{16} Alexander Bevan, \textit{Alternative Dispute Resolution} 18 (Sweet and Maxwell, London, 1992).
2.2 JOINT SESSION

The next stage in the mediation process is a joint session where the mediator jointly and simultaneously interacts with both the parties, who in presence of each other open and affirm their respective cases. The parties are given sufficient time to describe the dispute from their respective angles and thereafter they are also afforded an opportunity to respond to the case of the other party, though not from a strictly adversarial perspective. There is an opportunity to put questions also.17

The joint sessions envisages a free and open dialogue facilitated by the mediator with the objective of ascertaining views, exchanging information, comprehending emotions and perceptions and analyzing the facts and issues. This discussion and dialogue is extremely important for setting the tone for amicable resolution. It is extremely important that the mediator makes sure that each party feels that he has been accorded his due share of time and has been effectively heard.

The mediator also utilizes this opportunity to learn about parties’ interests and priorities, close the gap between the facts and the parties differing perceptions of them, to demonstrate positive aspects of the relationship and the goals that the disputants have in common and encourage and model negotiating behaviors more likely to produce settlements.18 The mediator however refrains from generating solutions at this stage and concentrates on active listening. He however ensures a focused debate so as to narrow down the controversies while simultaneously attempting to understand the genesis of the dispute.

The role of the mediator is that of a facilitator during the joint session and he facilitates the parties to exchange information whilst at the same time persuading the parties to maintain decorum so that the talks do not break down.

down. The mediator must not permit rigid adversarial elements to enter the fray so as to prevent derailment of the mediation process. The mediator should at all times be enthusiastic about the prospects of settlement, pointing out that all of them will examine interests more so than positions, will generate options and work towards settlement based on objective standards where available.19

2.3 CAUCUS

The next stage in the mediation process is the caucus. Caucus is a private meeting which is conducted by the mediator with each party separately during the course of mediation. The parties are free to discuss their views candidly, sharing information they would not convey to the other party, acknowledging weaknesses in their legal positions, identifying and prioritizing their interests, and exploring settlement options that would be difficult to discuss directly with the other party.20

One of the main purposes of caucus is gathering further information which one party may not initially want to disclose in presence of the other party. The mediator therefore separately makes an endeavour to allow parties to privately open up with a view to further explore the issues and ascertain further information which though germane to the dispute was kept out of the purview of the joint session. He may put questions to the parties and counsel them so as to extract such relevant information.

A party in a private session may specifically require the mediator not to disclose to the other party information which has been provided in the course of caucus.21 Such information is considered as confidential and it is obligatory

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20 Hiram E. Chodosh, “Mediating Mediation in India”, available at: http://lawcommissionofindia.nic.in (last visited on 01.03.2011).

for the mediator not to disclose such information to the other party since confidentiality and faith form the edifice of mediation. However the mediator may ingeniously utilize this additional information for brokering a settlement in an amore effective manner without actually disclosing the same to the other party.

Caucus also allows ventilation of feelings and emotions privately in a safe manner as the absence of the other party at such a stage obviates the possibility of disruption of the mediation process and without resulting in deterioration of the relations between the parties. Caucus also affords cooling off period to the parties and enables them to evaluate the situation and appreciate alternatives in a better perspective. It also permits the mediator to candidly share his views and perceptions with the parties. The mediator may also attempt to get hold of a realistic offer which may be discussed with the other side so as to generate plausible solutions. It is therefore the private session or the caucus that is the engine room of the mediation process, the stage that develops the moment which hopefully turns into rapid negotiation and in many cases, settlement.22

2.4 REPEATED JOINT AND PRIVATE SESSIONS

The mediator may conduct multiple intermittent joint sessions and caucuses depending upon the facts and circumstances and requirements and goals.23 The mediator meets the parties sequentially, indulges in shuttle diplomacy carrying offers, counter offers and arguments back and forth.24 The object is to reduce posturing, break the impasse, allow the parties to communicate freely, analyse their interests and priorities, brainstorm all possible options and explore and generate plausible outcomes and solutions.


The mediator may use several communication techniques (reframing, agenda setting, etc.) to confirm comprehension of the factual and legal background and the emotional postures of the parties. In fact mediators are continuously in search of new tools and techniques to overcome barriers in settlement. The mediator also ascertains and enables the parties to understand their Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA) and Most Likely Alternative to a Negotiated Agreement (MLATNA).

It should be the endeavour of the mediator to effectively monitor and streamline the mediation process so that each and every aspect of the dispute is considered and the parties collaborate with each other in a problem solving manner and move towards a mutually acceptable self determined solution after appreciating their interests and priorities. The mediator has to use his skill and expertise to suitably control and mould the procedure so as to arrive at a holistic solution to the problem. As the negotiations progress, the mediator summarizes the areas of agreement to motivate the parties towards a final settlement.

2.5 SETTLEMENT

The final stage of the mediation process involves the mediator working with the parties to assimilate the mutually acceptable offers and counter offers to generate an ultimate solution which is agreeable to the parties. The last stride is that of actual preparation of the settlement agreement once the


26 Eg. One such technique is Decision Analysis which is also becoming a popular with mediators. David P. “Hoffer, Decision Analysis as a Mediator’s Tool”, 1 Harv. Negot. L. Rev. 113 (Spring 1996). Another such technique is Transactional Analysis. See Tony Whatling, “Transactional Analysis Matters - The Potential Application of Transactional Analysis to Mediation”, 1(7) The Indian Arbitrator 2 (August 2009).


parties are ad idem. The mediator also assists the parties to draft the final settlement agreement. The settlement agreement should encompass comprehensive broad based solutions to cater to the needs and aspirations of the parties and must specifically provide answers for each and every facet of the dispute leaving behind no scope for further dilemma either with respect to the dispute itself or with respect to enforcement of the settlement. The terms of settlement may be elucidated and clarified so as to obviate the possibility of any ambiguities. However if complete settlement is not possible, the mediator may help the parties seek partial agreements or consider their next steps.29 The settlement agreement should be signed by the parties.30

3. ROLE OF THE MEDIATOR

Mediation is facilitated negotiation conducted with the assistance of a third party neutral possessing specialized skills, requisite training and sufficient experience necessary to assist the disputant parties in reaching a negotiated settlement. The foremost aspect of a mediator’s role is his neutrality. The mediator occupies a fiduciary position and more so because not one but all the parties repose confidence in him.31 A mediator must, therefore without delay disclose any circumstances likely to give rise to a reasonable doubt as to his independence or impartiality.32 His neutrality, independence and impartiality are therefore the keys to a successful mediation.33

30 See Rule 24, Mediation and Conciliation Rules, 2004 (Delhi).
32 See also Rules 8 & 9, Mediation and Conciliation Rules, 2004 (Delhi).
33 Article 7, WIPO Mediation Rules clearly stipulates that the mediator shall be neutral, impartial and independent; Rule 8, Mediation and Conciliation Rules, 2004 (Delhi) also enjoins upon a mediator to disclose any circumstance likely to give rise to a reasonable doubt as to his independence or impartiality.
The mediator is a friend, philosopher and guide for the parties. A mediator however neither imposes a solution nor actively suggests concrete proposals for resolution, but only creates a conducive atmosphere in which the parties can themselves find a solution for their problems.\(^{34}\) A mediator is a facilitator\(^{35}\) who facilitates communication between the parties and helps them generate possible solutions to a dispute.\(^{36}\) He always honours the right of self determination of the parties\(^{37}\) and his duties includes determining the parties' bottom lines and through relatively persuasive interventions move them in stages off their positions to a point of compromise.\(^{38}\) His task is limited to assisting the parties to conduct negotiations between themselves.\(^{39}\) However despite the lack of teeth in the mediation process, the involvement of a mediator alters the dynamics of negotiation.\(^{40}\)

34 It has been opined that in the context of gaining the parties’ trust and maintaining it throughout the process it needs to be stressed that a mediator should not be suggestive. See Michael Tsur, “ADR - Appropriate Disaster Recovery”, 9 Cardozo J. Conflict Resol. 371 (2008); The autonomy of the parties and the high level of their control of the process and of the outcome necessitates that the mediator’s power be limited. See Isabelle R. Gunning, “Diversity Issues in Mediation: Controlling Negative Cultural Myths”, 1995 J. Disp. Resol. 55.

35 In the Indian context a mediator is primarily a facilitator. However, otherwise mediation may be evaluative also. See Jeremy Gormly, “Evaluative Mediation: The Endless Argument”, 3(11) The Indian Arbitrator 2 (November 2011); See also E. Patrick McDermott & Ruth Obar, “What’s Going On in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit”, 9 Harv. Negot. L. Rev. 75 (Spring 2004).


The mediator attempts to facilitate voluntary resolution of the disputes by the parties, communicates the views of each party to the other, assists 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 and he does not impose any terms of settlement on the parties.41

The mediator, depending on what seems to be impeding an agreement, may attempt to encourage exchange of information, provide new information, help the parties to understand each other’s views, let know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn about those interests which the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interest of all parties.42

4. ADVANTAGES OF MEDIATION

4.1 COST EFFECTIVE AND EXPEDITIOUS RESOLUTION

Mediation offers an ADR mechanism for cost effective and expeditious resolution of disputes.43 The object of mediation is amicable dispute resolution and hence the costs involved are minimal in comparison to arbitration or litigation. The parties are also able to save on lawyer’s fee and court fee. The

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41 See Rule 16, Mediation and Conciliation Rules, 2004 (Delhi); See also ‘Civil Procedure - Alternative Dispute Resolution Rules 2003’ advocated by the Supreme Court in Salem Advocates Bar Association v. Union of India, AIR 2005 SC 3353; A skilled mediator helps the parties to identify and overcome the potential invisible barriers to a settlement in mediation. Bennett G. Picker, “Navigating the Mediation Process: Overcoming Invisible Barriers to Resolution”, 61 (3) A.A.A Dispute Resolution Journal (August - October 2006).


43 In fact the driving force for participants in mediation is achievement of a fair result as quickly and inexpensively as possible. See James Melamed, “A View of Mediation in the Future”, 1(8) The Indian Arbitrator 6 (September 2009).
mediation process is quite simple and there are neither any procedural fetters nor any legal claptrap in the mediation process. The procedural flexibility, avoidance of legal formalities and proficient assistance by the mediator in steering the parties to an amicable resolution, result in speedier dispute resolution. Moreover once a settlement is reached the dispute stands finally resolved thereby obviating the possibility of successive appeals thereby minimizing the costs and delay.

4.2 CREATIVE SOLUTIONS

Mediation enables the parties to devise creative, tailor made solutions for their disputes taking into account the needs, aspirations and interests of the parties which may not be possible in case of litigation or arbitration. The parties themselves retain full control of the mediation process and are free to determine their own solutions. They are at liberty to settle all disputes to suit their requirements. The hallmark of mediation is therefore its capacity to help the parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy.\textsuperscript{44} It is the most appropriate ADR mechanism in case of complex and multifaceted disputes as such disputes often require novel broad based solutions rather than a straightforward legal adjudication.

4.3 A WIN-WIN SITUATION

Mediation is essentially non adversarial in nature and fundamentally parties are not opponents in mediation, but are collaborators striving towards a mutually acceptable resolution which results in a win-win situation\textsuperscript{45} as the final outcome is arrived at with the consent of both the parties and leaves both


\textsuperscript{45} William Sheffield, “Disputes among Business Partners should be Mediated or Arbitrated, not Litigated”, in P.C. Rao and William Sheffield (Eds.), \textit{Alternative Dispute Resolution} 288 (Universal Law Publishing Company Pvt. Ltd., Delhi,1997).
the parties satisfied.\textsuperscript{46} The beauty of the process is that, unlike in litigation or arbitration, neither party looses in mediation and in fact both emerge as winners. This also promotes compliance and more durable settlements.\textsuperscript{47} Even where mediation does not result in a final settlement, and the dispute remains in trial, the joint communication established and the clarification of the nature of the dispute, if not an actual narrowing of the conflict, makes the trial proceed much more efficiently.\textsuperscript{48}

4.4 PRESERVATION OF RELATIONSHIPS

In mediation the parties alone are responsible for their own decisions which come forth through the absence of formality of court procedures and through open discussion of issues and free interchange of ideas resulting into a greater likelihood of a lasting resolution.\textsuperscript{49} Mediation affords an opportunity to communicate, participate and collaborate with the opposite party and understand each others’ interests in a cool, composed and amiable atmosphere. It focuses on long-term interests and bonding, fosters amity and friendship\textsuperscript{50} and promotes peace, harmony and everlasting relationships amongst the parties. Mediation is therefore very promising in continuing relationship cases.\textsuperscript{51} Since both parties emerge as winners, relations are preserved between the parties for times to come.

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\textsuperscript{46} In fact party-acceptability of outcomes is, and should be, the defining feature of justice in mediation and in this context the process of mediation serves as an instrument for securing justice. See Joseph B. Stulberg, “Mediation and Justice: What standards Govern?” \textit{6 Cardozo J. Conflict Resol.} 213 (2005); Mediation presents the opportunity to express differences and improve relationships and mutual understanding, whether or not an agreement is reached. See Anil Xavier, “Mediation is here to Stay”, 2 (3) \textit{The Indian Arbitrator} 2 (March 2010).
\textsuperscript{47} Tania Sourdin, “Matching Disputes to Dispute Resolution Processes – The Australian Context”, in P.C. Rao and William Sheffield (Eds.), \textit{Alternative Dispute Resolution} 143 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).
\textsuperscript{49} The Delhi Mediation Centre, \textit{Annual Report} (2006-2007).
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4.5 CONFIDENTIALITY

Mediation is a closed door private affair and the prime advantage associated with mediation is confidentiality. Unlike court proceedings third parties do not have access to mediation proceedings. The mediator and the parties are also supposed to keep confidential, all matters relating to the mediation proceedings. Even during the proceedings when one party gives information to the mediator subject to a specific condition that it is to be kept confidential, the mediator is precluded from disclosing that information to the other party.

Mediation is confidential whether or not it results in the settlement and resolution of the dispute. In case mediation is unsuccessful, what transpired in the mediation proceedings is not to be disclosed. This is despite the fact that confidentiality in mediation has no statutory backing because the process of mediation is inherently considered to be confidential. In case of court annexed mediation conducted by the mediation centres at Delhi also, confidentiality has been accorded due importance. The courts have also emphasized upon the aspect of confidentiality in mediation proceedings.

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54 There is no statutory provision like s. 75, Arbitration and Conciliation Act, 1996 which affords confidentiality in mediation as a statutory guarantee.

55 Rule 20, Mediation and Conciliation Rules, 2004 (Delhi) provides for confidentiality in mediation proceedings; Rule 22, Mediation and Conciliation Rules, 2004 (Delhi) prohibits the summoning of a mediator as a witness in other proceedings.

56 In Moti Ram v. Ashok Kumar, (2011) 1 SCC 466, a case of Court referred mediation, the Supreme Court observed “...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....”.

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5. MEDIATION AS AN ADR MECHANISM IN DELHI

5.1 PROLOGUE

Mediation has globally surfaced as an extremely popular ADR mechanism to supplement the existing formal adjudicatory mechanism. In India, mediation in its fundamental and generic form has been an accepted mode of ADR for generations. However, mediation, as is now understood globally in its modern context, has, only in the past few years begun to become familiar to lawyers and judges generally in India57 and in fact, of late it has developed as a highly specialized subject in India.58

Mediation as a mode of dispute resolution is extensively utilized in Delhi and in fact Delhi has been one of the pioneers in institutionalizing mediation.59 The enactment of section 89 CPC was followed by an extraordinary, focused and concerted judicial endeavour to popularize and propagate mediation as an ADR mechanism. The judiciary, inter alia, prepared a ‘National Plan for Mediated Settlement of Disputes’ which conceived training of mediators, development of mediation manuals, setting up of mediation centres in court complexes and spreading awareness about mediation amongst litigants so as to popularize mediation.60 In pursuance of these objectives, various mediation centres have been established in Delhi which have primarily been administering post litigation mediation for resolution of disputes in pending cases, and of late have additionally been attempting to venture into the domain of pre litigation mediation. The establishment of a


59 Mediation is the fastest growing ADR mechanism. See Arunvir Vashista, “Emerging trends in ADR as Dispute Resolving Techniques”, XLIX ICA Arbitration Quarterly 31 (January – March 2011).

National Institute of Mediation and Conciliation at Dwarka in Delhi is also in pipeline.\textsuperscript{61}

That apart, private mediation – institutional as well as ad hoc is also readily available in Delhi and it is always open to the parties to take recourse to mediation for settlement of their disputes outside the court annexed mediation centres before they invoke the jurisdiction of the courts\textsuperscript{62} or even after that. The parties may resort to ad hoc amateur mediation on an interpersonal basis in the community or they may take assistance of professional mediators on an ad hoc basis.\textsuperscript{63} There are various institutions available in Delhi which, offer professional mediation services at the pre litigation stage as well as the post litigation stage. Thus there are sufficient avenues in Delhi for resolution of disputes through mediation.

5.2 MEDIATION AT THE DELHI MEDIATION CENTRE

5.2.1 Overview

The incorporation of section 89 CPC in the statute book and its purposive interpretation by the Supreme Court set the tone for growth of the process of mediation in India. To implement the objectives of section 89 CPC Justice R.C. Lahoti appointed a ‘Mediation and Conciliation Project Committee’ on 09.04.2005 which initiated a pilot project of judicial mediation at Tis Hazari courts, Delhi and consequently a working mediation centre was set up at Tis Hazari courts, Delhi on 04.08.2005 for providing a model for

\textsuperscript{61} The 13\textsuperscript{th} Finance Commission has given grants to set up one mediation centre in each of the 600 districts in the country with an outlay of 750 courts including one court and ADR centre in each district and the remaining amount for training out of which 10\% may be spent for awareness. See Justice Sunil Ambwani, “Alternative Dispute Resolution: National Judicial Excellence Enhancement Programme (JEEP) First Visit”, Speech at National Judicial Academy, Bhopal on September 11th, 2011, available at: www.allahabadhighcourt.in/event/speech_on_ADR (last visited on 15.04.2012).

\textsuperscript{62} However pre litigation mediation is scantily utilized in Delhi on account of lack of statutory framework.

\textsuperscript{63} When conducted on interpersonal basis mediation is not professionally managed so as to render finality to resolution of a dispute and interim ad hoc solutions are devised and hence the purpose is not served.
expeditious settlement in litigated disputes. A full-fledged Delhi Mediation Centre was inaugurated at Tis Hazari courts on 24.10.2005. Thereafter other centres of the Delhi Mediation Centre were gradually established at Karkardooma Court Complex, Rohini Court Complex and Dwarka Court Complex in Delhi.

The centres of the Delhi Mediation Centre are primarily providing post litigation court annexed mediation services. This is one of the modern incarnations of mediation which has become a reality on account of introduction of section 89 CPC into the statute book, wherein sub judice matters are referred to mediation in terms of section 89 of the Code of Civil Procedure, 1908 and mediation services are provided by the court as a part and parcel of the same judicial system. The advantage of court annexed mediation is that judges, lawyers and litigants become participants therein, thereby giving to them a feeling that the negotiated settlement is achieved by the concerted efforts of all the three actors of the justice delivery system. The mediation centres in Delhi are working on a full time basis providing professional mediation services and have gained immense popularity in a very short span of time.

5.2.2 The Mediation and Conciliation Rules, 2004 (Delhi)

The mediation proceedings before the Delhi Mediation Centre, after referral of cases to the centre by the courts, are governed by the Mediation and Conciliation Rules, 2004. Under the directions of the Supreme Court in

65 The centre is housed at room no. 325 on the third floor of Tis Hazari court building.
66 The centre is housed on the ground floor of Karkardooma court building.
67 The centre is housed on the fourth floor of Rohini court building.
68 The centre is housed on the third floor of Dwarka court building.
70 Framed and notified by the High Court of Delhi vide notification No. 171/Rules/DHC dated 11.08.2005 and published in the Gazette Extra Ordinary Part IV No. 120 (NCTD No. 427) dated 11.08.2005. See Appendix 2.
the 1st Salem Bar Association Case\(^71\) a committee headed by Justice M. Jagannadha Rao was formed and the committee placed before the Supreme Court the Draft Civil Procedure - ADR and Mediation Rules, 2003 which were considered by the Supreme Court in the 2nd Salem Bar Association Case\(^72\). The Supreme Court thereafter directed the respective High Courts to examine and finalise the said rules and consequently the Delhi High Court approved and published the Mediation and Conciliation Rules, 2004.

The Mediation and Conciliation Rules, 2004 comprehensively deal appointment of mediators, their qualifications, disqualifications and duties, the procedure for mediation, ethics, confidentiality and all other aspects pertaining to court annexed mediation proceedings in connection with any suit or proceedings pending in the Delhi High Court or the subordinate courts in Delhi.

### 5.2.3 Procedure for Court Annexed Post Litigation Mediation at Delhi Mediation Centre

The Delhi Mediation Centre utilizes mediation as a dispute resolution tool for settlement of cases pending in courts and referred to it by the courts in accordance with the statutory provisions.\(^73\) The case, after being referred to the mediation centre attached to the court\(^74\) is placed before the Judge Incharge,\(^75\) Mediation Centre who assigns the same to a particular mediator from a panel\(^76\) prepared by the High Court or the District and Sessions Judge.\(^77\)

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\(^71\) Salem Advocate Bar Association v. Union of India, AIR 2003 SC 189

\(^72\) Salem Advocate Bar Association v. Union of India (II), AIR 2005 SC 3353.

\(^73\) S. 89 and R. 1A, 1B and 1C of O. X of the Code of Civil Procedure, 1908.

\(^74\) If there is no mediation centre attached to that particular court the case can also be referred to any other mediation centre.

\(^75\) The Incharge in case of mediation centres situated at the district courts in Delhi is generally an Additional District Judge.

\(^76\) See Rules 2 & 3, Mediation and Conciliation Rules, 2004 (Delhi).

\(^77\) Usually some Additional District Judges and lawyers are attached as trained mediators to the mediation centre at each district court complex.
The procedure thereafter to be followed by the mediator is specified under the Mediation and Conciliation Rules, 2004 (Delhi). The mediator is supposed to follow a fair and just procedure and he may conduct joint or separate meetings with the parties. The rules provide that each party, ten days before a session, has to 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 issues, though in practice this is not scrupulously followed.

The mediator is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, but is to 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. The mediator may conduct repeated sessions at such intervals he deems fit and proper in consultation with the parties and normally such sessions are held every week till the matter is resolved or mediation is terminated.

Mediation at the Delhi Mediation Centre has to be conducted in a time bound manner. On the expiry of ninety days from the date fixed for the first appearance of the parties before the mediator, the mediation proceedings stand terminated, unless the court, which referred the matter, either suo motu, or upon request by any of the parties extends the time, however an extension of only thirty days is permissible. This obviates the possibility of unscrupulous litigants procrastinating the judicial trial of the case under the pretext of exploring mediation as an alternative.

Where an agreement is reached between the parties in regard to all the issues in the suit or proceeding or on some of the issues, the same has to be reduced to writing and signed by the parties or their constituted attorneys. The beauty of the process is that it affords the parties an opportunity to settle their

78 See Rule 10, Mediation and Conciliation Rules, 2004 (Delhi).
79 See Rule 11, Mediation and Conciliation Rules, 2004 (Delhi).
80 See Rule 18, Mediation and Conciliation Rules, 2004 (Delhi).
other pending cases also or even their other disputes/ claims which may not be *sub judice* and thereby arrive at a comprehensive settlement resolving all their disputes once and forever. The agreement of the parties, signed by them is to be submitted to the mediator who is supposed to forward it to the court with a covering letter.\(^{81}\) The mediation settlement in practice is, however signed and authenticated by the mediator also and in fact the settlement is many a time recorded in the mediation proceedings sheet which is then signed by all.

On receipt of the settlement, the court has to fix a date of hearing and if the court is satisfied that the parties have settled their dispute, it has to pass a decree in accordance with the terms thereof.\(^{82}\) This is because there has to be some public record of the manner in which the suit is disposed of and, therefore, the court has to record the settlement and pass a decree in terms thereof.\(^{83}\)

### 5.2.4 Mediators and Training of Mediators

The Delhi Mediation Centre has various empanelled trained mediators who are continuously involved in assisting the disputant parties in their endeavour to amicably resolve their disputes through the process of mediation. Not only judges but also numerous lawyers, having the requisite training and post qualification experience have been empanelled as mediators and in fact the number of lawyer mediators is much more than judicial mediators.\(^{84}\) That apart, experts and other professionals with at least fifteen

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\(^{81}\) See Rule 24, Mediation and Conciliation Rules, 2004 (Delhi); As of now the process of mediation is being advocated as a facilitative process. However once mediation after being institutionalized in the courts progresses some form of evaluation would necessarily creep in. This has been the experience of some in the West also. See Nancy A. Welsh, “The Thinning Vision of Self Determination in Court Connected Mediation: The Inevitable Price of Institutionalization”, 6 *Harv. Negot. L. Rev.* 1 (Spring 2001).

\(^{82}\) See Rule 25, Mediation and Conciliation Rules, 2004 (Delhi).

\(^{83}\) See *Salem Advocates Bar Association v. Union of India*, AIR 2005 SC 3353

\(^{84}\) For a list of lawyer mediators see [http://www.delhimediationcentre.gov.in](http://www.delhimediationcentre.gov.in) (last visited on 13.03.2012).
years standing and persons who are themselves experts in mediation can also be appointed as mediators. 85

It goes without saying that the success of the mediation process depends on the skills and expertise of the mediator. Therefore training in mediation is imperative since one may be a good judge or a good lawyer, but one may not be a good mediator as the qualities and skills required by a mediator are of a very different kind from those required of a judge or a lawyer. 86 Mediators must be specially trained in the art of scientifically and professionally managing and facilitating negotiation. Therefore judges and lawyers have to be first trained in the art of mediation 87 and then permitted to serve as mediators. 88

The proposals in the 'National Plan for Mediation' also emphasize upon the selection of right mediators and trainers and training to make them successful mediators. 89 It is found that a minimum of 40 hours of specialized theoretical training by experts followed by conducting of 10 actual mediations under the supervision of expert trainers give the mediators the required skills, knowledge and attitude required for mediation. 90 However lawyers/ judges definitely have an edge in serving as mediators as they understand the

85 In terms of Rule 4, Mediation and Conciliation Rules, 2004 (Delhi).
87 S.B. Sinha, “ADR: Mechanism and Effective Implementation”, available at: http://bombayhighcourt.nic.in/mediation/index_articles.htm (last visited on 11.04.2012) quoting Chief Justice Benjamin F. Overton: “Judges are the most experienced neutrals in the system and if properly trained in the mediation process would turn out to be excellent mediators.”
88 We may have a separate cadre of mediation judges who shall conduct mediation five days a week. See M.M. Kumar, “Relevance of Mediation to justice Delivery in India”, a paper presented in the National Conference on Mediation, organised by the Mediation & Conciliation Project Committee, Supreme Court of India, held on July 10, 2010 at New Delhi, available at: http://highcourthcnd.gov.in (last visited on 12.04.2012).
89 Delhi Mediation Centre, 2(6) Mediation Newsletter (June 2008).
90 R.V. Raveendran, “Mediation – An Introduction” available at: http://bombayhighcourt.nic.in/mediation/index_articles.htm (last visited on 11.04.2012); At a later stage we may also have mediator certification programs. Mediator certification would improve quality of mediators for the benefit of users of mediation services and would enhance the prestige and legitimacy of the mediation process. See Stephanie A. Henning, “A Framework for Developing Mediator Certification Programs”, 4 Harv. Negot. L. Rev. 189 (Spring 1999).
nuances of law and we must not forget that the ultimate settlement must not be illegal. The Delhi Mediation Centre not only conducts actual mediations but also provides training in mediation in Delhi and in fact the master trainers of the Delhi Mediation Centre have regularly been providing mediation training in other states also.

5.2.5 Achievements of the Delhi Mediation Centre

The success of court annexed mediation is an open secret and has been acknowledged by all. The accomplishments of court annexed mediation in Delhi can be appreciated from the statistical reports showing the number of cases referred and settled and number of connected cases settled during the last 6-7 years at various mediation centres in Delhi.

**General Statistical Report**
**Tis Hazari Courts, Delhi.**

<table>
<thead>
<tr>
<th>Report between the referring date 22/8/2005 to 31/07/2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total no. of cases referred for mediation:-</td>
</tr>
<tr>
<td>No. of cases which were not fit for mediation:</td>
</tr>
<tr>
<td>No. of Balance Cases:</td>
</tr>
<tr>
<td>No. of cases pending for mediation:</td>
</tr>
</tbody>
</table>

---

91 See however Anil Xavier, “Lawyer Mediator, Non-lawyer Mediator: Who is better?”, 1(6) The Indian Arbitrator 2 (July 2009).

92 The Mediation Centres at various court complexes in Delhi have been conducting 40 hours training programs for training advocates and judges as mediators. Apart from that awareness programs on mediation as a tool of responsive and timely justice and refresher courses on concept of mediation are also conducted. See Delhi Mediation Centre, 4(1) Mediation Newsletter (January 2010).

93 Available at: http://www.delhimediationcentre.gov.in (last visited on 20.08.2012).
<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of Disposed Cases:</td>
<td>27126</td>
</tr>
<tr>
<td>No. of cases settled :</td>
<td>17065 (62.91%)</td>
</tr>
<tr>
<td>No. of cases not settled</td>
<td>10061 (37.09%)</td>
</tr>
<tr>
<td>No. of connected cases settled</td>
<td>5475</td>
</tr>
</tbody>
</table>

**General Statistical Report**
Karkardooma Courts, Delhi.

**Report between the referring date 01/12/2005 to 31/07/2012**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total no. of cases referred for mediation:</td>
<td>16428</td>
</tr>
<tr>
<td>No. of cases which were not fit for mediation:</td>
<td>2876 (17.51%)</td>
</tr>
<tr>
<td>No. of Balance Cases:</td>
<td>13552</td>
</tr>
<tr>
<td>No. of cases pending for mediation:</td>
<td>253</td>
</tr>
<tr>
<td>No. of Disposed Cases:</td>
<td>13299</td>
</tr>
<tr>
<td>No. of cases settled :</td>
<td>10602 (79.72%)</td>
</tr>
<tr>
<td>No. of cases not settled</td>
<td>2697 (20.28%)</td>
</tr>
<tr>
<td>No. of connected cases settled</td>
<td>3968</td>
</tr>
</tbody>
</table>
### General Statistical Report
Rohini Courts, Delhi.

**Report between the referring date 02/02/2009 to 31/07/2012**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total no. of cases referred for mediation:</td>
<td>9051</td>
</tr>
<tr>
<td>No. of cases which were not fit for mediation:</td>
<td>2029 (22.42%)</td>
</tr>
<tr>
<td>No. of Balance Cases:</td>
<td>7042</td>
</tr>
<tr>
<td>No. of cases pending for mediation:</td>
<td>196</td>
</tr>
<tr>
<td>No. of Disposed Cases:</td>
<td>6826</td>
</tr>
<tr>
<td>No. of cases settled:</td>
<td>4634 (67.89%)</td>
</tr>
<tr>
<td>No. of cases not settled:</td>
<td>2191 (32.10%)</td>
</tr>
<tr>
<td>No. of connected cases settled:</td>
<td>1337</td>
</tr>
</tbody>
</table>

### General Statistical Report
Dwarka Courts, Delhi.

**Report between the referring date 05/07/2009 to 31/07/2012**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total no. of cases referred for mediation:</td>
<td>6343</td>
</tr>
<tr>
<td>No. of cases which were not fit for mediation:</td>
<td>1456 (22.95%)</td>
</tr>
<tr>
<td>No. of Balance Cases:</td>
<td>4887</td>
</tr>
<tr>
<td>No. of cases pending for mediation:</td>
<td>224</td>
</tr>
<tr>
<td>No. of Disposed Cases:</td>
<td>4663</td>
</tr>
</tbody>
</table>
The added benefit of mediation is that not only the case which is actually referred to mediation, but all other cases pending between the parties can be settled at one go. The expression ‘connected cases settled’ refer to such other cases pending between the parties. The data discloses that more than 51,900 cases (excluding connected cases) in total have been settled on account of mediation at district courts in Delhi. The number is phenomenal and clearly explains the efficacy of the mediation process and its role in clearing the overcrowded dockets of the courts in Delhi. The statistics reveal the magnitude of the concerted efforts of the referral judges and the mediators to achieve the salutary objective behind section 89 CPC. Lawyers too have participated in the program with great zeal. The effective participation by lawyers in the mediation program has helped to dispel all doubts, if any, that the mediation process would adversely affect the advocates in their professional activities in any manner.94

An important aspect which has contributed to the efficacy and success of mediation is the availability of sufficient time in mediation. Being able to devote enough time to fully explore settlement and responding timely to the parties’ needs are aspects which are likely to contribute to a quality process and to parties’ views that the process is fair.95 The statistical data of civil matters referred to mediation from 22.08.2005 to 31.07.2007 at Tis Hazari mediation centre indicates the approximate time spent in the mediation process and which is as under:96

<table>
<thead>
<tr>
<th>No. of cases settled :</th>
<th>3787(81.21%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of cases not settled :</td>
<td>876(18.79%)</td>
</tr>
<tr>
<td>No. of connected cases settled:</td>
<td>656</td>
</tr>
</tbody>
</table>

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Custody/ guardianship matters - 171 minutes
Divorce Petitions – 130 minutes
Petitions for maintenance – 137 minutes
Suit for possession and damages – 111 minutes
Suit for breach of contract – 75 minutes
Suit for injunction – 128 minutes

This gives us an insight into the average time spent on mediation proceedings. Experience has revealed that there are no constraints of time in mediation and parties can have repeated sittings and in practice successive sittings are arranged every week with the same mediator resulting in a constant, focused and personalized endeavour for resolution of the dispute. Thus even complex matters involving numerous parties can be easily resolved by mediation. Old Chronic litigations which have haunted the courts for years together continue to be expeditiously, amicably and finally resolved through the process of mediation at the Delhi Mediation Centre.  
Thus mediation appears to be the most apposite ADR mechanism in case of such complicated disputes. The empirical and statistical data indubitably revels that court annexed post litigation mediation has been extremely successful in Delhi in all kinds of cases and has emerged as the front runner in the ADR revolution in Delhi.

5.3 MEDIATION AT THE DELHI HIGH COURT MEDIATION AND CONCILIATION CENTRE (SAMADHAN)

The Delhi High Court Mediation and Conciliation Centre, now known as ‘Samadhan’, was established in May 2006 and is housed in the Delhi High Court building. Afterwards the Centre was refurbished and inaugurated on 07.01.2008.

97 A civil dispute which remained pending for 32 years in the form of three civil suits at the Delhi district courts was finally amicably settled through mediation on 15.10.2008 at the Delhi Mediation Centre. See Delhi Mediation Centre, 2(10) Mediation Newsletter (Oct. 2008).
98 At Sher Shah Road, New Delhi.
The Delhi High Court Mediation and Conciliation Centre, functions under the aegis of the Delhi High Court and the ‘Samadhan’ overseeing committee comprising of judges of the Delhi High Court and lawyers, provides constant guidance and monitoring for the effective functioning of the centre. The centre has a panel of more than 200 experienced and well trained mediators and it boasts of state of the art infrastructure. It deals with matters of all sorts referred to it by the Delhi High Court, Supreme Court and the district courts at Delhi and the endeavour is to provide professional facilities and a consumer friendly environment at the mediation centre.

Samadhan has also been making endeavours to popularize mediation as a mode of dispute resolution and creating awareness about its utility and advantages. The centre has published information brochures, pamphlets, calendars, etc. expounding the process of mediation as a dispute resolution mechanism and containing detailed information about the centre. Such information brochures, pamphlets etc. are distributed to the parties as well as the general public for their information. Such information brochures are also annexed with the summons issued to the parties by the registry of the Delhi High Court. The Centre has also compiled and published two training manuals on mediation namely ‘The Mediator’s Tool Box’ and ‘Family and Matrimonial Mediation Manual’. The Mediators of Samadhan have also been acting as master trainers and have been organizing training programs in mediation in and outside Delhi. Thus the centre has been making continuous efforts for the all round development of mediation as an instrument for effective justice.

The contribution of the centre to the ADR revolution can very well be visualized from the statistical data. From 01.04.2008 to 31.03.2010, 2625 cases were referred to the centre. The Centre has also compiled and published two training manuals on mediation namely ‘The Mediator’s Tool Box’ and ‘Family and Matrimonial Mediation Manual’. The Mediators of Samadhan have also been acting as master trainers and have been organizing training programs in mediation in and outside Delhi. Thus the centre has been making continuous efforts for the all round development of mediation as an instrument for effective justice.

The court order for issuance of summons also contains an explicit direction to this effect. The objective is to make the parties aware of the concept, utility and availability of mediation as an ADR mechanism so that the parties can take recourse to mediation to settle their disputes at the earliest stage.

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100 In Alok Mishra v. Garima Mishra, 2009 (2) R.C.R. (Civil) 263 and Aviral Bhatla v. Bhawna Bhatla, 2009 (3) S.C.C. 448 the Supreme Court recorded its appreciation for the commendable efforts made by the mediators of the Delhi High Court Mediation and Conciliation Centre in resolving complicated matrimonial disputes.

101 The court order for issuance of summons also contains an explicit direction to this effect. The objective is to make the parties aware of the concept, utility and availability of mediation as an ADR mechanism so that the parties can take recourse to mediation to settle their disputes at the earliest stage.
cases were referred to the centre and out of them 616 cases were settled at the centre. That apart, 2504 connected cases were also settled thereby taking the total number of settled cases to 3120. The centre has also started dealing with pre litigation disputes and till 31.03.2010, it had also settled 8 pre litigation disputes. The centre has therefore proved to be quite effective in utilizing and popularizing mediation as a mode of dispute resolution and the centre has itself attained great popularity during a short duration. It has also helped in reducing the judicial arrears to a considerable extent and in realizing the salutary objectives behind the incorporation of section 89 CPC.

5.4 MEDIATION AT THE DELHI DISPUTE RESOLUTION SOCIETY

The Delhi Disputes Resolution Society is a society registered under the Societies Registration Act, 1860 which has been set up under the aegis of the Government of NCT of Delhi and the Delhi High Court. The aims of the society, inter alia, are to establish various ADR centers in Delhi, to help the parties to resolve their disputes amicably, economically and quickly, to save cost of litigation to the state and the courts and to clear back log of petty cases from the courts.

The Chief Minister of Delhi is the patron in chief of the Delhi Disputes Resolution Society. A Judge of the Delhi High Court is also the member of the governing council apart from the District and Sessions Judge, Delhi, Registrar General of the Delhi High Court, Chief Secretary of Delhi and others. The Principal Secretary (Law, Justice & Legislative Affairs) is the chairman of the executive council of the society. The registered office of the society is situated at Department of Law, Justice & Legislative Affairs, Government of NCT of Delhi, 8th Level, C-Wing, Secretariat, Delhi.

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103 He is a member of the Delhi Higher Judicial Service on deputation with the Government of NCT of Delhi.
In order to achieve its objectives the Delhi Disputes Resolution Society has set up mediation centers in various districts in Delhi with the aim of providing pre litigation mediation facilities also in addition to post litigation mediation facilities. The mediation centres which have been set up at various places in Delhi by the society are situated at (i) State Consumer Dispute Redressal Commission, Vikas Bhawan, I.T.O., New Delhi (ii) District Court Consumer Forum, K. G. Marg, New Delhi (iii) 419, F.I.E., Udyog Sadan, Patpar Ganj, Industrial Area, New Delhi, (iv) Delhi Transport Authority, Rajpur Road, 5/9 Under Hill Road, Civil Lines, Delhi (v) Near Police Station, Parliament Street, New Delhi (vi) Ambedkar Bhawan, Sector 16, Rohini, Delhi, (vii) Consumer Dispute Redressal Forum-II, Udyog Sadan, C-22 & 23, Qutab Institutional Area, behind Qutab Hotel, New Delhi (viii) District Consumer Court, Office of Deputy Commissioner, North-East, 1st Floor, Nand Nagri, Delhi.

The mediation centres established by the Delhi Disputes Resolution Society are slowly gaining momentum in Delhi. The government departments, public sector enterprises, BSES, NDPL etc. are frequently utilizing the facilities of mediation at these centres, conducted by trained mediators. The centres also cater to consumer related disputes, petty compoundable criminal cases, cases of dishonour of cheques, accidental compensation cases, family and relationship matters, land related matters and other civil matters at the pre litigation stage as well as the post litigation stage. The expenses of the mediation centres are borne by the state and no fee is charged from the parties.

The matters are not being referred by the courts to these centres under section 89 CPC, however still the settlement arrived at the centres can form the basis of a compromise decree which can be passed by the courts in terms of the said settlement.\textsuperscript{104} In pre litigation cases the parties can mutually enforce the terms of the settlement and especially where one of the parties is a government department it is quite easy such to resort to such mutual

\textsuperscript{104} In terms of Order XXIII Rule 3, Code of Civil Procedure, 1908.
enforcement. The Delhi Dispute Resolution Society has a significant role to play to realize the goal of justice at doorsteps through ADR by establishing easily accessible mediation centres apart from the court annexed mediation centres.

5.5 PRIVATE INSTITUTIONAL MEDIATION IN DELHI

There are few private institutions available in Delhi which offer institutionalized professional mediation services also. The parties may take recourse to the mediation proceedings under the aegis of such private institutions by mutual agreement.

LCIA India\textsuperscript{105} at New Delhi, launched in April 2009, is the first independent subsidiary of LCIA\textsuperscript{106} outside London, which, \textit{inter alia}, provides professional institutional mediation services in Delhi. LCIA India has framed its own LCIA India Mediation Rules which deal with appointment of mediator, commencement and conduct of mediation proceedings, confidentiality etc. in respect of mediation conducted under the auspices of LCIA India. LCIA India mediation services are normally availed by the parties at the pre litigation stage, although there is no bar in availing the services at the post litigation stage also.\textsuperscript{107}

The parties, however, are required to bear the costs themselves for availing such mediation services offered by LCIA India. The fee which is charged by LCIA India is in terms of the LCIA India schedule of mediation costs, however the same is considerably on the higher side.\textsuperscript{108} The high cost of mediation, however acts as a deterrent for individual parties and small

\begin{footnotesize}
\textsuperscript{105} LCIA India has its office at 301-A World Trade Tower, Barakhamba Lane, New Delhi.
\textsuperscript{106} London Court of International Arbitration (LCIA) is a London based premier international arbitral institution which has worldwide recognition in providing world class facilities and services for conduct of arbitration.
\textsuperscript{107} In fact as per LCIA Mediation Rules the parties are free to initiate or continue any arbitration or judicial proceedings in respect of the dispute which is the subject of the mediation.
\textsuperscript{108} LCIA India charges mediation fee at hourly rates not exceeding Rs. 20,000/- per hour along with registration fee of Rs. 10,000/- and secretarial fee of Rs. 2500/ Rs. 5000 per hour and other miscellaneous expenses.
\end{footnotesize}
business houses for availing the institutionalized mediation services of LCIA India and they prefer ad hoc mediation or mediation through the state/ court sponsored mediation centres.

The corporate, however, still prefer to avail institutionalized mediation services of splendid organizations like LCIA India primarily because of the superior quality of professional services offered by such institutions, the brand value associated with such institutions and obviously because they can afford the fee payable in such cases as the disputed amount runs into crores of rupees. Be that as it may, LCIA India is providing an additional avenue for settlement of disputes through the process of mediation in a professional manner in Delhi.

The International Centre for Alternative Dispute Resolution (ICADR) also provides facilities for conciliation/ mediation. Some of the private companies while entering into contracts incorporate dispute resolution clauses providing for mediation as a preliminary mode of consensual dispute resolution. In such cases the matter may be referred to mediation to be conducted under the auspices of an institution or by a neutral mediator appointed by the parties themselves by mutual consent. Thus private mediation is also gaining impetus as a mode of pre litigation dispute resolution in Delhi.

109 ICADR has its head office at Plot No.6, Vasant Kunj Institutional Area, Phase-II, New Delhi.
110 ICADR, however, classifies the process primarily as Conciliation. The FICCI Arbitration Tribunal (FACT) has also framed the FACT Rules of Conciliation which provide that the term “Mediation” shall mean and include “Conciliation” and all reference to ‘Mediators’ shall mean and include “Conciliators”.
111 For a draft mediation clause see - The WIPO Arbitration and Mediation Center, Guide to WIPO Mediation, available at: http://www.wipo.int (last visited on 30.05.2012); See also Tom Arnold, “Mediation Outline: Twenty Common Errors in Mediation Advocacy- In no Particular Order”, in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution 259 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).
112 Empirical Research conducted shows that only 10% of the respondents had come across such clauses in the contracts executed by private companies which provide for recourse to mediation at the preliminary stage for dispute resolution; See also TVC India Pvt. Ltd. v. ABN Amro Bank N.V, 2008 (3) A.D.(Delhi) 550.
113 Recently the Company Law Board (CLB) while returning the petitions filed by Norway-based Telenor and India’s Unitech, citing technical errors, asked the firms to resolve their
6. ISSUES PERTAINING TO MEDIATION

6.1 ENFORCEMENT OF A MEDIATION SETTLEMENT

6.1.1 Mediation Settlement is not Statutorily Executable.

Mediation is a non binding process. Once the parties arrive at a settlement agreement in mediation, the next question arises as to how the agreement is to be enforced. There is no dispute where the parties voluntarily execute the entire terms and conditions of the settlement agreement, but in cases where one of the parties’ decides to backtrack from the settlement agreement or attempts to procrastinate the matter, what is the remedy of the other party, is a very perplexing question.

In case of pre litigation mediation, this settlement agreement is nothing but a simple contract. While in conciliation the settlement agreement is considered to be an arbitral award on agreed terms and is per se executable as a decree of the court there is no such analogous statutory provision in case of mediation as there is no comprehensive legislation governing mediation. The irony of the matter is that when a settlement is arrived at with the intervention of a mediator the settlement though authenticated by a mediator is not deemed to be a decree; but when the same settlement is arrived at by calling the mediator as a conciliator, the settlement is deemed to be a decree.115

The settlement agreement arrived between the parties in case of mediation is therefore not per se enforceable as a decree of the court and it can at the most form the basis of a suit. This would mean further recourse to litigation despite the matter having been settled by mediation and would render the entire process of mediation as unproductive and otiose. But that is

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114 See ss. 74, 30 and 36, Arbitration and Conciliation Act, 1996 which provide that the settlement agreement drawn up in conciliation proceedings shall have the same status and effect as if it is an arbitral award on agreed terms and which can be executed as a decree of the court in terms of s. 36 of the Arbitration and Conciliation Act, 1996.

the state of affairs which prevails in Delhi/India and this has been a major hurdle in the development of mediation.

6.1.2 Enforcement of Mediation Settlement – Post Afcons Judgment

Section 89 of the Code of Civil Procedure, 1908 deals with reference of disputes to mediation at the post litigative stage. Interestingly section 89(2) of the Code of Civil Procedure, 1908 provides that in case of reference of any sub judice matter to mediation the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. This again is something which is contrary to the general concept of mediation as mediation is a private dispute settlement procedure de hors the judicial process. On the contrary, section 89 of the Code of Civil Procedure, 1908 further provides that in case of judicial settlement the court shall refer the matter to any person or institution which shall be deemed to be a Lok Adalat.

This issue was considered by the Supreme Court of India in the year 2010 and the Supreme Court acknowledged the fact that there is an error in the provision and opined that a proper interpretation of section 89 of the Code of Civil Procedure, 1908 requires a change from a plain and literal reading of the section and 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.

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117 Section 89 (2), Code of Civil Procedure, 1908 provides that: “...(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.....”.

118 Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., JT 2010 (7) SC 616.
Clauses (c) and (d) of section 89(2) of the Civil Procedure Code, 1908 now read as under when the two terms are interchanged\textsuperscript{119}:

(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.

Thus after the judgment of the Supreme Court in \textit{Afcons Infrastructure} mediation has been assigned its usual meaning. Mediation now contemplates reference of the dispute to any person or institution. The matter in Delhi is normally referred to the court annexed mediation centres and thereafter the matter is assigned\textsuperscript{120} to a particular trained mediator, who conducts mediation proceedings.

But the most significant change which the \textit{Afcons} judgment has brought about is that such person or institution conducting mediation is now to be deemed as a Lok Adalat and the provisions of the Legal Services Authorities Act, 1987 would be applicable. The necessary concomitant is that the settlement agreement certified by the mediator would be deemed to be an award of the Lok Adalat and would in turn be enforceable as a decree of the court.\textsuperscript{121}

Interestingly even before the \textit{Afcons} judgment the High Court of Delhi\textsuperscript{122} had held that parties are estopped from withdrawing from the

\textsuperscript{119} In view of the directions issued in \textit{Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.}, JT 2010 (7) SC 616 the above changes made by interpretative process are to remain in force till the legislature corrects the mistakes, so that section 89 CPC is not rendered meaningless and infructuous.

\textsuperscript{120} Such assignment of the matters is done by the Incharge, Mediation Centre.

\textsuperscript{121} Every award of the Lok Adalat is final and binding on all the parties to the dispute and enforceable as decree of the court. See s. 21, Legal Services Authorities Act, 1987.

\textsuperscript{122} The Delhi High Court in \textit{Surinder Kaur v. Pritam Singh}, 154 (2008) DLT 598 held that parties would be estopped from disputing the settlement agreement arrived at before the
settlement agreement arrived at before the Mediation Centre and in such eventualities the court can dispose of the case on the basis of the said settlement in terms of Order XXXIII Rule 3 CPC.\textsuperscript{123} However, undoubtedly the \textit{Afcons} judgment lends tremendous support to the mediation movement by removing the foremost disability associated with a mediation settlement and asserting the enforcement of a mediation settlement agreement as decree of the court.

But the \textit{Afcons} judgment applies only to post litigation court referred mediation in terms of section 89 of the Code of Civil Procedure, 1908 and the fate of a pre litigation mediation settlement or post litigation mediation settlement \textit{de hors} section 89 of the Code of Civil Procedure, 1908 still lingers in a quandary.

\subsection*{6.2 LACK OF A COMPREHENSIVE STATUTORY FRAMEWORK}

The next important issue concerning mediation relates to lack of statutory framework in India. While arbitration and conciliation have been given statutory backing, mediation is yet to get that status.\textsuperscript{124} The process of conciliation is governed by part III of the Arbitration and Conciliation Act, 1996. However for mediation in general we do not have any legislation which supports and governs the mediation process. It is only in case of post litigation court annexed mediation where rules have been framed by various High Courts for conduct of such mediation in pursuance of section 89 of the Code of Civil Procedure, 1908. However these rules also cannot be equated with a

\begin{footnotesize}
\begin{enumerate}
\item In \textit{Sir Syed Memorial Educational Society v. Mohmmad Usman Wani}, AIR 2000 J&K 67 it was held that Order XXIII Rule 3 CPC does not prescribe that the statements of the parties should be recorded by the court ordering the compromise and the only requirement of law is that there should be satisfaction of the court that the suit has been adjusted wholly or in part by any lawful agreement or compromise and that should be in writing and signed by the parties.
\item See also “Let litigation make way for settlement culture: Kapadia”, \textit{The Hindu}, New Delhi, July 11 2010.
\end{enumerate}
\end{footnotesize}
comprehensive legislation. Thus neither confidentiality in mediation is a statutory guarantee nor do the other aspects of mediation have statutory backing. In fact the issue of unenforceability of a mediation settlement agreement in general is a direct result of the absence of a comprehensive legislation on mediation. It is therefore incumbent that if mediation is to flourish as an ADR mechanism we must have a Mediation Act on the lines of the chapter on conciliation under the Arbitration and Conciliation Act, 1996.

6.3 INADEQUATE USE OF PRE LITIGATION MEDIATION

Pre litigation mediation is an extremely important aspect from the point of view of both, the parties and the judicial system. Why the parties should be relegated to mediation only once they have invoked the jurisdiction of the courts. Why not give the parties an option to explore dispute resolution through mediation at the pre litigation stage itself. If that is done there would be additional benefits for parties in terms of time, money and preservation of relationships. If such a case is brought before the court, it adds to the ever surmounting arrears but if it is resolved at the pre litigation stage itself it would never enter the judicial system.

Such pre litigation mediation may be conducted by any institution or ad hoc mediators and a range of options in this arena are available in Delhi. However it is to be acknowledged that pre litigation mediation in Delhi has not been that successful and effective. Therefore there is a need to focus and develop a better framework for pre litigation mediation. The existing mediation centres can diversify their role so as to provide pre litigation mediation services also. At the same time private players providing pre litigation mediation services need to be promoted. The lawyers, NGOs, other organizations\(^\text{125}\) and the general public would also have to take initiative in this regard.

\(^{125}\) Indian Institute of Arbitration & Mediation (IIAM) has launched a community mediation service by establishing community mediation clinics for popularizing mediation as a mode of dispute resolution. See Anil Xavier, “Bringing Justice to your Doorsteps: IIAM Community Mediation Service”, 1(8) *The Indian Arbitrator* 2 (September 2009). Similar programs can be launched in Delhi also.
However the ground reality is that the prime reason for inadequate use of pre litigation mediation is legislative and not administrative. The lack of statutory basis and the unenforceability of a mediation settlement agreement in a summary manner are the basic causes which are preventing pre litigation mediation from flourishing in Delhi because then the enforcement of a mediation settlement itself becomes an insurmountable challenge. The introduction of a comprehensive legislation on mediation would therefore also go a long way in ameliorating the status of pre litigation mediation in Delhi.

6.4 LACK OF AWARENESS AND SETTLEMENT CULTURE

The Delhi Mediation Centre is doing a commendable job in increasing awareness with respect to the existence, utility and benefit of the process of mediation yet we still have a long way to go. Mediation is yet to become a part of legal and business culture in Delhi. Along with awareness there is also a need to change the mindset of the masses so as to persuade them to adopt mediation as a mode of dispute resolution. The basic challenge is therefore to develop a settlement culture amongst the people and to effect an attitudinal transformation so as to inculcate a collaborative and problem solving approach.

7. EPILOGUE

Mediation in its contemporary incarnation as an ADR process involving negotiation facilitated by a specially trained mediator through a structured process, has emerged as the frontrunner in the ADR revolution which is gaining momentum in Delhi for realizing the cherished dream of ‘access to

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126 The LCIA India which provides institutionalized mediation services in Delhi clearly states on its website (http://www.lcia-india.org) that mediation does not lead to a binding decision that is enforceable in its own right.

127 The information brochure published by the Delhi Mediation Centre is annexed with summonses so as to increase awareness regarding mediation as an ADR mechanism amongst the litigants so as to enable them to explore mediation as a mode of dispute resolution at the earliest.

justice’ for all. The popularity of mediation is growing day by day in Delhi as more and more people are recognizing and acknowledging its utility and efficacy as a mode of dispute resolution.

It is because of its well entrenched procedural advantages and its efficacy in the state of affairs prevailing here, that no other ADR mechanism has received judicial endorsement and recognition of the stature which mediation has received. Mediation centres have been established all over the country under the aegis of the superior judiciary for furthering the avowed objectives of section 89 CPC. Delhi is fortunate to have five such court annexed mediation centres possessing state of the art infrastructure, manned by professional and trained mediators and functioning under the proficient guidance and direct monitoring of the Delhi High Court. All these efforts are aimed at effectively and systematically institutionalizing the mediation process.

The establishment of mediation centres at various districts by the Delhi Dispute Resolution Society, mooted by the Government of NCT Delhi, is again a manifestation of the fact that the government is also conscious of the efficacy of mediation as a mode of dispute resolution and as these mediation centres gain momentum they would go a long way in realizing the much desired societal objective of justice at doorsteps, in an expeditious and cost effective manner through mediation.

At the post litigation stage mediation is perhaps the most preferred mode of dispute resolution especially for complicated, multifaceted and long standing disputes and the empirical and statistical data reveals intriguing details and speaks volumes about the efficacy of mediation in Delhi. Although at the pre litigation stage, mediation has not made much headway on account of lack of statutory framework, yet we have a range of institutional and ad hoc options available in Delhi for pre litgation mediation also. A comprehensive legislation on mediation is much desired in this area and would not only widen the horizons of mediation and add to its efficacy but would also encourage more extensive use of mediation.
Mediation has been a time tested dispute resolution mechanism for decades in the west. The nature of litigation and other relevant circumstances in our country may not be the same as they are there but we can certainly borrow their experience which is quite rich by this time and suitably adapt the system to suit our requirements.\textsuperscript{129} We need to channelize these experiences of the west into the mediation process and develop the same in light of the socio-economic conditions prevailing here so as to create a \textit{sui generis} model of mediation that would be most apposite keeping in mind the imperative needs and aspirations of our justice delivery system. However one thing is for sure that mediation is here to stay and in fact it has become an indispensible part and parcel of the justice delivery system. What is however required is constant evaluation, monitoring and a focused and well guided endeavour for further improvement of the mediation movement.\textsuperscript{130}

\textsuperscript{129} Justice R.C. Lahoti, Keynote address delivered at the valedictory session of two days Conference on “ADR, Conciliation, Mediation and Case Management” organised by the Law Commission of India available at: http://lawcommissionofindia.nic.in/adr_conf/Justice_Lahoti_Address (last visited on 12.04.2012); See also Anirudh Wadhwa and Anirudh Krishnan (Eds.), \textit{R.S. Bachawat’s Law of Arbitration and Conciliation} (Lexis Nexis Butterworths Wadhwa, Nagpur, 5\textsuperscript{th} Edn., 2010).

\textsuperscript{130} The Mediation and Conciliation Project Committee constituted by the Supreme Court is constantly working in this direction. Recently the 3\textsuperscript{rd} National Conference on Mediation was conducted by the Mediation and Conciliation Project Committee, Supreme Court of India and the Delhi High Court Mediation Monitoring Committee at Vigyan Bhawan, New Delhi, 07\textsuperscript{th} and 8\textsuperscript{th} July 2012.