Chapter - 6

Role of Advocates and Referral Judges in Mediation

[6.1] INTRODUCTION

Now it is well accepted notion that mediation is one of the Alternative Dispute Resolution Mechanism. The process of mediation consists of the Parties, Mediator, Referral Judge as well as Advocates of the concerned parties. Mediation being a somewhat new process there is little support from the Advocates in this process. At the same time, though the Parliament has amended Section 89 of the Code of Civil Procedure by introducing various modes of Alternative Dispute Resolution Mechanism to be followed by the Judge while dealing with the pending matter, it is generally observed that number of cases referred to the Mediation process is not commensurate with the pendency of the cases in the Court. There is misconception prevailing in the Advocates’ community as well as Judicial System that the role of the Advocates and Judges in Mediation is optional. But, this conception is erroneous. The Advocates as well as Referral Judges have important roles in the process of Mediation. The roles of both are discussed here-in-below.

[6.2] ROLE OF ADVOCATES IN MEDIATION

It is a common belief that in Mediation the participation of Advocates is optional and or that they have no role to play. This belief is erroneous. Advocates do play dominant and prominent and active role in the mediation process during preparation, during mediation and after the
Mediation of a case is incomplete without the consent, presence and active participation of the advocates representing the parties in the mediation process.\(^{168}\)

Mediation as a mode of Alternative Dispute Resolution 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 Advocate in mediation is functionally different from his role in litigation, the service rendered by the Advocate to the party during the mediation process is a professional service. Since Advocates 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 Advocate 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 Advocates aware of the concept and process of mediation, the advantages and benefits of mediation and the role of Advocates in the mediation process.

Hon’ble Mr. Justice C. Nagappan,\(^{169}\) emphasized the vital role played by advocates in mediation to assist the parties by preparing their

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\(^{168}\) Paper presented on Institutionalization of Mediation at National Conference on Mediation at Delhi, by Justice K. L. Manjunath, Judge High Court of Karnataka and President Bangalore Mediation Centre NyayaDegula, Bangalore, page. 13

\(^{169}\) Judge High Court of Madras, at 3rd National Conference on Mediation at New Delhi on 8th July, 2012.
clients, motivating them by informing of the benefits of mediation and assist them in mediation. The Advocates should change their attitudes of ‘winning at all cost’ and acting as an adversary to talking a reasonable approach and behaving in a non-adversarial manner to assist the party to reach an amicable settlement, which is a statutory obligation under section 89 of Code of Civil Procedure, 1908.

Mediation is assisted negotiation. Negotiation is central to Advocacy. Advocates play a critical role in many society’s negotiations. “Because of their skills and experience advocates have superior opportunities to do good”, said Abraham Lincoln. They can be peacemaker. They can help people construct fair and durable commitments, feel protected, recover from loss and resolve disputes. They also have an ability to do considerable harm. They can aggravate hostilities and run up substantial transaction costs. Given a choice most of us would choose to good.

The adversarial nature of our judicial system, the temptation to act out of self-interest, the rewards of playing the hard ball, the inflated expectations of clients and constrains of bargaining are the shadows of law. The incentive to act combatively can be compelling. However costs in adversarial tactics can be ruinous. Deals blow up, cases don’t settle, expenses escalate, relationship fail, reputations suffer, court dockets jam up, commitments fall apart, justice is delayed and opportunities to create value – to, make both sides better off – slip away. Mediation is for advocates who feel sickened by trench warfare and exhausted by cases that drag on unnecessarily for years. Advocates who want to change the
way things work, the advocates who wonder whether they picked the right profession. Whether people are making deals or negotiating settlements conflict is inevitable. None of us can control that. What we can do is to offer a new way to look at these conflicts that will minimize costs and create value for both parties. Advocate’s main duty and function is to advice their clients what is most advantageous to them and how their disputes can be resolved in fastest manner. If clients get quick results they will be willing to pay more. Again reputation of a advocate that he helps in bringing satisfactory results speedily, either by settlements or by trail will fetch more work and clients. By trial one can hardly bring quick results and the matter would not end in the trial court. The mediation process not only encourages advocates to appear in mediation proceedings but also welcomes them to continue to represent their clients before the mediator.

In mediation reference advocates continue to represent the same clients in the same case. They can properly advice the clients whether the case is proper for mediation or not, they can help the clients in negotiation and can supervise and advice whether mediation proceedings are progressing well. They can advice their clients on questions of law, on disadvantages of court litigation and uncertainties ahead in adjudicative process. They can help assessing the merits of the case, preparing to present mediation briefs and contribute very effectively at every stage of mediation. Most importantly, presence of their advocates during mediation process will give greatest security to the clients process wise and also substance wise. While appearing in mediation advocates will
develop a specialized new branch of practice, help in creating harmony in the society and with appropriate experience and training can also develop practice as a mediator. By practicing and promoting mediation one takes up the challenges of helping people resolve their disputes in a peaceful manner. Advocates will find this kind of work very rewarding and challenging. Each time one is able to help people find their way to an agreement one would feel personally responsible for their deliverance from a state of disharmony to a state of harmony. There is always a difference between winning a case and finding a solution. To preserve, develop and improve communication between estranged parties, build bridges of understanding, find out options for settlement for mutual gains, search unobvious from obvious, dive underneath a problem and dig out underlying interests of the disputing parties, help them find out their needs and priorities, preserve and maintain relationships and participate in collaborative problems solving are some of the soul-searching exercises one undertakes in mediation. Ignorance ignites anxiety, irritability, hatred, lack of faith and suspicion leading to insecurity and hostility. Mediation helps in overcoming negative human values and leads to peace and harmony. Mediation is a welcome challenge to the spirit of advocacy and helps restore the benevolence of the profession.

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

(i) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.
The role of the advocate in our legal system is associated with the functioning of Courts. Mediation does not postulate the displacement of the advocate. Mediation does, however, contemplate a shift in the focus of the legal profession. The role play in mediation would require advocates to be effective participants in dispute settlement outside the Court. When faced with a dispute and the prospect of approaching an adjudicatory forum for relief, apart first contacts an Advocate. The Advocate must first consider whether there is scope for resorting to any of the Alternative Dispute Resolution mechanisms. Where mediation is considered the appropriate mode of Alternative Dispute Resolution, educating the party about the concept, process and advantages of mediation becomes an important phase in the preparation for 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 Advocate 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 Advocate makes him

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170 Mediation Training Manual, Supreme Court of India, page 69
realize his real needs and underlying interest which can be better satisfied through mediation. Before their clients decide whether to mediate, Advocate(s) may give initial advice concerning whether it is in the clients’ best interest to participate in mediation.

More importantly, the role and function of the advocate has to be radically modified from being a participant in formal legal resolution of disputes to being an important functionary who will guide parties in the true realization of their interests and towards achieving negotiated settlements. The most fundamental change in perception has to be that mediation must provide effective intervention before disputes assume the formal legal character of a Court case. The vital role of the legal profession is being associated through the mediatory process of being willing participants in dispute settlement.

The Bar Council performs an important role in relation to legal education and it is, therefore, only legitimate to expect that formal changes in the curriculum for legal education are brought about. Legal education centered on precedents and cases must now accommodate practical training in mediation. Some of the premier law schools in the country have incorporated alternative dispute resolution techniques as a part of the curriculum but this development has largely been isolated and sporadic. The programme of awareness and advocacy must extend to students of law who will be lawyers of the tomorrow. The success of the movement towards the mediation will depend in a large measure upon the co-operation of the legal profession. Awareness, advocacy and the need for positioning senior members of the Bar in positions of leadership is the
sine qua non in order that mediation is able to develop into a viable system\textsuperscript{171}

Advocate(s) assist the mediator in educating and informing the mediator of the validity and sustainability of the legal contentions urged in the case. Quite often, the parties to a dispute become aware of the strengths and weaknesses of their case only at the mediation. Hence, the information provided by the Advocate(s) could make the difference between a successful and failed mediation. Advocate(s) may prepare mediation brief to summarize the legal issues/claims and defenses in order to facilitate the mediator. Advocates typically prepare exhibits for mediation, including relevant documents, bills, vouchers and other documents etc. Prior to mediation, Advocates should discuss with their clients the strengths and weaknesses of their cases, their overall negotiation goes, their opening offer, their bottom line (reservation price), and can guide their parties to end the litigation if really the mediation is beneficial to their clients.

Whenever any party approaches an Advocate mediator before the litigation comes to the court, the advocate can scuttle the matter, by using the skills of mediation and avoiding the litigation going to the court.

\textbf{(6.2.2) DURING MEDIATION}

The role of Advocates is very important during mediation also. The participation of Advocates in mediation is often constructive but

\footnotesize{\textsuperscript{171} MEDICATION – realizing the potential and designing implementation strategies. By Dr. Justice Dhananjaya Y. Chandrachud Judge High Court at Bombay page. 18. Also see: http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf}
sometimes it may be non-cooperative and discouraging. Advocate(s) may attend mediation sessions and participate directly in mediation in the same manner as they participate in Arbitration. Advocate(s) can help their clients in choosing appropriate process and assist their clients to participate in mediation. 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 Advocate 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 Advocate must be alert and vigilant to supplement them. With the help of reality-testing, using the BATNA/ WATNA 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.\textsuperscript{172}

During the process of the mediator about the legal issues involved, the relative strengths and weaknesses of each other’s case is assessed by the Advocates of the opposite party thereby leading to a reality check. The reality check assists the mediator in moving the parties towards resolution of the dispute as unrealistic claims become apparent. As advocate(s) represent the disputing parties in the court, their knowledge of the real needs/interest of their clients and current judgments, law relating to the subject matter of dispute would also be up to date. Providing such information in mediation process to the mediator ensures that neither party suffers injustice nor that settlement is contrary with prevalent law. Advocates can help in explaining to their clients consideration of costs and potential benefits of mediation to their clients. Advocates advice prior to mediation will be useful in explaining process and finding our underlying interests, priorities and in generating and selecting options of settlement. Presence of advocate(s) during mediation facilitates discussion with their clients and also can help in preparing mediation brief. Advocate(s) can act as a crucial check against uninformed and pressured settlements. Further proper advice by advocate to the clients on legal assessments of their cases can be of great value. In

\textsuperscript{172}http://supremecourtofindia.nic.in/MEDIATION\%20TRAINING\%20MANUAL\%20OF\%20INDIA.pdf
impasses situations create during mediation, advocate by their creative contribution help in coming of impasse situation.

If the Advocate knows the skills of Mediation, in the court also he can use the skill, to advice the parties as his counsel and even the other counsel appearing for other side, to explore the possibility of settlement.

(6.2.3) **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 Alternative Dispute Resolution 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 advice 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.

Bar members are officers of the court and owe a duty to the courts to be fair and assist the court in dispensation of justice. Similarly, in mediation they are expected to render assistance in settlement of cases, there by contributing actively to the dispensation of justice in the country. The presence of Advocate(s) in the mediation is reassuring to the parties as they feel safer and more secure in the presence of their respective

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173 Mediation training Manual, Supreme Court of India, page 70
advocate(s). It allows parties to seek advice/opinion from their counsel whether they desire to do so during the process. When the impasse occurs, the skill and knowledge of the Advocate(s) is required for by the mediator to resolve the impasse.

Therefore, it is the need of the day that the Bar should actively cooperate with the Bench, in litigation exploring the benefits of the mediation process in order to avoid initiation and continuation of a litigation. They must develop a culture that they are also part of mediation institution and their role is also one of the important components of the institution.

Mediation is assisted negotiation and negotiation is central to advocacy and thus advocacy play a critical role in many of society’s negotiations and can be peacemakers and can help people construct fair and durable commitments, feel protected, and recover from loss and resolve disputes. If advocate(s) encourage their client to go in for mediation, it will result in speedy resolution of their disputes and will in turn fetch meaningful work for the advocate. Mediation is a welcome challenge to the spirit of advocacy and helps restore the benevolence of the profession, which has also developed a specialized new branch of practice.174

The role of advocate(s) representing the parties in the entire process of mediation and advocate(s) in an adversarial system in a Court,

is completely different from a role which play in mediation where the entire enterprise is based on the co-operation of the parties. Advocate(s) is expected to approach the entire issue not in terms “My way” and “Your way” nut in a synergy of the two, which leads to “our ways”. The Advocate is also required to play a role in explaining to his/her client the entire process of mediation, and that his job also involves conveying to his client the possible outcomes of the disputes depending upon the merits of his/her case, and thereby the advocate positions his client for better settlement. The skill required in mediation for a advocate would also be different from those required in the Court proceedings, for whereas in Court the Advocate needs oratorical skills, in mediation he needs the skill to negotiate effectively in mediation. The objective of the advocate is to get maximum benefit for his client, based on his interest and learn when to “let go” at the right time. The advocate(s) role is crucial as ethical issues are also involved and that the Advocate has an important role to play in drafting the final settlement between the parties.175

Good Advocate(s) must have the skills required for professional competence. But this is not enough. They must know how to carry the burdens of other people on their shoulders. They must know of pain, and how to help heal it. Advocate(s) can be healers. Like Physicians, minister and other healers. Advocate(s) are persons to whom other people open up their innermost secrets when they have suffered or are threatened with

175 Justice A. K. Sikri, third National Conference on Mediation held at New Delhi on 8th July, 2012
serious injury. People go to them to be healed, to be made whole, and to regain control of their lives.\textsuperscript{176}

It is believed only a legal system based on the principles of impartibility, integrity and independence can reinforce public faith in the courts. But when a person finds himself in the complex world of litigation both as financially and emotionally, he is left with no option but to resort to the mediation mechanism.

Amidst such condition, it is the obligation of lawyers to advice clients about litigation alternative to conflict resolution. Mediation allows people to resolve their disputes outside the court in a cooperative manner and is generally viewed as an attractive incentive for lawyers who want to push for settlement.\textsuperscript{177}

If all the Advocates are trained as mediators, they can very well mediate cases before the parties approaching the court and even after, sitting across the table together. Using the mediation technique in their daily affairs changes the perception, personality and develops a wide vision, and magnanimous attitude towards the litigants and society. If the skills are not properly used, or they are misused, it definitely creates a lot of problems to the litigants, Courts and also to Advocates.

Warren Burger once said\textsuperscript{178}:

\textsuperscript{178} Chief Justice Warren Burger
“The obligation of the legal profession is … to serve as headers of human conflict… (we) should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. (Courts) should provide mechanism that can produce an acceptable result in the shortest possible expenses and with a minimum of stress in the participants. That is what all about.”

[6.3] ROLE OF REFERRAL JUDGES IN MEDIATION

In mediation, the key to success depends on Judges referring appropriate cases, which occurs at the very beginning of the process. Conversely, failure is dependent on referring inappropriate cases.

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.

The advantage of court annexed mediation is that the Referral Judge, counsels and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors of justice delivery system.

In Court annexed mediation, the fountainhead of mediation is the Referral Judge who initiates the process by passing a referral order in a pending litigation, either with the consent of the parties who are willing
to try mediation or in cases where the referral judge considers it fit and appropriate to send parties for mediation after being satisfied that there exist elements of settlement. Hence, “reference” is a pre-requisite to initiate the mediation proceedings. Section 89 read with order X Rule 1-A\textsuperscript{179}, 1-B\textsuperscript{180} & 1-C\textsuperscript{181} of the Code of Civil Procedure is the source of power of a Referral Judge. Section 89 is the substantive section which empowers the court to refer appropriate cases for settlement outside the court and Order X Rule 1-A, 1-B & 1-C are the procedural provisions. As per the provision of Order X Rule 1-A, after recording admission or denial of documents, the court is under an obligation to direct the parties to the suit to opt for any of the four modes of settlement as specified in sun-section (1) of the Section 89 Code of Civil Procedure and on the option of the parties, the court fixes the date of appropriate before the forum or authority as opted by the parties. This is not to say that the courts cannot permit/call upon parties to undergo mediation at an earlier stage of completion of pleadings and even at a later stage, during the course of evidence. A case may be referred for mediation at any stage of the trial, but courts must ensure that a request for sending the parties to mediation does not become a tool for procrastination in the hands of a party inserted in unnecessarily delaying the court proceedings.

Success in mediation depends to a great extent on the Referral Judges referring such cases, which in their opinion, they think are fit for mediation. The responsibility cast on the Judge while making a reference

\textsuperscript{179} Direction of the Court to opt for any one mode of alternative dispute resolution.
\textsuperscript{180} Appearance before the conciliatory forum or authority.
\textsuperscript{181} Appearance before the Court consequent to the failure of efforts of conciliation
is therefore onerous and crucial. Proper referrals help reduce the caseload, maximize success of mediation and increase the litigant’s satisfaction with the justice system. While making appropriate referrals reduces the work load of a judge, inappropriate referrals results in waste of precious time and delays the trial. It also damages the perceived effectiveness of the Alternative Dispute Resolution process and results in ending up back in Court with a failed experience.

(6.3.1) **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.\(^\text{182}\).

(6.3.2) **STAGE OF REFERENCE**

The appropriate stage for considering reference to Alternative Dispute Resolution 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 Alternative Dispute Resolution 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 Alternative Dispute Resolution processes may be passed only in the presence of the parties and/or their authorized representatives.

The role of Referral Judges in the mediation process can be recognized into three stages\(^\text{183}\):

1. Pre – Mediation,
2. During Mediation and
3. Post – Mediation

\((6.3.2.1)\) \textbf{PRE – MEDIATION:}

At the pre – mediation stage, in proceedings in a civil suit, after the pleadings are complete and documents of the parties are put to admission/denial, at the stage of framing of issues, the Referral Judge has the benefit of perusing the pleadings and examining the respective stands of both the parties. At this stage, the Referral Judge is expected to objectively evaluate all the important factors which in his/her discretion

will facilitate a successful mediation. Before selecting the cases appropriate for mediation, he/she is expected to take into consideration the following factors:

(a) The factor as to ripening of the case for mediation.
(b) The factors as to the elements of settlement.
(c) The factor of Government being a party to the suit.

(a) The factor as to ripening of the case for mediation

As noted earlier, the stage of the trial is not material. Statistics reveal that quite a large number of cases which were at the stage of completion of pleadings have been successfully settled through mediation. At the same time, it may be mentioned that a pre-mature reference can be self-defeating as the parties may not be ready for it. Some points that the Referral Judge needs to ascertain at this stage as to:

(1) Whether the parties are agreeable to a negotiated settlement of their disputes?
(2) Are the parties ready for it?
(3) Whether the parties and their advocates have positive attitudes?
(4) Are there any reservations to mediation and if so, can they be overcome?
(5) Have previous attempts to mediate been made and failed and if so, why?
(6) Have the parties reached the “Fatigue Stage”?

(7) Whether the parties want a prompt resolution of their disputes?

(8) Whether the parties are inclined to maintain/build upon their relationship in the future?

(b) The factors as to the elements of settlement

The nature of dispute involved must be assessed by the Referral Judge before selecting cases for mediation. The general rule is that every case can be settled through mediation, exception being such case where there is some law point to be settled or constitutional issues are involved for decision by the court or the question involved relates to public policy or there are so many parties involved in the case, that mediation is not a viable solution or where parties simply refuse to negotiate a settlement and also where either of the parties have been proceeded against ex-parte.

(c) The factor of Government being a party to the suit

If the Government, its agency or a statutory body is one of the litigators, than in such a case, Alternative Disputes Resolution through LokAdalat is preferable and more accepted route for exploring settlement. However, there can be no hard and fast in this regard, and each case has to be scrutinized by the Referral Judge in its own context before sending it to mediation.
Once the Referral Judge identifies a case as being fit for mediation, he/she must call the parties and highlight the benefits of settlement of disputes through mediation. This is the time when all misgivings about the process must be dispelled by the Judge. The parties and their advocates must be informed that it is quick and responsive process and that unlike the court process, there are no strict or binding rules of procedure that require to be followed. It is economical and there is no extra cost involved in the proceedings. While explaining the process, the referral judge should clearly indicate to the parties that the counsels would be present before the mediators to assists them and that not only will the entire process be confidential, there will be no compulsion to settle. Parties should be made aware that the court will maintain overall supervision on the process as the matter still remains in court and that, if settled, the court will put its seal on it by passing a final order/judgment. It should be explained to the parties that the mediators would facilitate the parties in examining the best and worst alternatives to settlement (BANTA, WANTA, and MLATNA):

- BATNA stands for the ‘Best Alternative to a Negotiated Agreement’;
- WATNA for the ‘Worst Alternative to a Negotiated Agreement’ and
- MLATNA for the ‘Most Likely Alternative to a Negotiated Agreement’,

Agreement, give them the freedom to create options and refine their suggestions to reach a mutually acceptable agreement and once a consensus is reached, the settlement agreement would be signed by the
parties, their advocates and the mediator and sent back to the Court. Parties must be told that in such a process, they are the key players and that it would lead to harmonious settlement of the dispute as mediation will enable disputing parties to interact on a one-to-one basis and will enable them to settle their own terms of agreement. The confidentiality of the process must be emphasized and it may be indicated that agreeing to mediation will not be treated as a weakness of a party’s case. Also it should be made clear that if the dispute is successfully settled through mediation, the plaintiff/appellant would additionally stand to gain by being entitled to claim refund of full court fees as per Section 16 of the Court Fees Act.184

(6.3.2.2) **DURING MEDIATION**185

While the mediation proceedings are talking place, the Referral Judge ought to monitor the process giving short dates and placing the matter before him/her from time to time. This helps the judge in keeping his hands on the pulse of the case and at the same time, the litigants don’t feel abandoned. By doing so, the counsels also take the proceedings seriously as they realize that the judge is constantly monitoring the process of the case. This sends a message to the parties to take the mediation process seriously and not delay the proceedings unnecessarily. At this stage, absence of the parties or their counsels can be brought to the notice of the court by the other side or even the mediators in their

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184 The Court Fees Act, 1870.
185 Referral Order: Its Significance, by Justice Hima Kohli, Judge Delhi High Court, Member Overseeing Committee of Delhi Mediation and Conciliation Centre, ADR Mechanism, RSLSA, page. 107
interim report. Any other hurdles faced in the smooth process of mediation can be pointed out by the parties and redressed by the Court. If mediation is not completed within the time frame mentioned in the referral order, the Referral Judge may extend the time after checking the process. In other words, the Referral Judge must keep an overall supervision on the progress, as the court is the parental institution for resolution of disputes and mediation under its control, guidance and supervision has more authenticity and smoother acceptance. In this whole process, the Referral Judge must not call upon the Mediator(s) to appear in Court or the Chamber or have any direct interaction with them. The confidentiality of the process must not be breached at any stage, even while checking the progress of the case.

(6.3.2.3) **POST – MEDIATION STAGE**

At the post-mediation stage, the following three eventualities can arise:

(a) Mediation is a “non-starter”
(b) Mediation is not successful.
(c) Mediation is successful and a settlement report is filed.

When mediation is a “non-starter” or is not successful, the mediator informs the court by filing a report. No details or reasons are required to be given in the report by the mediator and no blame is apportioned as the proceedings are strictly confidential between the parties and the mediator. The report therefore does not prejudice the court

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186 Ibid page 108.
or affects the merits of the case. As per Order X rule 1-C\textsuperscript{187} Code Civil Procedure, when the case referred for mediation, is referred back to the court, the parties are directed to appear before the court on the date fixed by it for taking the case for trial from the point at which it was when forwarded to the Mediation Centre for the parties to explore the possibility of a negotiated settlements. It is to be remembered that there is nothing like “Failure” in mediation, as there is always a likelihood of a breakthrough even after the mediation has not been successful. This is so because by now the initial ice has been broken between the parties. They have interacted freely with each other in an informal atmosphere and have assessed each other’s stands and weighed their options. As a result, there is more clarity of thought. The Court / Judge can still intervene after intervene after receiving a ‘Non-Starter’ Report of a “Non-successful” and take the matter further after interacting with the parties and tooling out an acceptable settlement at this stage. In other words, the fruits of mediation can still be reaped in court by some constructive intervention.

Once the parties at a settlement and an agreement is drawn, signed by all parties and their counsels, as also the Mediator(s), the settlement agreement is then filed in the court for appropriate directions and the Court/Judge then peruses the same carefully before passing an order recording the settlement. At this stage, the judge is expected to examine the settlement agreement carefully to ensure that it is worded clearly and is unambiguous, that all loose ends are tied, specific time frames. If any, are indicated, amounts payable are clear, it is duly signed and dated by all

\textsuperscript{187} Appearance before the Court consequent to the failure of efforts of conciliation
parties and their counsels. The agreement ought to ensure that it can be implemented effectively and smoothly and there is no lingering dispute or foreseeable legal impediment in giving effect to the settlement. As against a formal trial, where while passing a decree, a judge cannot go beyond the prayers made in the pliant, in court annexed mediation, the terms of the settlement may travel beyond the scope of pleadings. When signed by the parties, their counsel and the mediator, the presiding judge passes a decree in terms of the settlement. In accordance with Order XXXIII Rule 3 of the Code of Civil Procedure, other civil and criminal cases can also be compromised concurrently which can be recorded in the settlement agreement. Hence if the parties adhere to the terms of settlement, several pending cases can be finally disposed of at one go and thus reduce the pending list of cases.

The settlement once accepted by the Court, becomes enforceable under the provisions of the Code of Civil Procedure. The Court enforces the settlement agreement by the legal process of Execution/Contempt. No Appeal or revision lies or is entertained in a mediated case as all the disputes get finally settled and the settlement is voluntarily reached after a consensus by both the parties. 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.188

(6.3.3) CHOICE OF CASES FOR REFERENCE

The referring Judge should evaluate all the important factors which in his discretion will facilitate a successful mediation. For example, if it is an older case where the parties have a lower emotional investment, and it involves quantum issues between educated investment, and it involves quantum issues between educated litigants, these factors would strongly suggest that the matter should be referred for mediation. There may be other factors which, in the judge’s experience, make a case suitable for a successful mediation. However, no case should be sent to mediation merely to clear a Judge's docket; it will only delay resolution, result in a failed experience, and end up back on the Judge’s calendar’s referral Judge should select appropriate cases for mediation. A referral Judge before selecting the cases appropriate for the mediation should consider following factors189:

1. Party Characteristics
   
   - Costs and time in mediation are not more than litigation.

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188 Mediation training Manual, Supreme Court of India, page 68.
- The parties and their advocates have a positive attitude towards mediation.
- Government is not a party to the suit.

2. **Case Characteristic**

- The case should not involve complex legal issues, ambiguous precedent, Constitutional issues, or Public Policy.
- A referral judge should ascertain whether previous attempts to mediation have failed and why.

3. **Consent**

1. It has been found in some cases, that where there are too many parties involved, these are unsuitable for mediation. It is advisable not to refer such cases for mediation unless all the parties have a very positive frame of mind.

- Section 89 of the CPC mandates referral of a case for mediation only if there is an element of settlement. It is critical for the Judge to make inquiries which lay the foundation for successful referral. The elements of laying such a foundation are:
  - Determine whether the parties have consented to mediation and whether they wish to settle their cases. Do not allow referral to mediation in which there is no evidence of good faith intent to settlement but
mediation is intended to delay the legal proceedings. It should be made clear that mediation does not delay the proceedings.

- Referral is appropriate when one party has agreed to mediation, and the other party is willing to go to mediation, though not necessarily committed to settlement.

- Referral to mediation is proper even when neither party has agreed to settle, but both parties are honestly willing to explore the possibilities of settlement through mediation. However, the referring Judge should believe it can be settled before he refers such cases to mediation.

- Lastly, referral is appropriate where neither party has expressed a desire to settle a case, but where the referring Judge should believe that a settlement may be possible. The referring Judge's careful exercise of discretion is critical here. An example of such a situation might involve parties who are unaware of the law, and with the careful attention and time that could be given by a mediator, a case may very well settle with a credible explanation of the law and the damages can be easily worked out.
4 Conference with the parties

(A). Where parties are not open to a settlement, they may be given a copy of the Mediation Centre pamphlet. Sometimes it may be worthwhile talking to the parties for a few minutes. This kind of a discussion can sometimes go a long way in resolving disputes. It helps the parties to thing about the benefits of settlement through mediation.

(B). As a referring Judge, you should probe the issues with the parties to determine whether the possible terms of a settlement and the identified issues are proper subjects of mediation. For example, where “quantum” issues such as monetary damages can resolve a case, this has a high likelihood of settlement in mediation.

(C). The parties should be informed by the referring Judge about the utility of mediation, and they should invariably be given the Mediation Centre pamphlet if they have not already received one.

- It should be made clear to both the parties that mediation is free of cost and that if mediation process succeeds, the Plaintiff/Appellant will be entitled to refund of Court fees.

- It should be explained that mediation provides a friendly non adversarial opportunity to talk with a skilled Judge mediator and seek a solution to the entire litigation.

- It should be emphasized that this is a voluntary process, and it is also confidential.
5. **Schedule set for the Trial:**

Mediation does not imply the delay of the trial. Overall schedule set for the trial should not be disturbed. A referral judge should fix the case for further proceedings before the court, at the time of referral. It will provide definite time limit for a mediator and the parties will not be encouraged to delay the trial.

6. **Points to be considered:**

The cost and time spent in mediation should not exceed the cost and time spent in litigation. Do the parties wish to maintain a future relationship either personal or business? In case one of the litigants is Government or its agency of a company or any entity whatsoever then a referral judge should ascertain whether the official/office appearing has authority to settle. The case should not involve interpretation of statutory rules and regulations.

As held by the Supreme Court of India in Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors.\(^\text{190}\), having regard to their nature, the following categories of cases are normally considered unsuitable for alternative dispute resolution process.

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.

\(^{190}\) JT 2010 (7) SC 616, (2010) 8 Supreme Court Cases 24
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 Alternative Disputes Resolution 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" 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 Alternative Dispute Resolution 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.

Civil cases including suits for –

- Injunction,
- Possession,
- Specific performance,
- Recovery of money,
- Business disputes,
- Labour and service matters,
- Insurance disputes,
- Motor accident claim cases,
- Matrimonial cases including divorce,
- Custody and dowry cases,
- Community disputes and
- Criminal cases including complaints made under section 406/498-A Indian Penal Code and
- Section 138 of the Negotiable Instrument Act can be referred for mediation.

Promoting mediation, particularly for resolving family and matrimonial disputes, is the best option as it helps in healing relationships and minimizing emotional damages. Apart from the abovementioned benefits, it also promotes the interest of the entire family including those of the children and reduces economic and emotional cost associated with the resolution of family disputes. Mediation is the context of matrimonial disputes is different in its form and content form disputes in respect of commercial and property matters on account of presence of certain factors which are unique to such disputes. These factors include the motivation of parties, their emotional quotient and social compulsions and their personal liabilities and responsibilities towards their near and dear ones. The views that two parties may hold regarding their life pattern and the institution of marriage, can be diametrically opposed and so can their perception of security for the future life etc. Thus, in cases of mediation for matrimonial disputes, the elements that weigh with the parties are not purely commercial, logical and cut and dried. Very often irrational and sentimental factors have a pre-dominant role in the eruption of the disputes as well as their resolution. The job of the Referral Court in family disputes is to explore the elements of settlement by calling upon the parties to appear in court, briefly interact with them and open their
mind to a lasting solution through an alternative dispute redressal forum of mediation.

(6.3.4) **THE REFERRAL ORDER**

The significance of the referral order cannot be overemphasized. As it sets the tone for mediation, it is essential for a Referral Judge to word the referral order carefully. A mention may be made in the referral order of the relevant provision of law which empowers a Referral Judge to refer the case for mediation. A referral order may indicate in brief the nature of dispute being forwarded to the Mediation Centre, to enable the Centre to have some clue as to the nature of the dispute between the parties to enable it to assign Mediator(s) having adequate expertise in the field, if necessary. A referral order should contain specific directions to parties and advocates to appear before the mediator, on a fixed date and time. It may clarify that parties would be at liberty to submit relevant documents before the mediator to help clarify the issues and facts during mediation. The time frame for undertaking the mediation process ought to be specified in the referral order. At the same time, the next date of hearing before the Court needs also be fixed, so as to make the parties aware of the fact that the Court is not only keeping an overall control on the conduct and conclusion of mediation, but will not permit the parties to delay the proceedings. The consent of the parties to participate in mediation of their own free will must be recorded in referral order. In case any/both the litigants are a government body, Corporation or firm, the referral order must mention that an officer authorized and competent
to take a decision on behalf of his client in the matter, is present before the Mediator(s) with the counsel on the record.

Components of a Referral Order:

1. **Authorization:**

   The relevant statute or rule authorizing a referral judge to refer the case should be mentioned.

2. **Identification of Alternative Dispute Resolution:**

   A referral judge should mention the particular mode of alternative resolution to which referral in being made.

3. **Administrative matters:**

   A referral order outline the administrative matters such as who is authorized to appear before a mediator; whether the parties may submit documents before a mediator; the limit of the mediation etc.

4. **Fee:**

   A referral order should sate whether the parties required to pay fee to mediator.

5. **Good faith participation:**

   A referral order should contain that the parties agree to participate in mediation in good faith.
6. **Time Limit:**

A referral order should mention the definite time for conducting and conclusion of mediation. It will now allow the parties to use mediation as a delaying tactic. The court may direct the parties to appear before the court on a given fixed date and ask for the progress report on that date and if satisfied about the process may grant further time for continuation of mediation.

7. **Confidentiality:**

A referral order should spell about the aforesaid aspects of mediation.

8. **Consent:**

A referral order should contain that the parties have consented for participation in mediation out of their free will. If a mediation is not completed within the time mentioned in the referral order, case can be called in court to check progress.

A referral order is an important document which initiates the mediation. A referral order should contain the following:\footnote{MEDIATION AND CONCILIATION RULES, 2004, ANNEXURE A-2, page no. 15 see http://delhimediationcentre.gov.in/annexure-a2.pdf}:

- A referral order should state relevant statute or rule authorizing a referral Judge to prefer to mediation.
● A referral order should outline proposed duties and responsibilities of the mediator.

● The parties may be advice to file/submit documents or any other relevant materials before the mediator.

● A referral order should state who is authorized to appear before a mediator. It should be mentioned whether advocates are permitted to appear during mediation proceedings.

● A referral order should contain that parties are required to participate in mediation in good faith.

● A referral order should spell out a definite time frame for conduction and conclusion of mediation proceedings.

● A referral order should spell out in unambiguous forms that mediation proceedings are confidential in nature.

(6.3.5) COMMUNICATION BETWEEN A REFERRAL JUDGE AND A MEDIATOR:

A referral judge should not have exparte communication on the merits of the case with the mediator. A mediator should only communicate the final outcomes of the case to the referral judge. There should be no remarks made blaming either party for failure to settle. If any communication is necessary, then it should be in writing. Mediation
Rules also prohibit direct communication between the mediator and a referral court.

(6.3.6) **ROLE AFTER CONCLUSION OF MEDIATION**

To sum up, mediation is a far more satisfactory way of disputes as compared to regular litigation. In a settlement negotiated through the process of mediation, both sides are in a win-win situation as there is no court verdict in favour of one party and against the other. Instead, the dispute is resolved on mutually acceptable terms and there is no acrimony left. Instead of discord, disharmony and a bitter relationship at the end of an adversarial proceeding, there is peace, accord and re-established relationship between parties at the end of consensual proceedings. It is therefore apparent that in walking the litigants through this time entire process, from the time when a reference order is passed, till the settlement Agreement is acceptable or the matter is returned un-settled, the Referral Judges play a pilot role. No doubt, the Referral Judges do not conduct mediation, but by exercising their authority to refer a case for mediation, and finally by receiving the case back, they remain the starting point and the ending point of the entire process. Their contribution to establish mediation as a system of dispute resolution is immense. Without their correct assessment of a case before reference of the same for mediation and without their overall supervision of the entire process, till the matter comes back in court, successful mediation is simply not possible.
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.

(6.3.7) **DO…S FOR REFERRAL JUDGES:**

There are certain positive actions to be taken by the referral judges while referring the matters to the mediation process. They can be enumerated as follows: -

1) Ensure the presence of the parties before referral for information.
2) Assess the relevant facts of the case.
3) At the time of referral, interest with the litigants eliciting information and explaining the process
4) Explaining the benefits such as no cost, refund of court fees, timely resolution of disputes and process of the mediation to the litigants.
5) Pass an appropriate referral order and obtain signatures of the parties/Advocates on referral order.
6) Direct the parties as well as their advocates to appear before the Mediation Cell on a fixed date and time.
7) Fix date schedule of the trial i.e. next date of effective hearing before the court at the time of referral.
(6.3.8) **DON’TS FOR REFERRAL JUDGES**

There are certain things which the referral judge should not do while considering the point of reference of a matter to the mediation center. They can be stated as follows: -

1) Do not refer a case where either of the parties are ex-parte.
2) Cases pertaining to Constitution/ Public Policy should not be referred.
3) Mediation should not be allowed as a tool for delay of the trial.
4) The case should not be referred for mediation only for the sake of reference.
5) Do not refer the case without making an objective assessment of the case.
6) Do not have any communication with the mediator as the mediation proceedings are confidential.
7) 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.
Skills can be used, even during Lok Adalats and also mediation of cases of other courts, and effectively used at the time of invoking the provision of Section 89 and Order X of Code of Civil Procedure for directing the parties to opt for mediation method. They can be used in court to explore the possibility of settlement, at any time before pronouncing the judgment even after the parties came back to the court after option for alternative dispute resolution methods.

Mediation has significant potential not merely for reducing the burden of arrears, but more fundamentally for bringing about a qualitative change in the focus of the legal system from adjudication to the settlement of disputes. The success of mediation will depend not merely upon the evolution of an appropriate legal and regulatory framework, but upon addressing basic issues of human resource development. Inducing a system to evolve from a litigation oriented approach to a more curative or preventive approach involves much more than the development of law. The development of law is an important step, but it has been to suggest that various other key factors are involved. Meeting the resistance to change, creating awareness in society as well as amongst other participants of the benefits of the mediation process, developing capacities and involving the Bench and the Bar in a co-operative effort are critical elements in the success of the process. Above all, confidence in the mediation process will be fostered only if the mediator discharges
in positive terms the ethical concerns of a process to which the role of the mediator is central\textsuperscript{192}.

Hon’ble Justice C. Nagappan,\textsuperscript{193} emphasized that the role of the Judges is also very important, both at pre-mediation stage as well as post mediation. The trial judge must have the knowledge of mediation and should also be convinced of the benefits of mediation to be able to prevail upon the advocates, and encourage them and motivate the parties to resort to mediation. However, care has to be taken that mediation, is not used as a tool for delay and the participation of the party must be in good faith.

\textsuperscript{192} \textbf{M E D I A T I O N – realizing the potential and designing implementation strategies.} By Dr. Justice Dhananjaya Y. Chandrachud Judge High Court at Bombay page. 24. Also see: http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf

\textsuperscript{193} Judge, High Court of Madras, at 3\textsuperscript{rd} National Conference on Mediation held at New Delhi on 8\textsuperscript{th} July, 2012.