Chapter – 4

Mediation as an ADR

[4.1] Introduction:

The greatest need of the hour given the overburdened court system is alternative modes of disputes resolution. “Mediation” is a timely and necessary solution to the same. The power of mediation is that it creates a new dynamic for future interaction. The control that the parties have over their situation, which allows them to craft unique solutions for their problems, with the advantage of privacy which encourage a conflict – free and non- adversarial atmosphere, reduction coats, timely – solutions to conflicts and a peaceful resolution of the same are built few of the advantages of mediation. The aim of every judicial administration is to be just, honest and make available speedy remedy to the aggrieved persons who as a last resort seek the assistance of the courts.

The rapid growth and popularity is sample proof of the public’s faith in the advances of mediation, which provide a convenient, fast and amicable solution.

The success of any dispute redressal system depends on the two basic elements, firstly, a well-regulated system of Courts following a simple and orderly procedures and secondly, a definite, easily, ascertainable and uniform body of law.

The sole of the good government is providing justice to the people, as such; the preamble of the constitution highlighted the aspect of political, social and economic justice to the people.66

The article 39-A of the Constitution of India, seems the operation of the legal system, promotes justice on the basis of equal opportunity, so that no citizen is denied access to justice on account of financial or other disability.\(^67\)

The liberalization of judicial economy opened the gates for inflow of foreign investment. India opened its economy and took several measures of economic reforms in the early 90’s. After the development in the international trade and commerce, with the increasingly role of GATT and later WTO, there was a spurt in trading in goods, services, investments and intellectual property. Disputes arose between the trading parties, which were diverse in nature and complex, involving huge sums. Such disputes required quick and amicable settlement since the parties could not tolerate the prolonged legal process in Courts, appeal, review and revision.\(^68\)

Indian judiciary played a very substantial role in the process of emphasizing the need for the change in the existing arbitration laws. Along the same lines, the Apex Court has also recognized the alternative formula in its various decisions. In Sitaram v/s. Viranna\(^69\), the Privy Council affirmed the decision of the Panchayat and Sir John Wallis observed that, the reference to a village Panchayat is the time-honored method of deciding disputes. It avoids protracted litigation and is based on the ground realities verified in person by the adjudications and award

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\(^{67}\) Ins. By Constitution (42\textsuperscript{nd} Amendment) Act, 1976, S.8 (w.e.f. 03-01-1977)

\(^{68}\) O. P. Malhotra, India Malhotra, The Law and Practice of Arbitration and Conciliation. P.13

\(^{69}\) AIR 1934 p.g. 105.
is fair and honest-settlement of doubtful claims based on legal and moral grounds.

The field of Mediation is changing and evolving rapidly. In fact, Mediation has been the primary method of resolving conflict for thousands of years in the mode known to the people, by using their status, good offices and common sense, etc. The history has taught us that the mediation is intimately bound up with the religious and spiritual context within all major religious like Hinduism, Islam, Christianity, Buddhism, Jainism etc., which the mediation process, in modalities that were changing from one another and from time to time, was practiced religiously. In India, as the society developed, now we have grown into a country of more than 130 Crore people with liberalization and globalization, and there has unimaginable growth on all counts especially economically. The people of India, being attracted to the western culture, without adequate exposure to the human values, owing to ego clashes and other human frailties, are led to disruption of their harmonious relationships including matrimonial, which has now become a menace to the society. All these factors led to explosion of litigation in the country. During British India period, mediation was popular among businessmen. Impartial and respected sarpanchs or Mahajans were requested by business association members to resolve their disputes using an informal procedure, which combined mediation and arbitration. Tribal Village chief and elders were serving the role of peacemakers.

Mediation is conducted on a confidential basis and without prejudice to the legal rights and remedies of the parties. Mediation
process passes through several stages, with all these qualities, mediation process. Implement the values underlying in our constitution. It is a part of a programme of empowerment of the poor which again is part of the plenary legal aid ideology. It is the poor who need the services of the mediator the most. They lack the resources to vindicate their rights in court or with public authorities. Mediation has its own advantages. It saves precious time, energy and money of parties apart from saving them from the harassment and hassles of a prolonged litigation. Informality: No court rules or legal precedents are involved in mediation. There are not fixed solution in mediation. Parties can look for developing creative solutions to resolve matters and the solutions rest with the parties themselves. The mediator does not impose a decision upon the parties.

[4.2] **Meaning of Mediation**

Defining Mediation is very challenging because of the different practices that have evolved.

It has been suggested that the term mediate is derived from the Latin word ‘mediare’ which means ‘to be in the middle’. However, as mediation continues to develop in this jurisdiction there —... is less consensus on what constitutes mediation. This may be due in part to the expansion of mediation into new dispute arenas and to the increasing involvement of individuals from other professions.\(^70\) the practice of mediation is subject to interpretation and debate, there does appear to be elements common to most mediation models and a number of

\(^70\) See Picard _The Many Meanings of Mediation: A Sociological Study of Mediation in Canada’ (Carleton University, 2000).
assumptions which underlie most mediation approaches. These include: mediators assist negotiation, they do not hold decision-making power; it is a consensual processes; mediators help disputing parties understand each other through effective communication; parties need to go beyond positions to uncover interests; parties should be empowered to resolve their own disputes; parties are best able to generate options for settlement; parties will be more compliant with an agreement they have themselves constructed; and mediation is future, more so than past, oriented. Mediation is based on the belief that, with the assistance of a neutral and independent third party, people can work through and resolve their own disputes. The mediator takes an active role in controlling the process. The mediator asks questions to identify the interests of the parties and the real issues in the disagreement. The mediator helps the parties explore solutions that benefit both parties but does not suggest solutions. Mediation is -“a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator”’. The inclusion of the term “parties attempt by themselves” suggests that the mediator should not play an advisory or evaluative role in the resolution of the dispute, but the parties should come to a resolution by themselves.

Mediation as per Black’s Law Dictionary\(^\text{71}\) - A method of non-binding dispute resolution involving a neutral third party who tries to help

\(^{71}\) Seventh Edition Page 96
the disputing parties reach a mutually agreeable solution—Also termed conciliation.

Article 1 of the Austrian *Civil Law Mediation Act 2003* defines mediation as—an activity voluntarily entered into by the Parties, whereby a professionally trained neutral facilitator (Mediator) using recognized methods systematically encourages communication between the Parties, with the aim of enabling the Parties to themselves reach a resolution of their dispute.\textsuperscript{72}

Section 5 of the *Commercial Mediation Act 2005* in Nova Scotia defines mediation means—a collaborative process in which parties agree to request a third party, referred to as a mediator, to assist them in their attempt to try to reach a settlement of their commercial dispute, but a mediator does not have any authority to impose a solution to the dispute on the parties.\textsuperscript{73}

In the United States, mediation is defined under Section 2(1) the *Uniform Mediation Act 2004* as—a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.\textsuperscript{74}


\textsuperscript{73} Chapter 36 of the Acts of 2005.

\textsuperscript{74} The Uniform Mediation Act was drafted by the National Conference of Commissioners of Uniform State Laws and approved by it and recommended for enactment in all the states, August 10–17, 2001 and amended August 1–7, 2003. Available at: http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm.
According to the commentary attached to the *Uniform Mediation Act*, the emphasis on negotiation in this definition is intended to exclude adjudicative processes, such as arbitration and fact-finding, as well as counseling. It was not intended to distinguish among styles or approaches to mediation.

The Explanatory Memorandum to the Council of Europe’s 1998 Recommendation R. 98(1) on mediation states that: —… the essence of mediation itself rests in its voluntary character and on the fact that the parties themselves try to reach an agreement and if they refuse or feel unable to mediate, it is counter-productive to attempt to compel them.\(^{75}\)

Mediation as a process is distinct from litigation. Mediation is a process to resolve conflict from society which in turn reduced the burden on the Court. The essence of mediation lies in the parties themselves finding a lasting solution to resolve and end their conflict rather than determining who is at fault. As Gandhiji said “ It is a great service to join the hearts of those riven asunder”.\(^{76}\)

Experience the world over tells us that adversarial litigation is not the only means of resolving disputes. The inevitable result of channeling all disputes through the adversarial system is to accumulate huge arrears.

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\(^{75}\) Explanatory Memorandum to Recommendation No. R (98) 1 on family mediation at 27 and 28. See also Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (2000/C155/01) which states that any initiative should —be based on voluntary participation.

The search for a simple, quick, flexible and accessible disputes resolution system has resulted in question of Alternative Dispute Resolution mechanism especially the mediation. Today the mediation is seen as most promising mechanism for the resolution of both simple and complex disputes.\footnote{Message by Judge Ajit Prakash Shah, Former Chief Justice High Court of Delhi, as quote in SAMADHAN – Reflections – 2006 – 2010.}

Mediation is not mere settlement simpliciter. In common parlance, a settlement process is understood as encouraging disputants to agree to a midpoint between their positions and to move them towards a compromise. To ensure satisfaction of the end user, the settlement should include unravelling the real conflict, understanding the needs of disputants and the reasons for their positions, relationship of the parties and connection to the issue in disagreement. Mediation is more than pure negotiation and involves a keen understanding of the psychodynamics of conflict resolution and nudging the disputants towards a resolution by bringing a change in the thought process\footnote{Paper “Need for Enhancement of Standard in Mediation Practice” presented at 3\textsuperscript{rd} National Conference on Mediation, New Delhi, 8\textsuperscript{th} July, 2012 by Uma Ramanathan.}.

Indian Jurist Prof. Madhava Menon said:

“Mediation is not conflict management as understood by professional groups. Nor is it disposal of cases as conceived by judicial administrators. It is in fact the handling of human relations in a responsive and positive manner for the good of the people and betterment of the community. The essence of mediation lies in free and fair negotiation between parties, where the mediator is to act as the educator.
of law and patience and facilitator of the process keeping the dialogues less bitter and settlement fairer.”

Mediation is the most popular technique which is being employed in resolving the disputes and is a part of legal aid. Mediation is a process by which disputing parties seek the intervention and assistance of a neutral third party to act as a mediator and to reduce their differences. He is a facilitator, who helps the parties to reach a negotiated settlement. Mediation, as a method of dispute resolution is no new phenomenon, rather one that has for long existed in our tradition. In most of the cases the disputants desire for an amicable solution. Mediation has been employed by various tribes of our country by way of a village council, usually consisting of certain village elders. Today, mediation is perhaps the fastest growing form of alternative dispute resolution. In the process of mediation, the mediator or the impartial neutral, plays an important role and the success of mediation depends upon his ability and experience.\(^79\) He should have (use) his skill and ability to perceive and articulate the grievance, the cause of conflict and the issue at stake. The Mediator has an active but a limited role. He is a facilitating intermediary who has no authority to make any binding decisions, as he is not a judge, but who adopts various procedures, techniques and skills to help the parties to resolve their dispute and arrive at negotiated agreement without adjudication or to impose an award.

By now mediation has been recognized as a useful tool for resolution of conflicts in general and for reduction of pendency in Courts

\(^79\) H.R Khanna, Indian judicial system P 244
in particular. Mediation is a process by which the parties themselves evolve a lasting settlement which ends their disputes once and for all. The simplest definition of mediation is “assisted negotiation”. If the parties can be objective and wise they can negotiate among themselves without a mediator. However, for various reasons, the process of negotiation does not always yield results. Sometimes the parties are so torn apart that they are unable to enter into a dialogue. Such disputes can be resolved by an efficient mediator. The parties with the help of a mediator may be able to approach the same dispute from a different point of view and may look at different solutions.

Furthermore, voluntary participation in mediation and conciliation is intrinsically linked to other fundamental principles of these processes such as autonomy and party self-determination. Indeed, Mediation rhetoric, focusing on empowerment and recognition, is grounded in voluntariness.  

A trained mediator can help to find a solution “out of the box” in which both parties may get much aware of what could be achieved through the usual legal process of litigation or arbitration.

The Specific Value of Mediation Processes

An evaluation of the usefulness of mediation in light of core objectives presupposes an awareness of what it is and the specific value it offers. Furthermore, an effective adaptation of mediation to a set of new

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conditions first counsels separate treatment of a wide variety of features clustered under the mediation rubric. Separate treatment of these processes and techniques underlines the view that many, if not all, of these features are severable from the rest. Severability allows for more creative designs and experiments to overcome problems encountered in the application of mediation to legal disputes.\(^{82}\)

In B.S. Joshi Vs. State of Haryana, the Supreme Court held that in cases such as Section 498A Indian Penal Code and Section 125 Criminal Procedure Code, where after a settlement no evidence may be led, the High Court can quash the first information report or the proceedings.

In mediation process, disputants will be empowered by putting them in control of their disputes resolution. It will enabled them to communicate with each other in a manner they could never have in a Court. They will receive how much time, money and energy is saved by opting for mediation as a forum for resolving their disputes. In mediation no party loses, but everyone wins.

Mediation is a process whereby hundreds of litigants will be able to look at their long term interests and improve their future, not dissent the past. It will help them realistically examine the strengths and weaknesses

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\(^{82}\) MEDIATING MEDIATION IN INDIA, by Hiram E. Chodosh, Fulbright Senior Scholar, Indian Law Institute, New Delhi (2003); Associate Dean for Academic Affairs (effective July 1, 2003); Professor of Law, Director of the Frederick K. Cox International Law Centre, Case Western Reserve University School of Law, Cleveland, Ohio; J.D., Yale Law School, 1990.

\(^{83}\) B.S. Joshi Vs. State of Haryana, AIR 2003 SC 1386;
of their cases, restore their broken relationship and actually opt for more than they have ever imagined.

Mediation is a process which is structured but, which at the same time does not involve the rigidity inherent in conventional litigation settings. The mediator conducts the proceedings in an informal manner bearing in mind the fundamental principle that his role is neither to advice nor to adjudicate. Rules of evidence do not apply to the conduct of a mediation proceeding. Parties are at liberty to place whatever information that they consider relevant. Information which cannot legally be received in evidence in a Court of law may yet be relevant to a practical resolution of the issues between parties. Hence, all such information can be received. Parties to mediation can be represented by legal advisors but they are invited to directly participate by speaking in the course of mediation. A direct interface with the mediator is encouraged.84

[4.3] ADVANTAGES OF MEDIATION

The object of Mediation is to offer to the litigant public, a speedy and satisfactory alternative dispute resolution process. In certain types of cases when the cases suitable for negotiated settlements are referred to mediation, the benefits are twofold. First, the parties find an amicable solution by the negotiated settlement. Second, the Courts will have more

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84 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.
space to build cases which required to be adjudicated by the Courts.\textsuperscript{85} Mediation saves precious time, energy and money of parties, apart from saving them from the harassment and hassles of a prolong litigation. Its procedure is simple, informal and confidential and reduces worry and tension associated with litigation.\textsuperscript{86} Its advantages are: -

1. Mediation immediately puts parties in control of both their dispute and its resolution.

2. Through mediation parties can communicate in a real sense with each other, which they had not been able to do since the dispute started.

3. Mediation saves cost on what could become a prolonged litigation.

4. Mediation shows the parties the strengths and weaknesses of their case, which helps them, find realistic solutions.

5. Mediation focuses on long-term interests and helps the parties create options for settlement.

6. A settlement arrived at through mediation benefits both opponents.

7. At the end of successful mediation, the parties shake hands with each other and wise each other good health and happiness.

8. Mediation restored broken relationships and focuses on improving the future, not on dissecting the past.

\textsuperscript{85} Mediation – Its Importance and Relevance – By Justice R. V. Raveendran, Former Judge of Supreme Court of India, Souvenir, National Conference on Mediation 2012 page 20.

\textsuperscript{86} Ibid page 26.
9. The mediation process is voluntarily and parties can opt out of it at any time if it does not help them.

10. The mediation process is confidential, the procedure simple and the atmosphere informal.

11. The law mandates mediation and the courts encourage and endorse it.

12. The plaintiff is entitled to refund of full court fees if the dispute is settled through the process of mediation.

13. The settlement agreement is enforceable as if it were a decree of the court.

14. No appeal lies against a settlement agreement arrived at through the process of mediation.

15. Often no need for execution proceeding.

[4.4] MEANING, ROLE AND FUNCTION OF A MEDIATOR

(4.4.1) MEANING OF A MEDIATOR

Mediator means a person who intervenes in a dispute to bring about an agreement or reconciliation. In other words, mediator is a third party, who assists the parties in amicably resolving the disputes by using specified communication and negotiation techniques. The Mediator’s job is to act as an intermediary or a medium taking a middle position in the process of settlement of disputes.
(4.4.2) ROLE AND FUNCTION OF A MEDIATOR

The role play of the mediator is a key ingredient in the qualitative success of mediation. A band of trained mediators is thus critical if mediation is to acquire a high degree of acceptability. The essence of mediation lies in the role of the mediator as a facilitator. The mediator is not an adjudicator. Unlike the Judge in a traditional Court setting or for that matter even an arbitrator; the mediator is neither a trier of fact nor an arbiter of disputes. The role of the mediator is to create an environment in which parties before him are facilitated towards resolving the dispute in a purely voluntary settlement or agreement. The mediator is a neutral. The neutrality of the mediator is akin to the neutrality of a Judge but the role of the mediator is completely different from that of a Judge. The mediator does not either deliver judgment or dictate to the parties the terms of the agreement. As a neutral, the function of the mediator is to enable the parties to arrive at a mutual and voluntary agreement. This, the mediator can achieve if he understands and perceives the nature of his function correctly. As a facilitator, the mediator has to understand the underlying issues between the parties. In order to do so, the mediator has to open up communication between the parties and between the parties and himself. The mediator has to enable the parties to understand their own interests and to understand the interests of the disputing party. The mediator must enable parties to distinguish between their positions and interests. In the process of dialogue before him the mediator enables parties to appreciate and evaluate their own interests and those of each other. All along, as he facilitates communication between the parties, the mediator controls the
process ensuring on the one hand that he is not judgmental or on the other, an advisor. The effort of the mediator is to ensure that through the mediation dialogue parties arrive at a solution which is in their best interest. Mediation as process is distinct from litigation. Like many other branches of law, acronyms are not unknown to mediation and it has been stated that in enabling parties to move towards a settlement, the mediator has to reflect on the precepts of BATNA, WATNA 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.87

The mediator has to be trained to develop effective communication skills. Training in mediation has to allow the mediator to develop job specific skills such as the skill of active listening. Active listening is the process by which a mediator decodes a verbal or non-verbal message, identifies the basis for the message being expressed and then restates the message using positive non-adversarial language. Sometimes the mediator has to carry out a neutral reframing of a party’s positions in a manner which would be inoffensive to the other. The mediator has to be trained to summarise the essence of statements by parties regarding

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87 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. 7.
issues, positions and terms of agreement. The mediator has to learn to acknowledge, which is an act by which he communicates having accurately understood the statement of a party and its importance. The mediator has to set the agenda or the order in which issues, claims and settlement terms will be discussed. There are stages in the mediation when the mediator has to defer or postpone in response to a question raised by one of the parties. Often times the mediator has to redirect the process by which he shifts the focus from one subject to another. The choice of words by a mediator is extremely significant because his language must be suggestive of collaboration. The mediator has to eschew adversarial terms. Language which polarises the parties has to be avoided. An astute mediator would similarly avoid recourse to formal legal terminology such as ‘liability’, ‘damages’, ‘faults’ and ‘rights’. The language of the mediator must promote the object of achieving self determination, identifying solutions, an open examination of alternatives and the exploration of alternative settlement proposals 88.

The mediator needs to listen to the parties and although is not supposed himself/herself, has to ensure that the parties do evolve a solution. Judges and advocates are mostly using their legal learning and are quick to see their solution, particularly legal solutions. They can quickly indentify the points and counter points favoring or harming the two parties. But the mediator needs another kind of skill: the ability to work towards win-win solution for both parties.

The mediator is specially trained to not only allow the parties to speak but to extract as much informations possible from each party.

The mediator does not have the authority of a judge. Nor should he/she be perceived to be a person in that authority yet the mediator has to have to control over the process. He/She has to develop the skill to handle acrimonious situations and see that the parties’ maintain the ground rules, the discipline, so to say, of allowing the process without being aggressive, insulting or dominating. He/She has to know how to bring back order if one of the two parties, wittingly or unwittingly, threatens to disrupt the process. Although the outcome rests with the parties, the mediator is in control over the process.

The mediator has to know how to handle emotional outburst including anger and grief. He has to deal with such parties with full empathy respecting their emotions and yet helping them to compose themselves. In fact, emotions like anger and grief are at times important factor constituting the grievances.

We have now the 40 hour training of those who have been in the Bar and are willing to be trained. But we have no idea about their ability to be mediators or gauge the skills that they acquire in the 40 hour training. Assessment at the intake level of mediators is necessary to get committed mediators. The trainees must be evaluated on the basis of their aptitude to be patient, to be encouraging and persuasive and generally be a ‘solid pillar’. 89

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89 Ibid.
Mediation As an advanced form of facilitated negotiation, the mediator employs both (1) sophisticated bargaining techniques that allow the parties to think beyond the formal parameters of the law, and (2) neutralizing communication and facilitations skills that attempt to neutralize the self-destructive aspects of the conflict. Each tool is of considerable value in resolving legal disputes, and when applied in combination over several phases of the process, the resulting mediation process poses a powerful approach to both routine and seemingly irreconcilable conflicts.

Hiram E. Chodosh\textsuperscript{90}, given the different techniques for the fruitful mediation, which are as under:

1. Negotiation Techniques: The Intellectual Technology

(A). Position-Based Bargaining

Many mediation experts stress the negative consequences of position-based bargaining and urge that mediations should focus primarily (if not exclusively) on a determination, prioritization, and maximization of the parties’ interests. Indeed, the first chapter in the seminal book, Getting to Yes, begins with the mandate: “Don’t Bargain Over Positions.”\textsuperscript{91} For reasons advanced here, particularly in the early stages of developing mediation practice, such advice may be misplaced. Position-based bargaining can help the parties to reach a more realistic view of the settlement value of their claims and defenses (thus narrowing their

\textsuperscript{90} Ibid.
\textsuperscript{91} See ROGER FISHER AND WILLIAM URY, GETTING TO YES 3-8 (1983).
differences) and to take that settlement valuation into account as one of their many interests.

(B). Interest-Based Bargaining:

The foregoing discussion took a modest step beyond the conflicting views of the parties on the legal merits of their positions. A more realistic settlement value based on weaknesses in their positions, uncertainty, hidden costs, and the time value of money may be helpful in bringing the parties closer together, if not in settling the matter altogether. Surely some cases will settle with the help of these tools, alone; others will not.

(c). Integrative Bargaining:

If the parties cannot agree on how to share or cooperate, an effective mediator may explore integrative bargaining strategies. Integrative bargaining explores the investment of resources outside those at stake in the controversy. Examples of integrative bargaining applied to legal conflict are many: convincing a bank not party to the dispute to finance a new business arrangement formed from a breach of conflict claim; a wealthy malpractice claimant promising to donate money to the retraining of doctors in the relevant area of practice; a landlord-tenant family repossession case where the owner gets a contractor to knock down the building and build more units for a growing family and provides a new flat to the recalcitrant tenant, or an unenforceable maintenance award in a divorce proceeding where the broader community pays the maintenance (thus alleviating the underlying source
of conflict, e.g., financial pressure) and eventually bringing the couple back together.

2. The Value of Neutralizing Communications Skills

Beyond the negotiation techniques employed by an effective mediator, several communication techniques are useful tools of facilitation. As in negotiation strategies, none is a sure-fire way to settle a dispute; however, each one alone has the ability to bring the parties further together by neutralizing the emotionally harsh and irrationally exaggerated behavior and perspectives of the parties and to transform the frequently self-defeating aspects of their conflict (particularly where they have an interest in preserving or enhancing a relationship) into a mutually beneficial settlement.

(A). Establishing Joint Communication

Mediations reestablish joint communication between the parties in three significant ways. First, particularly in private mediation, the parties may have to communicate about logistics for the mediation itself (e.g., timing, exchange of documents, confidentiality agreements, etc.). Second, the mediator brings the parties together and in the first joint session, they hear from one another their varied points of view (and often those of their attorneys). Third, as the mediator moves from private caucusing into the settlement or agreement phase, the parties frequently begin to speak directly to one another. Joint communication of each varied kind is obviously no guarantee to settlement; however, this one factor may be
key to bringing parties together where resistance to communicating with one another further escalates the conflict.

(b). Establishing Tone

An effective mediator establishes a positive tone and environment conducive to settlement by behaving in a professional, confident, purposeful, open, constructive, and socially engaging manner. By setting an example, the mediator may encourage through body language and emotional tones the kind of behavior expected in the session. Again, this can have a neutralizing impact on the more negative, insecure, closed-minded, destructive, and resistant behavior frequently encountered in adversaries.

(c). Active Listening

Both as a necessary tool for effective facilitation and as a way of acknowledging the viewpoints of each side, active listening is an essential quality of a good mediator. It allows for a more accurate comprehension of the dispute, the ability to distinguish dispositive or helpful from irrelevant or unhelpful comments, positions from interests, less important interests from higher priority ones. Again, active listening also signals to the parties that what they have to say is important, and that can encourage the parties to listen actively to one another as well.

(d). Acknowledgment

Acknowledgment is one of the most important communication skills in effective mediation.92 As emphasized by Albie Sachs of the

92 WILLIAM URY, GETTING PAST NO 40 (1991) (“Every human being, no matter how impossible, has a deep need for recognition.”)
Constitutional Court of South Africa and an architect of the Truth and Reconciliation Commission,\textsuperscript{93} acknowledgment may be the most critical means to breaking the vicious cycle of human conflict. To acknowledge the views of one party or another is not to express any judgment (either positive or negative) but to register that the view has been heard and understood. Acknowledgment of one party by another (without apology) often defuses a conflict by allowing the combating parties to feel that their voice has been heard.

(e). Neutral Restatements, Summaries, and Word Changes

Mediators listen to and use language effectively to take the edge off volatile statements and words.\textsuperscript{94} They may reframe a statement as neutrally as possible without trivializing the viewpoint of the speaker. Parties often describe the factual background in a disorderly fashion, and a mediator’s role is to bring some order to confusing statements. Finally, an effective mediator will be careful in the choice of words. “Damages” may become “bills or expenses.” “Liability” may become “responsibility.” “Your side of the story” may be restated as “factual background.” Again, here, by rephrasing more neutrally, the mediator defuses the language of its explosive impact without changing the core meaning, and by doing so, may encourage the parties by example to speak with fewer offensive or conflictual phrases and words that put the other side on the defensive.

\textsuperscript{93} See, e.g., ALBIE SACHS, SOFT VENGEANCE OF A FREEDOM FIGHTER (2000).
\textsuperscript{94} See Gregg. F. Relyea, The Critical Impact of Word Choice in Mediation, 16 Alternatives No. 9, 1 (Oct. 1998). The author is particularly grateful to Mr. Relyea for sharing his mediation materials prepared for Indian audiences.
(f). Sequencing: Agenda Setting; Deferring; Redirecting

Effective mediators control the sequencing of what is discussed by setting the agenda, deferring, and redirecting. They may postpone the discussion of positions until they explore interests. The may advance those topics they believe are more likely to bring the parties together. For example, instead of focusing a separated couple on what led to their conflict, a mediator might ask the parties to give a description of their children. A mediator who is asked early on for a premature evaluation of a case might reply that it is too early to do so at that particular time. The ability to adjust the sequence provides the mediator with enormous flexibility to move in fruitful directions based on input from the parties.

(g). Changing the Messenger:

In conflictual relationships, even close ones, suggestions by one party are automatically discounted by the other. The very same suggestion may come from a third party and be far more readily accepted. Mediators are able to supply that role. They can solicit ideas from one side, and communicate those suggestions to the other, without attribution, and thus without any reactive discounting by the recipient. Changing the messenger thus can advance acceptance of the message, and confidential private caucusing allows the mediator to play this important role of a go-between.

(4.4.3) Communication in Mediation

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

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95 ADR Mechanism, Rajasthan High Court, Page no. 133
the success of mediation. Communication is not just TALKING and LISTNING. Communication is a process of information transmission. The intention of communication is to convey a massage. The mediator has the responsibility of opening the channels of communication and getting them to talk to him/her and one another\textsuperscript{96}. This communication between the mediator and the parties is often done through the written and spoken word. The purpose of communication could be any or all of the following:

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

Communication is conveying a message to another, in the manner in which you want to convey it. For example, a massage of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of diem. Communication is also information sent by one to another to be understood by the receiver in the same way as it was intended to be conveyed. Communication is initialed by a thought or feeling or idea or emotion which is transformed into words/gestures/acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the massage by assigning reasons and attributing thoughts, feeling/ideas to

\textsuperscript{96} L T Lim & J Lee “A Lawyer’s Introduction to Mediation” (1997) 9 SAcLJ 100, 112-113
the message. It evokes a response in the Receiver who conveys the same to the sender through words/gestures/acts/expressions. Consequently, a communication would involve:

A sender – person who sends a message

A Receiver – person who receives the message

Channel – the medium through which a message is transmitted which could be words or gestures or expression

Message – thoughts/feelings/ideas/emotions/knowledge/ Information that is sought to be communicated

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

Decoding – understanding the message or information

Response – answer/reply to a communicated message

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

Communication may be unintentional e.g. in an emotional state, the feeling could be conveyed involuntarily through body language, gesture, words etc - A mediator should be alert to observe such expressions. Communication may be verbal or non-verbal. Communication could be through words – spoken or written, gestures, body language, facial expressions etc. Studies reveal that in any communication, 55% of the meaning is transmitted through body
language, 38 % is transmitted through the attitude/demeanor of the communication, and 7% is transmitter through words.\footnote{ADR Mechanism, High Court of Rajasthan, page no. 134}

\subsection*{(4.4.3.1) VERBAL AND NON-VERBAL COMMUNICATION}

Verbal communication is transmission of information or message thorough spoken words. Non-verbal communication refers to the transmission of information or message from sender to receiver without the use of spoken words. It includes written communication, body language, tone, demeanor, attitude and other modes of non-verbal expression. It is often more spontaneous than verbal communication and takes place under less conscious control.\footnote{M L Knapp & G R Miller (eds) “Handbook of Interpersonal Communication” (Sage Publications, 1994, 2nd ed), 235.} therefore, it can provide more accurate information. Non-Verbal Communication plays a role in communication ranges from a conservative estimate of 65\%\footnote{A Mehrabian and S R Ferris “Inference of Attitudes from Non-Verbal Communication in Two Channels”, (1967) 31 The Journal of Consulting Psychology, 248-252} to as high as 93\%\footnote{V P Richmond, J C McCroskey, Section K Payne Nonverbal Behaviour in Interpesronal Relations (Prentice Hall, 1991, 2nd Ed), 4}. Briefly consider two distinctions between Verbal and Non-Verbal Communication\footnote{There are of course exceptions to this rule. For example, sign language and morse code are non-verbal but also based on a shared arbitrary system of coding. Symbols, emblems and insignia are other examples.}. The first distinction is that Verbal Communication relies on a shared arbitrary system of coding known as language. In contrast, Non-Verbal Communication does not rely on a shared arbitrary system of coding.\footnote{There are of course exceptions to this rule. For example, sign language and morse code are non-verbal but also based on a shared arbitrary system of coding. Symbols, emblems and insignia are other examples.} Although certain generalizations about the meanings of certain body movements or positions can be drawn, these do not have universal application. One must be careful not
to mistake the map for the territory. The second distinction is that the meaning one derives from Verbal Communication necessarily comes from the language used. If spoken or written words are not used, there can be no Verbal Communication. Non-Verbal Communication on the other hand, is a continuous process because Non-Verbal Communication never stops. Even the absence of Verbal Communication has communicative potential.

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

(4.4.3.2) REQUIREMENT FOR EFFECTIVE COMMUNICATION:

There are certain requirements for effective communication. They are as under:

(i). Use simple and clear language
(ii). Avoid difficult words and phrases
(iii). Avoid unnecessary repetition
(iv). Be precise and logical
(v). Have clarity of though and expression
(vi). Respond with empathy, warmth and interest
(vii). Ensure proper eye contact
(viii). Be patient, attentive and courteous
(ix). Avoid unnecessary interruptions
(x). Have good listening abilities and skills
(xi). Avoid making statements and comments or responses that could cause a negative effect.

(4.4.3.3) **CAUSES OF INEFFECTIVE COMMUNICATION:**

A good communication yields good results. At the same time, if the communication is ineffective then it will not have proper effect in the mediation process. There are causes of ineffective communication, which can be stated as follows:

(i). Difference in perception i.e. where the Sender’s message is not understood correctly by the Receiver

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

(iii). Differences in language and expression

(iv). Poor listening abilities and skills

(v). Lack of patience

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

(4.4.3.4) **BARRIERS TO COMMUNICATION:**

Like causes of ineffective communications there are certain barriers to the communication. They can be classified, in nutshell, as follows:


(4.4.3.4.1) PHYSICAL BARRIERS;

(i). Lack of congenial atmosphere

(ii). Lack of proper seating arrangements

(iii). Presence of third party

(iv). Lack of sufficient time.

(4.4.3.4.2) EMOTIONAL BARRIERS;

(i). Temperaments of the parties and their emotional quotient

(ii). Feelings of inferiority, superiority, guilt or arrogance

(iii). Fear, suspicion, ego, mistrust or bias,

(iv). Bidden agenda,

(v). Conflict of personalities.

(4.4.3.4.3) COMMUNICATION IN ADVERSARIAL SYSTEM AND MEDIATION

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<thead>
<tr>
<th></th>
<th>ADVERSARIAL SYSTEM</th>
<th>MEDIATION</th>
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<tbody>
<tr>
<td>GOAL</td>
<td>To win</td>
<td>To reach mutually acceptable solutions</td>
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<td>STYLE</td>
<td>Argumentative</td>
<td>Collaborative</td>
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<tr>
<td>SPEAK</td>
<td>To establish and convince</td>
<td>To explain</td>
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<tr>
<td>LISTEN</td>
<td>To find flaws and development counter arguments</td>
<td>To understand.</td>
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(4.4.3.4.4) COMMUNICATION SKILL IN MEDIATION

Communication skill in mediation include:-

(A) Active Listening

(B) Listening with Empathy

(C) Body Language

(D) Asking the Right Questions

(4.3.4.4.4 (A)) Active Listening:

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

In active listening the listener pays attention to the speaker’s words, body language, and the context of the communication. An active listener listens for both what is said and what is not said. An active listener tries to understand the speaker’s intended massage, notwithstanding any mistake, mis-statement or other limitations of the speaker’s communication. An active listener controls his inner voices and
judgments which may interfere with his understanding the speaker’s message. Active listening requires without unnecessarily interrupting the speaker. Parties must be given uninterrupted time to convey their message. There is a difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one also understands the meaning of what has been said. Listening is an active process.

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

(i) **Summarizing:**

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

(ii) **Reflecting:**

Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is a restatement of feelings and emotions in terms of the speaker’s experience.

(iii) **Re-framing:**

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

a. Converts the statement from negative to positive
b. Converts the statement from the past to the future
c. Converts the statement from positions to interests
d. Shifts the focus from the targeted person to the speaker
e. Reduces intensity of emotions

Example:

Patty: “My boss is cruel and insufficient. It is impossible to talk to him. I should be able to meet him at least once a day. He doesn’t make any time for me and always ignores me.”

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

Note:

Position: A position is a perception (“my boss is cruel and indifferent”) or a claim or demand or desire outcome (“I should be able to meet him at least once a day”).
Interest: An interest is what lies beneath and drives a person’s demands or claims. It is a person’s real need, concern, priority, goal etc. It can be tangible (e.g. Property, money, shares etc) and/or intangible (e.g. communication, consideration, recognition, respect, loyalty etc.)

(iv) Acknowledge:

In acknowledge the mediator verbally recognizes what the speaker has said without agreeing or disagreeing. Example “I see your point” or “I understand what you are saying”. This way mediator assures the speaker that he has been heard and understood.

(v) Deferring:

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

(vi) Encouraging:

The mediator can encourage parties when they need reassurance, support or help in communicating. Example: “what you said makes things clear 11 or” this is useful information”

(vii) Bridging:

A technique used by a mediator to help a party to continue communication. Example: “And------”, “And then------”, The
word “And” encourage communication whereas the word “But” could discourage communication.

(viii) **Restating:**

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

(ix) **Paraphrasing:**

Is a communication technique where the mediator states in his own words the statements of the speakers conveying the same meaning.

(x) **Silence:**

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

(xi) **Apology:**

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

**Example:** “I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you”
(xii) Setting an agenda:

In order to facilitate better communication between the parties the
mediator effectively structures the sequence or order to topics,
issues, position, claims, defences, settlement terms etc. It may be
done in consultation with the parties or unilaterally.

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

(4.4.3.4.4 (A) (a)) BARRIERS TO ACTIVE LISTENING:

(i) Distractions :-

They may be external or internal The sources of external
distractions are noise, discomfort, interruptions etc. The
Sources of internal distractions are tiredness, boredom,
preoccupation, anxiety, impatience etc.

(ii) Inadequate time :-

There should be sufficient time to facilitate attentive and
patient listening.

(iii) Pre-judging :-

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

A Mediator should not assign responsibility to any party for what has happened.

(v) **Absent Mindedness:-**

The mediator should not be half-listening or inattentive.

(vi) **Role Confusion:-**

The mediator should not assume the role of advisor or counsels or adjudicator. He should only facilitate resolution of the dispute.

(vii) **Arguing/ imposing views:-**

The mediator should not argued with the parties or try to impose his own views on them.

(viii) **Criticizing**

The mediator should not criticize any party during the mediation process.

(ix) **Counseling**

It is not the function of the mediator to be counsel of any one of the party. He should not act as an counseling one of the party.
(x) Moralizing

During the mediation process, the real facts and the problems only should be considered. The dispute should not be viewed only from the point of view of morality. Mediator needs to keep peace in mind while dealing with the mediation process. Further, personal moral view of the mediator should not be brought into the process of negotiation.

(xi) Analyzing

The mediator should not assume the role of analyzer of the conduct of any of the parties or the views expressed by them during the mediation process. He should only facilitate resolution of the dispute.

(4.4.3.4.4 (B)) LISTENING WITH EMPATHY

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

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

Wife: “I had such a hard day at work”

Husband: “I am so sorry you had a hard day at work” - Sympathy (focus is on listener/husband)

Husband: “You had a herd day at work, mine was worse” - Sympathy (focus is on listener/husband)

Husband: “You feel it was hard for you at work today. Would you like to talk about it? (Focus on speaker/wife) - Empathy

Reflecting is a good communication techniques used to express empathy.

(4.4.3.4.4 (C)) BODY LANGUAGE:

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

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

(i) Symmetry of posture - If reflects mediator’s confidence and interest

(ii) Comfortable look - It increases die confidence of the parties
(iii) Smiling face - It puts the parties ease
(iv) Leaning gendy towards - It is a sign of attentive listening the speaker
(v) Proper eye contact with - It ensures continuing attention. The speaker

(4.4.3.4.4 (D)) **ASKING THE RIGHT QUESTIONS:**

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

**TYPES OF QUESTIONS:**

(i) **Open Questions:**

These are questions which all give a further opportunity to the party to prove more information or to clarify his own position, retaining
control of the direction of discussion and maintaining his own perspective. They are broad and general scope.

**Examples:**

(a). “What you tell me more about the subject?”

(b). “What happened next?”

(c). “What is your claim?”

(d). “What do you really want to achieve?”

(ii) **Closed Questions:**

These questions are limited in scope, specific, direct and focused. They are fact-based in content and tend to elicit factual information. The response of these questions may be ‘YES’ or ‘NO’ or a very short response and may close the discussion on the particular issue.

**Examples:**

(a). “What colour shirt was the man wearing?”

(b). “On which date was the contract signed?”

(c). “What is the total amount of your medical bills?”

(d). “Were you present in the market when the event occurred?”
(iii) **HYPOTHETICAL QUESTIONS:**

Hypothetical questions are Questions which allow parties to explore new ideas and options.

**Examples:**

(a). “What if the disputed property is acquired by Government?”

(b). “What if your husband offers to move out of the parental house and live separately?”

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

**(4.4.4) Effective Mediator**

The effective mediator is who:

- Gives parties a sense of concern for and understanding of their feelings about the case, even when the Mediator asks tough questions
- Avoids appearance of bias or favoritism
- Develops a good working relationship with all parties
- Listens and respond courteously and with understanding
- Acknowledges points made and the significance to the parties of problems and issue
- Encourages parties to make their own decisions.
(4.4.4.1) **Investigation**

- Subtly analyses parties’ presentations and vigorously searches for understanding of issue and interest underlying positions
- Asks relevant and insightful question
- Probes, for clarification
- Keeps track of new information and changing positions

(4.4.4.2) **Managing the Interaction**

- Earns the confidence of the parties in her or his management of the process and decisions on procedure
- Makes decisions about order of presentations, caucusing, etc., consistent with progress towards resolution
- Manages client representative relationship well
- Handles emotional tensions and outbursts so as encourage progress towards settlement

(4.4.4.3) **Persuasion and Presentation Skill**

- Appears relaxed, alert and engaged with the process
- Demonstration skill and confidence throughout verbal communication
- Presents information, analyses explanations in ways the influences the parties positively
- In articulate and enthusiastic throughout the process
- Maintains eye contact and open gestures
• Is easily understood and logically organized

(4.4.4.4) **Managing Tensions**

• Shows acute awareness of rising tension
• Is able to deflect parties, when unhelpful tension arises, from slipping into negativity, by appropriate comment, anecdote or other tactic
• Has a wide variety of techniques for directing parties’ attention away from unproductive presentations or exchanges
• Uses tension to good purpose, where appropriate, to allow venting of emotions or for a party to have its say in demonstrating lack of substances in the other party’s case
• Is able to help parties see their problems from a broader perspective

(4.4.4.5) **Inventive and Problem – Solving Skills**

• Avoids premature commitment to solutions
• Helps generate an atmosphere of problem-solving enquiry
• Recognizes underlying interests and problems as against positions or symptoms
• Pursues avenues leading to collaborative solutions
• Invents or helps parties invent new avenues towards workable solutions
• Finds novel but practical ways to interrelate parties’ goals
(4.4.4.6) **Strategic Direction**

- Graphs the key issues blocking or promoting movement
- Is able to identify procedures and communications to assist movement towards resolution of major issues
- Is able to develop an agenda and priorities with the parties
- Is open and flexible and develops a keen sense of direction for progress without losing the capacity for flexibility
- Draws together options into a coherent settlement package

(4.4.4.7) **Postscript-substantive Knowledge**

- Has expertise in the specialist field
- Demonstrates knowledge without arrogance
- Is able to identify all or most known solutions to common problems in the field and adapt them to fit parties’ circumstances.
- Create an environment conductive to the process of mediation
- Develop communication with the parties
- Establish and maintain an effective working framework with the parties
- Facilitates the process of mediation through active engagement with the parties
- Manage the process of mediation
- Enable the parties to create solutions
(4.4.5) **Ethics for Mediators**

Ethics is a part of the code of conduct applicable to a mediator in the process of mediation. It is based upon certain values that are intrinsic to Mediation i.e.-

1. Every act, conduct, dealing of the Mediator related to or connected with Mediation, the parties and the process is required to be Fair, Unbiased, Impartial and Equitable.
2. The conduct of the Mediator should be above board and in conformity with the highest moral standards.
3. The Mediator must maintain confidentiality.
4. The conduct of the Mediator must reflect and be in conformity with the universally acceptable ‘good practices’.
5. The Mediator should refrain from promises or guarantee of results.
6. The Mediator would withdraw from the Mediation if he / she even remotely senses that he/she cannot be impartial.
7. The Mediator shall not be judgemental nor express an opinion on any issue even if requested or demanded by parties.
8. The Mediator will upload the integrity and fairness of the Mediation process.
9. The Mediator should not compel parties to enter into a settlement.
10. The Mediator shall disclose any interest in or relationship with the subject matter of dispute or parties which is likely to affect his / her impartiality or lead to bias or apprehension of bias.
11. The Mediator will not render legal advice to any party even if requested.
12. The Mediator shall satisfy himself / herself that he is to complete the assignment in a professional manner.

13. The Mediator shall recognize that mediation is based on principals of self determination by the parties and that the mediation process relies upon the ability of parties to reach an agreement voluntarily.

[4.5] Stages and Structure of the Mediation Process

The stages and the structure of the Mediation Process may be summarized in the following manner:-

(1) Stages of the Mediation Process

(2) Structure of the Mediation Process

(4.5.1) Stages of the Mediation Process

The process of mediation can be easily divided into ten stages as given follows:

Stage-1: Selection of Mediation / conciliation Centre;
Stage-2: Execution of Contract in mediation/ conciliation;
Stage-3: Furnishing of information and correspondence;
Stage-4: Meeting of parties;
Stage-5 Familiarizing mediator with facts about dispute;
Stage-6: Gathering information,
Stage-7: Facilitating Negotiation;
Stage-8: A stage if Impasse;
Stage-9: Termination of mediation or achieving agreement and
Stage-10: Post-termination stage
(4.5.1.1) Stage-1: Selection of Mediation / conciliation Centre;

Mediation begins when one or both disputants make contact with a mediation Centre. Although clients may be referred to mediation by a court or their advocates, often one of the two disputants contacts the mediator directly to inquire about mediation. The mediator must inform the person making contact of the nature of the service etc. The mediator will frequently send informative brochures that provide specific facts about mediation and demonstrate its advantages.

(4.5.1.2) Stage-2: Execution of Contract in mediation/ conciliation;

Mediation is forward-looking; the goal is for all parties to work out a solution they can live with and trust. It focuses on solving problems, not uncovering the truth or imposing legal rules. This, of course, is a far different approach than courts take. In court, a judge or jury looks back to determine who was right and who was wrong, then imposes a penalty or award based on its decision. Because the mediator has no authority to impose a decision, nothing will be decided unless both parties agree to it. Knowing that no result can be imposed from above greatly reduces the tension of all parties -- and it also reduces the likelihood that someone will cling to an extreme position. Also, if mediation does not produce an agreement, either side is free to sue.
(4.5.1.3) Stage-3: Furnishing of information and correspondence;

The mediator will then give an opening statement. This outlines the role of the participants and demonstrates the mediator’s neutrality. Some mediators will make comments about what they see as the issue and confirm the case data if briefs have been pre-submitted. Next, the mediator will define protocol and set the time frame for the process. There will be a review of the mediation guidelines and the mediator will briefly recap what it is that he has heard as the issues. The opening statement during the introductory remarks will set out the ground rules for the mediation. These ground rules are what help the mediation move along smoothly.

The mediator shall explain the following ground rules of mediation:

• Ordinarily, the parties/counsel may address only the mediator

• While one person is speaking, others may refrain from interrupting

• Language used may always be polite and respectful

• Mutual respect and respect for the process may be maintained

• Mobile phones may be switched off

• Adequate opportunity may be given to all parties to present their views,
Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

(4.5.1.4) Stage-4: Meeting of parties;

In the mediation process, the mediator shall ensure that the parties and/or their counsel are present. There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

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

To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.

- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
• He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.

(4.5.1.5) Stage-5 Familiarizing mediator with facts about dispute;

The mediator will give each side the opportunity to tell their story uninterrupted. Most often, the person who requested the mediation session will go first. The statement is not necessarily a recital of the facts, but it is to give the parties an opportunity to frame issues in their own mind, and to give the mediator more information on the emotional state of each party. If there are lawyers present who make the initial statement, the mediator will then ask the client to also make a statement. The rationale behind the statement of the problem is not a search for the truth; it is just a way to help solve the problem. The mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.

• The mediator will then request the counsel to introduce themselves.

• The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions.

• The mediator will discuss with the parties and their counsel any time constraints or scheduling issues.

• If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.
The mediator will usually ask that if attorneys are present, they can confer, but the clients should speak for themselves. Parties should not interrupt each other; the mediator will give each party the opportunity to fully share their side of the story.

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

(4.5.1.6) **Stage-6: Gathering information,**

The mediator will ask the parties open-ended questions to get to the emotional undercurrents. The mediator may repeat back key ideas to the parties, and will summarize often. This helps the mediator build rapport between the parties, especially when a facilitative style is used. Parties vent personal feelings of pain, hurt, anger etc... The mediator identifies emotional factors and acknowledges them; The mediator explores sensitive and embarrassing issues; The mediator distinguishes between positions taken by parties and the interests they seek to protect; The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve); The mediator identifies areas of dispute between parties and what they have previously agreed upon; Common interests are identified; The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained. The mediator formulates issues for resolution.

(4.5.1.7) **Stage-7: Facilitating Negotiation;**

Mediation provides a unique opportunity for the parties as it relates to the opportunity of a negotiated resolution of their case. Typically, in a negotiation, one party gets to his/her/its goal, the other party gets to his/her/its goal, and rarely are those goals the same. If impasse occurs, litigation will commence, continue, or be completed. Absent facilitation,
no one is encouraging getting back to re-evaluation or re-negotiation. Certainly someone can suggest continuing negotiation, but typically neither side wants to show the other such interest (it being perceived as a weakness in the negotiation process).

Mediation, on the other hand, brings to the table that facilitation that is otherwise missing in a pure negotiation context. The neutral, while there to facilitate the negotiations, is also there as an advocate for the process. The mediator represents resolution similar to the responsibility of an attorney to represent his/her client. The mediator is going to work as hard for the process as the attorneys are going to work for their respective parties.

Roger Fisher and William Ury call it “a fact of life. … Negotiation is a basic means of getting what you want from others. It is back-and-forth communication designed to reach agreement when you and the other side have some interests that are shared and others that are opposed.” Mediators, help the parties to communicate effectively and improve their mutual understanding. Their responsibilities – as with mediation concepts – relate to the process rather than the content. Mediator can also act to some extent as creative content providers for enriching the discussion.

(4.5.1.8) Stage-8: A stage if Impasse;

In the beginning, the mediator can assist parties in getting to the table through designing of the mediation process. This can include not only exchanges of information, but also the establishment of pre-
mediation caucuses with one or more parties. It In this regard, the mediator serves the opportunity for breaking impasse. The sooner the mediator is brought into the process, the better and more able the mediator is to assist the parties in getting to “yes”. The mediator can assist with the exchange of information, as well as, the exchange of communications, as well as, the exchange of offers. The mediator can expedite information gathered, as well as, filter communications. Therefore, “breaking impasse” becomes the mediator’s responsibility from beginning to end.

Parties are encouraged to freely create possible options for agreement. Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later. Also stabilizes the relationship of the parties in getting to the table. Mediators may have truncated the creative processes that generate options to resolve each carefully framed issue. Again, they may need to circle back to generate more ideas.102

(4.5.1.9) Stage-9: Termination of mediation or achieving agreement

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for

a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

(4.5.1.10) Stage-10: Post-termination stage

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

A typical mediation involves several stages. These stages are neither rigid nor inflexible and can be modulated to achieve the desired outcome.

(4.5.2) Structure of the Mediation Process

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

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103 MEDIATING MEDIATION IN INDIA, by Hiram E. Chodosh, Fulbright Senior Scholar, Indian Law Institute, New Delhi (2003); Associate Dean for Academic Affairs (effective July 1, 2003); Professor of Law, Director of the Frederick K. Cox International Law Centre, Case Western Reserve University School of Law, Cleveland, Ohio; J.D., Yale Law School, 1990.
and flexible manner so that the mediation process gains momentum, following a specific and predictable course as illustrated below\textsuperscript{104}.

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

\textsuperscript{104} Mediation Training Manual, Supreme Court of India, page No. 24
The foregoing negotiation strategies and communication skills may be structured in wide variety of ways. As currently practiced in much of the world, mediation exhibits several definable stages; however, this does not mean that variations from this basic structure undermine the mediation process. The structure creates an efficient convention for mediators and parties to follow in multiple iterations; however, adjustments may be desirable, indeed even necessary in many cases. For example, in the U.S., it is considered desirable to conduct a mediation in one continuous proceeding. This assumes that the primary participants have full and independent authority to settle. In contrasting social, economic, or bureaucratic settings, whether in family, business, or government cases, the participants may lack this full authority: the spouse has to consult his parents; the manager has to consult the CEO; the civil servant has to consult the Minister; etc.\(^{105}\) Those who have conducted many mediations in India, for example, report the frequent need to conduct mediations in a series of shorter sessions (in contrast to one long session). Nonetheless, it may be useful to outline the major stages of the mediation process (however differently they may be sequenced or separated): preparation, introduction, joint sessions; private caucusing; and the agreement phase.

(4.5.2.1) **PREPARATION**

In the preparation phase, the mediator is selected (whether by the court as part of an annexed process from a panel of eligible neutrals, or

\(^{105}\) Justice Rao’s consultation paper addresses this concern in Rule 3 of the Consultation Paper on ADR and Mediation Rules, supra note 3, at 1-2.
by the parties themselves in a private mediation). In the absence of statutory rules that govern the confidentiality of the mediation process or in the event of a private mediation in which the neutral is compensated, a mediation agreement must be negotiated. Provisions may include the time, place, and duration of the mediation, as well as the terms of the neutral’s engagement. In some mediation, the parties prepare short statements or memoranda or supply key documents to the mediator to save time by acquainting the neutral with the case.

**4.5.2.2) INTRODUCTION**

In the first session, the mediator attempts to set a positive tone, relaxed atmosphere, basic structure, and ground rules for the mediation. The neutral often begins with a self-introduction of mediation experience and credentials. The parties and lawyers introduce themselves. The mediator then explains the process, the limited role of the neutral, explains the restrictions of confidentiality, disposes of any administrative matters, and solicits questions from the parties before proceeding.

Mediation begins with an opening statement in which the mediator establishes his own neutrality, explains the process to the parties and informs them that all that is said in the course of the proceedings is confidential and will not be utilised if either of the parties takes recourse to a Court of law for resolving the dispute. The mediator has to engender the confidence of parties by creating an environment that would promote constructive negotiation. The opening statement of the mediator is followed by the opening statement of the parties themselves in which
parties would explain their case as each of them views it and their own perceptions and interests.

The statements by parties are followed by the stage of summarizing and agenda setting. The next stage is the exploration of issues. The mediator helps parties in focusing upon the issues which arise and in exploring those issues further.

This is followed by private sessions or caucuses between the mediator and each of the parties separately. During the course of these private sessions, the parties may exchange information with the mediator so as to enable a candid and frank assessment to be made of the interest of each party. A party in a private session may require the mediator not to disclose to the other party information which has been provided in the course of the session. The private sessions are then typically followed by a joint negotiation session. Private Sessions may again be resorted to by the mediator to dislodge a situation of an impasse.

(4.5.2.3) **JOINT SESSIONS**

The joint session focuses on input from the parties (and their attorneys) on the nature of the dispute and attempts to explore any early avenues for settlement. Parties usually tell their stories (and may be listening to one another for the first time since the conflict erupted). The lawyers may discuss how they see the case from a positional point of view. The mediator may use several communication techniques (reframing, agenda setting) to confirm comprehension of the factual and legal background and the emotional postures of the parties. Unless the
case can be settled in the joint session, the mediator will ask the parties whether they would be willing to go into private caucuses. During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so\textsuperscript{106}.

(4.5.2.4) **PRIVATE CAUCUSES**

In the private caucus, the mediator is often able to gain a deeper understanding of the problem. The parties are freer to discuss their views candidly, sharing information they would not convey to the other litigants, 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. Mediators may also use ATNA (alternative to a negotiated agreement) strategies to conduct a form of reality testing and to achieve a more rational perspective on the resolution of the conflict.

(4.5.2.4 (i)) **RE - AFFIRMING CONFIDENTIALITY**

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

\textsuperscript{106} Mediation Training Manual, Supreme Court of India, page No. 29
(4.5.2.4 (ii)) GATHERING FURTHER INFORMATION

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

• Parties vent personal feelings of pain, hurt, anger etc.,

• The mediator identifies emotional factors and acknowledges them;

• The mediator explores sensitive and embarrassing issues;

• The mediator distinguishes between positions taken by parties and the interests they seek to protect;

• The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);

• The mediator identifies areas of dispute between parties and what they have previously agreed upon;

• Common interests are identified;

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

• The mediator formulates issues for resolution.
(4.5.2.4 (iii)) REALITY - TESTING

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

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

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

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

(d) Examination of the monetary and non-monetary costs of litigation and continued conflict;

(e) Assessment of witness appearance and credibility of parties;

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

(g) Consequences of failure to reach an agreement.

Techniques of Reality-Testing

Reality-Testing is often done in the separate session by:
A. Asking effective questions,

B. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or

C. Considering the consequences of any failure to reach an agreement (BATNA/WATNA/MLATNA analysis).

(4.5.2.4 (iii)(A)) ASKING EFFECTIVE QUESTIONS

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

Examples of effective questions:

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

- CLOSED QUESTIONS, which are specific, concrete and which bring out specific information.

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

• QUESTIONS THAT BRING OUT POSITIONS: 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'

• QUESTIONS THAT BRING OUT INTERESTS: 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(4.5.2.4 (iii)(B)) DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OF THE PARTIES

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as, 'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?
(4.5.2.4 (iii) (C)) CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA/MLATNA ANALYSIS).

BATNA - Best Alternative to Negotiated Agreement
WATNA - Worst Alternative to Negotiated Agreement
MLATNA - Most Likely Alternative to Negotiated Agreement

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

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

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

By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem-solving. The parties are then encouraged to explore several creative options for settlement.

(4.5.2.4 (iv)) BRAIN STORMING

Brain Storming is a technique used to generate options for agreement.

There are 2 stages to the brain storming process:

A. Creating options

B. Evaluating options

(4.5.2.4 (iv) (A)) Creating options:-

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

(4.5.2.4 (iv) (B)) Evaluating options:-

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

Brainstorming requires lateral thinking more than linear thinking. Lateral thinking: Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement. Linear thinking is logical, traditional, and rational and fact based. Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(4.5.2.4 (v)) SUB-SESSIONS

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who
come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub-sessions with only the advocate(s) or the party or any member(s) of the party. A Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties. If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub-session(s) with parties having common interest, to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

**(4.5.2.4 (vi)) EXCHANGE OF OFFERS**

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

**(4.5.2.5) AGREEMENT**

Finally, the mediator will facilitate parties to move to an agreement which is a voluntary settlement arrived at between the parties for resolving the issues between them. Assuming the parties have reached an agreement in either private or subsequent joint sessions, the mediator will transition into the agreement phase. The terms of settlement will be articulated and further clarified. The mediator will facilitate the drafting
of the agreement, if necessary, as well as efforts to transfer consideration and dismiss claims simultaneously, thus minimizing the low risk of non-compliance with the consensual agreement. The mediator may also take interest in remaining informed about any necessary future exchanges as part of a settlement, e.g., transfers of custodial children from one spouse to another.

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

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

(4.5.2.5.1) **THE DRAFTING OF AGREEMENT:**

While drafting an agreement of settlement, the following factors has to be kept in mind by the Mediator:

- clearly specify all material terms agreed to;
- be drafted in plain, precise and unambiguous language;
- be concise;
- use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);
- use language and expression which ensure that neither of the parties feels that he or she has 'lost';
- ensure that the terms of the agreement are executable in accordance with law;
- be complete in its recitation of the terms;
- avoid legal jargon, as far as possible use the words and expressions used by the parties;
- as far as possible state in positive language what each parties agrees to do;
• as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(4.5.2.5.2) **WHERE THERE IS NO SETTLEMENT**

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

• The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

The essence of mediation is that it

(i) focuses upon the parties’ own needs and interests,

(ii) provides for a full disclosure of competing interests and positions

(iii) confers upon the parties a right of self determination,

(iv) allows for procedural flexibility and

(v) maintains privacy and confidentiality. The mediator, it is well settled, is the guardian of the process and it is the
mediator who has to ensure that parties maintain complete confidence in the proceedings.¹⁰⁷

[4.6] **Nature of cases suitable for Mediation:**

The mediation is recommended in all such matters in which the relations between the parties have to survive beyond litigation. The Court should refer all such matters to mediation in which disputes relating to properties, partition, marriage and custody of children, commercial and business are involved. The mediation also succeeds in consumer disputes, suppliers, contractors, banking, insurance, labour matters, doctor and patients, landlord and tenant and in cases relating to intellectual property rights.

- Business contracts and transactions;
- Real estate and construction,
- Consumers issues,
- Employment and service issues,
- Industrial disputes, banking and insurance cases,
- Trademarks disputes,
- Disputes of child custody and rights,
- Issues arising out of habeas corpus petition that need verification, company disputes including winding up petition.
- all cases relating to trade, commerce and contracts including money claims, tenancy matters, insurance matters etc.;

¹⁰⁷ Ibid.
• all cases arising out of strained or soured relationship (social issues) including matrimonial, maintenance, custody matters; family disputes such as partition/division, and disputes amongst partners;

• all cases in which there is need for continuation of pre-existing relationship in spite of disputes such as easementary rights, encroachments, nuisance, employer and employee matters, landlord and tenant, and disputes involving members of societies, associations, apartment owners

• all cases relating to tortuous liability such as motor accident and other accident claims;

• all consumer disputes including disputes with traders, suppliers, service providers, who are keen to maintain their reputation, credibility or product popularity

[4.7] **Cases not suited for Mediation**¹⁰⁸

Mediation is not recommended, where questions of law are involved to be adjudicated by the Court, or in which offences of moral turpitude and fraud are involved. Mediation is also not recommended, when there is serious imbalance between the positions of the parties, in which fair negotiation is not possible.

¹⁰⁸ An Article “ALTERNATIVE DISPUTE RESOLUTION” Justice Sunil Ambwani, Judge, Allahabad High Court, JTRI (Judicial Training & Research Institute), JOURNAL Page no. 32, ISSN No 0976-9153, SEVENTEENTH YEAR, Issue XXXIII December, 2012
S.89 of the Code provides for settlement of disputes outside the Court. The cases, which are not suited for mediation process, should not be referred under Section 89. These cases may be broadly categorized as;

1. Representative suits under Order 1 Rule 8 of the Code, involving public interest or interest of persons, who are not parties before the Court;

2. Disputes relating to election to public office, except those, where two groups in case of dispute of management of societies, clubs, associations are clearly identifiable and are represented;

3. Cases involving granting relief in rem, such as grant of probate or letters of administration;

4. Cases involving serious allegations of fraud, fabrication, forgery, impersonation, coercion etc.;

5. Cases involving protection of courts for minors, deities, mentally challenged persons and suits for declaration of title against government;

6. Cases involving prosecution of criminal offences etc.

[4.8] Court Annexed Mediation:

Procedure of Court Annexed Mediation – Section 89 and Order X of Code of Civil Procedure Governs the Procedure:-
(a) **Previous History:**

Even though the Legal Services Authority Act, Lok Adalat and Arbitration and Conciliation Act, 1940 and later 1996 are in existence, there was no mandate to the court to resort to compulsory reference of parties to any of the alternative dispute resolution methods now introduced. Earlier Section 89 was there in the statute book but later it was removed and reintroduced by the amendment of Code of Civil Procedure in 1999 and came into force in 2002. By the amendment now it is mandatory for the court to direct the parties to the suit to opt for any one of the alternative dispute resolution methods so as to explore the possibility of settlement of their dispute amicably outside the court.

(b) **Amendment of Civil Procedure Code Purpose:**

(i). The intent of the legislature in bringing the amendment to empower the courts to direct the parties to opt for any modes of alternative dispute resolution before adjudication by the courts;

(ii). In order to provide an opportunities to the parties to have the facility of expert arbitrators, mediators and conciliators even though the parties never thought of the same before filing the suit;

(iii). Providing an opportunities to the parties to resolve their disputes out side the court apart from the provisions of order 23 rule 3 Code of Civil Procedure. Further, to provide
opportunity to the parties to became judges of their own case.

(c) **Object sought to be achieved by amendment:**

(i). Reduce delay in disposal of the cases,

(ii). Pendency reduction and docket explosion,

(iii). To preserve and give momentum to the rights of the parties for speedy trial and disposal of their cases,

(iv). To preserve human relationships, values and cordial atmosphere between the parties,

(v). To encourage outside court settlement of dispute thereby avoiding the litigation expenses and court fee to the parties,

(vi). To uphold the faith and confidence respond by the litigant public in judicial system.

(d) **Manner in which a case is dealt with before the court and before mediation centre/ mediator:**

(i). No pre-litigation mediation. Case must be pending anywhere in Courts. It can be referred to mediation at any stage of the case.

(ii). Identification of cases.\(^{109}\)

(iii). Examination of parties.\(^{110}\)

(iv). Persuading the parties, to apt for mediation.

(v). Referring the parties to mediation centre or to mediators.

\(^{109}\) Section 89 of Code of Civil Procedure

\(^{110}\) Order X Rule 1 of Code of Civil Procedure
(vi). Receiving of the parties and case by mediation centre or mediators by creating healthy and pleasant atmosphere.

(vii). Holding mediation by joint session and private session and finding solution acceptable to both parties.

(viii). Returning the file and parties to court with solution incorporated in a lawful agreement.

(ix). When case is not settled, returned with restoration of confidence in the parties to participate in adjudicatory process, irrespective of what happened in mediation process.

(x). Court to hear the parties and advocates about the lawfulness of the agreement and to pass appropriate orders/judgment.

(xi). If the case is not settled, court to proceed with the case and adjudicate in accordance with law.

If we look at the procedure under section 89 and also under Order X rule 1 – A to C of Code of Civil Procedure, the court has no control over mediators and mediation process. The court cannot regulate the process and also the mediators. The Courts’ duty is only restricted and it can only exercise powers under the above provisions and also rules if any of the states framed in consonance with Section 89 of the Code. During the course of mediation, after reference, there must be separate institution which can take care of mediation process, and the mediators and the parties to mediation and the people at the helm of affairs of mediation.

One more difficulty in court annexed mediation is that there has to be pendency of the case before the court. The court, as an institution, does
not recognize the pre-litigation mediation or private mediation. In the event of parties participating in a private mediation or institutional pre-litigation mediation, the courts have no power to put its seal and pass any decree as it can be done in pre-litigation Lok Adalats. Therefore, there should be a separate independent machinery and system to take care of all the requirements for mediation process.

[4.9] Some instances of settlement of disputes, post-litigation as well as pre-litigation, through the mediation in the State of Gujarat.

The process of mediation in the State of Gujarat is gaining popularity. It is reflected from the instances as are highlighted by the Gujarat State Legal Services Authority, in its various Mediation Newsletters’, some of the cases settled, post-litigation as well as pre-litigation, through mediation as under:

(4.9.1) Post – Litigative Cases Settled:

Cases settled in the Gujarat High Court Mediation Centre:-

The Hon’ble High Court of Gujarat had referred a Special Criminal Application filed by respondent against his wife and three others for settlement to the Gujarat High Court Mediation Centre. The matter was handed over to a Mediator. During the mediation proceedings, parties along with their Advocates attended proceedings and after prolonged discussion, the parties have settled their dispute amicably. The parties decided to reunite along with their children. They agreed to request Hon’ble High Court for setting aside the Orders passed by the subordinate Courts. Wife has waived the claim of maintenance or arrears of
maintenance. Thus, with the help of mediation a long drawn battle between parties was settled saving the family.\textsuperscript{111}

Post-Litigation Case Settled in Palanpur Mediation Centre, District Court Banaskantha:-

A regular Civil Suit No. 371/97 was pending in the Court at Palanpur with regard to dispute relating to easementary rights between the parties. The dispute was going on since 15 years and the cause of dispute was with regard to disposal of rain water.

The said matter was referred to the Mediation Centre, Palanpur for convincing the parties for arriving at amicable settlement. Both the parties were called at Mediation Centre, Palanpur for mediation. Because of the sincere efforts of the part of the Mediator and cooperation of the parties, amicably settled their dispute and have agreed to the terms and conditions of settlement.\textsuperscript{112}

Post – Litigation Case Settled in the Jamnagar Mediation Centre:-

A Post-Litigation criminal matter was filed under section 138 of the Negotiable Instrument Act before appropriate Court at Jamnagar with regard to bouncing of cheque of Rs 10,000/-. 

The accused of this case had issued a cheque of Rs. 11,000/- to the Complainant, which, got bounced with endorsement “Funds insufficient”. Hence, the complainant filed a complaint under Section 138 of the

\textsuperscript{111} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 2, July, 2012 p. 6.
\textsuperscript{112} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 3, September, 2012
Negotiable Instrument Act. The matter was referred to the Mediation Centre at Jamnagar. Due to sincere effort of Mediator and Cooperation of the parties and their advocates, an amicable settlement was arrived at between both the parties.113

Case settled in Navsari Mediation Centre. Navsari District:-

Plaintiff had filed Regular Civil Suit in the year – 2009 against the defendants for possession of Four Rooms on the ground of Sub Tenancy in the Court of Principal Senior Civil Judge, Navsari. The Principal Senior Civil Judge had referred this matter to the Mediation Centre for amicable settlement. The Mediation Centre issued notices to the parties. Both the parties remained present before the Mediator. Because of sincere effort on the part of Mediation and co-operation of the parties, the matter was amicably settled and they agreed that Defendant will hand over the vacant possession of the Four Rooms to the plaintiff on or before 31-07-2015 and Defendant agreed to pay rent upto 31-07-2015, to the plaintiff. Further they agreed that defendant will not hand over the possession of the four rooms to any third party during this period.114

Case Settled in Mehsana Mediation Centre, Mehsana District:

Plaintiff had filed Regular Civil Suit No. 87/2012, against the defendant in the Court of the Principal Senior Civil Judge, Mehsana, for declaration and permanent injunction on the ground that Defendant had

113 Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 3, September, 2012
114 Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 4, December, 2012
tried to encroach upon plaintiff’s land situated at Nagalpur area and tried to construct illegal shop on the said land of Plaintiff. The Principal Senior Civil Judge had referred this matter to the Mediation Centre, Mehsana, for exploring the possibility of amicable settlement. Both the parties have remained present before the Mediator and due to sincere efforts on the part of the Mediator, the parties settled their disputes. Agreement was arrived at to the effect that the Plaintiff will withdraw the Regular Civil Suit No. 87 of 2012 as the defendant has removed the cabin and also paid an amount of Rs. 6,00,000/- for settlement to the plaintiff. It was agreed that the Plaintiff shall not claim any right or interest in margin land and shall have no right or interest in the said land. It was also agreed that the Plaintiff will co-operate in transferring the Suit land in the name of Defendant in the records of Municipality as well as in Gujarat Electricity Board. They also agreed that, they will withdraw the Criminal complaints which were lodged against each other at Mehsana Police Station.\textsuperscript{115}

Case Settled in the Surat Mediation Centre, Surat District:

The complainant had filed the F.I.R against the 3 accused before the “B” Division Police Station, Amroli at Surat, u/s 406, 420, 465, 467, 468, 471, 474, 120(B), 504, 506(2), 114 of Indian Penal Code alleging that accused No. 1 had prepared the bogus sale deed in the name of complainant and accused no.1 had executed sale deed in favour of accused no. 2. It was also alleged that accused no. 2 also executed agreement to sell in favour of accused no. 3 and thereafter, executed sale

\textsuperscript{115} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 4, December, 2012
deed in favour of accused no. 3. It was further alleged that accused no. 2 had sold this property on consideration of an amount of Rs. 15 Lacs.

Accused No. 3 had also filed a Suit no. 370/2011 in the 3rd Additional Senior Civil Judge at Surat against the complainant for executing documents for confirmation of sale deed in favour of the accused no. 3 and also complainant had also filed a Suit No. 392/2011 against in the court of 15th Additional Senior Civil Judge at Surat.

At the request of the complainant and all accused, a Criminal Case No. 28421/2011 filed before the 3rd Court of Judicial Magistrate First Class. Court was referred to the Mediation Centre, Surat by the concerned Judicial Magistrate First Class, Surat for exploring the possibility for the amicable settlement. During the mediation proceeding, due to sincere efforts on the part of the Mediator and the zeal and co-operation of the parties, the matters were settled amicably. It was agreed by all the accused to pay Rs. 11,00,000/- to the complainants towards the settlement of above three cases. It was further agreed by the complainant to withdraw the Regular Civil Suit No. 392/2011, which was filed by her and she agreed to execute necessary deed in the Civil Suit No. 370/2011 which was filed by the accused no. 3 against her. At the time of settlement, Rs. 11,000/- was paid by accused to the complainant towards earnest money.\textsuperscript{116}

\textsuperscript{116} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 4, December, 2012
Case settled in Dahod ADR Centre, Dahod District:-

The applicant had filed a M.A.C.T. case against respondent to recover an amount of Rs. 1,25,000/- before the Dahod Tribunal and the Tribunal had awarded an amount of Rs. 1,25,000/- with interest in favour of the applicant. The respondent had not paid this amount to the applicant. Hence the applicant had filed a Execution Petition No. 22/2006 against the respondent to recover the said amount. The Tribunal had referred this Darkhast to the ADR Centre for amicable settlement. After service of notice to parties, parties along with their advocates appeared before the Mediator at ADR Centre, Dahod. due to sincere efforts on the part of the Mediator, the parties had settled their disputes. Respondent had paid an amount of Rs. 50,000/- in cash to the applicant and also given three cheques of Rs. 25,000/- of difference dates towards full and final settlement of the Darkhast.117

Case Settled in Rajkot Mediation Centre, Rajkot District:-

Plaintiff had filed Civil Suit No. 828/2009 in the Court of Small Cause Court, Rajkot against defendant for recover an amount of Rs. 1,04,114/-. Plaintiff had given a cheque of Rs. 1,04,114/- to the defendant payable at State Bank of Saurashtra, Bhaktinagar Branch dated 22/10/2007 for purchase of a house. The defendant orally agreed to repay the said amount with interest at rate of 10% per annum. The defendant

117 Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 5, March, 2013 p. 7
had repaid an amount of Rs. 15,000/- to the plaintiff by cheque payable at Indian Overseas Bank, Rajkot on dated 09/08/2008 in favour of plaintiff. The defendant also given another cheque payable at Indian Overseas Bank, Rajkot for an amount of Rs. 9,000/- dated 20/10/2008 but the said cheque was dishonoured.

For amicable settlement, Principal Judge, Small Cause Court, Rajkot had referred this suit to the Mediation Centre, Rajkot. Both parties remained present in the Mediation Centre with their Advocates and due to sincere effort on the part of Mediation and co-operation of the parties had settled their disputes and plaintiff had accepted an amount of Rs. 83,000/- as full and final settlement of the Suit from the defendant. The plaintiff also agrees to withdraw the Civil Suit No. 828/2009, which was pending before the Court of Principal Judge, Small Cause Court, Rajkot.118

(4.9.2) **Pre – Litigative Cases Settled:**

Pre-litigative Case Setttled in Bhuj Mediation Centre:-

A pre-Litigative matrimonial dispute was referred by a lady resident of village Mandvi, Kuchchh in the Mediation Centre, Kachchh @ Bhuj. The matter was referred to the mediator. The husband, his parents and brother, and the wife with her maternal uncle and aunty remained present during the meeting. The marriage span was of 8 years and there were two children born from the wedlock. Prior to the filing of this Pre-litigative application, wife was staying at her maternal home and

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118 Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 5, March, 2013 p. 7
had filed a police complaint. During the negotiation the dispute was resolved resulting in reunion of family. It was also settled that wife would withdraw the police complaint. Reference to mediation even at pre litigation stage saved family life of parties and saved them from expenditure of litigation.119

Pre-Litigation Case Settled in Godhra Mediation Centre, Panchmahal District :-

A pre-litigation accident case was referred to by the District Legal Service Authority, Godhra on 29-05-2012 to the Mediation Centre Godhra for amicable settlement

An accident occurred between the applicant’s son, driving auto Rickshaw No. GJ-23U-5974 and opponent’s son, driving his Motor Cycle No. GJ-17-Q-9196. The opponent’s son was seriously injured and a complaint was filed by the opponent (original complainant) against in the Godhra Town Police Station.

On being referred to the Mediation Centre the applicant approached the Mediation Centre of the Godhra and both parties were called on 02-06-2012. Mediation took place between the parties. Due to sincere effort on the part of Mediation and co-operation of the parties and their Advocates, the dispute was resolved and the applicant agreed to pay Rs. 55,000/- by way of cheque as compensation for injuries sustained to the applicant.

Thus, reference to mediation on pre-litigation stage saved the valuable time of both the parties from the long legal battle as well of the Court and also saved the cost that was likely to be incurred towards fighting legal battle.\textsuperscript{120}

\textbf{[4.10] Some instances of settlement of disputes, post-litigation as well as pre-litigation, through the mediation in the India}

\textbf{CASE NO. 1 :- FAMILY DISPUTE}\textsuperscript{121}

\textbf{Background:}

This complicated family dispute between three brothers and three sisters was basically to distribute properties/assets amongst the brothers and sisters by virtue of an Arbitration Award, the Will of the deceased father and the distribution made by the mother of the parties. The Award was made Rule of Court, but a Review Petition was filed against it, which was pending. There were two probate petitions with regard to the Will of the father and contempt petitions filed by the parties against each other which were pending in the Courts.

In the Review Petition the Judge tries to mediate between the parties, which failed. The parties themselves tried to arrive at a settlement which also failed. The matter was very intricate and the related issues were interwoven. The properties involves were numerous, some owned by the company, some owned individually and some rented. Therefore for dividing the properties and assets, transfer of shares and other modalities

\textsuperscript{120} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 3, September, 2012

\textsuperscript{121} SAMADHAN – Reflection 2006 -2010, page no. 66
had to be arrived at between the brothers who were the shareholder. Thus issue of paying outstanding taxes, filing of income tax returns from properties jointly owned, etc. were also to be sorted. The modalities to satisfy the claims of the sisters, were also to be decided.

**Mediator’s Role:**

Though the litigants were siblings, they were very hostile and were not on talking terms with each other. It was the general impression of the brothers and sisters that the eldest brother had usurped majority of the assets and deprived the others of their rightful shares. The eldest brother on the other hand was very pained and hurt by the attitude of the other siblings because according to him he had devoted all his life to building all the business and assets along with his father and had always looked after the interests of the younger brothers and sisters.

All the parties had adopted certain rigid positions and were not willing to soften their stands. The mediators had to address the parties individually and tough their emotional chords. In the process it was revealed that there were certain misunderstandings between the parties due to which they had formed certain impressions about each other. The mediators encouraged the parties to interact with each other, which in itself was a herculean task. Eventually, with a lot of cajoling from the mediators the parties spoke to each other which helped dispel their misunderstandings. The younger brothers appealed to the elder brother to be magnanimous and the elder brother relented. The parties mellowed
down and decided to find an amicable solution so that good relations could be restored between them and a protracted litigation avoided.

On the day all the parties finally arrived at a consensus, the mediation session continued late into the night. Even after the draft Settlement was drawn up as per desire of the parties some issues cropped up and the Settlement was in the verge of being abandoned. The Mediators had to show exemplary patience and appease and pacify the parties. The Counsel for the parties played a very positive role and were instrumental in recasting and finalizing the modalities of the Settlement. At 11:30 pm finally all the parties agreed to the terms of the Settlement.

**Settlement:**

The eldest brother agreed to certain amounts to the other brothers and sisters. One property was agreed to be given to one sister. It was agreed that the Review Petition and one Probate Petition and the Objections to the other Probate Petition would be withdrawn. The Contempt Petitions would also be withdrawn. The cheques for payment to the parties were deposited with the Mediators, to be handed over to the respective parties on the orders of the Courts. A separate Memorandum of Understanding was entered into by the parties including the modalities for sorting out the issues inter-se relating to the payment of taxes, filing income-tax returns etc. These modalities were to be carried out as per the M.O.U. between the parties. The process of mediation not only ended the litigation, hatred and acrimony between the siblings, it united the family and restored bond between the brothers and sisters.
CASE NO. 2 :- INDUSTRIAL DISPUTE

Background:

An industrial dispute was referred to mediation wherein the mediators facilitated reinstatement of 47 workmen back to their employment in a phased manner through an amicable settlement. 87 workmen had been removed from service in a charitable hospital. The Industrial Tribunal decided in favour of the workmen and by its award directed the management to reinstate all 75 workers along with payment of back wages, medical benefits and continuity of service. The management of the charitable hospital challenged the award passed in the High Court. The matter was referred to mediation.

Mediator’s Role:

Fifteen sessions were held during the process of mediation from September 2007 to September 2008. It is important to mention why mediation took a year to complete. The mediators had to seek time on several occasions in the early months because though the workmen and their representatives appeared at every session fixed by the mediators, no authorized representatives of the management were present. The mediators had to repeatedly impress upon the counsel for the management that for a comprehensive mediation intervention, it was vital that the representative of the management authorized to participate in the mediation process and negotiate with the workmen, be present.
Following notices from the mediation centre, the representatives of the management started appearing. But it was clear that no settlement was possible with continuous resistance from the management which created a continuing impasse for the mediators. The mediators realized the need for the crucial participation of the chairman who was known for his humane approach towards his employees. The participation of the chairman was also being resisted by his representatives and lawyers. Finally the mediators succeeded in contacting the 85-years old chairman and holding a comprehensive mediation session exclusively with him alone. At a crucial turn in the proceedings, the chairman called the workmen’s representatives touched his feet and showing great enthusiasm, sincerity and dedication towards their employment, promised to give their best to him.

Settlement:

The result was an amicable settlement between the parties wherein 47 workmen were reinstated in a phased manner with back wages and continuity of service. 23 workmen who were parties before Industrial Tribunal had not contacted their representatives to contact their case and 5 others, after joining had left the mediation.

CASE NO. 3 DIVORCE BY MUTUAL CONSENT

Background:

In a matrimonial matter, the mediators held twenty five sessions (each session ranging from 1½ to 3 hours), spread over a period of six

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123 SAMADHAN – Reflection 2006 -2010, page no. 71
months and brought about settlement wherein the parties amicably resolved to jointly move for dissolution of their marriage by mutual consent to resolve their differences. Both boy and girl belong to well to do business families. Serious allegations were leveled against each other which included dowry demand, allegations under Section 327 of the Indian Penal Code and proceedings lodged under Section 468A read with section 406, section 377 read with section 34 of the IPC against the boy and his family. There were proceedings to quash the FIR under section 482 Cr. P. C. and as well as under the Domestic Violence Act.

Earlier a memorandum of understanding had been signed in court, setting out the terms of settlement and the first motion for a mutual consent divorce had been files. At that stage, for some reason, the girl backed out of the settlement. Criminal cases were filed by the boy and his family against the girl’s father and brothers for criminal trespass etc. At this stage, the lawyer representing the boy and his family also got involved and cross FIRs were registered by the girl and lawyer against each other in Delhi. A bail application was filed in the High Court wherein the matter was referred to mediation.

Mediator’s Role:

The mediators had a difficult role in the matter where there was intense acrimony between the parties and they could keep the proceedings going only by using caucus or private sessions. There were many stages when the mediation proceedings came to a breaking point. Progress in one session was undone in the next one because of extraneous reasons or
the role of third parties. The lawyer who was personally affected as a party also did not want the matter to be settled qua him. This became the biggest stumbling block. However, the other lawyer was extremely positive. The mediators had to constantly show the parties the consequences of not arriving at negotiated settlement.

**Settlement:**

The matter was finally settled. Parties withdraw all civil and criminal proceedings against each other. The husband agreed to pay to wife an amount of Rs. 40 Lacks as full and final settlement of her claims before the court. Both parties agreed to dissolve their marriage by mutual consent and the families realize the futility of litigation.

**CASE NO. 4 :- MONEY DISPUTE**

**Background:**

This was a challenging mediation for the mediator. The dispute between the parties was regarding payments made by the Plaintiff to the Defendant and issuance of cheques for the amount by the plaintiff which had been dishonored. The plaintiff had filed an appeal challenging the genuineness of the cheques and the matter was hotly disputed amongst the parties. The relations between the parties were strained to such an extent that they were not ready to sit in the same room.

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124 SAMADHAN – Reflection 2006 -2010, page no. 72
Mediator’s Role:

Numerous mediation sessions were held with the parties and the challenge for the mediator was to collectively and separately help build up a level of confidence and trust in the process of mediation which would enable communication to be established between the parties. The mediator explained to the parties that both were losing out financially and in terms of loss of piece of mine. The animosity between them further aggravated the problem. The respective strengths and weaknesses from the legal aspect were also explored by the mediator. Counsels for the parties were taken into confidence by the mediator and their valuable inputs were taken.

Settlement:

The greatest challenge in this case was not the amount of money involved nut re-establishing communication between the parties. After various options were examined by the parties and their counsel, a settlement was arrived at, whereby the plaintiff/appellant agreed to pay a sum of Rs. 7.30 lakhs to the defendant/respondent and all pending litigations were agreed to be withdrawn by the defendant/respondent upon receipt of the payment. The entire process was made time bound and provision was made in the settlement agreement for the eventuality of default also. It was agreed that in case of any default, parties would be at liberty to revive the litigation and proceed in accordance with law. Parties honoured the terms of the settlement and all their disputes were finally resolved.
CASE NO. 5:- TRADEMARK DISPUTE

Background:

The dispute in this mediation pertained to a trademark and copyright matter. Three to four mediation sessions were held (each session ranging from one hour to 2½ hours) and brought about a settlement wherein the parties amicably resolves all the disputes and differences pertaining to the impugned trademark including infringement of copyright in the artistic work. Interestingly both the parties were based in the same physical territory and were selling the similar products and both were doing well for themselves.

Mediator’s Role:

Since both parties were able to sell their respective products under the trademarks adopted by them and both were doing well, there was resistance by the party who had allegedly infringed the trademark and copyright of the plaintiff and there was initial reluctance in changing the packaging, colour scheme and also some change in the trademark names for the products. Private Sessions were held to show the parties the consequences of not arriving at a negotiated settlement. The lawyers played a positive role in persuading their respective clients to resolve their matters amicably. Lengthy discussions took place on the possible new names which could be used by the defendant without really having to give up completely the earlier names and yet satisfying the plaintiff that

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125 SAMADHAN – Reflection 2006 -2010, page no. 74
there will not be further infringement of their trademark/trade name as well as the copyright in the artistic work.

**Settlement:**

The matter finally settled and the defendants furnished changed samples of the disputed materials to the satisfaction of the plaintiff and the suit was agreed to be withdrawn by the plaintiff. As a result of the fact that the defendant had agreed to change the colour scheme and also the trade name of the various products, monetary compensation was not insisted upon by the Plaintiff.

**CASE NO. 6:- COMMERCIAL DIAPUTE 126**

**Background:**

This was a commercial dispute between the manufacturer of watches and its authorized distributor. The manufacturer of watches had filed a suit against the distributor appointed by the manufacturing company for sale of watches in the city of Kolkata. The distributor had been selling watches for the manufacturing company since the past many years. Certain disputes and differences arose between the Company and the distributor as a result of which the distributorship agreement had been terminated and the manufacturing company had sued the distributor for recovery of alleged outstanding amount of over Rs. 22 lakhs and for return of stocks held by the distributor worth Rs. 20 lakhs. The distributor had in response to the suit filed a counter claim for recovery of about Rs.

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126 SAMADHAN – Reflection 2006-2010, page no. 80
21 lakhs. There were differences in the statement of accounts of both the parties and the Hon’ble thought it appropriate to refer the matter to the Mediation Centre to facilitate the parties to reconcile their respective accounts.

**Mediator’s Role:**

The distributor was a well educated and professionally qualified man. He contended that the company had played a fraud upon him by terminating the distribution agreement and that according to a document relied upon by him, the company had agreed to pay about Rs. 20 lakhs to him as on a particular date. The manufacturing company was being represented by two or three young management personnel and carried with them a mandate to settle the disputes. In order to facilitate the parties to arrive at a settlement, the parties were requested to produce their respective statement of accounts to reconcile their differences. However, although the company produced its statement of accounts, the distributor produced only part of the statement of account i.e. from the date of execution of the document relied upon by him, which according to him was indicative of the admission of the liability of the company till that date. About nine sessions, lasting between one to two hours each were held. During the process of the mediation proceedings in both joint and private sessions, it transpired that there were personal differences between the distributors and one of the officers of the company which had manifested in the form of termination of the distribution agreement and consequent difference in the accounting figures. It thus became evident that each of them was justifying their claim in order to settle
scores with each other. At this stage the mediator thought it appropriate to request the manufacturing company to seek participation of the officer with whom differences had arisen with the distributor at the mediation proceedings. Despite assurances, the officer concerned never turned up for any of the mediation sessions. Various options were discussed with the parties. However, in the second last session, there was an impasse in the proceedings and the mediation was on the verge of closure as unsettled. As that stage the mediator felt that the parties should be recalled once more. The suggestion was accepted by the parties.

**Settlement:**

On the final day, once again the interests of the parties were discussed and the parties came to an amicable settlement on realizing that litigation to settle personal scores is against their ultimate interests. The distributor agreed to pay about Rs. 6 lakhs, while the stock of watches in his possession was retained by him as full and final settlement of their disputes and differences. Consequently the suit was agreed to be withdrawn in terms of the settlement duly signed by the parties.

**Case no. 7:- FROM ACRIMONY TO HARMONY**

The warm smile on 80-year-old Urmila’s face scarcely hid the tension writ large in her eyes when her young grand-daughter Seema wheeled her into the Mediation Room. The Mediator helped the old lady get off the wheelchair and sit in the visitor’s chair.

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127 SAMADHAN – Reflection – 2, 2010-2012, page no. 94
“Ma’am, could I offer you a cup coffee or tea,” asked mediator.

“No beta, just get me out of the Courts, I am looking for peace and can’t take it anymore,” Urmila said.

The mediator smiled sympathetically, and tried to comfort her without touching upon any of her emotional conflicts. He had just begun to introduce himself to Urmila when a tall, middle-aged lady walked into room with her son and daughter. On her entry into the room, Urmila’s face dropped and the smile disappeared. The mediator welcomed then and requested them to sit comfortably. The body language on either side was a clear indication that there was immense acrimony and tension between them. The mediator once again introduced himself and got the two sides to introduce themselves. The lady who had walked in was Pratibha, Urmila’s daughter-in-law. Before launching into questions about why they were in court and what the disputes was about, the mediator quietly introduced the mediation process to the parties. He got the assurance of both sides that they had voluntarily opted for mediation and that they were open to a negotiated settlement of their dispute and differences. Having spent over half an hour in building communication with the two sides, the mediator was ready to start discussing the dispute.

Moderated by the mediator, each party got a chance and time to speck about their woes without being interrupted by the other. Urmila was emotionally shattered at the treatment Pratibha had meted out to her. Both lived in the same house, which belongs to Urmila, but Pratibha claimed it tone her matrimonial home. Pratibha’s husband had passed
away four years ago. Communication between the mother-in-law and daughter-in-law had broken down.

Urmila alleged she did not get proper food to eat and was treated shabbily. She wanted Pratibha to move out of the house and let her live in peace. Pratibha contended that even though the house was in her mother-in-law’s name, it had been financed by her late husband and that she had every right to live in it. She denied she treated her mother-in-law badly but insisted that the house be transferred in her name as she had no savings for herself and wanted to secure her own demise. Bitterness and acrimony had increased beyond imagination since the last three and a half years that the two parties had been litigating in the courts.

The mediator listened to the parties without commenting or interrupting as they spoke their hearts out, though periodically reminding them of their agreement not to react to the allegations of the other. Having heard them, the mediator spoke to them separately during which the real issues of conflict emerged. He helped them separate their interest from the positions taken by them in the court. He found out that the Urmila loved Pratibha’s children and was ready to secure their future. Options were generated by both sides which the mediator shared with them in these separate sessions. The whole process took several days and eventually the parties agreed to an out-of-the-box settlement. Pratibha agreed to live in a rented accommodation, while Urmila agreed to partition the house and rent one portion to a third party. The rent so received would be paid to Pratibha for the welfare of the two children and for paying for her rented accommodation. Urmila agreed to transfer her
house to PRatibha’s children. The agreement was signed and culminated in an order of the court binding the parties to the settlement.

The parties were happier and content was evident as they bid adieu to the mediator and walked out of the Mediation Centre with smiles on their faces. What otherwise would have been a long protracted legal battle with uncertain results and huge expenses resulted in the return of peace and harmony within the family.

CASE NO. 8:- ABANDONING AN IMPASSE

A Workman was dismissed without a show-cause notice on grounds of abandonment of service. Claim before the Labour Court resulted in an ex-parte award granted in favour of the workman inter-alia with back wages amounting to Rs. 5 lakh and reinstatement. A civil writ petition was filed and the award was stayed. During the pendency of the matter, the parties consented to refer their dispute to the Mediation Centre.

Both the parties struck to their respective stands during the joint session which was attended by the workman along with a representative of the union. While there was much evident acrimony, fact finding during joint sessions and caucus revealed that the workman was not hostile. He was sensitive and admitted to his mistake of abandoning his work for two days, country to the stand taken by the union. He, however, blamed the management for creating a hostile environment and said he was forcibly prevented to join his duty when he wanted to.

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128 SAMADHAN – Reflection – 2, 2010 -2012, page no. 102
In the caucus, the management made it clear that they would not reinstate him in view of organizational discipline. But they also indicate giving some kind of financial compensation. The management further indicated that they were close to nailing evidence that the workman was employed somewhere else since his alleged termination. The management wanted these facts to be conveyed to the workman. On being so informed, the man admitted he was working elsewhere but requested that this he not disclosed to the management. He also consented to setting the matter with some compensation. He agreed to do so since he had taken some loan which he had to repay. He also required funds for his children’s educations with the assistance of the mediator through private session.

There was an impasse during the process of assisted negotiation where the workman was unwilling to settle for anything below Rs. 3 lakh and the management was against giving anything above Rs. 2 lakh. Both turned out to be tough negotiators. At that point, the mediator applied the principles of BATNA (Best Alternative to a Negotiated Agreement) and WATNA (Worst Alternative to a Negotiated Agreement).

The parties agreed to a middle path when they were made to see the futility of a legal battle fraught with uncertain results, delays in the final judgment, mental trauma and the disagreement on the amount vis-à-vis further costs of litigation.

They signed a settlement agreement wherein the workman agree to accept Rs. 2.5 lakh as full and final settlement and the management
agrees to pay the same in two monthly installments. The workmen also agreed not to press for reinstatement.

**CASE NO. 9: REVIVING A BOND RESOLVING A BIND**

Mr. RL was the owner of three houses in Kamla Nagar, Delhi, two shops in Khari Baoli and one double-storeyed house built on a plot of 360 sq. yards. Mr. RL passes away leaving behind four sons and two daughters without executing any will. Post his death, dispute arose between the siblings with respect to the father’s estate. The parties agreed to refer their disputes to arbitration of a retired district judge. The arbitrator made and published his award. The youngest brother was unhappy with the award and challenged it. During the course of arguments, the court suggested to the parties that they attempt resolution through the process of mediation. The disputants agreed and the matter was referred to the Delhi High Court Mediation and Conciliation Centre.

The first session was attended by all the members of the family along with their respective advocates. Accusations and heated exchanges flew, particularly between the eldest and the youngest brother. Each blamed the other for the bitterness in their relationship. They were not even willing to talk to each other. The mediator calmed them down and made his opening statement, preferring separate meetings over a joint session in the first instance so he could hear all sides. He said it would not be possible to do so with all sides sitting together because of the deterioration in their relationship.

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129 SAMADHAN – Reflection – 2, 2010-2012, page no. 108
As mediation progressed and several sessions were held, the disputants realized that early resolution to the dispute was in everyone’s interest. The mediator, with the help of the sisters, succeeded in getting the brothers to the negotiation table. They started talking to each other initially through the mediator. The atmosphere improved and several options were generated by the parties to amicably divide the estate. The mediator found during sessions that all the brothers had a lot of respect and love for their sisters. Aided by the mediator, the sisters took the lead in exploring several options.

The turning point came with the sisters proposing that they would not claim any right in the properties left behind by the father if the brothers settled their dispute amicably. A settlement finally arrived at with respect to the shops in Khari Bsoli as well as in Kamla nagar. They mutually agreed that the double-storeyed house in Gujranwala town would be remodeled so that each one of them could use his portion i.e. independently, without any interference from the other.

The parties executed a deed of settlement in terms of which binding orders were passed by the court and the award was set aside.

The mediator found that once the bond amongst the family members was revived, it became possible for the parties to move from their positions and negotiate a settlement which met the interests of all. The sisters, who were happily married and well placed, did not lose anything. But the family ties became stronger and relationships were restored.
CASE NO. 10: DECISIONS, NOT DAMAGES

A well company A & Co. filed a suit for permanent injunction against C & Co. on the grounds that the latter was using the trademark ‘XXX’ for exporting their garments to various countries including America.

The allegation of A & Co. was that ‘XXX’ was their trademark and a very popular brand globally and C & Co. was passing it off as its own and earning huge incomes from the sales.

C & Co. refuted the allegations on the ground that the word ‘XXX’ was conjoint with the product ‘oil’, not with ‘cloth’. C & Co. was using this name only for the purpose of exporting garments. The court granted an interim injunction and the suit was put on trial on the question of damages.

While the suit was in progress, the matter was referred for mediation. The parties were apprised of the benefits and advantages of the mediation process. The parties struck to their positions initially but softened somewhat during the process. In the process of generating options, C & Co. proposed that since the word ‘XXX’ was a known brand globally, A & Co. should not object to its use by them. The latter, A & Co., were adamant to being with. Asked by a mediator to think about the proposal and come forward with any other option suitable to both the parties, they agreed they would not object to use of the word ‘XXX’ by C

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130 SAMADHAN – Reflection – 2, 2010-2012, page no. 110
& Co. with respect only to the garments that were exported. They would not use it for cloths that were sold in Indian markets.

The company, C & Co., responded positively and agreed upon a settlement which was drawn between the parties with an undertaking that they will not use ‘XXX’ for any of their products sold in Indian markets directly or indirectly.

It is interesting to note that A & Co. gave up its claims for damages against C & Co. It was apparent that both the parties were looking at a solution where they could feel duly protected with the freedom to do their own business without causing any loss or harm to each other.

[4.11] MODALITIES IN OPERATION IN THE STATE OF GUJARAT FOR REFERRING PRE-LITIGATION MATTER TO THE MEDIATION CENTRE: -

Considering the importance of the Mediation process for settlement of dispute amicably, the Mediation Monitoring Committee of the Gujarat High Court has considered the issue for framing Modalities to provide for referring of Pre-litigation matter to the mediation centres functioning in the State.131

The Mediation Monitoring Committee in its meeting held on 05-08-2011 had considered the facts that there is no specific rules, regulations or provisions in respect to the Pre Litigation Matters which may referred to the Mediation Centres. After consideration of Section 89

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of the Code of Civil Procedure; National Legal Services Authority (Lok Adalats) Regulations, 2009; Legal Services Authorities Act, 1987 as well as Apex Court Judgment in the case of Afcons Infrastructure Ltd. & Anr. V/s. Cherian Varkey Construction Co. (P) Ltd. & Ors\textsuperscript{132}, the Committee after due deliberation and discussion has framed the following modalities for referring Pre-Litigation Matters and to make it legally enforceable.

**MODALITIES**

1]. Any Pre-Litigation matters may be referred to the Mediation Centre functioning at the relevant place by any person/party concerned with such matters.

2]. The following procedure shall be followed in regard to the Pre-Litigation matter to be referred to the concerned Mediation Centre:

1. Any party/person who has any dispute with some person, Institution etc., may submit an application in Form – I along with one copy for each of the respondent.

2. On submission of such supplication, concerned Mediation Centre may register it as a Pre-litigation matter and give it Registration Number by entering it in the Register as prescribed in Form - II

\textsuperscript{132} JT 2010 (7) SC 616
3. After registration, necessary notice as prescribed in Form – III to be issued to both parties indicating the date and venues of the Mediation proceedings.

4. In case of Non-appearance of the party in response to Notice in Form – III, second Notice in Form – IV to be issued to such absentee party.

5. Such matter may be entrusted by the Secretary of the concerned Mediation Centre to the appropriate qualifies Mediators.

6. Mediators shall follow the settled principles of mediations in conducting the Mediation.

7. On settlement of dispute between the parties, same shall be recorded in writing with the signature of the parties concerned and the Mediator.

8. Such settlement shall be referred to the Lok Adalat or the permanent Lok Adalat of the concerned Court.

9. Such Lok ADalat shall record the same as an agreement between the parties and shall pass appropriate award contemplated under Section 21 of the Legal Services Authorities Act, 1987. Original award shall be kept with the concerned Legal Services Authority/ Committee and copy
thereof, free of cost, shall be supplied to the parties concerned, in the first instance.

10. In case of non-settlement of dispute between the parties, the application may be filed and the concerned person may be advised to take necessary legal recourse as may be available to him.

11. Brief notes of the proceedings be prepared and kept it with main application by the mediator.

12. No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall be summoned by any party to a suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or seen/ perused by him during the mediation proceedings.

[4.12] CONSTITUTION OF DISTRICT MEDIATION MONITORING COMMITTEE AND ITS FUNCTION IN THE STATE OF GUJARAT

So far as the Gujarat State is concerned the Mediation Monitoring Committee, High Court of Gujarat has constituted the Mediation Monitoring Committee for the purpose of mediation activities in the
The Mediation Monitoring Committee of the High Court of Gujarat has also prescribed functions for the District Mediation Monitoring Committee. The constitution of the District Mediation Monitoring Committee and its functions are as under:

1. The Chairman of the District Legal Services Authority will be the Chairman of the District Mediation Monitoring Committee of the District.

2. The Junior most Additional District Judge at Head Quarter will be the Member of the District Mediation Monitoring Committee.

3. The Chairman of the Taluka Legal Services Committee at Head Quarter will be the Member of the District Mediation Monitoring Committee.

4. The Secretary, District Legal Services Authority will be the Coordinator of the District Mediation Monitoring Committee.

The District Mediation Monitoring Committee has to perform the following functions:

1. The Committee has to ensure that Mediation Awareness Programmes are conducted frequently at District Level as well as Taluka places.

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133 Mediation Newsletter Volume 1 Issue 1 April, 2012 page 4 of the Gujarat State Legal Services Authority, Ahmedabad.
2. The conduction of the Mediation Awareness Programme should have a special emphasize on familiarization of the concept of Mediation and its propagation among the common people. For this purpose, the District Mediation Monitoring Committee may tap the various sources like print media and electronic media and issuance of appropriate booklet in local language highlighting the benefits of Mediation and simplicity of its procedural aspect.

3. To supervise the functioning of ADR Centre at the District Level and guide the centre to ensure attainment of the purpose of Mediation as a definite alternative dispute resolution system.

4. To ensure that Mediation Awareness Programme is attended by the District Judges and even Subordinate Court Judges along with lawyers and other guests as may be invited.

5. To carry out any of the directions, guidelines issued by the State Mediation Monitoring Committee.

6. The District Mediation Monitoring Committee shall send the quarterly report to the Mediation Monitoring Committee, High Court Mediation Centre, giving statistics in relation to progress of Mediation cases and allied matters in that Committee and also clearly depicting the problems or difficulties that are being faced by that Committee in proper implementation of mediation programme.
[4.13] STATISTICAL INFORMATION OF SETTLEMENT OF CASES THROUGH MEDIATION AS WELL AS LOK ADALAT

[A] STATEMENT SHOWING THE DETAILS OF THE MATTERS REFERRED TO ALL ADR/ MEDIATION CENTRES IN THE GUJARAT STATE ENDING 31/03/2012 SINCE ITS ESTABLISHMENT\(^{134}\).

<table>
<thead>
<tr>
<th>Matters Referred</th>
<th>Matters Settled</th>
<th>Matters Non-reference</th>
<th>Matters not Settled</th>
<th>Matters Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>3310</strong></td>
<td><strong>729</strong></td>
<td><strong>72</strong></td>
<td><strong>2154</strong></td>
<td><strong>355</strong></td>
</tr>
</tbody>
</table>

\(^{134}\) Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 1, April, 2012, page. 8
On analysis of the aforesaid statistical information, if the figure of non-reference of 72 cases and pending cases of 355 in all 437 are deducted from the total number of 3310 cases referred for mediation, the real figure would come to 2883. Out of it, 729 cases have been settled. It shows that the success ratio would be 25.29% out of the cases referred for mediation.
[B] STATEMENT SHOWING THE DETAILS OF THE MATTERS REFERRED TO ALL ADR/ MEDIATION CENTRES IN THE GUJARAT STATE ENDING 30/06/2012 SINCE ITS ESTABLISHMENT\textsuperscript{135}.

<table>
<thead>
<tr>
<th>Matters Referred</th>
<th>Matters Settled</th>
<th>Matters Non-reference</th>
<th>Matters not Settled</th>
<th>Matters Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>3671</td>
<td>803</td>
<td>85</td>
<td>2339</td>
<td>444</td>
</tr>
</tbody>
</table>

On analysis of the aforesaid statistical information, if the figure of non-reference of 85 cases and pending cases of 444 in all 529 are

\textsuperscript{135} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 2, July, 2012, page. 8
deducted from the total number of 3671 cases referred for mediation, the real figure would come to 3142. Out of it, 803 cases have been settled. It shows that the success ratio would be 25.56% out of the cases referred for mediation.
[C] STATEMENT SHOWING THE DETAILS OF THE MATTERS REFERRED TO ALL ADR/ MEDIATION CENTRES IN THE GUJARAT STATE ENDING 30/09/2012 SINCE ITS ESTABLISHMENT\textsuperscript{136}.

<table>
<thead>
<tr>
<th>Matters Referred</th>
<th>Matters Settled</th>
<th>Matters Non-reference</th>
<th>Matters not Settled</th>
<th>Matters Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>4428</td>
<td>940</td>
<td>137</td>
<td>2619</td>
<td>732</td>
</tr>
</tbody>
</table>

\textsuperscript{136} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 3, September, 2012
On analysis of the aforesaid statistical information, if the figure of non-reference of 137 cases and pending cases of 732 in all 869 are deducted from the total number of 4428 cases referred for mediation, the real figure would come to 3359. Out of it, 940 cases have been settled. It shows that the success ratio would be 27.98% out of the cases referred for mediation.
[D] STATEMENT SHOWING THE DETAILS OF THE MATTERS REFERRED TO ALL ADR/ MEDIATION CENTRES IN THE GUJARAT STATE ENDING 31/12/2012 SINCE ITS ESTABLISHMENT\textsuperscript{137}.

<table>
<thead>
<tr>
<th>Matters Referred</th>
<th>Matters Settled</th>
<th>Matters Non-reference</th>
<th>Matters not Settled</th>
<th>Matters Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>4834</td>
<td>1011</td>
<td>164</td>
<td>3023</td>
<td>636</td>
</tr>
</tbody>
</table>

On analysis of the aforesaid statistical information, if the figure of non-reference of 164 cases and pending cases of 636 in all 800 are deducted from the total number of 4834 cases referred for mediation, the

\textsuperscript{137} Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 4, December, 2012, page 8
real figure would come to 4034. Out of it, 1011 cases have been settled. It shows that the success ratio would be 25.06% out of the cases referred for mediation.
[E] STATEMENT SHOWING THE DETAILS OF THE MATTERS REFERRED TO ALL ADR/ MEDIATION CENTRES IN THE GUJARAT STATE ENDING 31/03/2013 SINCE ITS ESTABLISHMENT\(^{138}\).

<table>
<thead>
<tr>
<th>Matters Referred</th>
<th>Matters Settled</th>
<th>Matters Non-reference</th>
<th>Matters not Settled</th>
<th>Matters Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>5408</td>
<td>1267</td>
<td>195</td>
<td>3317</td>
<td>629</td>
</tr>
</tbody>
</table>

On analysis of the aforesaid statistical information, if the figure of non-reference of 195 cases and pending cases of 629 in all 824 are deducted from the total number of 5408 cases referred for mediation, the

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\(^{138}\) Mediation Newsletter, Gujarat State Legal Services Authority, High Court of Gujarat, Volume 1, Issue 5, March, 2013
real figure would come to 4384. Out of it, 1267 cases have been settled. It shows that the success ratio would be 28.90% out of the cases referred for mediation.
STATEMENT SHOWING THE CASES DISPOSED OF IN LOK ADALAT IN THE STATE OF GUJARAT DURING THE PERIOD FROM 2007 TO 2010.

<table>
<thead>
<tr>
<th>Particular</th>
<th>Years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2007</td>
</tr>
<tr>
<td>Lok Adalats G.L.A* + P.L.A.**</td>
<td>12474</td>
</tr>
<tr>
<td>Civil CS***</td>
<td>51766</td>
</tr>
<tr>
<td>Criminal CS</td>
<td>566594</td>
</tr>
<tr>
<td>Pre – litigation CS</td>
<td>63764</td>
</tr>
<tr>
<td>Total C. S.</td>
<td>682124</td>
</tr>
<tr>
<td>Award M.A.C.T.</td>
<td>368624275</td>
</tr>
<tr>
<td>Compensate other than MACT****</td>
<td>2045727092</td>
</tr>
<tr>
<td>Award (MACP+ Other)</td>
<td>2414351367</td>
</tr>
</tbody>
</table>

Note:  
* G.L.A. – General Lok Adalat  
** P.L.A. – Permanent Lok Adalat  
*** CS – Cases Settled  
**** MACT – Motor Accident Claim Tribunal
On analysis of the aforesaid statistical information, it reveals that during the Year 2007, 6,82,124 cases have been settled in 12447 Lok Adalats. Out of it, the major portion is of Criminal cases which is 5,66,594 i.e. 83.06%, whereas 51,766 civil cases is settled which is 7.59% and 63,764 pre-litigative cases have been settled which is 9.35% of the total number of settled cases. If the total number of settled cases i.e. 682124 is divided by total number of Lok Adalats i.e.12474 then the percentage of settlement of cases per Lok Adalat come to 54.68%.

On analysis of the aforesaid statistical information, it reveals that during the Year 2008, 5,36,628 cases have been settled in 10660 Lok Adalats. Out of it, the major portion is of Criminal cases which is 4,25,288 i.e. 79.25%, whereas 38,544 civil cases is settled which is 7.18% and 72,796 pre-litigative cases have been settled which is 13.57% of the total number of settled cases. If the total number of settled cases i.e. 536628 is divided by total number of Lok Adalats i.e.10660 then the percentage of settlement of cases per Lok Adalat come to 50.34%.

On analysis of the aforesaid statistical information, it reveals that during the Year 2009, 5,42,406 cases have been settled in 10781 Lok Adalats. Out of it, the major portion is of Criminal cases which is 4,33,670 i.e. 79.95%, whereas 39,354 civil cases is settled which is 7.26% and 69,382 pre-litigative cases have been settled which is 12.79% of the total number of settled cases. If the total number of settled cases i.e. 542406 is divided
by total number of Lok Adalats i.e.10781 then the percentage of settlement of cases per Lok Adalat come to 50.31%.

On analysis of the aforesaid statistical information, it reveals that during the Year 2010, 4,35,489 cases have been settled in 9940 Lok Adalats. Out of it, the major portion is of Criminal cases which is 3,14,220 i.e. 72.15%, whereas 37,309 civil cases is settled which is 8.57% and 83,960 pre-litigative cases have been settled which is 19.28% of the total number of settled cases. If the total number of settled cases i.e. 435489 is divided by total number of Lok Adalats i.e.9940 then the percentage of settlement of cases per Lok Adalat come to 43.81%.

If we further analysis the above statistical figure for the period from Year 2007 to 2010, the total number of cases settled during this period would be 21,96,647 in the 43855 Lok Adalats. Out of it, 17,39,772 criminal cases have been settled which is 79.20% of the total cases settled. Whereas 1,66,973 civil cases have been settled and it is 7.60% of the total cases settled. The pre-litigative cases is of the total number of 2,89,902 which is 13.20% of the total cases settled. If the total number of settled cases i.e. 21,96,647 is divided by total number of Lok Adalats i.e.43855 then the percentage of settlement of cases per Lok Adalat come to 50.09%.
[G] STATEMENT SHOWING THE CASES DISPOSED OF IN LOK ADALAT IN THE STATE OF GUJARAT DURING THE PERIOD FROM 2011 TO 2013

<table>
<thead>
<tr>
<th>Particular</th>
<th>Years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2011</td>
</tr>
<tr>
<td>Lok Adalats G.L.A + P.L.A.</td>
<td>10266</td>
</tr>
<tr>
<td>Civil CS</td>
<td>32017</td>
</tr>
<tr>
<td>Criminal CS</td>
<td>266832</td>
</tr>
<tr>
<td>Pre – litigation CS</td>
<td>66229</td>
</tr>
<tr>
<td>Total C. S.</td>
<td>365078</td>
</tr>
<tr>
<td>Award M.A.C.T.</td>
<td>1012637295</td>
</tr>
<tr>
<td>Compensate other than MACT</td>
<td>4509864981</td>
</tr>
<tr>
<td>Award (MACP+ Other)</td>
<td>5522502276</td>
</tr>
</tbody>
</table>

Note:

* G.L.A. – General Lok Adalat
** P.L.A. – Permanent Lok Adalat
*** CS – Cases Settled
**** MACT – Motor Accident Claim Tribunal
On analysis of the aforesaid statistical information, it reveals that during the Year 2011, 3,65,078 cases have been settled in 10266 Lok Adalats. Out of it, the major portion is of Criminal cases which is 2,66,832 i.e. 73.09%, whereas 32,017 civil cases is settled which is 8.77% and 66,229 pre-litigative cases have been settled which is 18.14% of the total number of settled cases. If the total number of settled cases i.e. 3,65,078 is divided by total number of Lok Adalats i.e.10266 then the percentage of settlement of cases per Lok Adalat come to 35.56%.

On analysis of the aforesaid statistical information, it reveals that during the Year 2012, 1,74,197 cases have been settled in 10411 Lok Adalats. Out of it, the major portion is of Criminal cases which is 1,12,550 i.e. 64.61%, whereas 34,442 civil cases is settled which is 19.77% and 27,205 pre-litigative cases have been settled which is 15.62% of the total number of settled cases. If the total number of settled cases i.e. 1,74,197 is divided by total number of Lok Adalats i.e.10411 then the percentage of settlement of cases per Lok Adalat come to 11.26%.

On analysis of the aforesaid statistical information, it reveals that during the Year 2013, 2,23,361 cases have been settled in 10989 Lok Adalats. Out of it, the major portion is of Criminal cases which is 1,14,080 i.e. 51.07%, whereas 35,422 civil cases is settled which is 15.86% and 73,859 pre-litigative cases have been settled which is 33.07% of the total number of settled cases. If the total number of settled cases i.e. 2,23,361 is divided by total number of Lok Adalats i.e.10989 then the percentage of settlement of cases per Lok Adalat come to 20.33%.
If we further analysis the above statistical figure for the period from Year 2011 to 2013, the total number of cases settled during this period would be 7,62,636 in the 31666 Lok Adalats. Out of it, 4,93,462 criminal cases have been settled which is 64.70% of the total cases settled. Whereas 1,01,881 civil cases have been settled and it is 13.36% of the total cases settled. The pre-litigative cases 1,67,293 have been settled which is 21.94% of the total cases settled. If the total number of settled cases i.e. 7,62,636 is divided by total number of Lok Adalats i.e.31666 then the percentage of settlement of cases per Lok Adalat come to 24.08%.
### STATISTICS OF MEDIATION ACTIVITIES IN VARIOUS STATES AS ON MARCH, 2012

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>State</th>
<th>No. of Mediation Centres</th>
<th>Number of Mediators</th>
<th>Number of Training Programmes Conducted</th>
<th>Total No. of cases referred</th>
<th>No. of cases settled</th>
<th>Success rate of Mediation in %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Judges Mediators</td>
<td>Advocates Mediators</td>
<td>Others</td>
<td>Mediators who have undergone Mediation Training through other source</td>
<td>Mediation Training Programme</td>
</tr>
<tr>
<td>1.</td>
<td>Andhra Pradesh</td>
<td>24</td>
<td>19</td>
<td>104</td>
<td>15</td>
<td>715 (Conducted by APSLSA)</td>
<td>10</td>
</tr>
<tr>
<td>2.</td>
<td>Assam</td>
<td>12</td>
<td>15</td>
<td>89</td>
<td>11</td>
<td>15 (Conducted by MIND India)</td>
<td>5</td>
</tr>
<tr>
<td>3.</td>
<td>Bihar</td>
<td>2</td>
<td>118</td>
<td>239</td>
<td>-</td>
<td>60 (Conducted by BSLSA)</td>
<td>23</td>
</tr>
<tr>
<td>4.</td>
<td>Chandigarh</td>
<td>2</td>
<td>4</td>
<td>59</td>
<td>5</td>
<td>2</td>
<td>-</td>
</tr>
<tr>
<td>5.</td>
<td>Chhattisgarh</td>
<td>17</td>
<td>40</td>
<td>71</td>
<td>-</td>
<td>-</td>
<td>4</td>
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<tr>
<td>6.</td>
<td>Delhi</td>
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<td></td>
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<td></td>
<td></td>
<td>18</td>
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<tr>
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<tr>
<td></td>
<td>Delhi High Court Mediation Centre</td>
<td>1</td>
<td>267</td>
<td>-</td>
<td>-</td>
<td>13</td>
<td>-</td>
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<tr>
<td>7.</td>
<td>Goa</td>
<td>3</td>
<td>-</td>
<td>42</td>
<td>-</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>8.</td>
<td>Gujarat</td>
<td>17</td>
<td>16</td>
<td>374</td>
<td>2</td>
<td>200 (conducted by AMLEAD &amp; ICADR)</td>
<td>21</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Mediation Centres</th>
<th>Cases Referred</th>
<th>Cases Settled</th>
<th>Success Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Haryana</td>
<td>14</td>
<td>102</td>
<td>10</td>
<td>28.21</td>
</tr>
<tr>
<td>Himachal Pradesh</td>
<td>10</td>
<td>121</td>
<td>5</td>
<td>28.00</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>20</td>
<td>138</td>
<td>14</td>
<td>28.00</td>
</tr>
<tr>
<td>Karnataka</td>
<td>29</td>
<td>-</td>
<td>75</td>
<td>40.58</td>
</tr>
<tr>
<td>J &amp; K</td>
<td>16</td>
<td>99</td>
<td>11</td>
<td>31.80</td>
</tr>
<tr>
<td>Kerala</td>
<td>17</td>
<td>492</td>
<td>17</td>
<td>23.60</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
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<td>115</td>
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<td>Maharashtra</td>
<td>36</td>
<td>138</td>
<td>25</td>
<td>32.00</td>
</tr>
<tr>
<td>Orissa</td>
<td>18</td>
<td>339</td>
<td>11</td>
<td>55.96</td>
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<td>Punjab</td>
<td>11</td>
<td>73</td>
<td>4</td>
<td>22.01</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>37</td>
<td>229</td>
<td>19</td>
<td>13.00</td>
</tr>
<tr>
<td>Sikkim</td>
<td>4</td>
<td>37</td>
<td>4</td>
<td>43.73</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>27</td>
<td>738</td>
<td>2</td>
<td>17.00</td>
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<tr>
<td>Uttarakhand</td>
<td>14</td>
<td>38</td>
<td>2</td>
<td>12.87</td>
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<td>West Bengal</td>
<td>4</td>
<td>20</td>
<td>2</td>
<td>28.67</td>
</tr>
<tr>
<td>Supreme Court Mediation Centre As on 31.05.2012</td>
<td>1</td>
<td>38</td>
<td>-</td>
<td>24.72</td>
</tr>
</tbody>
</table>

- Number of Mediation Training Programmes conducted in various States for training mediator.
- Number of Referral Judges / Awareness Programmes conducted in various States for training the Judges for effective reference for Mediation.
- Total number of Mediation Centres in India.
- Total number of cases referred by various States in India.
- Total number of cases settled in India.
- National success rate of mediation
“If there is any great secret of success in life, it lies in the ability to put yourself in the other person’s place and to see things from his point of view – as well as your own”.

--- Henry Ford