Chapter - 7

Suggestions and Conclusion

[7.1] INTRODUCTION

Now it is accepted all over the world that Mediation is a process of resolving dispute by consensus in an organized manner with skills and techniques that could be learnt and used. It is also a process that is disputant friendly. Mediation is an approach which stresses problem solving rather than delivering of verdict.

The impact of mediation is multifaceted and its importance need hardly be emphasized in day-to-day life. Peace is and should be a rule and conflict an exception. The society would be happier with least conflict and more peace. The concept of mediation accepted in principle and spirit by all concerned, would not only save time and energy but would also bring about better cooperation and coordination amongst people; it will bring peace in the society. Civilized society cannot afford to perpetuate a dispute which will disturb human relationships and create unrest in the society and be a bottle-neck for progress.

Self determination is fundamental concept of the mediation. The process of mediation is, as we know, is voluntary. It is informal and focuses on future and outcome is mutually acceptable agreement.

As discussed in the preceding chapters relating to the Challenges and Obstacles in the mediation process and need for enhancement of standard of mediation practices and other issues relating to Mediation as an Alternative Dispute Resolution Mechanism as an effective tool of
dispensation of Justice, certain suggestions are being discussed in this chapter. After the suggestion, the conclusion part of the Thesis is enumerated at the end.

[7.2] **ANALYSIS OF THE OPINIONS OFFERED BY JUDGES, MEDIATORS AND BENEFICIARIES ON DIFFERENT QUESTIONNAIRES ON MEDIATION PROCESS: -**

During the research, I have collected the opinions of Judges, Mediators and litigant parties regarding the mediation satisfaction. The different questionnaires were provided to the concerned group. The analysis of the opinions offered by them are discussed here-in-below as under: -

[7.2.1] **ANALYSIS OF THE OPINIONS AS OFFERED BY JUDGES: -**

So far as the questionnaire relating to Judges, which is appended as Appendix – I with this chapter, is concerned, I had an occasion to have opinion of 15 Judges. On scrutiny of the answers provided by the Judges pertaining to each questions, it reflects that 20% Judges are referring the cases for mediation immediately after the service of process to the other side. Whereas 53.33% Judges were referring the case after filing of the written statement by the other side and 26.67% have referred after framing of issues. No Judge has referred the case for mediation during the recording of evidence as well as at the state of arguments.

Regarding response of parties for mediation 13.33% Judges have opined that there was very good response from the parties, whereas
46.67% have opined that it was good and 40% have opined that it was an average.

Regarding response of Advocates of the parties for the mediation process 6.67% have opined that it was very good, whereas 26.67% have opined that it was good and 20% have marked it as an average whereas 46.67% has stated that it was poor.

So far as the question relating to response of Mediators in settlement of cases, the opinion was to the extent that 20% has stated to be very good, 26.67% rated it as good and 53.33% has opined to be an average.

Regarding the availability of adequate staff for mediation centre 86.67% has answered in assertive, whereas 33% opined in negative.

So far as the response of the staff manning the mediation centre, it was rated as very good by 6.67% and good by 93.33%.

Regarding the need of Refresher Training Programme for trained Mediators all have opined that it is very much necessary.

Regarding infrastructure facility of mediation centre 6.67% have opined that it is excellent, whereas 46.66% have rated it as very good and 46.66% have rated it as good.

Regarding the need of Awareness Programme for Lawyers, Judges and Litigants, all have opined that it is needed.
So far as the need of institutionalization of Mediation is concerned, all have unanimously opined that it is needed.

At the same time, all have also opined that there is a need to incorporate Mediation as a special subject in syllabus at all Graduate level and/or Post Graduate level.

Regarding the question as to facing of any difficulty while referring the cases to the Mediation, 60% have opined that they have faced difficulties whereas 40% have opined that they have not faced any difficulty.

Regarding their suggestions for improvement of the Mediation Centres, majority have opined to have an Awareness Programme at all levels. They have also opined that Referral Judges may be chosen for Mediators as well as experienced Advocates may be chosen for Mediators.

[7.2.2] ANALYSIS OF THE OPINIONS AS OFFERED BY MEDIATORS:-

The answers relating to the questionnaire for Mediators is concerned, 24 Mediators provided their answers to the various questions to the questionnaire. The questionnaire thereof is appended as Appendix-II with this chapter.

Regarding number of cases handled for mediation is concerned, it was found that in the range of 8 to 30. Out of it, the settled cases were in
the range of 3 to 15. Thus the success ratio can be estimated at 30% to 50%.

So far as the average of number of sitting required for mediation is concerned, it is in the range of 2 to 6.

Regarding question of response of parties during mediation is concerned, 20.83% replied it as very good, 62.50% as good and 16.67% thereof replied that it was average.

So far as the question regarding response of advocates of the parties during mediation process is concerned, 4.17% shown it as excellent, 4.17% as very good, 50% good, 33.33% as average and 8.33% shown it as poor.

Regarding the availability of adequate staff for mediation centre is concerned, 79.17% replied it in affirmative and 20.83% replied in negative.

The question relating to opinion as to the response of staff manning the mediation centre is concerned, 45.83% graded it as excellent, 25% as very good, 25% as good and 4.17% as average.

Regarding the infrastructure facility at mediation centre is concerned, 37.5% replied as excellent, 20% as very good 33.33% as good and 4.17% as average.

So far as the referral of cases by the Court/Judges for mediation is concerned, 62.50% shown it to be satisfactory, whereas 37.50% in negative.
The question regarding any need of refresher training programme for the trained mediators is concerned, 95.83% replied in affirmative, whereas 4.17% replied it in negative.

Regarding the question as to any need of Awareness Programme on mediation for the Lawyers, Judges and Litigants is concerned, all have replied it in affirmative.

The question as to any need of institutionalization of mediation is concerned, 95.83% expressed their opinion in affirmative and 4.17% in negative.

Regarding the need to incorporate mediation as a special subject to be included in syllabus at graduate level in law and/or post graduate level in law, 95.83% opined that there is such need and 4.17% expressed their opinion in negative.

So far as the question relating to any difficulties faced during the mediation process by the mediators is concerned, 66.67% have expressed that they have faced difficulties and 33.33% have replied it in negative.

Regarding remarks and suggestions for better improvement of mediation process is concerned, all most all have expressed their opinion that:

1. There is need of Awareness Programme through various mode of publicity up to Taluka Level,
2. More efforts is required on the part of Referral Judges,
3. Need of improvement in process of service of notice to the parties,
4. Need of compulsion to attend the process.

[7.2.3] ANALYSIS OF THE OPINIONS AS OFFERED BY BENEFICIARIES: -

The answers relating to the questionnaire for Beneficiaries is concerned, 15 Beneficiaries provided their answers to the various questions to the questionnaire. The questionnaire thereof is appended as Appendix – III with this chapter. The analysis of the replies of the beneficiaries regarding various questions may be summarized as under:-

Regarding the question as to the rating of their first impression of the mediators handling their case, 13.33% have rated it as Unfavourable, 60% as Neutral and 26.67% as Favourable.

The question as to rating of the comfort and appropriateness of the physical setting arranged by the mediators for their session is concerned, 46.67% has rated it as Uncomfortable, 6.6% as Neutral and 46.67% as Comfortable.

So far as the question as to how clear were the introductory remarks and explanation of the mediation process offered by the mediators is concerned, 6.67% expressed it as Unclear, 13.33% as Neutral and 80% as Clear.

Regarding the question as to how comfortable they were during the mediation session, 33.33% expressed their opinion as Uncomfortable and 66.67% as Comfortable.
So far as the question as to rating their overall satisfaction with the manner in which the mediators conducted the mediation session is concerned, 20% rated it as Dissatisfied, 20% as Neutral and 60% as Satisfied.

The question relating to their involvement in the problem-solving process, 20% expressed their opinion as Not-Involved, 6.67% as Neutral and 73.33% as Involved.

Regarding the question as to whether the mediators give both parties an equal chance to explain their case, 100% have replied it in Affirmative.

The question as to how fair were the mediators to both sides is concerned, 80% opined it as Neutral and 20% as Fair.

So far as the question as to whether the mediation process address the main issues of their dispute is concerned, 53.33% replied it in Affirmative, 6.67% in Negative and 40% did not replied the question.

The question as to whether the mediation ended successfully (i.e. with a mutually agreeable solution), none has replied this question.

Regarding the question as to if they reached an agreement, where the terms and conditions of the agreement clear to them, 93.33% replied it as Unclear and 6.67% as Neutral.
So far as the question as to who well was the tone set for future problem solving with the other party is concerned, 100% have expressed it as a Neutral.

Regarding the question as to whether they have enough time for the mediation, 26.67% have answered it in an Affirmative, whereas 73.33% in Negative. However, nobody has expressed any opinion as to how much more time is needed for the mediation.

The question as to their satisfaction with the overall mediation is concerned, 26.67% have expressed it as Unsatisfied, 20% as Neutral and 53.33% as Satisfied.

Regarding the question as to their willingness to utilize mediation in the future, 80% has replied in Affirmative and 20% in Negative.

So far as the question relating to offering their comments or suggestions is concerned, nobody has expressed any comments or suggestions.

[7.3] VIEWS AND SUGGESTIONS OF CERTAIN EMINENT PERSONALITIES:

(A) Shri Sairam Panchu\textsuperscript{194} observed that mediation now stands well established as the courts have led the way in this regard. He made following suggestions for the growth of the mediation movement:

\textsuperscript{194} Senior Advocate and Trainer, Tamil Nadu Mediation & Conciliation Centre, at Third National Conference on Mediation.
(a). A website of mediation with all the relevant rules, articles and information about mediation be developed,

(b). The Training Manual released in the Conference be accompanied with PowerPoint presentations, with DVDs for each trainee,

(c). Training of Court Administrators as well as In-charges of the Mediation Centres be imparted,

(d). The role of advocates is very important in the success of mediation and there needs to be a harmonized balance of mediation and other forms of alternative disputes resolutions with focused and specialized emphasis, on mediation.

(e). There is the need for both qualitative mediation and adequate number of trained mediations.

(f). Institutionalized of the entire mediation system is essential with guidelines for selection of mediators certification and decertification of mediators, the authority for such certification and decertification, and the parameters for the same.

(g). In view of the ‘Afcon Judgment195, virtually all civil cases fall within amit of cases fit for mediation, the question that is to be asked no longer is as to ‘why the case should be sent for mediation’, but as to ‘why it should not be sent for mediation’;

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195 Afcons Infrastructure Ltd. &Anr. V/s. Cherian Varkey Construction Co. (P) Ltd. & Ors JT 2010 (7) SC 616
(h) Courts need to encourage pre-litigative conciliation and Court annexed mediation in cases instituted in Court;

(i) Mediation needs to be promoted as a professional career and payment to mediators is essentially required to be made, especially at the District Courts level to propagate mediation effectively.

(B) Hon’ble Dr. Justice Dhananjaya Y. Chandrachud, Judge, High Court of Bombay has expressed that strategies for successful implementation of mediation must be carefully assessed and a conscious effort has to be made towards the evolution of a process that will be acceptable to the society at large. In achieving a high level of acceptability for the mediation process, several issues need to be focused upon and these include:

(i) Developing awareness;

(ii) Advocacy;

(iii) Building capacities;

(iv) The creation of an institutional framework; and

(v) Actual implementation

(C) Hon’ble Mr. Justice Sunil Ambwani, Judge, High Court of Allahabad has made the following suggestions: -

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196 MEDIATION – realizing the potential and designing implementation strategies. By Dr. Justice Dhananjaya Y. Chandrachud, Judge, High Court of Bombay page 16. Also see: http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf
1. Mediation should be given focused attention in as much as it should be separated from the Lok Adalat movement;

2. Mediation needs to be institutionalized and a legislation on Mediation was required;

3. A Training Manual for Referral Judges is also required;

4. Pre-litigation Mediation be encouraged;

5. A uniform software with datas for linking all the Mediation Centres across the country with the MCPC and State Mediation Centres be created, which would be of aid in planning for the future.

6. A National Institute of Mediation be set up with the objectives of: -
   a. Standardization of Mediation and its procedures
   b. Maintenance of standards;
   c. Standards of good governance;
   d. Adoption of Best Practices in conducting Mediation;
   e. Conducting of Training of Trainers
   f. Accreditation and enrolment of mediators;
   g. Laying down Ethical standards; and

197 Report of the Third National Conference on Mediation, page 10
h. Holding of Regional and State Level Conferences.

(D) Dr. Sudhir Kumar Jain, Judge In-Charge Delhi Mediation Centre, Rohini District Courts, in the Third National Conference on Mediation held at New Delhi on 7th and 8th July, 2012 has suggested the following solutions: -

1. Training Programmes for judicial officers be conducted to sensitize them how to identify cases suitable for mediation and to refer adequate cases for mediation.
2. The District Judges/Coordinators of Mediation Centres need to hold meetings regularly with judicial officers for referring cases to mediation
3. The referral of cases for mediation per Judge/per year should be monitored (and mentioned that in Delhi, in the year 2006, the referral was 10.8 cases per judge/per year which has increased to 42.21 cases per judge per year in the year 2011 and that the referral of cases has also increased from 2790 in year 2006 to 16336 in year 2011).
4. There should be regular interaction between Mediators and the Referral Judges.
5. The process of selection of potential mediators must be systematic and regulated. The judicial officers and advocates with a positive mind-set for mediation be selected as mediators.

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6. There should be adequate number of Mediators in a Mediation Centre who have undergone 40 Hours training as prescribed by MCPC. However, there should not be surplus Mediators.

7. Refresher Courses/Advance Courses/Orientation Programmes for Mediators should be conducted periodically to refine and enhance their knowledge and skills.

8. The Practice Groups of mediators should be formed to share and exchange Best Practices followed by mediators under the supervision of the coordinator.

9. Mediators must be neutral and must possess common understanding of human nature, behaviour and psychology and they should also be trained in communication skills for better output qualitatively and quantitatively.

10. Mediation Centres of a State should be interlinked.

11. The functioning of the Legal Aid Authority and Mediation Centres should be separated and both should be given distinct identity, but there should be positive coordination between Legal Aid Authority and Mediation Centres.

12. Awareness Programmes highlighting benefits of mediation must be undertaken at the national level through documentaries, posters, handouts, pamphlets, placards highlighting mediation process and benefits of mediation displayed at prominent places of court complexes including entry and exit points, and Mediation Tables be set up at
prominent places of Court Complex including Facilitation Centres/office of Legal Services Authorities;

13. The pamphlets highlighting the mediation process and its benefits be annexed with the summons of the case at the time of service;

14. Awareness among the lawyers that mediation does not adversely affect them financially nor qua quantity of legal work be spread by interactive programmes.

15. There should be critical analysis of complaints against the mediators and remedial steps be taken promptly;

16. The Code of Conduct and Ethical Principles to be observed by Mediators be prepared, so as to develop confidence of the public in the mediation process and also to serve as a guideline for mediators; and

17. The impact analysis of Mediation be done scientifically by processing data to examine efficiency and efficacy and economics of Mediation.

[7.4] SUGGESTIONS

In the preceding chapter on the Challenges and Obstacles in the mediation process various challenges and obstacles are discussed. To remove the challenges and obstacles as stated earlier there are certain suggestions which can be followed and implemented for the more effective utilization of the process of mediation as a tool for dispensation of Justice. The point-wise suggestions are discussed here-in-below: -
[7.4.1]  **LACK OF TRAINED MEDIATORS**

To overcome the problem of lack of trained mediators, there should be regular, periodical training programmes for training the Advocates, Judges and other Resource Persons. There should also be refresher courses for the trained mediators. There should also be Training for the Trainers (TOT). Well planned and structured training programme could be prepared for all concerned to become familiar with fundamental of mediation, its techniques and skills with emphasis on the special features of commercial, industrial, labour and matrimonial dispute with mediation experts from all over the country including experts in communication skills and in-house treatment are needs of the hour.

The training should be imparted by experts, master trainers. If the mediation is institutionalized, the National Institute can recognize who is a master trainer and his qualifications, about his remuneration etc. and their service also can be to other countries in order to raise the level of the National Institution to International Institution of the Mediation.

Moreover, mediators drawn from other professions, advocates and walks of life must also comprise the pool or mediators to provide a richness and diversity to the process. Community leaders, experienced and respected businessman, retired Judges, experts in different fields, retired bureaucrats and Advocates can be persuaded to serve as mediators. Bar Councils, Bar Associations and Judicial Academies can join hands to organize workshops and conferences on the subject. Retired judges, desiring to act as mediators can be persuaded to consciously
address a general concern over the difference between mindset of a judge and of a mediator. Appointment of retired Judges as mediators can inspire great confidence in the mediation process amongst the participants with a familiarization programme with mediation process to avoid any role confusion.

There may be one area where our focus may be necessary and that is the training of Mediators and the role of Advocate(s). Robert Benjamin\textsuperscript{199} states about the Uniform Mediation Act, 2001. He expressed concern that the Uniform Mediation Act truly marries the future of mediation with the legal profession.

\begin{quote}
“This is about how the revolutionary nation of mediation, whereby individuals, organizations and communities seize the opportunity manage and self-determine their own issues and conflicts, is now becoming absorbed by the legal system and the established order.”
\end{quote}

Originally envisioned as an alternative to the traditional legal system, mediation is now the object of a leveraged take over by the legal profession and is quickly becoming just another cog in that

\textsuperscript{199} A Prominent Mediator and Trainer
system. The proposed Act in name, purpose and design is clearly a legal affair.

The American Bar Association is not the enemy, but their size and power can nonetheless twist and contort mediation practice into unrecognizable forms.”

Therefore, the Legislation issued for institutionalizing mediation, may also address this issue, namely the role of Advocate(s), the training to be imparted to Mediator and the continuous education programmes for all stakeholders.

[7.4.2] **LACK OF TRAINERS**

To have sufficient number of trainers to impart mediation training, it is most necessary that programmes on Training of Trainers (TOT) be organized regularly. It is necessary to see that at least 25 to 50 master trainers are available in each State. In case of the Institutionalization of the mediation process, the National Institute can organize such Training programmes for the Trainers and can try to identify master trainers.

[7.4.3] **LACK OF REFERRALS**

To overcome the obstacles of lack of references of cases to the mediation process by the Judges, it is necessary to sensitize the Judges regarding the importance of the mediation process and the benefit and the advantages of the mediation process. Sensitization programme through the Judicial Academy can be resorted to for this purpose. The attention of
the Judges is required to be drawn to the provisions of Section 89 of the Code of Civil Procedure that it is their obligation to refer cases to one of the mode of Alternative Dispute Resolution. They may be trained as to the techniques to find out the likelihood of settlement in a given case.

Cases for the reference to mediation can be categorized initially to include cases having minimum discovery requirements and maximum settlement elements, such as cases relating to money recovery, loan default, family disputes, etc.

[7.4.4] LACK OF INFRASTRUCTURE

There should be adequate space in mediation centres for the parties, lawyers and mediators. A mediation centre should be situated within the court premises or near court premises. The building should have also space for waiting. There should be a facility of water, toilet and some sort of reading materials may also be available in the mediation centre. The atmosphere of the mediation centre should be informal. There should also be an efficient coordinator in the mediation centre to coordinate between the Referral Judges and mediators and to regulate affairs of the mediation centre and the flow of cases. The staff and officials posted in the mediation centres should be litigant friendly and sensitization programmes should be conducted regularly to make them litigant friendly and to develop a positive mindset necessary for the proper functioning of the mediation centre.200

200 Dr. Sudhir Jain, Judge, In-charge Delhi Mediation Centre, Rohini District Courts, New Delhi “Challenges, Obstacles and Solution in Mediation implementation” report of the Third National Conference on Mediation held at New Delhi on 7th & 8th July, 2012 page 14.
It is advisable to provide such mediation facilities at the doorsteps of the court houses. Till Court annexed mediation programmes and poor infrastructural facilities are established it would be appropriate at least to provide mediation facilities through private reliable mediation centres run by the Bar Associations and/or non-Governmental organizations and appropriate funds or grants can be provided to them.

[7.4.5] ABSENCE OF SUITABLE LEGISLATION

Section 89 of the Code of Civil Procedure empowers the Court to refer the terms of a possible settlement for arbitration, conciliation, judicial settlement including the settlement through Lok Adalats, and mediation. Out of the above procedures indicated in Section 89, all the other except mediation, have already gained statutory independence, in the sense that Arbitration & Conciliation are now governed by the 1996 Act and Lok Adalats are regulated by the Legal Services Authority Act. But mediation alone has not so far gained statutory liberation, in the form an independent legislation. If a separate legislation is framed, on the lines of Legal Services Authorities Act, it may perhaps take mediation from its ad-hocism to institutionalization. The Act could provide for the constitution of:

(1) A National Mediation Authority (to be called NAMA) as Central Authority;
(2) State Mediation Authorities; and
(3) District Mediation Authorities.
While these Authorities can be constituted on the same lines as that of the Authorities under the Legal Services Authorities Act, their funding could only be from the Centre. If they are made to depend upon State funding, the development of infrastructure and the appointment or personnel, may suffer at times.

At the District level, an Officer of the rank of District Judge, other than the Principal District Judge, who happens to be the District Legal Services Authority, can be nominated as the District Mediation Authority. If staff strength of at least one Administrative Officer, one Assistant and one Office Assistant is sanctioned, the litigants and the advocates can be encouraged to take recourse the mediation.

Institutionalized mediation safeguards the rights of both the parties in the best possible way since such mediation activities can be assessed against the safely provided by the Courts of justice.

Institutionalization has following distinct advantages:

(i). Cases can be referred ay any time by Courts. The functioning of the Centre becomes continuous and uninterrupted.

(ii). An infrastructure is in place. Apart from the availability of Mediators, the secretarial staff will also be available to maintain records and registers and also prepare compromise memos, ones cases are settled.
(iii). The referral of cases by Courts and the reporting of the outcome of the Courts become smooth and transparent due to the maintenance of the registers.

(iv). Institutionalization helps in spreading awareness to litigants.

[7.4.6] RESISTANCE AMONGST BASIC ACTORS i.e. JUDGES, LAWYERS AND LITIGANTS

To overcome the resistance amongst the basic actors i.e. Judges, Lawyers and Litigants the following steps can be resorted to in respect of each actors.

(A) JUDGES:-

Judges should be sensitized that Justice is dispensed in mediation. They should also be sensitized to the facts that they have a role to play in mediation and use it as a new, effective tool and accord it the same status of Justice dispensation as Court proceedings and use it for the benefit of the litigant.

Proper awareness about the mediation process would gradually allay the fears of Judges and they will soon realize that mediation in effect reduces the burden upon the Courts and in fact leads to a satisfaction of all the parties to the dispute. Often even during Court proceedings, Judges conduct judicial mediation where it appears that there exists an element of settlement and once the judges accept mediation to be a complementary system which results in satisfactory
dispensation of justice, in accordance with law, the resistance from Judges to invocation of mediation would melt and result into a momentum whereby the Judges would act as catalysts in the resolution of disputes through mediation.²⁰¹

(B) LAWYERS:-

To motivate the advocates particularly post-litigation mediation requires involvement of Advocates. Motivation in this regard is necessary to make the mediation process more successful. An action plan is necessary for awareness programme particularly involving Advocates making them to avail the benefits of mediation. Large sections of Advocates feel the civil cases are reducing and some of the courts do not have much civil cases and therefore mediation may deprive them of their practice. In this context, it is necessary to create an awareness by appearing them that, early disposal encourages civil litigation. Often meetings of referral judges are to be conducted and they are to be apprised about the necessity of identification of the subjects for the purpose of mediation and not to mechanically refer the matter to the mediation, which will result in waste of valuable mediation time and court’s precious time.

To reach and motivate litigant public, the concept, process, advantages of mediation and to opt for mediation for resolution of their conflict or dispute.

²⁰¹ Justice Sanjay Kishan Kaul, Judge, High Court of Delhi – Challenges and Obstacles and solutions in Mediation Implementation, Report of the Third National Conference on Mediation held on 7th & 8th July, 2012 at New Delhi, page 11
This sense of awareness has to be created in the legal profession on an urgent basis by promoting a dialogue within the profession and between the professional and non-professional bodies. A determined effort has to be made to acquaint members of the Bar of the importance of mediation and of the special obligation which the mediatory process casts upon them.

There is need of cement/collaboration between Bar and the Bench to create justice through mediation. A sensitized and provocative Bar raised the edifice of faith and trust on foundations provided by the Bench. Together they empower disputants, and inspire them to find peace and harmony in their lives.

(C) LITIGANTS:-

Litigants may be sensitized to the facts that mediation will not frustrate the preferences of litigants and indeed their right to trial would be preserved. Furthermore, the best way to allay the fears of the litigants is by trying out mediation as a means for dispute resolution method which would make the parties understand that the mediator has no power or social control over them or that resolution the dispute. They may also be made aware that it always open to the parties, if they unsatisfied with the mediation to get the same adjudicated in Court.\(^{202}\)

In the nutshell it could be suggested that the formation of joint Bench – Bar Committees to implement the reformative provisions of law

may prove very useful. Municipal corporations and Governments corporations, who are the largest litigants, should be drawn into the process of mediation by framing appropriate schemes.

[7.4.7] **LACK OF MEDIATION MANAGEMENT**

To overcome the point of lack of mediation management, it is necessary that a full time Coordinator preferably Senior Judicial Officer should be appointed in the Mediation centre to coordinate between the Referral Judges and Mediators and to regulate affairs of the mediation centre and the flow of cases. Further, there should be a periodical evaluation of functioning of mediation centres. There is need of periodical review of performance of mediators. The panel of mediators may be reviewed after every 2 to 3 years.

Moreover, if there is interaction between mediators of different State to share and exchange Best Practices it would be beneficial for the process of mediation. Such interaction can also be held between the Coordinators of different mediation centres of the country.

The staffs and officials posted in the mediation centre may also be trained for the effective management of the centre.

There is need of introduction of the practice of daily visits to the Mediation Centre by the Judge and Advocates member of the Mediation Monitoring Committee which will give the necessary impacts and will prove to be every effective for the mediation process.
There should be common formats to maintain statistical information and also common statistical data by introducing common software facility to all the mediation centres along with Telephones and email and Fax facilities for information and feedback.

A system is to be evolved to call out the parties and advocates waiting for their turn in the waiting halls, to send S.M.Ss\textsuperscript{203} to mobiles of litigants and advocates about the listing of the case or re-arranging of the schedule.

\textbf{[7.4.8] LACK OF ADEQUATE FUNDS}

The cost factor attached with the mediation must be regulated and liberal funding is required from the Government for the proper functioning of the mediation centres. The importance of the mediation process in reducing the backlog of cases and likelihood of prevention of new cases coming to the Courts have to be brought to the notice of the Government for liberal funding for the purpose.

\textbf{[7.4.9] MEDIATION PROCESS ITSELF}

The mediator plays an important role in the mediation process. So also the reference of cases at a proper stage is also a vital and important point to be taken into consideration for initiating mediation process. The various suggestions relating to the mediation process itself are enumerated as follows: -

\textsuperscript{203} SMS means Short Messages Service
[7.4.9.1] SELECTION OF MEDIATOR

The selection of a proper mediator is very important for the mediation process itself. The mediator’s knowledge, experience, skill and approach to a dispute play a significant role. Therefore, care should be taken to choose an appropriate mediator.

For a fruitful mediation result mediator must use same language as that of parties or held meeting with the parties at a place comfortable for the parties it would make considerable difference in achieving the ends of mediation. The personal differences of the litigating parties are influenced by their social conditions which are to be understood by a keen mediator.

[7.4.9.2] MISUNDERSTANDING

In order to avoid misunderstandings in a conflict situation, during mediation, the mediator should encourage the parties to speak directly to the other party and describe their own feelings and perception rather than focusing on the opponents motives, misdeeds or failings. Inflammatory language should be avoided and the parties should speak only for a purpose as too much communication can be counter-productive. Mediator should persuade parties to listen intently and understand the opponent and respect the other party. Engaging in deep conversations can also reduce misunderstanding by improving relationships, by providing more context
to communication, and by breaking down stereotypes that contribute to negative characterizations or worldviews.  

[7.4.9.3] **MEDIATOR’S INTUITIVE BEHAVIOR**

Mediator should be able to identify the potential risks attached with his intuitive behavior and be able to adopt alternate strategies in order to overcome the obstacle. E.g. While listening to one of the parties, the mediator as an intuition shows signs of interest in what the party says to show that he understand its point of view. This invariables makes the other party feel that the mediator is siding with one party against the other. As an alternative the mediator should avoid phrases like “OK” or “I agree” but use phrases like “I See” or “I understand and do everything so that his paraphrasing is not mistaken for agreement.  

[7.4.9.4] **POWER IMBALANCE**

In case the mediator senses that there is power imbalance between the parties, it is his duty to try to redress the imbalance by assisting the weaker party to present his story and reach a dispute, while not compromising on his neutrality. If the imbalance seems to be serious, the mediator might want to have a private meeting with the party and if necessary to adjourn or terminate the mediation. The mediator should ensure that each party has equal floor space and intervene when one party tends to monologue. Where a gross power imbalance appears to exist, the parties should be given the option of sleeping on their decision and a

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204 Ibid page 47.
205 Ibid page 47
deadline should be negotiated for acceptance or otherwise of settlement proposal’s, or arrangements should be made for a second session. 206

[7.4.9.5] NEUTRALITY

The Mediator to avoid a loss of neutrality should be aware of the need to be seen by the parties as neutral by focusing equally on both the parties during the joint sessions and foremost by not assuming their individual stands which might prejudice the mind of the Mediator. The Mediator should strive to give opportunities to both the parties to present their options and to recognize any power imbalance which may occur during the mediation process. In such a scenario, it is upto the Mediator to be aware and to control his own personal values and prejudices and to encourage parties to propose options for settlement by using the content to determine the agenda. 207

[7.4.9.6] COMMITMENT TO RESOLVE DISPUTE

The mediator must determine whether the disputant truly has no commitment to resolve the dispute, or whether the disputant is merely frustrated with the case. A mediator should explore the disputants’ commitment to resolve the dispute from the outset to determine whether mediation is appropriate. That is, due to mediation’s voluntary nature, the mediator should inquire into whether the disputants feel forced, coerced, or misled to the mediation table. If so, the mediator can attempt to dispel those feelings and establish a commitment from the disputants to put

206 Ibid page 47 & 48
207 Ibid page 48
forth a good faith effort to settle the matter. If a disputant or attorney still cannot commit to mediation, the mediator should consider deferring mediation until a later stage in the proceedings. 208

[7.4.10] LACK OF AWARENESS

Creating of awareness, is a very important segment of an organization, unless there is awareness of existence of such an institution to the litigant public, the entire effort of institutionalizing the organization will be of no use. In order to get the work to the mediation centres, creating awareness is a major component of the institution. An action plan has to be prepared at National level and state level every year with the collaboration of all the Members of M.C.P.C.209, State Mediation committees with the assistance of the Officers In charge of Mediation Centres at State levels. And to prepare a curricula for every year and to take all necessary steps to implement the plans efficiently and effectively.

The success of mediation depends on the right case being reformed at right time. For this purpose, it is necessary to create awareness among the legal fraternity and the practice at large.

Since mediation is all about dealing with relationships, the local knowledge, cultural preferences and social attitudes require to be given their due importance which creating awareness as well as training.

Due publicity as given by legal service authority, such as Hoardings, Broadcasting in Radio and T.V., Newspapers, Internet.

208 Ibid page 46
209 Mediation and Conciliation Project Committee, Supreme Court of India
Though Police Stations, Revenue offices, Panchayat Offices, Industries must be given.

The advantages of mediation shall be known through the beneficiaries of mediation. Whatever they are facing problems civil law or public policy dispute stretching all the way to international conflicts, mediation has prove to be an efficient tool in deciding with such disputes.

Sensitization of the NGO, Students, Law Teachers, School Teachers about the concept of mediation and benefits to be made.

Awareness by advertisements in print, audio, video, internet search engines to be created.

To hold workshops on mediation in Colleges, Industries and Government offices.

To hold programmes on concept and benefits of mediation from grass root level with the aid of street play, documentary, effective seminars with the involvement of law Students.

To arrange for video conferencing with parties when they are not in the same city and unable to attend the mediation process.

To bring out a magazine with articles on Mediation and to provide information about cases that have got settled without compromising confidentiality.

Annual Conference of all mediators at National, State and District level to be held in different cities by rotation, for introspection,
interaction and to evolve new innovative ideas, for future development of the institutions.

In order to establish mediation as a viable alternative, it is crucial to provide education about benefits of the process to the community, the members of the Bar and the Courts.

It is necessary to familiarize the potential consumers of mediation services with the nature of the process, the ways mediation can benefit them and ways it differs from arbitration and trial. Equally important is to promote and encourage the management qualities of a judge. Coordinated efforts will have to be promptly started to effectively use the Alternative Dispute Resolution provisions incorporated in the Code of Civil Procedure.

[7.5] **CONCLUSION:**

Scope of Mediation is very promising in India for bringing in equitable treatment and sense of fairness and justice in society, mediating skills, especially unbiased communication skills and influential bargaining strategies are to be engaged.

Mediation builds up the capacity and at the same time induces the culture by providing mutual dispute resolution in the society. It facilitates forward an interest based resolution between the parties. At the same time, such process brings a dynamic and comprehensive remedy which is most appropriate and suitable, based on mutual consent.
By placing control for the resolution of dispute in the hands of the parties, the State has less power to interfere with the resolution of the private disputes, also by relieving the burden of the Courts, political branches may be less able to debilitate the Courts through neglect.

Mediation reduces the incentives for corruption because the neutral third party has no authority to bind the parties to an outcome of his or her choosing. This lack of power over the parties and a lack of monopoly over dispute resolution by the courts more generally means that officials have greater difficulty in extracting rent from litigants. Both parties are able to avoid unnecessary costs and reach a common consensus proving advantageous to both.\textsuperscript{210}

The success of the process of mediation is not only to be reflected in the cases resolved through mediation but also in encamping parties to come for pre-litigative mediation. The ultimate-goal of dispute resolution should be to treat litigation as its last resort.

Mediation has significant potential, fundamentally for bringing about qualitative change in the focus of the legal system from adjudication to amicable settlement of disputes. The temples of justice should not just be places where the resolution of disputes begins, but instead places where disputes are brought to an end after alternative methods of resolving disputes are tries as a first option.

Resolution of dispute through mediation brightens the hope for peace and harmony for as Abraham Lincoln said “behind every cloud the sun is still shining”.

Public sector undertakings and various government departments and institutions are needed to be persuaded to have participation in the mediation.

Referring pre-litigation matters to mediators will help the people in nipping their disputes in the buff and will discourage frivolous, casual or protracted litigation.

Need to prepare school children in peer mediation to enable them to equip themselves to handle and resolve their own disputes from a young age. It will serve the social responsibility in equipping future generations for peace, harmony and universal brotherhood.

We cannot stop the inflow of cases because the door of justice cannot close. But there is a dire need to increase the outflow either by strengthening (both qualitatively and quantitatively) the capacity of the existing system or by way of finding an additional outlet. In this situation three requirements are:

1. Mandatory reference to an Mediation Centre,
2. Case management by judges (case management includes identifying the issues in the case; summarily disposing of some

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issues and deciding in which order other issues are to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence.)

3. Committed terms of Judges and Lawyers.

We should aim to achieve prompt and more appropriate resolution of legal problems and disputes by increasing opportunities of advice and assistance to help people resolve their disputes speedily and more effectively and also increasing opportunities for people involved in court cases to settle their disputes out of courts and reducing delays in resolving those disputes that need to be decided by the courts.

The help of Psychologists, sociologists, retired bureaucrat and other experience persons from different walks of life without biases may be taken for better functioning of mediation at community level and appropriate infrastructure including trained mediators and institutionalization of Mediation Cells, be created to strengthen the growth of Mediation process. The involvement of respectable persons from community in the process of mediation after checking the socio, Economic and cultural background of the community. Empowering public to resolve their disputes through mediation may be with educating public through different campaigning programmes.  

212 Challenges to mediation, by Sanjeev Khanna J., High Court of Delhi at Third National Conference on Mediation at New Delhi, 08-07-2012 at New Delhi.  
213 Challenges to mediation, M. L. Mehta J., High Court of Delhi at Third National Conference on Mediation at New Delhi, 08-07-2012 at New Delhi.
**Last, but not least**, is the importance to identify the right persons for implementation and to inculcate the sense and feeling of responsibility and alleviate the feeling of extra burden on a judicial officer. It is being felt that quite many new ideas fail because of the unwillingness to go that extra mile by the person, who is within the settled pay scale and unfortunately thinks that he is not going to get any incentive for extra mile he ploughs. The system as it works today evaluates a lower court judge’s work on the basis of disposal and considers the officer more competent if his “disposal” is greater but “settlements” in his court are not duly recognized as an indicator of competence. The criteria on of evaluation of the performance of judges and also incentive for going that extra mile further need to be evolved within the system.

I hope Mediation would bring up an alternative/additional and efficacious remedy to resolve dispute and would also overcome the challenges faced by court system of delays. Mediation is need of the day to maintain social harmony and peace in community. It is of utmost importance that “Mediation be taken up as a movement in the dispute resolution process”. There is a need to create an environment of dispute resolution through mutual settlement.
“The reality today is that we are all interdependent and have to co-exist on this small planet. Therefore, the only sensible and intelligent way of resolving differences and clashes of interests, whether between individuals or nations, is through dialogue”.

--- Dalai Lama