MEDIATION - BASICS & ISSUES

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1. What is Mediation?

It is a non-binding, non-adjudicatory dispute resolution process, where a neutral third party renders assistance to the parties in conflict to arrive at a mutually agreeable solution. It involves a structured 'negotiation process where the mediator listens to the parties, ascertains the facts and circumstances as also the nature of the grievance, conflict or dispute, identifies the causes therefor, creates a conducive atmosphere to enable the parties to explore various alternatives and ultimately facilitates the parties to find a solution or reach a settlement. It is a professionally and scientifically managed conciliation.Mediation is erroneously defined in section 89 of Code of Civil Procedure as the process where the court effects a compromise between the parties by following the prescribed procedure (This definition requires a correction- see the article 'Section 89 CPC : Need for an urgent relook" of the author published in 2007 (4) SCC (J) 23).

2. Why Mediation ?

2.1)People are concerned about the delay, cost, uncertainty of outcome and lack of choice of solutions - which are the ills normally associated with adjudicatory litigation in courts and Tribunals. The end result in a court litigation is often rigid and inflexible, oblivious to the preferences of the litigants. A party to a conflict would therefore prefer a system which will enable him to find amicable solutions to the conflict or dispute, tailored to take note of his viewpoints and claims.

2.2)The proliferation of laws and increase in population has resulted in manifold increase in the volume of litigation. The overloaded judicial system is finding it difficult to cope up with the demands on it, having regard to the inherent limitations of the system. The demands for more judges, more courts, better infrastructure, and better laws have remained unfulfilled.

2.3)Courts function under age old procedural Laws. Those laws were intended to ensure fair play, uniformity and avoidance of judicial error. They permit appeals, revisions, reviews, innumerable interlocutory applications, and adjournments. Delay has thus virtuallv become a part of adjudicatory process. Delay leads to frustration and dissatisfaction among litigant public and erosion of trust and faith of the common man in the justice delivery system.

2.4)Civil disputes, in particular litigations involving partitions, evictions, easements and specific performance, are fought for several decades through the hierarchy of courts. In commercial litigation, delay destroys businesses. In family disputes, delay destroys peace, harmony and health turning litigants into nervous wrecks. The uncertainty about the final outcome, the frequent changes in laws, the enormous expenditure of time, energy and money, associated with court litigations, are taking a toll on the litigant. Many a litigant feels that delay in dispute resolution, uncertainty of the result, inflexibility in the solution and technicalities in law has made justice elusive and illusive. Litigants find it costly, time consuming and distressing. This leads to criminalization of civil society and weakens the rule of law.

2.5) In this background, the need of the hour is to reduce adversarial adjudicatory litigation and at the same time, give speedy, satisfactory and cost-effective justice. That is where alternative dispute resolution processes in particular mediation, become relevant.

3. What are the advantages of Mediation

3.1) It saves precious time, energy and money of parties, apart from saving them from the harassment and hassles of _ prolonged litigation. Its procedure is simple, informal and confidential and reduces worry and tension associated with litigation.

3.2)By disclosing the strengths and weaknesses of their case, it enables parties to find and formulate realistic solutions to their conflicts.

3.3) It provides an opportunity to communicate with the opposite party in a neutral and cordial atmosphere. It attempts to mend anc restore strained/broken relationships. It focuses on long-terrr interests and relationships and fosters amity and friendship.

3.4) As the mutually agreeable solution reached by a negotiated settlement is tailor made for the parties, it can be moulded shaped, adjusted to suit the requirements of the parties. It gives choices and options in the solution to the conflict. It removes uncertainty and inflexibility from the result.

3.5) As it is voluntary, a party can opt out any time. The party (and not a Judge or Advocate) is always in control of the dispute and its resolution. (This may also be viewed as a disadvantage. Because it is non-binding and non adjudicatory, the resolution of the dispute purely depends upon the volition of parties. Unless both parties are mature, understanding, tolerant and cooperative and interested in a negotiated settlement, there can be no solution or settlement).

4. Who can be a Mediator?

Anyone who has patience and perseverance and who is a good listener and clear communicator, positive and optimistic in outlook and committed to cause of justice and dispute resolution, can be a mediator. Any Advocate, a Judge, social worker, psychologist or person with, abundant common sense and understanding, can, with appropriate training become an expert Mediator.

5. What is expected of a good Mediator ?

5.1) Neutrality : A mediator should be neutral and also seem to be neutral. Consciously or 'even unconsciously, he should not take sides.

5.2)Understanding of human nature : Mediation is conflict resolution. Conflicts arise on account of selfishness, greed, jealousy, ego, lack of understanding and sometime feeling of hurt or wounding of pride. To remove conflicts, one has to understand the reasons for the conflict and be able to recognize the area of conflict. The Mediator should remember that the more closer the earlier relationship, more bitter will be the fight when disputes occur. For example, disputes between two parties who have no personal relationship are the easiest to settle. Next are commercial disputes. The difficulty increases in proportion to the previous closeness in relationship in the following order: social relationship, employer/employee, landlord;tenant, neighbours, partners, siblings, parent/child, the most difficult being husband/wife.

5.3)Persuasive skills : Mediator should have communication skills and felicity of language. He should be able to freely communicate with the parties. He should also be able to persuade parties to open up and disclose their mind and heart, their grievances and the solution they expect, so that he can assess them and suggest solutions.

5.4) Legal knowledge: A mediator should have the ability to assess the strength and weaknesses of the case and able to put across the weaknesses to the respective parties. He should also be able to highlight the strength of the opponent's case, so as to make a party to see reason. But at the same time, he should remember that he is not a Judge, and it is not his duty to render judgment or decide who is right or who is wrong, but only to facilitate a mutually acceptable solutions/settlement.

5.5)Patience: Only a few cases can be settled in a single sitting. Different types of cases may require different skills and different number of sittings. A mediator should be able to give the time needed for the parties to proceed from stage to stage, step by step.

5.6)Common sense : Abundant common sense gives a person understanding and an awareness of ground realities, enabling a person to identify the nature and cause for the conflict, and suggest practical and acceptable solutions. It creates trust and confidence in the parties.

5.7) Confidentiality : The parties tend to openly discuss their problems with the mediator. The strength and weaknesses of the case of the parties become known to the mediator. Matters whicl would not be divulged in a court hearing 'including trade secrets and family secrets are routinely disclosed during the negotiation process. A mediator has to be discreet and maintain confidentiality. He should neither disclose the facts/secrets ot parties to outsiders nor use them for personal benefit or to the detriment of the parties.

6. When can there be mediation ? Mediation can be attempted at any stage - pre-litigation, dunng litigation and post litigation (during execution). So long as there is a dispute or conflict and so long as parties are willing, there can be mediation.

7. What are the Stages in Mediation Process?

(7.1) Opening statement by the Mediator : Talks about his position, experience and neutrality. Explains the advantages of a negotiated settlement or conflict resolution as also the limitations and disadvantages of court adjudication [Mediator explains]

(7.2) Joint Sessions : Encourages both sides to explain their side of the case, put forth their claims, and expresses their grievances and complaints. [Mediator, listens]

(7.3) Private caucus/sessions : Discusses with the parties separately. Evaluates and points out the strengths and weaknesses in their case, as also obstacles to certain types of solutions. Points out the strength of the opponent's case. Explains the pros and cons of difficult solutions [Mediator assesses/ guides/persuades]

(7.4) Finding a solution : Encourage parties to come out with solutions/alternatives. Help the parties to draw up draft settlements. Enable parties to reach a mutually agreeable solution. [Mediator facilitates]

(7.5) Settlement :The Agreement or settlement memo setting out the terms of settlement are signed by the parties in the presence of the mediator and countersigned by the mediator. [Mediator closes]

8. How to make the mediation user friendly, and successful?

8.1)Draw up a national plan for making mediation a regular recognized alternative disputes resolution process, and provide for inclusive participation of lawyers, judges and social workers as trained mediators.

8.2)Provide necessary infrastructure. Records and Registers relating to reference to mediation and settlement through mediation. Frame necessary rules and regulations relating to registration of mediators, conduct of mediation, ethical conduct and discipline of mediators.

8.3)Draw up syllabus for (i) training mediators and (ii) training referral judges and (iii) training Trainers.

8.4)Provide appropriate training: (i) to those who want to become mediators (ideally 40 hours of lectures and 10 practical hands on mediations), (ii) to judges for identifying and referring cases to mediation (iii) to Trainers to train mediators.

8.5)Prepare a User's manual for Mediators and a ADR reference Handbook for Judges.

8.6)Evolve a scheme for using the facilities of State Judicial Academies and State Legal Services Authorities for mediation related activities where no separate infrastructure or funds are not available for mediation programme.

9. Topics for further discussion :

Several aspects relating to mediation require debate and discussion among the stake-holders. Some of them are noted below.

(1) Who should be the mediators? Should they be lawyers, judges, retired judges, social workers, psychiatrists or specialists in respective fields (for example. Businessmen in reeard to commercial disputes. Engineers for building/engineerinj disputes, Counsellors in matrimonial disputes etc.)

(2)What should be the nature, extent and process of training tc prospective mediators? Who should be the trainers ?

(3)Whether there should be any ceiling on the number of mediator; to be licensed or permitted to operate in a given area ?

(4)Whether mediation should be controlled or supervised by courts or should be left to independent bodies? Whether mediation should be part of legal services under by the State Legal Services Authorities? Whether mediation should be institutionalized or ad hoc ?
(5)How to generate the funds required for mediation programmes and remuneration of mediators ?
(6)Whether the mediators should be honorary or remunerated? If to be remunerated, the scale of remuneration ?
(7)Who should pay the mediators - the parties, the Judiciary, the legal services authorities, government. Bar Association?
(8)Whether there should a code of conduct and ethics for mediators and who should be the controlling, enforcing and disciplinary authority.
(9)What is the remedy available to a party having a grievance against a mediator?
(10)Whether court annexed mediation should be initiated in all courts or only in select courts in cities where there is excess load.
(11)What steps should be taken to popularize/familiarize mediation among the public.I am sure this conference will throw up suggestions and answers at some of these questions and also raise other questions which will enable the process of mediation to improve and flourish and serve the -common man.