MEDIATION : CONSTITUENTS, PROCESS AND MERIT

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After 56 years of coming into force of the Constitution of India people have started thinking whether Constitution has failed us or we have failed the Constitution. Time has come and really we are thinking aloud today-whether the justice delivery system failed us or we have failed the justice delivery system-Who is to be held responsible for it. But these questions are of little importance to the litigants; they are not interested in this. They are only interested in getting their dispute resolved as early as possible and perhaps within a reasonable time through a process which is cheap, flexible and not based on rigid formula of legal principles or technicalities.

The probable answer to all these questions lies in Alternative Dispute Resolution system better known as ADR. The concept of ADR is not a very new one. For the last two decades the topic was enunciated and introduced in the various legal discussions and now it has even got statutory force. According to Black's Law Dictionary, the word alternative means 'giving an option'.

ADR is a term, which refers to various procedures developed in

Following its inspiration, several countries including Australia Canada , Germany, Holland Hong Kong New Zealand South Africa Switzerland and the United Kingdom

The Adversary system of justice which we have in India , time is also to a great extent consumed over procedural wrangles, technicalities of law and inability on the part of a large number of litigants to engage lawyers who are well versed in ,law. The time has come to devise new ways and strategies to find out methods for quick disposal of cases. In that situation jurists began urging the need to explore the possibility of creating a dispute resolution machinery other than the Court. Emphasis was laid on the need to establish a culture of amicable solution of dispute whether post-litigation or pre-litigation.

In its 14th report, the Law Commission refers to devise ways and means to realize that Justice is simple, speedy, cheap, effective and substantial. In Setting an agenda" is a communication technique used by mediators to establish the order in which issues, positions, claims, or proposed settlement terms will be addressed.

SPECIAL COMMUNICATION SKILLS DEALING WITH EMOTIONS:

Accept some venting Utilize active listening to verify the sincerity of the emotions. Utilize private sessions (caucuses) Insist that some order be maintained. Move to an easier issue on the agenda Utilize paraphrasing Deal with one issue at a time Invite parties to disclose the emotional impact of the situation. Invite parties to express their feelings to one another Suggest a recess.

USING THE PRIVATE SESSION (CAUCUS):

Probably the most over used tool possessed by the facilitator or mediator is the private session. It is so over used that some facilitators/ mediators always break the parties into private sessions at the conclusion of the opening statements. Over use of the private session can be counterproductive because communication is insulated. When should you consider asking for a private session? To explore share private matters and information you do not desire to share in general sessions. To regain control when a party is getting out of hand. When you believe you need to "float" risky trial balloons. When you believe the parties are near impasse. When should you consider asking for a general session? When a party can be directly persuaded. When a party can communicate a compelling position.

Using body language: non-verbal communication gestures, use ot space, and manipulation of objects-may be intentional or unintentional, but it still.

REACTIVE DEVALUATION

Reactive devaluation is a psychological phenomenon that occurs when a person reacts negatively to information based upon the source of the information. Parties in a dispute may react negatively to offers or counter-offers if they are suggested by the opposing party or attorney. A mediator may handle this situation by: Taking ownership of the information,with the consent of the party. Suggesting a possible offer or counter-offer without attributing it to any particular person. Precisely, a mediator must have the following qualities, namely- Patience Optimism Detachment Perseverance Flexibility Sense of humour Therefore, a person having all these qualities and who are well versed in the ADR mechanism can better facilitate the ADR process in the country and secure access to justice in time. its 77th report the Law Commission took the view that the Indian society primarily being an agrarian one and thus is not sophisticated enough to understand a technical and cumbersome procedure followed by Courts. The system to impart justice which we have inherited from the Britishers at the lowest level alienated the people because of technicality, extreme formalism, rigid rules of procedure and foreign language for a large number of people. It lost its meaning and effectiveness. The Constituent Assembly also gave out its mind by enacting Article 39A of the Constitution of India as also providing for conciliatory provisions in matrimonial and family disputes. Parliament also amended the Code of Civil Procedure by inserting Rules 5 to 8 in Order XXVII (duty of Court in suits against the Government) or a public officer to assist in arriving at a settlement) and by incorporating a new Chapter under Order - XXXII (A) (suits relating to matters concerning the family), by the Amending Act I of 1976, but unfortunately the scheme as envisaged has not been translated into action. In the situation, the need of the day is to explore the possibility of creating a dispute resolving macNnery otherwise than the court and arbitration. Emphasis must be laid to the need of establishing a culture of amicable solution of disputes whether at a post-litigation or pre-litigation stage. It is really an alternate resolution system to supplement or supplant the present judicial system.

Importance of the subject can be gauged from the fact that India has recently entered into bilateral investment protection agreement with the United Kingdom , Germany , the Russian Federation , the Netherlands , Malaysia and Denmark.

Each agreement makes provisions for settlement of disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former through the following ADR procedures, negotiation, conciliation and arbitration.

India is also a party to the Convention, Establishing the Multilateral Investment Guarantee Agency which provides for settlement of disputes between States parties to the Convention and the Multilateral Investment Guarantee Agency through negotiation, conciliation and arbitration. There are a number of agreements in other sectors to which India is a party contajning provision for dispute resolution through ADR procedures. Even with a view to make the Central Govt, or the State Govt, or other local bodies avoid unnecessary litigations, Section 80 of the CPC contains' provisions for serving notice of two months on these bodies before enforcing the claim in the courts. The reason is to avoid recourse to the courts and tile claims are settled amicably. Order XXXII-A of the Code of Civil Procedure, Section 23 of the Hindu Marriage Act, Industrial Disputes Act, Family Courts Aci, Legal Services Authorities Act and Arbitration and Conciliati6n Act, all of them are based on the concept of ADR. Section 89 of CPC authorizes the courts to offer the party for ADR under.

a) Arbitration, b) Conciliation, c) Judicial settlement including settlement through Lok Adalats and/ or d) Mediation

Of the several ADR techniques, "mediation'" seems to be the most widely used one, it is the same dispute resolution process as conciliation, except that in the case of former the neutral third party plays a more effective role in putting forward his own suggestions for the settlement of the disputes. Mediation, as a method of dispute resolution is no new phenomenon, rather one that has for long existed in our traditions. 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. Mediation is perhaps the fastest growing form of alternative dispute resolution in business today. Lawyers and dients seeking rapid, economical, and private dispute resolution are using mediation in court-annexed and private, for-fee settings. Unlike litigation and arbitration, which consists of a formal evidentiary hearing, mediation is a semi formal negotiation behveen the parties without the use of evidence or witnesses. While litigation and arbitration are presided over by a judge who renders a decision in the cases, mediation is facilitated by a specially trained neuh'al advisor who is not empowered to decide the case, only to assist the parties in negotiating effectively. Mediation is also unlike litigation in that it is non-adversarial.

Indeed, the most effective mediators build a process in which parties understand their role as active participants and col]aborate to resolve the dispute. Unlike a trial or arbitration, mediation often results in a mutually agreeable outcome. The essence of the mediation is its flexibility, which enables the participants to select a process suitable to their needs. The institution of mediation has been statutorily recognized by the Parliament when Section 89 of the Code of Civil Procedure was amended providing for resolution of disputes in the cases where it appears to the court that there exists an element of settlement, which may be acceptable to the parties.

The Supreme Court in Salem Advocates Bar Association (I) v. Union of India [(2003) I see 49] not only upheld the constitutionality of the statute but also directed framing of appropriate rules. The rules so framed by the Chairman, Law Commission, Justice M. Jagannadha Rao has been accepted by this Court in Salem Advocates Bar Association, TN. v. Union oflndia [(2005) 6 see 344] laying down that "The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section 89 and if the parties do not agree, the court shall refer them to one or other of the said modes."Mediation - is an informal process in which a neutral third party without the power to decide or usually to impose a solution helps the parties resolve a dispute or plan a transaction. Mediation is voluntary and non-binding, although the parties may enter into a binding agreement as a result of mediation. It is not an adjudicative process. It is not as if one party wins and the other parties looses. Both the parties arrive at an equitable solution that is why mediation is said to be a win win situation. :The appropriate case for mediation are those where -

1. Parties want to control the outcome
2. Communication problem exist between parties or their lawyers
3. Personal or emotional barriers prevent settlement
4. Resolution is more important than vindicating legal or moral principles
5. Creative possibilities for settlement exist
6. Parties have an ongoing or significant past relationship. Parties disagree abut the facts or interpretation
7. Parties have incentiv.e to settle because of time, cost of litigation, drain on productivity, etc
8. A formidable obstacle to resolution appears to be the reluctance ofthe lawyers, not the parties.

MEDIATION PROGRAMME IN DELHI

Mediation Programme started in Delhi District Courts in the first week of August, 2005 with the help of ISDLS. ISDLS posted its Trainers for giving training to the Mediators. The training started on 8.8.2005. Initially six judicial officers from Delhi Higher Judicial Service were nominated for training after ascertaining their willingness. After one week of theoretical training, the Trainer started practical training and they were asked to do mediation under the observation of trainer. Two mediation centres are functioning at Delhi

ADVANTAGES OF MEDIATION:

First, it is less costly than evidentiary process. Mediation is normally completed in a matter of hours through a series of one to three conferences. It may occur much earlier and with much less preparation in a dispute than in a trial or arbitration. Furthermore, mediation is not a formal evidentiary process requiring extensive use of expert witness or

demonstrative proof. Indeed, the process is most effectively accomplished without introduction of evidence or witnesses, relying instead on the parties to negotiate in good faith.

Second, the process is more efficient than most evidentiary processes; one ofthe principle attractions of mediation is the speed with which parties can resolve their disputes. Because mediators are present to manage negotiation, not to represent a party or render a legal decision, they need not prepare extensively to conduct the conference.

Third, the process offers a range of settlement options limited only by the creativity of the parties and the mediator. Parties can create outcomes custom designed for their particular situation.

Fourth, the process does not preclude the use of further, more formal dispute resolution mechanisms such as arbitration or litigation. Parties are therefore free to strive for a settlement without jeopardizing their chances for or in a trial if mediation is unsuccessful. Fifth, as noted earlier, the parties control the outcome of the case. Mediation does not create the risk of outright loss associated with trial, because the parties do not transfer the power to decide.the cases to someone else.

DISADVANTAGES OF MEDIATION:

Mediation is not without its disadvantages. Principal among them is the absence of due process protection for the participants. The formalized procedural and evidentiary rules of due process designed to protect parties, and associated with the trial or arbitration of a lawsuit are lacking in mediation. This lack of formality is a disadvantage in the eyes of those who believe it may permit mediator bias, coercion, or party bad faith. For others, it affirms the need for a well-trained mediator or an attorney to assist in preparation and _o participate during the process to ensure that the important legal rights not being waived without in-formed consent.

A second concern for some parties and attorneys is the absence of an appeal process in the event that the privately negotiated agreement is later determined by one of the parties to be flawed in some way. Because it is a highly confidential process, it is never performed on the record or recorded by a court reporter.

TRAINING OF MEDIATORS:

The training is necessary to teach the fundamentals of mediating the litigated case. Training must focus primarily on participation in role-plays of the-various stages of mediation. It shouid also include lecture, videotape, demonsh<ation and small group exercises. The participants should be exposed to the component of atypical mediation conducted in a litigated case as practised in many courts in the United States. Such methodology would, however, have to be followed by at least 12 real mediations under the general supervision of the trainer. The simulation exercises comprise "learning by doing" sessions, preceded by a very brief introduction as to mediation techniques and objectives. The trainee learns the intricacies of mediation skills in the "learning by doing" sessions as the program progresses. Each exercise involves five trainees, and given the requirement of supervision by the trainer, not more than two or three exercises can be run simultaneously. The typical strength of group should not exceed 10 or 15 trainees per trainer. Each trainee should get an opportu,. nity to play the role of the mediator, the party involved and the counsel, with sufficient provision of time to permit role reversals.

THE PROCESS OF MEDIATION

A mediator must follow the following process:

STAGE ONE: Mediator lets lawyers and clients know what to expect and how to prepare; arranges logistics; and addresses authority issues, and ensures the attendance of decisionmakers.

STAGE TWO: The mediator's introduction Mediator explains the process; establishes procedural guidelines: sets tone of neutrality and optimism.

The mediator should "model" (i.e. demonstrate) a calm, but businesslike, demeanor when mediating a dispute. The mediator should be relaxed, but focused. The atmosphere can be described as similar to a business meeting. Anxiety, frustration, and the anger are highly contagious emotions. The mediator should not display any of these emotions. When a mediator adopts a moderate tone, the parties are likely to follow.

Explain that statements made in mediation are confidential. This means that parties should feel more comfortable to talk about their ideas and positions knowing that their words cannot be used against them at a later date. Explain whether the confidentiality is based on law or upon the agreement of the parties (before they start mediating).

STAGE THREE: Identifying the problem Parties and/or counsel state their views of the dispute and identify issues that remain in dispute. What would you like the other party and me to understand about your perspective on this dispute? Discuss any aspects of the dispute you would like the other party and me to under stand: the factual background, what is important to you about the dispute, what you need to conclude it, the law.

STAGE FOUR: Exploring the problem

Mediator assists parties in recognizing their underlying values, needs, and interests. What about--------- is important to you? What interests of yours does... meet? What if you don't get? What goals/interests/needs of yours could be furthered by an agreement? What considerations/concerns/needs/interests of yours must be met by any agreement?

If the other party were to agree to - What would that mean? What problems would that solve? What needs would be met? What interests would be served? If other party were not to agree to - What problems would that create? Wrhat needs would go unmet? Why it is important to you to have - ? Why do you want— ?

STAGE FIVE: Developing options for resolution Mediator and parties identify and evaluate options for resolving the disputes; parties choose mutually agreeable options. What ideas do you have for addressing the problem you identified? What solutions will meet as many of your needs as possible? • Brainstorming options. Evaluating options You said------ was important to you. How well does this option meet those interest/needs/ concerns?

STAGE SIX: Concluding the mediation Mediator and/ or counsel documents the terms of agreement; mediator confirms the parties understanding and acceptance of the agreement; defines future responsibilities of the parties; acknowledges conclusion of mediation.

COMMUNICATION TECHNIQUES USED IN MEDIATIONS

"Summarizing" is a technique used by a mediator to briefly, clearly and. accurately restate the essence of a statement by a party or attorney regarding issues, positions, or proposed terms of agreement.In summarizing, a mediator must be careful to:• Be accurate Be brief. Re-state the neutral Be complete. "Acknowledgment" is a communication technique used by a mediator to: Reflect back a person's statement or position.

In a manner that recognizes the perspective of the party regarding the statement or position. One purpose of acknowledgement is to convey that the mediator has accurately heard and understood t.he statement/ position. Another purpose of acknowledgement is to convey that the mediator understands the importance of the statement' position to the party. "Re-directing" is a communication technique in which the mediator shifts the focus of a party from one subject to another. Re-directing may be used to: Focus on the details Re-focus on general issues Respond to a hostile or highly adversarial statement by a party. "Deferring" is a communication technique in which the mediator postpones a response to a question or statement by a party. It may be used: Where a party or attorney requests a premature evaluation To follow an agenda established by the mediator To gather additional information To defuse hostile or highly adversarial statement.