

An Endeavour: Mandatory Application of Mediation by Civil Courts in Pending Litigation

by

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on

23.02.2013

at

**Tamil Nadu State Judicial Academy for the Newly Recruited Civil Judges
2012 (Batch - II)**

1 - Introduction

I deem it a matter of pride and joy to be present amongst newly recruited civil judges of the State of Tamil Nadu, in order to enlighten and share some of my experiences with you all, which I find might be of great significance, if applied, in your future as Judges. Last time I was given the pleasant opportunity to provide a lecture on the topic "*Labour Law vis-a vis Civil Jurisdiction*". Today, I will speak on a topic of equal importance and which I feel will be very useful in its application in a court of law. The topic "*Mandatory Application of Mediation by Civil Courts in Pending Litigation*" deals with the significance of Mediation (to which I will even be adding the other forms of ADR as well) expressly acting as an alternate form of dispute resolution and the role which will be played by you all, in effectively ensuring that these principles are followed, by identifying the potential issues at the threshold, to avoid the hassle of litigation.

The proliferation and pendency of litigation in Civil Courts for a variety of reasons according to me, has made it impracticable to dispose of cases within a reasonable time. This has led to the overburdening of the judicial system, thereby placing it in a position of not being able to cope up with the heavy demands on it, mostly for reasons beyond its control. Hence, I feel, speedy justice has in turn become a casualty, though the disposal rate of the judge is quite high in our country. '*An effective judicial system requires not only that just results be reached but that they be reached swiftly.*' But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within a reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as a life time, and sometimes litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from suffering harassment. Thus, there is a chain reaction of litigation process and civil cases may even give rise to criminal cases. Speedy disposal of cases and delivery of

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quality justice is an enduring agenda for all who are concerned with the administration of justice.

Hence, the need to put in place Alternate Dispute Resolution (ADR) mechanisms has been immensely felt so that the courts can offload some cases from their dockets. The ADR systems have been very successful in some countries, especially USA wherein the bulk of litigation is settled through one of the ADR processes before the case goes for trial.

In fact, Article 39A of our constitution enjoins that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall in particular, provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent Judiciary within a reasonable time are the cherished goals of our Constitutional Republic and for that matter of any progressive democracy.

This being said, in our country, arbitration and mediation have been in vogue since long. Arbitration was originally governed by the provisions contained in different enactments, including those in the Code of Civil Procedure Code. The first Indian Arbitration Act was enacted in 1899, which was replaced by the Arbitration and Conciliation Act of 1940 and then by 1996. The mediation of informal nature was being adopted at the village level to resolve petty disputes from time immemorial. Thanks to the innovative measure taken by the judiciary in some states, resolution of court litigation through Lok Adalats became quite popular during 1970's and 80's. With the advent of Legal Services Authorities Act, 1987, Lok Adalats and Legal Aid Schemes have received statutory recognition and became an integral and important part of the justice delivery system. Through this lecture, I will deal and provide certain suggestions/propositions and legal provisions, which I personally feel, if applied by you all, will lead to a much efficient functioning of our judicial system. You judges play an important role in determining the fate of a case and can help and assist in identifying and reducing the number of litigations as whole, by referring the matters which need to be referred to one of the forms of ADR.

2 – Significance & Impact of ADR for 'Smooth' Judicial Functioning

But before I delve into the above topic in depth, I feel it is necessary to first understand the concept and significance of ADR as a form of our adjudicatory process.

The time has come when we have to make an introspection about the effective modes of Alternate Disputes Resolution. Not only because of Docket explosion, but for variety of other reasons. I shall endeavor to highlight those other reasons when we deal with the different modes of ADR.

At the outset, among various modes of Alternate Disputes Resolution, it will be good if we find what will suit more for the type of litigation prevailing now *viz-a-viz*. the litigant mass.

In Alternate Disputes Resolution, resort is made to Arbitration by the parties who are in the know of things. For instance, Arbitration is handy for the parties dealing in

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commercial contracts and Government contracts. It is less expensive, time saving, free from procedural hazards and other formalities. But as days passed on and awareness improved, the said mode has now become comparatively costly at least in the private sector commercial transactions. One other pitfall is the scope for collateral proceedings being raised in the courts under the provisions of Arbitration and Conciliation Act at the initial stages themselves under Sections 9, 10, 11 and 24 of the Act. Even after the preliminary award or final award, parties are entitled to move the judicial forum for challenge on different grounds and thereby provide scope for further litigation. Keeping such shortcomings in the said mode of Alternate Disputes Resolution, it will have to be held that it may not be fully suitable for all types of litigations and the litigants in general. A comparative study of the said mode of Alternate Disputes Resolution with the most suitable one can be made at the relevant and appropriate stage of discussion.

One other mode of Alternate Disputes Resolution, which is statutorily recognized, is conciliation. Conciliation as a mode of settlement between parties has been working well for more than five decades in the Industries and Labour Sector. In fact, under the provisions of the *Industrial Disputes Act, 1947*, Sections 7, 10, 11, 12 and 18 have been prescribed. There are statutory authorities designated as Conciliation Officer, right from the level of Labour Officer up to the level of Commissioner of Labour who play the role of Conciliation Officer to bring about a settlement between workmen and management. But one relevant factor to be borne in mind is that even settlements arrived at between them either at the bilateral or tripartite level, are open to challenge before the prescribed judicial forum as a matter of course. Barring usage of conciliation as a mode of settlement between disputing parties in such labour related issues, conciliation as a mode of settlement process is not in vogue in other types of litigations. One other factor may be that there are no definite groups or trained personnel available to practice the said method of Resolution as an established mechanism. Though, in the Arbitration and Conciliation Act, the expression Conciliation is prominently used, the said mode of Resolution has not been put into practice as a common method of Settlement Resolution.

It is, however, relevant to note that the conciliation machinery under the industrial Disputes Act has been working well for the past several decades in resolving disputes among the workmen and managements in the Industrial and commercial sector. Cost wise, since the conciliation machinery has been set up under the Industrial Disputes Act, as a statutory forum, virtually there is nil cost except to the State Exchequer. The Conciliation Officer under the Industrial Dispute Act, having regard to those regulated working pattern on a day to day basis dealing with variety of labour related issues are able to handle the said machinery effectively. In fact, having regard to the systematic way of dealing of such conciliation machinery, even high profile disputes are more effectively handled without providing scope for such disputes getting exploded or causing grave set back to the Industrial Sector as well as to the society at large. In fact, such heavy staked disputes get resolved quickly without much hassle and with less monetary loss. Say for instance, the Air India disputes. Though in the first blush, one might feel to think as though there were huge monetary loss and public inconvenience, compared to the magnitude of the issue raised and the stand point of the Management of the Airlines and the volume of the employees, once the issue got resolved at the intervention of High Level Conciliation forum, the whole issue got settled, bringing about a final solution without any extra cost and without any casualty. Above all, the stratum of the issue being litigated in courts was brought to an end. It is not known, as

to why the State, inspite of extraordinary growth of litigation, has not even attempted to set up similar such machinery to resolve civil litigations. As on date, since there is no such organized machinery available, the said mode is not resorted to for resolution and consequently one has to think of any other alternate method.

Baring the above two types, what is ruling the field is Lok Adalat manned by the Legal Services Authority. When we talk of Lok Adalat, what comes to one's mind is to what extent the said method has worked so far in achieving the results. The hard truth remains that except in the matter of Motor Accidents Claims and to some extent cases filed under Section 138 of Negotiable Instruments Act, Lok Adalat cannot be said to have yielded any accredited results. Even for a moment, I am not suggesting that Lok Adalat as an Alternate Disputes Resolution machinery is ineffective. In fact, continuous Lok Adalats and Mega Lok Adalats have brought about considerable amount of settlements in certain types of litigations. The hard truth remains that the said machinery cannot be held to have achieved the desired results as a settled mode of Alternate Disputes Resolution in all types of litigations. At least one factor to be noted is that the personnel involved in such Lok Adalats, though were one time High Level Judicial Officers, cannot be said to have acquired any specialized training to negotiate or conciliate or mediate between the fighting litigants and goad them for a successful settlement. The greatest advantage in Lok Adalat is its cost effectiveness and less time consuming as well as the easy way of bringing about the parties to the talking table. I am of the view that, it can be made more effective by imparting some intensive training to those who preside over Lok Adalat sittings on aspects such as how to tune the minds of the litigating parties to resort to out of court settlement by highlighting the ill effects of prolonged litigation *vis a vis* the advantage of a settlement in the first instance as against an ultimate verdict, its vagaries, cost factor, the diminishing value of the gain after a prolonged success and above all the never ending fighting mood of the parties even after the conclusion of the litigation. Likelihood of such mindset in any human being would always be triggering further litigations causing mental agony and hardship not only to the litigating parties, but future generations to suffer for no fault of theirs. Such training, if imparted, would not only improve the working of the Lok Adalat system more effectively, but is sure to bring about more number of settlements.

The reason why I am explaining all this so elaborately, is for all of you to ponder over and suggest similar such ideas to improve the working of the system. It will be appreciated if such of those judicial officers who actively participate / organize Lok Adalats, to delve deep into the working and suggest ways and means to improve the working of the system. In this context, it will be worthwhile to keep in mind that organizing Lok Adalats either permanent / continuous or Mega Adalats, being a statutory function, improving the working of the system by adopting new skills, improved working, updating knowledge on the working of Lok Adalats, applying different ideas for different types of litigations and different types of parties will be a welcome step. In this respect, the members of the subordinate judiciary should come forward to air their views on both improvements of the system and also the shortcomings prevailing, which hampers its successful working. Every endeavor in this respect by those interested in sharing their views may use the website of ENDEAVOR and contribute their might.

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A thoughtful consideration on the working of different modes of Alternate Disputes Resolution gives us an insight as to the advantages and disadvantages existing in them.

Keeping the above mentioned perspectives in mind, when we examine one other mode, namely, the concept of Mediation, it can be noted that the said concept has emerged in this country very recently. The said concept is undoubtedly working well in western countries as already mentioned.

The Mediation as a concept of Disputes Resolution is unique and stands apart as compared to other modes of ADR. The concept of Mediation was evolved in the latter half of the 20th Century, though its root came to some extent from the renowned age old Panchayat system that was and is prevailing in the Rural Villages. It will have to be stated that the concept of Mediation after its introduction and continuous practice has been improved in its practice to a very great extent in the last quarter of the 20th Century and after the emergence of the 21st Century, the practice has been developed to a very great extent in Western countries. To trace the history of its emergence, it had its roots in USA, notably at the *POUND CONFERENCE* in 1976. The Pound Conference recorded a definite resolution to embrace ADR, especially Mediation. It was followed by two enactments. The Civil Justice Reform Act, 1990 which required each federal judicial district to address and concentrate on judicial delay and congestion and suggest an alternate machinery to release the congestion. The Administrative Dispute Resolution Act, 1996 required several federal agencies to use ADR, as Postal and Air Force and expanded the use of ADR, by appointing specialists, and thereby, settling government and labour disputes amicably.

Several thousand statutes emerged to adopt Mediation as a Mandatory use for dispute Resolution. The State Bar Associations set up Mediation Centers. The American Bar Association has its intensive Disputes Resolution Section which holds a bigger annual conference than its litigation section. Many Companies are committed to Mediation. Several countries have set up Mediation Centers and the cases are taken off the courts mandatorily to undergo the process of Mediation before the court appointed Mediators.

Other countries, like United Kingdom also introduced Court annexed Mediation as an alternate for Disputes Resolution Mechanism. UK introduced civil Procedure reforms in 1999 for active Case Management Reforms. In 2001 Lord Chancellor's Department announced that all Government disputes should resort to resolve litigations by adopting settlement procedures. Courts discouraged parties by denying costs where they unreasonably declined to adopt settlement procedure. At the same time in the commercial sector there was innate approach for resort to ADR Mechanism. Similarly in Australia, South Africa and Sri Lanka, ADR Mechanism in the place of litigation process was encouraged and implemented.

In fact, *Justice Warren Burger*, the former CJI of the American Supreme Court had observed, while discussing on the importance of ADR:

"the harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of Judges in numbers never before contemplated. The notion-that ordinary people want black robed judges, well-dressed lawyers, fine paneled court rooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible". Based on this above quote, I

would like to enumerate the benefits or advantages that can be accomplished by the ADR system. They are summed up here briefly:

1. Reliable information is an indispensable tool for the adjudicator. Judicial proceedings make a halting progress because of reluctance of parties to part with inconvenient information. ADR moves this drawback in the judicial system. Information can be gathered more efficiently by an informal exchange across the table. Therefore, ADR is a step towards success where judicial system has failed in eliciting facts efficiently.
2. In Mediation or Conciliation, parties are themselves prodded to take a decision, since they are themselves decision-makers and they are aware of the truth of their position, the obstacle does not exist.
3. The formality involved in the ADR is lesser than traditional judicial process and costs incurred is very low in ADR
4. The cost procedure results in a win-lose situation for the disputants
5. Finality of the result, the time required to be spent is less, efficiency of the mechanism, possibility of avoiding disruption.

Till now I have dealt in detail, with the significance and need of ADR in our judicial system and believe this would have given all of you a complete understanding of our current scenario. In light of this context I would like to enumerate certain provisions from the civil procedure code and certain other statutes, which encourages or promotes settlement, via ADR, and the crucial role played by judges in these scenarios.

3 - Provisions in CPC 'Supporting & Promoting' ADR

The Civil procedure is the body of [law](#) that sets out the rules and standards that [courts](#) follow when [adjudicating civil lawsuits](#) and govern how a [lawsuit](#) or [case](#) may be commenced, what kind of [service of process](#) (if any) is required, the types of [pleadings](#) or [statements of a case](#), [motions](#) or applications, and [orders](#) allowed in civil cases, the timing and manner of [depositions](#) and [discovery](#) or disclosure, the conduct of [trials](#), the process for judgment, various available [remedies](#), and how the courts and clerks must function.

Section 89 is generally understood as the only provision in CPC which provides for out of the court settlement; but this I have to state is a misconstrued notion among the legal members, as there are many other provisions under the act which support & promote settlement.

Even prior to the existence of Section 89 of the Civil Procedure Code (CPC), there were various provisions that gave the power to the courts to refer disputes to mediation, which sadly have not really been utilized. Such provisions, inter alia, are in the Industrial Disputes Act, the Hindu Marriage Act and the Family Courts Act and also present in a very nascent form via Section 80, Section 107(2), Section 147, Order 23 Rule 3, Rule 5 B of Order 27, Order 32 A and Order 36 of the CPC, 1908. A trend of this line of

thought can also be seen in *ONGC v. Western Co. of Northern America² and ONGC Vs. Saw Pipes Ltd³*.

Before I discuss the CPC provisions, here are a few examples of some other statutes and their provisions respectively supporting settlement;

i. *Industrial Disputes Act, 1947* provides the provision both for conciliation and arbitration for the purpose of settlement of disputes. (I have already discussed these provisions). In *Rajasthan State Road Transport Corporation v. Krishna Kant⁴*, the Supreme Court observed: "The policy of law emerging from Industrial Disputes Act and its sister enactments is to provide an alternative dispute-resolution mechanism to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil courts. Indeed, the powers of the courts and tribunals under the Industrial Disputes Act are far more extensive in the sense that they can grant such relief as they think appropriate in the circumstances for putting an end to an industrial dispute."

ii. *Section 23(2) of the Hindu Marriage Act, 1955* mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance, make an endeavor to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case. For the purpose of reconciliation the Court may adjourn the proceeding for a reasonable period and refer the matter to a person nominated by the court or parties with the direction to report to the court as to the result of the reconciliation. [*Section 23(3) of the Act*].

iii. *The Family Court Act, 1984* was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith by adopting an approach radically different from that ordinary civil proceedings. [*K.A.Abdul Jalees v. T.A.Sahida*]⁵. Section 9 of the Family Courts Act, 1984 lays down the duty of the family Court to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter. The Family Court has also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility.

3.1 - Provisions under CPC are hereby enumerated in detail:

I. **Section 80(1)** of Code of Civil Procedure lays down that no suit shall be instituted against the government or public officer unless a notice has been delivered at the government office stating the cause of action, name, etc.

• The object of Section 80 of CPC – the whole object of serving notice u/s 80 is to give the government sufficient warning of the case which is of going to be

²1987 SCR (1)1024

³AIR 2003 SC 2629

⁴1995 SCC (5)75

⁵(2003) 4 SCC 166

instituted against it and that the government, if it so wished can settle the claim without litigation or afford restitution without recourse to a court of law. [*Ghanshyam Dass v. Domination of India*]⁶. It is to give the government the opportunity to consider its legal position and if that course is justified, to make amends or settle the claim out of court. - [*Raghunath Das v. UOI*]⁷.

- Section-80 of CPC is also a provision to initiate conciliation and give an opportunity to the Government to settle the matter amicably prior to institution of a suit in the court. A statutory notice of 2 months before the proposed action under section 80 Civil Procedure Code 1908 is intended to alert the State to negotiate a just settlement or at least have the courtesy to tell potential outsiders why the claim is being resisted. The underlying object is to curtail litigation and is also to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well.

- Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period thereof, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. It is to be noted that Government of India and State Governments are the largest litigants in India.

- A litigation policy for the State involves settlement of governmental disputes with citizens in sense of conciliation rather than in a fighting mood. Indeed it should be a directive on the part of the State to empower its law officer to take steps to compromise disputes rather than continue them in court. The Supreme Court of India had emphasized that Governments must be made accountable by Parliamentary Social audit for wasteful litigation expenditure inflicted on the community through its inaction.

- The Government, government departments or statutory authorities are defendants in a large number of suits pending in various courts in the country. But in a large number of cases either the notice neither is replied to or in the few cases where a reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 CPC and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expenses and costs to the exchequer as well. A proper reply can result in reduction of litigation between the State and citizens. Having regard to the existing state of affairs the Supreme Court of India has directed that all Government, Central or State or other authorities concerned, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. This direction of Supreme Court shall put the Government authorities in a conciliation mode and promote early settlement of disputes.

⁶ (1984) 3 SCC 46

⁷ AIR 1969 SC 674

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Hence, it is your role as judges to identify these situations and resolve them at the threshold.

II. Section 89

By the CPC (amendment) Act 1999, section 89 had been introduced in the CPC, 1908 and it became effective from 01-07-2002. Section 89 in CPC reads as follows;

“Settlement of disputes outside the Court- (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

(a) arbitration;

(b) conciliation

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

*The related provisions which were incorporated by the same amendment act are those contained in **Rules 1A, 1B and 1C of Order X, CPC**, which are extracted hereunder:*

1A. Direction of the Court to opt for any one mode of alternative dispute resolution.

After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1B. Appearance before the conciliatory forum or authority

Where a suit is referred under rule 1 A, the parties shall appear before such forum or authority for conciliation of the suit.

1C. Appearance before the court consequent to the failure of efforts of conciliation

Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the court on the date fixed by it."

With the introduction of these provisions, a mandatory duty has been cast on civil courts to endeavor for settlement of disputes by relegating the parties to an ADR process. Five ADR methods are referred to in Section 89. They are (a) Arbitration, (b) Conciliation, (c) Judicial Settlement (d) Settlement through Lok Adalat, and (e) Mediation.

Arbitration as well Conciliation are governed by the Arbitration and Conciliation Act, 1996, which superseded the previous Arbitration Act of 1940. The arbitration unlike conciliation is an adjudicatory process. Once a civil dispute is referred to arbitration, the case will go outside the stream of the court permanently and will not come back to the court. However, in contrast, a dispute referred to conciliation which is a non-adjudicatory process, does not go out of the domain of the court process permanently. If there is no amicable settlement the matter reverts back to the court which has to proceed with the trial after framing issues. The reference to arbitration or conciliation is only possible if there is consent of the parties. In absence of the consent the court cannot on its own merits refer the parties to arbitration or conciliation. This legal position is no longer in doubt in view of the recent judgement of the Supreme Court in *Afcons infrastructure Ltd. vs. Cherian Varkey Construction Co. Pvt. Ltd.*⁸. In the case of arbitration, if there is no pre-existing arbitration agreement, the parties to suit can agree for arbitration by filing a joint memo or application and the court can then refer the matter to arbitration and such arbitration will be governed by the provisions of the AC act. The award of the arbitrators is binding on the parties and is enforceable as if it is a decree of the court, in view of what has been said in section 36 of the AC act. If any settlement is reached in the arbitration proceedings, then the award passed by the arbitrator on the basis of such agreed terms will have the same status and effect as any other arbitral award; vide section 30 of the AC Act.

When the matter is settled through conciliation, the settlement agreement shall have the same status and effect as if it is an arbitral award (vide section 74 of the AC act) and therefore it is enforceable as a decree of the court by virtue of section 36 of the AC act. Similarly, when a settlement takes place before the Lok Adalat, the award of the Lok Adalat is deemed to be a decree of a civil court under section 21 of the Legal Services Authorities Act, 1987 and executable as such.

The Supreme Court observed in the case of Afcon "*as the court continues to retain control and jurisdiction over the cases which it refers to conciliations or Lok Adalats, the settlement*

⁸ (2010) 8 SCC 24

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agreement in conciliation or in the Lok Adalat award will have to be placed before the court recording it and disposal in terms."

Coming to mediation, there is practically no difference between conciliation and mediation and quite often they are used as inter-changeable terms. Mediation is aimed at conciliation and conciliation has the elements of mediation. In the dictionary of modern legal usage by Bryan A. Garner, it is stated thus:

"The distinction between mediation and conciliation is widely debated among those interested in ADR... Some suggest that conciliation is 'a non-binding arbitration', whereas mediation is merely 'assisted negotiation'. Others put it nearly the opposite way: conciliation involves a third party's trying to bring together disputing parties to help them reconcile their differences, whereas mediation goes further by allowing the third party to suggest terms on which the dispute might be resolved. Still others reject these attempts at DIFFERENTIATION and contend that there is no consensus about what the two words mean- that they are generally interchangeable. Though a distinction would be convenient, those who argue that usage indicates a broad synonymy are most accurate".⁹

It may be noticed that section 73 of the AC Act contemplates the conciliator suggesting the terms of settlement. Therefore, the point of distinction noted in the above passage does not hold good in India. According to my brother, Justice R. V. Raveendran, former Judge, Supreme Court of India and author of the judgment in *Afcons Infrastructure case*, where the conciliator is a professional trained in the art of mediation (as contrasted from a layman, friend, relative, well-wisher, or social worker acting as a conciliator), the process of conciliation is referred to as mediation. In cases where the third party assisting the parties to arrive at a settlement is not a trained professional mediator, the process is referred to as conciliation.¹⁰ It is however necessary to point out that in many States, there are trained mediators including legal professionals and there are mediation centers managed by the Judiciary in few States. Mediation has emerged as a science now.

In *Afcons Infrastructure case*, the Supreme Court referred to the definition of mediation as given in the Model Mediation Rules, according to which *"settlement by 'mediation' means the process by which a mediator appointed by parties or by the court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between the parties directly or by communicating with each other through the mediator, by assisting the parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."* In short, mediation is a process of dispute-resolution by which the mediator assists and persuades the disputing parties to arrive at an amicable settlement.

Judicial settlement on the other hand means a compromise entered by the parties with the assistance of the court adjudicating the matter or another judge to whom the court had referred the dispute. In Black's Law Dictionary, *"judicial settlement"* is defined as

⁹ *A dictionary of modern legal usage* 554 (2nd ed 1995)

¹⁰ (2007) 4 SCC J23, *"Section 89 CPC: Need for an Urgent Relook"*

“the settlement of a civil case with the help of a Judge who is not assigned to adjudicate the dispute”.

Referring to the inter-relation between section 89 and Order X Rule 1 A, the Supreme Court pointed out that there is no inconsistency. Section 89 confers the jurisdiction on the court to refer a dispute to an ADR process, whereas Rules 1A to 1C of Order X, lays down the manner in which the jurisdiction is to be exercised by the court. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

Hence, my advice to every Judicial Officer is that they should at least once read the entire judgment and the guidelines set out, for an effective understanding of Section 89 CPC r.w Order X.

- III. **Section 107(2)** states that the Appellate Court shall have the same powers and shall perform as nearly as may be, the same duties as are conferred and imposed by the code on courts of original jurisdiction in respect of institution of suits instituted thereon. Hence I wanted to point out that all these provisions promoting ADR will be applicable to courts of appellate jurisdiction as well and is not restricted to Trial Courts alone.
- Iç. **Section 147** is a very significant provision which I feel all judges must pay heed to more often. It deals with the '*consent or agreement by persons under disability*'. It states that '*in all suits to which any person under the disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the court by the next best friend or guardian for the suit (as provided under Order 32 Rule 7) have the same force and effect as if such person, were under no disability and had given such consent or made such agreement.*' Hence, according to me, it is the responsibility of the court to make sure that people with certain disabilities, should be provided assistance along with the right advice, so that the matter is sorted out amicably, and to which you all can play a great role. [Look up *Bishundeo Seogent*¹¹]
- ç. **Order 23 Rule 3** of CPC is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order 23 provides that if the court is satisfied that a suit has been adjusted wholly or partly by and lawful agreement or compromise, the court shall pass a decree in accordance to that. Order 23, Rule 3 gives mandate to the Court to record a lawful adjustment or compromise and pass a decree in terms of such compromise or adjustment. But the compromise decree has to be read as a whole, to gather the intention of the parties. [*Mamju Lata Sharma v. Vinay Kumar Dubey*¹²]. The compromise should also not be recorded in a casual manner, but the court must apply its judicial mind while examining the terms of the settlement before the suit is disposed of in terms of the agreement. There is a responsibility cast on the court to satisfy itself about the lawfulness

¹¹ AIR 1951 SC 280

¹² AIR 2004 All 92 (94) (DB)

and genuineness of the compromise. [*Banwari Lal v. Chano Devo*¹³] Some Cases which I recommend you to look up are as follows; (*ILR 1946 Page 36, VSA Arumuga Mudilyar v. VPS Balasubramanium Mudilyar; AIR 1953 Madras, page 492, City Chidambaram Chetiar v. CT Subramanium Chetiar; AIR 1956, Bomabay, Page 569 Misrilal Jalamchand v. Shobhachand Jalamchand; AIR 1971 SC 1081*)

- çI. **Order 27 Rule 5B** confers a duty on court in a suit against the government or a public officer to assist in arriving at a settlement. In a suit where Government or public officer is a party it shall be the duty of the Court to make an endeavor at first instance, where it is possible according to the nature of the case, to assist the parties in arriving at a settlement. If it appears to the court in any stage of the proceedings that there is a reasonable possibility of a settlement, the court may adjourn the proceeding to enable attempts to be made to effect settlement. [*PP Abubacker v. Union*¹⁴]
- çII. **Order 32A of CPC** lays down the provision relating to “*suits relating to matters concerning the family*”. It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigations involving affairs of the family seem to require special approach in view of the serious emotional aspects involved. In these circumstances, the objective of family counseling as a method of achieving the object of preservation of family should be kept in forefront. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement.

The provisions of this Order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession, etc., Rule 3 imposes a duty on the Court to make an effort of settlement by way of providing assistance where it is possible to do so. The Court may also adjourn the proceeding if it thinks fit, to enable an attempt to be made to effect a settlement where there is a reasonable possibility of settlement. In discharge of this duty Court may take assistance of welfare expert who is engaged in promoting the welfare of the family. [**Rule 4**] When the family dispute is essentially between family members, it would appropriate to refer the dispute to a Lok Adalat. [*Pushpa Suresh Bhutada v. Subhash Maheshwari*¹⁵]

- çIII. Besides the above mentioned provisions, another important one, which I feel might be of significance is **Order 36 Rules 1-6**. According to this provision, courts have a duty and obligation to provide any opinion to the parties and must as far as possible, indulge and advocate a settlement or compromise. By this provision, parties enter into an agreement to get the opinion of the court and hence, court must go out of the way to make sure that issue is handled appropriately. Some Cases which I recommend you to look up are as follows; [*Ramdhan Sinha v. Notified Area Authority, AIR 2001 Gau 149; Trustees & Co. v. Municipal Corp. 54, Bom 825; Saradindu v. Bhagobati, 10 CWN 835;*

¹³ AIR 1993 SC 1139

¹⁴ 1972 K 103,107

¹⁵ AIR 2002 Bom 126

Sayad v. Lakabhai, 23 B 752; *Baxly Board v. WKMS Board*, 9 QBD 518; *Glargow Navigation Co. v. Iron Ore Co.*, 1910 AC 293; *Minoo v. Manecj*, AIR 1964 Mys 185]

4 - Important Decisions to Reduce Litigation

With an intention to reduce litigation, the Supreme Court started issuing various directions so as to see that the public sector undertakings of the Central Govt. and their counterparts in the States should not fight their litigation in court by spending money on counsel, court fees, procedural expenses and waiting public time. (see *Oil and Natural Gas Commission v. Collector of Central Excise*, 1992 Supp2 SCC 432, *Oil and Natural Gas Commission v. Collector of Central Excise*, 1995 Supp4 SCC 541 and *Chief Conservator of Forests v. Collector*, (2003) 3 SCC 472).

In *ONGC v. Collector of Central Excise*¹⁶, [ONGC I] there was a dispute between the public sector undertaking and GOI involving principles to be examined at the highest governmental level. Court held it should not be brought before the Court wasting public money any time. In *ONGC v. Collector of Central Excise*¹⁷, (ONGC II) dispute was between government department and PSU. Report was submitted by cabinet secretary pursuant to SC order indicating that instructions have been issued to all depts. It was held that public undertaking were to resolve the disputes amicably by mutual consultation in or through good offices, empowered agencies of govt. or arbitration avoiding litigation. GOI directed to constitute a committee consisting of representatives of different depts. To monitor such disputes and to ensure that no litigation comes to court or tribunal without the Committee's prior examination and clearance, the order was directed to be communicated to every HC and all subordinate courts for information. In *Chief Conservator of Forests v. Collector*¹⁸, ONGC I AND II were relied on and it was said that state/union govt. must evolve a mechanism for resolving interdepartmental controversies- disputes between depts.

In *Punjab & Sind Bank v. Allahabad Bank*¹⁹, it was held that the direction of the Supreme Court in *ONGC III*²⁰, to the govt. to set up committee to monitor disputes between government departments and public sector undertakings, make it clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee.

In the judgment of the Supreme Court of India in *Salem Bar Association vs. Union of India*²¹, the Supreme Court has requested for preparation of model rules for ADR and also draft rules of mediation under section 89(2) (d) of Code of Civil Procedure, 1908. The rule is framed as "*Alternative Dispute Resolution and Mediation Rules, 2003*".

¹⁶ [1992 Supp2 SCC 432]

¹⁷ [1995 Supp4 SCC 541]

¹⁸ (2003) 3 SCC 472

¹⁹ 2006(3) SCALE 557

²⁰ [(2004) 6 SCC 437]

²¹ (2005) 6 SCC 344

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“Rule 4 of the Alternative Dispute Resolution and Mediation Rules, 2003”, lays down that the Court has to give guidance to parties (when parties are opting for any mode of ADR) by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their opinion as to the particular mode of settlement, namely;

(i) it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;

(ii) where there is no relation between the parties which requires to be presented it will be in the interests of the parties to seek reference of the matter to arbitration as envisaged in clause (1) of sub-section (1) of sec.89.

(iii) where there is a relationship between the parties which requires to be preserved, it will be in the interests of the parties to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of sec.89.

The Rule also says that disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

(iv) where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section(1) of section 89.

According to Rule 8, the provisions of these Rules may be applied to proceedings before the Courts, including Family courts constituted under the Family Courts (66 of 1984), while dealing with matrimonial, and child custody disputes.

Shri M.C.Setalvad, former Attorney General of India has observed: “...equality is the basis of all modern systems of jurisprudence and administration of justice... in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal ...Unless some provision is made for assisting the poor men for the payment of Court fees and lawyer’s fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice.”

5 - Role of Judiciary in the Settlement Process

Having in detail enumerated the various provisions applicable to settlement, now I shall deal with the role of judges in this process, which is of great importance;

Judges who refer the cases for settlement through any of the ADR methods are known as referral judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

5.1 - Reference to ADR and statutory requirement

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

5.2 - Stage of Reference

The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/or their authorized representatives.

5.3 - Consent

Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly the court can refer the case for conciliation under section 89 CPC only with the consent of all the parties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

5.4 - Avoiding delay of trial

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

5.5 - Choice of Cases for reference

As held by the Supreme Court of India in *Afcons Infrastructure (supra)*²², having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process.

²² *Ibid* 7

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- i. Representative Suits under Order I Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.
- ii. Disputes relating to election to public offices.
- iii. Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- iv. Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.
- v. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.
- vi. Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

- i. All cases relating to trade, commerce and contracts, including
 - disputes arising out of contracts (including all money suits);
 - disputes relating to specific performance;
 - disputes between suppliers and customers;
 - disputes between bankers and customers;
 - disputes between developers/builders and customers;
 - disputes between landlords and tenants/licensor and licensees;
 - disputes between insurer and insured
- ii. All cases arising from strained or soured relationships, including:
 - disputes relating to matrimonial causes, maintenance, custody of children;
 - disputes relating to partition/division among family members/coparceners/co-owners; and
 - disputes relating to partnership among partners.
- iii. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
 - disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.);
 - disputes between employers and employees;

- disputes among members of societies/associations/apartment owners' associations;
- iv. All cases relating to tortious liability, including
 - claims for compensation in motor accidents/other accidents; and
- v. All consumer disputes, including
 - disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of "suitable" and "unsuitable" categorization of cases is not exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or addition by the courts/ tribunals exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

5.6 - Motivating and preparing the parties for Mediation

The referral judge plays the most crucial role in motivating the parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation.

The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

5.7 - Referral Order

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of hearing before the referral court, whether the parties have consented for mediation, name of the institution/mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/ mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

5.8 - Role after conclusion of mediation

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential orders.

Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court. If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court.

However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect confidentiality of the mediation process, there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation. If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable, the referral judge should act upon the terms and conditions of the agreement and pass consequential orders. To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

The above points I have mentioned are very applicable to you all and should be implemented at the right stage. It is important that you first identify whether a particular case needs to be referred to or not; this you can apply using the principles I have dealt with extensively. Once this step is complied with, these above points should be implemented by you all, while referring a case to any form of ADR. I hope you all understand the significant role you play in reducing the overall number of litigation.

6 - Conclusion

Richard Hill, a highly competent and dedicated arbitration lawyer from Switzerland has summed up the importance of mediation as follows;

“Two persons have a legitimate claim to an orange but neither of them is willing to accept half the orange. If the claim is resolved in accordance with a judicial paradigm, one of them will get some portion (possibly none) of the orange, and the other will get the remaining portion. But then, a mediator is called in: who asks each person what they intend to do with the orange. The first person answers that she intends to use the rind to make perfume, while the second answers that she intends to use the pulp to make orange juice. Hence the mediation process yields a solution that is fair, and better, satisfies the interests of the parties than could any solution based on adversarial process!”²³

²³ *The Theoretical Basis of Mediation and Other Forms of ADR: why they work’ published in Arbitration International Volume - 14 No.2 (1998) @ Page 181*

Therefore, time has come when we have to introspect and think of a process, which can be developed whereby all kinds of litigations can be amicably settled at the bilateral levels by the parties themselves by providing some effective assistance with the help of some experts who can facilitate the parties to reach such an amicable settlement. In that respect Mediation as a mode of settlement process and concept, in my personal opinion, can be developed very effectively by developing the said process through Mediation and Conciliation Centers set up by the High Courts in the various States. What all it requires is an orientation on Mediation as a first step to propagate about the benefits of the concept of Mediation and its working in such orientation programmes. The success achieved in the Western countries can also be highlighted to make the concept and thereby create an awareness about the benefits of Mediation by setting up Mediation Centers in the District headquarters and in course of time even at Taluk levels by giving extensive training to the members of the legal fraternity and the retired Judicial Officers. Well knit group of trained mediators can be made available in different sectors through whom the disputes can be amicably settled. In fact in the Western countries there are mediators who are specialized in different subjects as corporate disputes, civil disputes, family disputes, commercial disputes etc.

If once Mediation, as a process, gets due recognition by virtue of its advantages, I am confident that it would work well in our country where the awareness of the rights of the people is on the increase and there is a craving of the litigant public to approach the courts for redressal of their grievances. If Mediation centers are set up with necessary infrastructure and trained mediators, which I find are being done now, in course of time every kind of dispute other than those which could be resolved only by the courts, can be settled at the threshold and thereby putting a lasting and final solution to such disputes which would enable the parties to concentrate on their regular avocation without being disturbed by such litigations lingering in Courts for years together. The highest advantage in the process of Mediation is that once the matter gets settled in the process of Mediation, there would be no scope for challenging such settlement before any forum. Hence, having stated this, it is your duty and responsibilities as Judges to help and assist as much as possible in maintaining the streams of justice and keeping it clean, while also at the same time, ensuring that litigation as a whole is reduced.

While concluding, it will be worthwhile to quote what the father of our Nation, Late Mohandas Karamchand Gandhi said as regards a settlement being made between the parties in any litigation, which is quoted as under:-

"My joy was boundless. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties driven as under. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul."

My endeavor is for the readers to ponder over the little ideas cited in this lecture and come out with more of their suggestions and ideas to improve the process of Mediation (& ADR) working in our State and make it a grand success. With these few words of wisdom, I wish you all nothing but the best.
