

‘RELEVANCE OF MEDIATION TO JUSTICE DELIVERY IN INDIA’

(A paper presented by Justice M.M. Kumar, Judge, Punjab and Haryana High Court, Chandigarh, in the National Conference on Mediation, organised by the Mediation & Conciliation Project Committee, Supreme Court of India, held on July 10, 2010 at New Delhi.)

Hon’ble Mr. Justice Cyriac Joseph, Hon’ble Mr. Justice Sanjay Kishan Kaul, Mr. P.P. Rao, Senior Advocate, Mrs. Laila Ollapally, Advocate and Trainer, Hon’ble Judges from various High Courts, learned Senior Advocates and Trainers, ladies and gentlemen.

It is indeed a privilege for me to be amongst this august gathering to share my views on the subject of ‘***Relevance of Mediation to Justice Delivery in India***’. One of the parameter to fathom success of justice delivery system in any society is to ascertain how quickly and efficiently the disputes between the contesting parties are settled. If a divorce petition of a young couple in their twenties is to be decided after fifteen years when they advance to middle age and find it difficult to have another suitable partner of their choice then it makes one to think that there is something wrong either in the justice delivery or elsewhere. Then cost is also heavy. The illustrations could be multiplied from all most all branches of litigation including civil, commercial, criminal, rent etc. Therefore, some solution has to be found to rescue such people from their unenviable conditions. In any case, the adversary system under Anglo-Saxon jurisprudence established in this

country has some inherent problem. A judgment and a decree is passed which has attained finality after dismissal of appeal up to the highest court, then the process of execution all over again has to be initiated. Moreover, it results in citizens defining personal problems and social troubles in terms of legal rights and obligations. This infatuation over who is right from a legal standpoint results in the transformation of social conflicts into legal disputes and this often accentuates problems instead of resolving them. The court judgements may end lawsuits but they do not resolve the disputes and the inherent hurt marked by those decisions.¹ Therefore, all over world search for alternative disputes resolution processes started and mediation, if I may say so, has been considered as a unique tool and most potent in the armouries of ADR processes.

On the question what mediation is, a word may be necessary. In his famous book 'The Mediation Process: Practical Strategies for Resolving Conflict', Christopher W. Moore tells us what mediation is, in the following words:

“Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation

¹ Mediation in the Singapore Family Court by Adrian Loke, (1999) 11 SAclJ 189

process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants.”

Thus, mediation is necessarily a process of negotiation by which the participant together with the assistance of a neutral person attempts to resolve the dispute. The third party mediator makes effort by negotiations with the participants to systematically identify and isolate disputed issues in order to develop options consider alternatives and to reach a congenial agreement that will accommodate their needs and rights. The third party mediator lacks authority to decide but only facilitate to create congenial environment to enable the party to resolve their dispute amicably themselves².

In order to accord statutory recognition to ADR including mediation, the Law Commission in its 129th Report made recommendation for making it obligatory for the Court to refer the dispute to ADR including mediation for settlement. The stage chosen for making reference is when the pleadings have been filed and after the issues are framed. The reference of dispute can be in any of the five alternative methods, which have now been

² A Lawyer's Introduction to Mediation by Lim Lei Theng & Joel Lee, (1997) 9 SAcLJ 100

incorporated in Section 89 CPC. Taking notice of various lacunas in the drafting of Section 89, Hon'ble Mr. Justice R.V. Raveendran has observed³

“Section 89 apparently was drafted in a hurry. It is not very happily worded. It is not very practical. But the object behind Section 89 is sound..... .”

After pointing out various anomalies it was suggested that clause (c) and (d) of sub-section (2) of Section 89 deserves to be interchanged and went on to detail the reasoning as under:-

“.....“Mediation” is a dispute resolution by a suitable neutral institution or person assisting disputing parties to arrive at a negotiated settlement. When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, defining or using such words with completely different meanings in Section 89 has led to confusion, and created complications in implementation. The mix-up of meaning of the terms “judicial settlement” and “mediation” in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word “mediation” in clause (d) and the words “judicial settlement” in clause

³ Section 89 CPC: Need For An Urgent Relook, by Justice R.V. Raveendran, (2007) 4 SCC J-23

(c) are interchanged, the said clauses click and make perfect sense, as is demonstrated below:

(c) for mediation, 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 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

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

Should not this “error apparent” on the face of Section 89 be rectified?”⁴

However, a casual look at Section 89 read with Order X Rule 1A to 1C of the CPC, which have sound object, would highlight that justice delivery and mediation are inseparably linked. The provisions of Section 89 postulate that in appropriate cases the Court may with the consent of the parties send a term of reference for mediation. In that regard, necessarily intense training is imparted to referral Judges so as to enable them to identify the

⁴ Ibid 3

cases which may be considered fit for mediation. Naturally criminal cases, except involving petty offences are kept outside the scope of mediation. A large number of civil cases could be identified and sent for mediation. Once a reference is made for mediation then the possibility of resolving the dispute has to be explored by the Mediator/Mediation Centre. If the matter is resolved then certainly it would be extremely helpful to control the docket explosion because solving one case by mediation process has a cascading effect. Firstly, ordinarily it brings an end to all other litigation and execution proceedings. Moreover, the tendency to raise new dispute emerging from ego of the parties and strained personal relationship to some degree, are also taken care of.

The question then is what types of mediation models are to be preferred and it is imperative to ponder over the issue. We have to develop an indigenous model that would be suitable for our social and economic conditions. Our culture differs from western culture, where 'Mediation' has been developed as a modern concept, both in structuring mutual relationship, commercial relationships and in resolution of disputes. In oriental cultures, personal, social and commercial relationships are structured by a philosophical approach where good faith and face saving play a major role with an emphasis on social consensus, moral persuasion and harmonious relations. This is as opposed to western cultures which

emphasize precision in documentation and application of principled legality in structuring relationships. Western cultures also usually adopt a more adversarial approach when it comes to resolving disputes. Naturally an indigenous recipe has to be prepared. Such an indigenous recipe has to be made a part of training so as to evolve a mediation process which is befitting to our requirements.⁵ Then mediation must be in the language of the parties. It does not need emphasis that local language of the parties helps crossing many barriers and creates a wonderful atmosphere.

Another aspect which may need consideration of this august gathering is whether mediation should be confined to the overburdened Judges or it should also be handled by counsel of repute and wider acceptability. Two years back, Mediation Centres were open in Punjab and Haryana. The mediation at the district level was entrusted to the Judges only. To start with and to popularise the concept probably it was good beginning. It ensured that masses develop faith in mediation process. However, the results in two years showed a very limited success. According to the data available from eight Mediation Centres set up in the State of Punjab they have settled only 465 cases from November 2008 to April 2010, whereas in ten Mediation Centres set up in the State of Haryana, the total number of cases settled is 1176. The result did not match the colossal effort made by

⁵ Ibid 1

all the stake holders. As a consequence, there was self introspection. It was generally felt that over burdened Judges cannot be expected to conduct mediation that too either on Friday afternoon or on Saturday. It may be pointed out that at the level of Civil Judges (Junior and Senior) Divisions in Haryana, we have 174 officers working. They are required to deal with 4,90,532 cases (as on 30.4.2010). On an average, an officer is to deal with more than 2,800 files, which is huge work. Likewise, in Punjab there is pendency of 5,81,706 cases (as on 31.5.2010). There are 201 officers dealing with those cases. Thus, on an average an officer is dealing with about 2900 cases. It was felt that mediation is a long drawn process, which may involve many bouts of negotiations, each one of them involving four five hours. We found that it is too much to expect a tired and overburdened judicial officer to undertake mediation work.

Taking some remedial measures, a decision was taken to acquire human resource by attracting Advocates from the Bar. The process which has been followed is that through the District Judges applications from the advocates for undergoing training were invited and on the recommendation made by the learned District Judges the names of the interested counsel with clean antecedents were cleared. Thereafter, Mediation training was imparted to about 108 advocates from all the 18 Centres of Punjab and Haryana over a period of five days in May 2010. The training programme

was inaugurated by Hon'ble Mr. Justice Cyriac Joseph and many a anecdotes from the inaugural speech of Justice Joseph are still fresh in our memories. The trainees were particularly thrilled when they were told that after training they would be transformed from butcher to a neat surgeon. The data of decided cases is not available after handing over the mediation to the lawyers. It is significant to mention that a three-member committee at every district has been constituted which is presided over by learned District Judge along with Additional District Judge as a nodal officer and the Chief Judicial Magistrate. After training these lawyers have been given oath and there is active supervision by the District Level Committee. As the programme is at experimental stage, it may be too early to predict the results. However, it appears that the results are likely to be impressive because every Centre has five trained mediator. They conduct mediation on all days. It is true that the parties may have faith in the Judge when he conducts mediation. But it is equally true that there is more proximity between the lawyer and the parties. The litigant public is found more hesitant in revealing the real cause of dispute to the Judges as compared to the advocate mediator who may interact with the parties with desired openness. One of the view is that the psyche of the litigant does not allow him to come with open heart with the real dispute before a Judge mediator as he cannot ever be debriefed about his authority and status. There is anecdote concerning the proceedings before Panches of a Panchayat. The

Panches are considered Paremeshwar and are undoubtedly very close to village residents. A dispute came before the Panchayat concerning molestation of a girl by a boy. The boy resolutely deny the allegation. Then the girl was asked to name any witness. The girl disclosed the name of the real younger brother of the offender. The younger brother had not disclosed it to the police or the Court. But before the Panchayat he plainly stated that incident had taken place in his presence before his eyes but he could not disclose it before the Kotwal. The incident reveals that the witnesses may be hesitant to reveal the truth before a formal institution of Courts/police. They may readily disclose such a truth before the Panches or a group which has proximity with the parties. Therefore, there may be a significant advantage of mediation by advocates. Moreover, the support of the Bar becomes readily available if advocates themselves are deputed to conduct mediation. In that context we may quote Hon'ble Mr. Justice R.V. Raveendran, who observed:

“.....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 with the active participation of the Bar, become relevant and urgent.”⁶

One suggestion could be made. If the mediation is to be conducted by the trained mediator-cum-judicial officers then there may have to be a separate cadre of Mediation Judges who shall conduct mediation five days a week. They should not be given any judicial work. For every district the requirement may be assessed and cadre be formed.

I would conclude by saying that mediation is extremely relevant to the justice delivery in India since it not only brings an end to the litigation pending before the Courts but it also has cascading effects of bringing an end to bad-blood between the parties and making them useful members of the Society.

(Justice M.M. KUMAR)

⁶ Ibid 3