# IV – WORKSHOP – 2017-18

# KRISHNA DISTRICT

# IDENTIFIED OFFICERS

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**INTRODUCTION, UNDERSTANDING CONFLICT, CONCEPT OF MEDIATION**

Paper Presented by

Sri S.Venkateswara Prasad,
XV Additional District Judge,
Nuzvid.

The General meaning as per Oxford Dictionary for "mediation" is 'to try to get agreement between two or more persons or group who disagree with each other'.

As per the "Law Dictionary" by Sri P.Ramanada Iyer, 'It is a form of alternate dispute resolution in which a third party, usually professionally trained, helps the parties to resolve their differences'.

Mediation is an interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. Mediation is a form of alternate dispute resolution which is popularly known as 'ADR'. Participation in mediation is always voluntary.

The concept of mediation was given legal recognition as a method of dispute resolution for the first time in the Industrial Disputes Act, 1947.

There was a paper presentation by Mr.Sriram Panchu, Senior Advocate (Founder, Indian Centre for Mediation and Dispute Resolution) in the conference sponsored by the Law Commission of India on ADR/Mediation at New Delhi on 3rd & 4th May 2003, by discussing certain problems, evaluating and suggesting certain reforms in the line of ethics, values of Law and demands of Public Policy.

The Indian Centre for mediation & dispute Resolution started in July 2001 at Chennai, with Board of Advisors with Jurists, Lawyers, members of varied professions – who conducted several awareness camps with Bar, Family Court Judges & trained its first batch of 22 mediators including Judges, Retired IAS Officers, Chairmen of Companies. Issues relating to Companies, Property devlopers, Family matters were taken up and discussed. The centre planned to foster training in mediation in Law schools.

The Corporate community has been the fastest to embrace mediation. The success rate in company disputes is increasing.

As per Rule 1-A of Order X C.P.C, Court can direct parties to opt for any one of the modes of alternate dispute resolution for settlement outside court as per sub sec (1) of Sec.89 C.P.C., When there is an element of settlement, parties can opt for any one of the modes viz., arbitration, conciliation, Judicial settlement and mediation.

'Model Alternate Dispute Resolution and Mediation draft Rules' were finalized by Hon'ble Justice M.Jagannadha Rao Committee; Hon'ble Supreme Court directed to follow certain modalities and instructing High Courts to examine and finalize Rules - **"Salam Advocate Bar Association, Tamil Nadu Vs. Union of India" (2005 (5) SCJ 519)**.

**In "Afcons Infrastructure Ltd and Anr. Vs Cherian Varkey Construction Company Private Limited & others (2010) 8 SCC 24**, the Hon'ble Supreme Court laid down certain guidelines pertaining to the kind of cases that would be eligible for ADR. The cases relating to Representative suits involving public interest, disputes relating to election to public offices, specific and serious allegations of fraud, forgery, impersonation, fabrication of documents, matters requiring protection of courts, claims against minor, deities, mentally challenged persons, declaration of title against Government etc.,. are not suitable for mediation; the other cases suitable for ADR are cases relating to trade, contracts, bankers and customers, builder & customer, matrimonial issues, child custody, employer/employee issues, recovery of money etc.,.

Mediation should be neutral, impartial, fair and at the same time control the aggressive party who tries to take advantage of other party who is innocent despite strong case on his side. Due to lack of formal rules, sometimes motives are attributed and mediation may not always be successful. Mediation saves time, money and resolves problems at grass root if issues are evaluated properly.

Society perceives conflicts as something one should resolve as quickly as possible. Mediation removes even the slightest displeasure in the minds of both sides than what they expect as verdict from Court of Law which may or may not become final.

# COMPARISON BETWEEN JUDICIAL PROCESS AND VARIOUS ADR PROCESSES & PROCESS OF MEDIATION

Paper Presented by

Sri K.P. Sai Ram,
V Addl. Junior Civil Judge,
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## INTRODUCTION:

Dispute resolution is an indispensable process for making social life peaceful. Dispute resolution process tries to resolve and check conflicts, which enables persons and group to maintain co-operation. It can thus be alleged that it is the sin qua none of social life and security of the social order, without which it may be difficult for the individuals to carry on the life together.

**Alternative Dispute Resolution (ADR)** is a term used to describe several different modes of resolving legal disputes. It is experienced by the business world as well as common men that it is impracticable for many individuals to file law suits and get timely justice. The Courts are backlogged with dockets resulting in delay of year or more for the parties to have their cases heard and decided. To solve this problem of delayed justice, ADR Mechanism has been developed in response thereof. Alternative Dispute Redessal method are being increasingly acknowledged in the field of law and commercial sectors both at National and International levels. Its diverse methods help the parties to resolve their disputes at their own terms cheaply and expeditiously. Alternative Dispute Redressal techniques are in addition to the Courts in character. Alternative Dispute Redressal techniques can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties.

Alternative Dispute Redressal techniques can be employed in several categories of disputes, especially civil, commercial, industrial and family disputes. Alternative Dispute Redressal methods offers the best solution in respect of commercial disputes where the economic growth of the Country rests.

The goal of Alternative Dispute Redressal is enshrined in the preamble of Indian Constitution itself, which enjoins the state: “to secure to all the citizens of India, justice, social, economic and political-liberty, equality and fraternity”.

The Law Commission of India has maintained that, the reason judicial delay is not a lack of clear procedural laws, but rather the imperfect execution, or even utter non-observance, thereof. The Law Commission of

India in its 14th Report categorically stated that, the delay results not from the procedure laid down by the legislations but by reason of the non-observance of many of its important provisions particularly those intended to expedite the disposal of proceedings. Given the huge number of pending cases, the governance and administrative control over judicial institutions through manual processes has become extremely difficult. In Brij Mohan Lal vs. Union of India & Other (2002)4 SCALE 433) the Hon'ble Supreme Court made it clear that this stage of affair must be addressed: 'An independent and efficient judicial system is one of the basic structures of our constitution... It is our Constitutional obligation to ensure that the backlog of cases is declared and efforts are made to increase the disposal of cases."

Wide range of process are defined as alternative dispute redressal process often, dispute resolution process that are alternative to the adjudication through Court proceedings are referred to as alternative dispute resolution methods. These methods usually involve a third party referred to as neutral, a skilled helper who either assists the parties in a dispute or conflict to reach at a decision by agreement or facilitates in arriving at a solution to the problem between the party to the dispute.

The alternative disputes resolution mechanism by the very methodology used, it can preserve and enhance personal and business relationships that might otherwise be damages by the adversarial process. It is also flexible because it allows the contestants to choose procedures, which fit the nature of the dispute and the business context in which it occurs.

The term "Alternative Disputes Resolution" takes in its fold, various modes of settlement including, Lok Adalats, arbitration, conciliation and Mediation. This technique of Alternative Disputes Resolution has been used by many countries for effective disputes resolution. The most common types of Alternative Disputes Resolution is Mediation. In fact, mediation had been described by some as the most Appropriate Dispute Resolution method. Mediation as a tool for dispute resolution is not a new concept. To put it in simple terms, mediation is an amicable settlement of disputes with the involvement of a neutral third party who acts as a facilitator and is called a "Mediator".

ADR is usually less formal, less expensive and less time consuming than regular trial. ADR can also give people more opportunity to determine when and how their dispute will be resolved.

**DIFFERENT TYPES OF ALTERNATIVE DISPUTE RESOLUTIONS**: -

The most common types of ADR for civil cases are Arbitration, Conciliation, Mediation, Judicial Settlement and Lok Adalat. In India, the Parliament has amended the Civil Procedure Code by inserting Section 89 as well as Order 10 Rule 1-A to 1-C. Section 89 of the Civil Procedure Code provides for the settlement of disputes outside the Court. It is based on the recommendations made by the Law Commission of India and Malimath Committee. It was suggested by the Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempts to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the Court to refer the dispute, after issues are framed, for settlement either by way of Arbitration, Conciliation, Mediation, Judicial Settlement through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate disputes resolution method that the suit could proceed further. In view of the above, new Section 89 has been inserted in the Code in order to provide for alternative dispute resolution.

It is apt to refer Section **89 of the Civil Procedure Code**, which runs as follows:-

**Sec. 89:** Settlement of disputes outside the court:- (1) Where it appears to the Court that there exist elements of 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 observations 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 has been referred – (a) **for arbitration or conciliation**, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 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 (39 of 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 (39 of 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."

On perusal of aforesaid provisions of Section 89, it transpires that it refers to five types of ADR procedures, made up of one adjudicatory process i.e. arbitration and four negotiatory i.e. non-adjudicatory processes such as Conciliation, Mediation, Judicial Settlement and Lok Adalat. The object behind Section 89 is laudable and sound. Resort to ADR process is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the Courts. Of course, Section 89 has to be read with Rule 1-A of Order 10, which runs as follows: -

**Order 10 Rule 1-A:** 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.

**Order 10 Rule 1-B:** Appearance before the conciliatory forum or authority:- Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

**Order 10 Rule 1-C:** 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.

A conjoint reading of Section 89 and Rule 1-A of Order 10 of Civil Procedure Code, it transpires that the Court to direct the parties to opt for any of the five modes of the Alternative Dispute Resolution and on their option refer the matter.

Thus, the five different methods of ADR can be summarized as follows: -

1. **Arbitration;**
2. **Conciliation**
3. **Mediation**
4. **Judicial Settlement &**
5. **Lok Adalat**

**1. ARBITRATION:**

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons – arbitrators, by whose decision they agree to be bound. It is a resolution technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding for both sides and enforceable. There are limited rights of review and appeal of Arbitration awards. Arbitration is not the same as judicial proceedings and Mediation. Arbitration can be either voluntary or mandatory. Of course, mandatory Arbitration can only come from statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur.

The advantages of Arbitration can be summarized as follows: -

a) It is often faster than litigation in Court.

b) It can be cheaper and more flexible for businesses.

c) Arbitral proceedings and an arbitral award are generally non public, and can be made
confidential.

d) In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the competent Court will be automatically applied.

e) There are very limited avenues for appeal of an arbitral award.

f) When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed as one cannot choose judge in litigation. However, there are some disadvantages of the Arbitration, which may be summarized as follows: -

a) Arbitrator may be subject to pressures from the powerful parties.

b) If the Arbitration is mandatory and binding, the parties waive their rights to access the Courts.

c) In some arbitration agreements, the parties are required to pay for the arbitrators, which add an additional cost, especially in small consumer disputes.

d) There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.

e) Although usually thought to be speedier, when there are multiple arbitrators on the penal, juggling their schedules for hearing dates in long cases can lead to delays.

f) Arbitration awards themselves are not directly enforceable. A party seeking to enforce arbitration award must resort to judicial remedies.

In view of provisions of Section 89 of the Civil Procedure Code, if the matter is referred to the Arbitration then the provisions of the Arbitration and Conciliation Act, 1996 will govern the case.

**CONCILIATION:**

Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately in order to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bring about a negotiated settlement. It differs from Arbitration in that. Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their commercial, financial and /or personal interests. The terms conciliation and mediation are interchangeable in the Indian context. Conciliation is a voluntary process whereby the conciliator, a trained and qualified neutral, facilitates negotiations between disputing parties and assists them in understanding their conflicts at issue and their interests in order to arrive at a mutually acceptable agreement. Conciliation involves discussions among the parties and the conciliator with an aim to explore sustainable and equitable resolutions by targeting the existent issues involved in the dispute and creating options for a settlement that are acceptable to all parties. The conciliator does not decide for the parties, but strives to support them in generating options in order to find a solution that is compatible to both parties. The process is risk free and not binding on the parties till they arrive at and sign the agreement. Once a solution is reached between the disputing parties before a conciliator, the agreement had the effect of an arbitration award and is legally tenable in any court in the country. Most commercial disputes, in which it is not essential that there should be a binding and enforceable decision, are amenable to conciliation. Conciliation may be particularly suitable where the parties in dispute wish to safeguard and maintain their commercial relationships.

The following types of disputes are usually conducive for conciliation:

- commercial,
- financial,
- family,

- real estate,
- employment, intellectual property,
- insolvency,
- insurance,
- service,
- partnerships,
- environmental and product liability.

• Apart from commercial transactions, the mechanism of Conciliation is also adopted for settling various types of disputes such as labour disputes, service matters, antitrust matters, consumer protection, taxation, excise etc.

**Conciliation proceedings:**

Either party to the dispute can commence the conciliation process. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute. Generally, only one conciliator is appointed to resolve the dispute between the parties. The parties can appoint the sole conciliator by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not termed as Presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and authenticated by the conciliator. In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award.

If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration. A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as

arbitrator. Similarly, the conciliation proceedings are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings; (b) admissions made by any party during the course of the conciliation proceedings; (c) proposals made by the conciliator for the consideration of the parties; (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings. Conciliation has received statutory recognition as it has been proved useful that before referring the dispute to the civil court or industrial court or family court etc, efforts to concile between the parties should be made.

**MEDIATION:**

Now, worldwide mediation settlement is a voluntary and informal process of resolution of disputes. It is a simple, voluntary, party centered and structured negotiation process, where a neutral third party assists the parties in amicably resolving their disputes by using specified communication and negotiation techniques. Mediation is a process where it is controlled by the parties themselves. The mediator only acts as a facilitator in helping the parties to reach a negotiated settlement of their dispute. The mediator makes no decisions and does not impose his view of what a fair settlement should be. In the mediation process, each side meets with a experienced neutral mediator. The session begins with each side describing the problem and the resolution they desire from their point of view. Once each sides respective positions are aired, the mediator then separates them into private rooms, beginning a process of “Caucus Meeting” and thereafter “joint meetings with the parties”. The end product is the agreement of both the sides. The mediator has no power to dictate his decision over the party. There is a win – win situation in the mediation. The chief advantages of the mediation are: -

1. The agreement which is that of the parties themselves;
2. The dispute is quickly resolved without great stress and expenditure;
3. The relationship between the parties are preserved; and 4. The confidentiality is maintained.

**4. JUDICIAL SETTLEMENT:**

Section 89 of the Civil Procedure Code also refers to the Judicial Settlement as one of the mode of alternative dispute resolution. Of course, there are no specified rules framed so far for such settlement. However, the term Judicial Settlement is defined in Section 89 of the Code. Of course, it

has been provided therein that when there is a Judicial Settlement the provisions of the Legal Services Authorities Act, 1987 will apply. It means that in a Judicial Settlement the concerned Judge tries to settle the dispute between the parties amicably. If at the instance of judiciary any amicable settlement is resorted to and arrived at in the given case then such settlement will be deemed to be decree within the meaning of the Legal Services Authorities Act, 1987.

Section 21 of the Legal Services Authorities Act, 1987 provides that every award of the Lok Adalat shall be deemed to be a decree of the Civil Court.

**LOK ADALAT:**

The concept that is gaining popularity is that of Lok Adalats or people's courts as established by the government to settle disputes through conciliation and compromise. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromise reached through systematic negotiations. The first Lok Adalats was held in Una aim the Junagadh district of Gujarat State as far back as 1982. Lok Adalats accept even cases pending in the regular courts within their jurisdiction.

Section 89 of the Civil Procedure Code also provides as to referring the pending Civil disputes to the Lok Adalat. When the matter is referred to the Lok Adalat then the provisions of the Legal Services Authorities Act, 1987 will apply. So far as the holding of Lok Adalat is concerned, Section 19 of the Legal Services Authorities Act, 1987 provides as under: -

**Section 19: Organization of Lok Adalats:-** (1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluka Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit. Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law. The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee, thus making it available to those who are the financially vulnerable section of society. In case the fee is already paid, the same is refunded if the dispute is settled at the Lok Adalat. The Lok Adalat are not as strictly bound by rules of procedure like ordinary courts and thus the process is more easily understood even by the uneducated or less educated. The parties to a dispute can interact directly with the presiding officer, which is not possible in the

case of normal court proceedings. Section 21 of the Legal Services Authorities Act, 1987 is also required to be referred to here which runs as follows: -

**Section 21: Award of Lok Adalat:-** (1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under subsection (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

In view of the aforesaid provisions of the Legal Services Authorities Act, 1987 if any matter is referred to the Lok Adalat and the members of the Lok Adalat will try to settle the dispute between the parties amicably, if the dispute is resolved then the same will be referred to the concerned Court, which will pass necessary decree therein. The decree passed therein will be final and binding to the parties and no appeal will lie against that decree. On the flip side, the main condition of the Lok Adalat is that both parties in dispute have to be agreeable to a settlement. Also, the decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of finality attached to such a determination is sometimes a retarding factor for however be passed by Lok Adalat, only after obtaining the assent of all the parties to dispute. In certain situations, permanent Lok Adalat can pass an award on merits, even without the consent of parties. Such an award is final and binding. From that, no appeal is possible. This is not to the say that Lok Adalat don't have many advantages. Lok Adalat are especially effective in settlement of money claims. Disputes like partition suits, damages and even matrimonial cases can also be easily settled before a Lok Adalat as the scope for compromise is higher in these cases. Lok Adalat is a definite boon to the litigant public, where they can get their disputes settled fast and free of cost. The appearance of lawyers on behalf of the parties, at the Lok Adalats is not barred. Lok Adalat are not necessarily alternatives to the existing courts but rather only supplementary to them. They are essentially win-win systems, an alternative to 'Judicial Justice', where all the parties to the dispute have something to gain. There are certain hybrids of Alternative Dispute Resolution that also deserve a mention. These processes have evolved in combination of various Alternative Dispute Resolution mechanisms with the ultimate objective of achieving a voluntary settlement. The purpose of many of these hybrids is that the principle objective of achieving a settlement is kept in mind and all permutations and

combinations should be utilized towards that objective to reduce the burden of the adjudicatory process in courts. The different Alternative Dispute Resolution processes and their hybrids have found solutions to different nature of disputes and thus the knowledge of these processes can be a significant aid.

**Comparison between Judicial Process and Various ADR Processes**

| JUDICIAL PROCESS | ARBITRATION | MEDIATION |
|---|---|---|
| Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome. | Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties. | Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement. |
| Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes. | Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996. | Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility. |
| The decision is binding on the parties. | The award in an arbitration is binding on the parties. | A binding settlement is reached partiesonly if parties arrive at a mutually acceptable agreement. |
| Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties. | Adversarial in nature as focus is on determination on rights and liabilities of the parties. | Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities. |
| Personal appearance or active participation of parties is not always required. required. | Personal appearance or active and active participation of parties is always required. | Personal appearance and active participation is not participation of the parties are required. |

| | | |
|---|---|---|
| A formal proceeding held in PUBLIC and follows strict procedural stages. | A formal proceeding held in private following strict procedural stages. | A non-judicial and informal public private following flexible procedural stages. |
| Decision is appealable. | Award is subject to challenge on specified grounds. | Decree/Order in terms of the settlement is final and is not appealable. |
| No opportunity for parties to communicate directly with each | No opportunity for parties to communicate directly with each other. | Optimal opportunity for parties to communicate directly with each other in the presence of the mediator. |
| Involves payment of court fees. | Does not involve payment of court fees. | In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules. |

| **MEDIATION** | **CONCILIATION** | **LOK-ADALAT** |
|---|---|---|
| Mediation is a non adjudicatory process. | Conciliation is a adjudicatory process. | Lok-Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987. |
| Voluntary process | Voluntary process. | Voluntary process. |
| Mediator is a neutral third party. | Conciliator is a neutral third party. | Presiding officer is a neutral third party. |
| Service of lawyer is available. | Service of lawyer is available. | Service of lawyer is available. |
| Mediation is party centered negotiation. | Conciliation is party centered negotiation. | In Lok Adalat, the scope of negotiation is limited. |

| | | |
|---|---|---|
| The function of the Mediator is mainly facilitative. | The function of the conciliator is more active than the facilitative function of the mediator. | The function of the Presiding Officer is persuasive. |
| The consent of the parties is not mandatory for referring a case to mediation. | The consent of the parties is mandatory for referring a case to conciliation. | The consent of the parties is not mandatory for referring a case to Lok Adalat. |
| The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement. | In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996. | The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987. |
| Not appealable. | Decree/order not appealable. | Award not appealable. |
| The focus in mediation is on the present and the future. | The focus in conciliation is on the present and the future. | The focus in Lok Adalat is on the past and the present. |
| Mediation is a structured process having different stages. | Conciliation also is a structured process having different stages. | The process of Lok Adalat involves only discussion and persuasion. |
| In mediation, parties are actively and directly involved. | In conciliation, parties are actively and directly involved. | In Lok Adalat, parties are not actively and directly involved so much. |
| Confidentiality is the essence of mediation. | Confidentiality is the essence of conciliation. | Confidentiality is not observed in Lok Adalat. |

# STAGES OF MEDIATION, ROLE OF MEDIATORS, COMMUNICATION IN MEDIATION, NEGOTIATION, BARGAINING IN MEDIATION, IMPASSE.

Paper Presented by

Sri Ch. Srinivasa Babu,
Prl. Junior Civil Judge,
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## Introduction:-

The concept of Mediation is an ancient concept in India. Earlier, the disputes used to be settled by the Panchayats, headed by the Village Elders. With the evolution of judicial process, the People started approaching the Courts of Law to get fair and impartial justice, which they did not get in some Panchayats. The meaning of mediation is an informal process for helping people who have a dispute to sort it out for themselves without going to court and it is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, consider alternatives and endeavour to rear an agreement. In order to render speedy justice, and to reduce the pendency in the Courts, the methods of Alternative Dispute Resolution Systems like Lok Adalaths, Mediations, Negotiations, etc., are being given importance now-a-days.

Basing on the Recommendations of the Law Commission of India and Justice Malimath Committee, the Legislature has inserted Section 89 of the Code of Civil Procedure, 1908, by way of the Code of Civil Procedure (Amendment) Act, 1999, with effect from 01.07.2002, wherein Mediation was envisaged as one of the Modes of Settlement of Disputes.

## Mediation means:-

Mediation is a Process of Negotiation, in which a neutral third Party assists the Disputing Parties in a Suit or Proceeding, in resolving their disputes. There are six stages in mediation process and also role of the mediator:-

1. Mediator's Opening statement
2. Disputants' Opening Statements
3. Joint Session
4. Caucus or Separate Session
5. Final Negotiation & Deal-Making
6. Closure

### 1. Mediator's Opening statement

After a Dispute is referred to him for Mediation, the Mediator will make an Opening Statement, which commences the Process of Mediation. By making such Statement, the Mediator establishes a relationship with the Parties,

which will enable him to gain the Trust and Co-operation from the Parties. The mediator's opening statement should be clear and concise. A mediator should try to avoid using 'jargon' or technical words that the disputants are unlikely to understand.

**2. Disputants' Opening Statements**

After the Mediator has given his Opening Statement, the Parties should give their Statement. Each Party to the Dispute shall have three equal time. Generally, the Party institutes the Litigation shall give his Statement first. It may also be as per the Choice of the Parties to the Dispute. The stage is also called 'ventilation' as the parties, locked in bitter dispute, is likely to furiously air his/her grievances.

The mediator must listen carefully the statements of the parties, the manner in which the information is shared, and the order of presentation is all important pieces of information. The mediator should usually let each disputant take as much time as needed without interruption from the other party or the mediator.

**3. Joint Session:**

After all participants and/or their representatives have presented their views through their opening statement, at this point, the mediator may try to lead the disputants to joint discussion and get them talking directly with each other in his presence. This phase may come before or after the separate meeting between a party and mediator.

The Objectives of the Joint Session are to workable and to gather information; to provide an opportunity to the Parties to hear the perspectives of the other Parties; to understand facts and issues; to understand perspectives, relationship and feelings;to understand obstacles and possibilities, and to ensure that each Participant feels heard. The Mediator shall identify the Issues and Interests of the Parties in the Dispute.

**4. Caucus or Separate Session:**

A caucus is a common step or procedure in mediation. It is a private meeting that each party holds with the mediator during the mediation. If the circumstances of the Mediation require, then, the Mediator should have a Caucus or a separate Meeting with the Party concerned. Where the Parties have reached an impasse, the Mediator has to call for Caucus, or a separate Meeting. Such separate Meetings will give a chance to the Parties to talk freely. It is a Process, in which Parties are kept in different rooms, and the Mediator shuttles between them, conveying the viewpoints, settlement ideas and financial offers, etc., to the Parties. The aim of Caucus or separate

Meeting, or Shuttle Mediation is to effect a reasonable settlement between the Parties.

**5.Final Negotiation & Deal-Making:**

The stage of Final Negotiations involves the activities initiated by both the Parties and the Mediator to reduce the scope of substantive and procedural differences between the Parties, in order to make them move towards a formal Agreement, leading to the termination of conflict. This is the final joint meeting between the parties in the presence of mediator before the closure of mediation. In this round, the results of the separate meeting are carefully considered. If there remains any miscommunication or misunderstanding, then those are discussed and removed, before parties reach the resolution of the disputes. The Mediator will help the Parties to arrive at a Deal, when the final Negotiations are
completed.

**6. Closure**

It is important that a process initiated, must end finally. Closure is the last process in mediation. Mediation may terminate when the Parties have resolved all the Issues, or when they have resolved some Issues, and decided to take the others into a different Forum, such as Arbitration or Litigation; or when the Parties are not willing to continue with the Mediation; or when the Mediator opines that it is not proper to continue, as there is no reasonable prospect of resolution. The Mediation can end be successful or unsuccessful.

In case of successful outcome, settlement terms are reduced to writing leading to a formal agreement between the parties. If the Mediation is unsuccessful, the Parties can get their remedy in the Court of Law.

**ROLE OF MEDIATORS**

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution.

**QUALITIES OF A MEDIATOR**

It is necessary that a mediator must possess certain basic qualities which include:

(i). complete, genuine and unconditional faith in the process of mediation and its efficacy.

(ii) ability and commitment to strive for excellence in the art of mediation by constantly updating skills and knowledge.

(iii) sensitivity, alertness and ability to perceive, appreciate and respect the needs, interests, aspirations, emotions, sentiments, frame of mind and mindset of the parties to mediation.

(iv) highest standards of honesty and integrity in conduct and behaviour

(v) neutrality, objectivity and non-judgmental.

(vi) ability to be an attentive, active and patient listener.

(vii) a calm, pleasant and cheerful disposition.

(viii) patience, persistence and perseverance.

(ix) good communication skills.

(x) open mindedness and flexibility.

(xi) empathy

(xii) creativity.

**ETHICS AND CODE OF CONDUCT FOR MEDIATORS**

1. Avoid conflict of interest
2. Awareness about competence and professional role boundaries
3. Practice Neutrality
4. Ensure Voluntariness
5. Maintain Confidentiality
6. Do no harm
7. Promote Self-determination
8. Facilitate Informed Consent
9. Discharge Duties to third parties
10. Commitment to Honesty and Integrity.

**QUALIFICATIONS OF MEDIATORS:**

Hon'ble Supreme Court of India in **Salem Advocate Bar Association V Union of India, (2005) 6 SCC 344** approved the Model Civil Procedure Mediation Rules prepared by the Committee headed by Hon'ble Mr. Justice M.J.Rao, the then Chairman, Law Commission of India. These Rules have already been adopted by most of the High Courts with modifications according to the requirements of the State concerned.

**Communication in Mediation:-**

Communication is a Process of Transmission of Information from one Person to another. It does not mean just TALKING and LISTENING. Its intention is to convey a message. Verbal Communication is transmission of information or message through spoken words. Non-verbal communication refers to the transmission of information or message from sender to receiver without the use of spoken words. It includes written communication, body language, tone, demeanor, attitude and other modes of non-verbal expression.

Communication is the core of mediation. Hence, effective communication between all the participants in mediation is necessary for the success of mediation.

The purpose of communication could be any or all of the following:

- To express out feelings/thoughts/idea/emotions/desires to others.
- To make others understand what and how we feel/think
- To derive a benefit or advantage
- To express an unmet need or demand.

**REQUIREMENTS FOR EFFECTIVE COMMUNICATION:**

i. Use simple and clear language.

ii. Avoid difficult words and phrases.

iii. Avoid unnecessary repetition.

iv. Be precise and logical.

v. Have clarity of thought and expression.

vi. Respond with empathy, warmth and interest.

vii. Ensure proper eye contact.

viii. Be patient, attentive and courteous.

ix. Avoid unnecessary interruptions.

x. Have good listening abilities and skills.

xi. Avoid making statements and comments or responses that could cause a negative effect.

**COMMUNICATION SKILLS IN MEDIATION**

Communication skills in mediation include:-

(A) Active Listening

(B) Listening with Empathy

(C) Body Language

(D) Asking the Right Questions

**NEGOTIATION**

Negotiation is a Process of Communication, wherein the Parties try to find a mutually acceptable solution to the dispute. Negotiation is an important form of decision making process. Mediation in essence is an assisted negotiation process. The purpose of Negotiation in Mediation is to help the Parties to arrive at an Agreement, which is as satisfactory as possible to both Parties.

Any negotiation that is based on merits and the interest of both parties is Principled Negotiation and can result in a fair agreement, preserving and enhancing the relationship between the parties. Thus, negotiation is a process of combining divergent positions into a joint agreement under a decision rule of unanimity. The mediator facilitates negotiation by resorting to reality-testing, brainstorming, exchanging of offers, breaking impasse etc.

The Purposes of Negotiations are:-

a. To put across one's view points, claims and interests.

b. To prevent exploitation/harassment.

c. To seek cooperation of the other side.

d. To avoid litigation.

e. To arrive at mutually acceptable agreement.

**Meaning of Bargaining**

Bargaining is a part of the negotiation process. It is a technique to handle conflicts. It starts when the parties are ready to discuss settlement terms.

**TYPES OF BARGAINING USED IN NEGOTIATION**

There are different types of Bargaining. Negotiation may involve one or more of the types of bargaining mentioned below:

(i) Distributive Bargaining

(ii) Interest based Bargaining

(iii) Integrative Bargaining

**(i) Distributive Bargaining:** is a customary, traditional method of bargaining where the parties are dividing or allocating a fixed resource (i.e., property, money, assets, company holdings, marital estate, probate estate, etc.). In distributive bargaining the parties may not necessarily understand their own or the other's interests and, therefore, often creative solutions for settlement are not explored. It could lead to a win-lose result or a compromise where neither party is particularly satisfied with the outcome. Distributive bargaining is often referred to as "zero sum game", where any gain by one party results in an equivalent loss by the other party.

**(ii) Interest-Based Bargaining:** A mutually beneficial agreement is developed based on the facts, law and interests of both parties. Interests include needs, desires, goals and priorities. This is a collaborative negotiation strategy that can lead to mutual gain for all parties, viz., “win-win”. It has the potential to combine the interests of parties, creating joint value or enlarging the pie. Relief expands in interest based bargaining. It preserves or enhances relationships. It has all the elements of principled negotiation and is advised in cases where the parties have ongoing relationships and/or interests they want to preserve.

**(iii) Integrative Bargaining:-** It is an extension of Interest Based Bargaining. In it, the Parties "expand the pie", by integrating the interests of both Parties and exploring additional options, and possible terms of settlement. The Parties think creatively, by adding to or changing the terms for settlement. As

the interests and needs of both parties have been identified, it is easier to integrate the interests of both parties and find a mutually acceptable solution.

**Plea Bargaining- Meaning:** In the Criminal Cases, Law is amended and Sections 265-A to 265-L, of Chapter 21-A, are added to the Code of Criminal Procedure, 1973, vide Criminal Law Amendment Act, 2005. "Plead Guilty and ensure Lesser Sentence" is the shortest possible meaning of Plea Bargaining. Plea Bargaining can be defined as "Pre-Trial Negotiations between the Accused and the Prosecution, during which the Accused agrees to plead guilty in exchange for certain concessions by the Prosecution".

The Court may reduce the sentence to 1/4th, if the Accused pleads guilty. There shall be no Appeal in the Case, where the Judgment has been pronounced by the Court on the basis of Plea Bargaining. The Compoundable Criminal Cases, to which Plea Bargaining is applicable, can be referred for Mediation, to enable the Parties to discuss, and to come at a Settlement, even before filing the Petition for Plea Bargaining.

**BARRIERS TO NEGOTIATION**

(1) Strategic Barriers.

(2) Principal and Agent Barriers

(3) Cognitive Barriers (Perception Barriers)

**1. Strategic Barriers:** A Strategic Barrier is caused by the strategy adopted by a party to achieve his goal. For example with a view to make the husband agree for divorce the wife files a false complaint against her husband and his family members alleging an offence under section 498 A of Indian Penal Code. A mediator helps the parties to overcome strategic barriers by encouraging the parties to reveal information about their underlying interests and understanding the strategy of the party.

**2. Principal and Agent Barriers:** The behavior of an agent negotiating for the principal may fail to serve interests of the principal. There may be conflict of interests between the principal and his agent. An agent may not have full information required for negotiation or necessary authority to make commitments on behalf of the principal. In all such contingencies the mediator helps the parties to overcome the 'Principal and Agent Barrier' by bringing the real decision maker (Principal) to the negotiating table.

3. **Cognitive Barriers (Perception Barriers) :**Parties while negotiating make decisions based on the information they have. But sometimes there could be limitation to the way they process information. There could be perceptional limitations which could occur due to human nature, psychological factors and/or the limits of our senses. These perceptional limitations are called

cognitive barriers and can impede negotiation. It is important a mediator to identify Cognitive Barriers and use communication techniques to overcome it.

**IMPASSE**

During Mediation, sometimes the Parties reach an Impasse. In Mediation, Impasse means and includes a stalemate, standoff, deadlock, bottleneck, hurdle, barrier or hindrance. Impasse may be due to various reasons. It may be due to an overt conflict between the parties; or due to resistance to workable solutions, or lack of creativity, or exhaustion of creativity, etc. Impasse may be used as a tactic to put pressure on the opposite party. There may also be valid or legitimate reasons for the Impasse.

**TYPES OF IMPASSE**

There are three types of impasse depending on the causes for impasse namely

(i) Emotional impasse
(ii) Substantive impasse
(iii) Procedural impasse

**(i) Emotional impasse:** Emotional impasse can be caused by factors, like Personal animosity, Mistrust, False pride, Arrogance, Ego, Fear of losing face, Vengeance, etc.,

**(ii) Substantive impasse:** Substantive impasse can be caused by factors, like lack of knowledge of facts and/or law, limited resources, despite willingness to settle, Incompetence (including legal disability) of the Parties, Interference by third Parties, who instigate the Parties not to settle dispute or obstruct the settlement for extraneous reasons, Standing on principles, ignoring the realities, and adamant attitude of the Parties, etc.,

**(iii) Procedural impasse:** Procedural impasse can be caused by factors, like lack of authority to negotiate or to settle, Power balance between the Parties, Mistrust of the Mediator, etc.,

**STAGES WHEN IMPASSE MAY ARISE**

Impasse can arise at any stage of the mediation process namely introduction and opening statement, joint session, separate session and closing.

**TECHNIQUES TO BREAK IMPASSE**

The mediator shall make use of his/her creativity and try to break impasse by resorting to suitable techniques.

**Conclusion:-**The stages in Mediation constitute a flexible, creative and non-legal process, unfettered by rigid procedures and rules. The Role of Mediator is extremely crucial during all the stages of Mediation. He can facilitate the Parties to resolve their disputes amicably. It enables the Parties to Mediation have an opportunity to participate in the decision making Process. A Mediator uses special negotiation and communication techniques to help the Parties to come to a Settlement.

**SETTLEMENT OF DISPUTES OUTSIDE THE COURT AND FIRST HEARING**

Paper Presented by

Sri P.Govardhan,
II Addl. Senior Civil Judge,
Vijayawada.

*"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough."* – **Abraham Lincoln.**

*"Society's greatest opportunity lies in tapping the human inclination towards collaboration and compromise, in the most creative social experiment of our time".***— *Derek Bok, President, Harvard University.***

***HISTORICAL PERSPECTIVE***

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth. This was one of the first originating philosophies of mediation - Wisdom, Reason and Prudence, which originating philosophy is even now practiced in western countries. Towards the end of the Vedic epoch, philosophical and legal debates were carried on for the purpose of eliciting truth, in assemblies and parishads, which are now described as conferences. India has one of the oldest cultural histories of over 5000 years and a recent history of about 1000 years during which it was invaded by the Iranian plateau, Central Asia, Arabia, Afghanistan and the West Indian culture has

absorbed the changes and influences of these aggressions to produce remarkable racial and cultural synthesis. The 29 Indian States have different and varying social and culture traditions, customs and religions. The era of Dharma Shashtras [code of conduct] followed the Vedic epoch, during which period scholastic jurists developed the philosophy of basic laws. Their learned discourses recognized existing usages and customs of different communities, which included resolution of disputes by non-adversarial indigenous methods. One example is the tribunal propounded and set up by a brilliant scholar Yagnavalkya, known as KULA, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as SHRENI, a corporation of artisans following the same business, dealt with their internal disputes. PUGA was a similar association of traders in any branch of commerce. During the days of Yagnavalkya there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International Commerce. Another scholar Parashar opined that certain questions should be determined by the decisions of a parishad or association or an assembly of the learned. These associations were invested with the power to decide cases based on principles of justice, equity and good conscience.

Buddhism propounded mediation as the wisest method of resolving problems. Buddha said, "Meditation brings wisdom; lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom".

Ancient Indian Jurist Patanjali said, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong". It is a recorded fact that complicated cases were resolved not in the King's courts but by King's mediator.

Even during the Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real mother gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this was not a fully-developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties.

## MEDIATION IN INDIA

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India. The Mahajans were respected, impartial and prudent businessmen who used to resolve the disputes between merchants through mediation. They were readily available at business centres to mediate the disputes between the members of a business association. The rule in the constitution of the Association made a provision to dismember a merchant if he resorted to court before referring the case to mediation. This was a unifying business sanction. This informal procedure in vogue in Gujarat, the western province of India, was a combination of Mediation and Arbitration, now known in the western world, as Med-Arb. This type of mediation had no legal sanction in spite of its wide common acceptance in the business world.

It is widely accepted that a village panchayat, meaning five wise men, used to be recognized and accepted as a conciliatory and / or decision-making body. Like many of the ancient dispute resolution methods, the panchayat shared some of the characteristics of mediation and some of the characteristics of arbitration.

The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. The British Courts gradually came to be recognized for its integrity and gained peoples' confidence. Even after India's independence in 1947, the Indian Judiciary has been proclaimed world over as the pride of the nation. Until commerce, trade and industry started expanding dramatically in the 21st century, the British system delivered justice quicker, while maintaining respect and dignity. Independence brought with it the Constitution, awareness for fundamental and individual rights, governmental participation in growth of the nation's business, commerce and industry, establishment of the Parliament and State legislatures, government corporations, financial institutions, fast growing international commerce and public sector participation in business. The Government became a major litigant. Tremendous employment opportunities were created. An explosion in litigation resulted from multiparty complex civil litigation, expansion of business opportunities beyond local limits, increase in population, numerous new enactments creating new rights and new remedies and increasing popular reliance on the only judicial forum of the courts. The inadequate infrastructure facilities to meet with the challenge exposed the inability of the

system to handle the sheer volume of caseloads efficiently and effectively. Instead of waiting in queues for years and passing on litigation by inheritance, people are often inclined either to avoid litigation or to start resorting to extra-judicial remedies. The United States was the first to introduce drastic law reforms about 30 years back and Australia followed suit. The United Kingdom has also adopted alternative dispute resolution as part of its legal system. The European Union also endorses mediation for the resolution of commercial disputes between member states.

While the scales of justice can tip either way in court, there are some certainties in resolving family and tax disputes through litigation. One is that the process will take a long time. Another is that it will be expensive. There is widespread enthusiasm for relieving pressure on a court system inundated with what are essentially civil disputes such as those between divorcing spouses, warring family members, and individuals and HM Revenue & Customs. as a cost-effective way to deal with proliferating caseloads. ADR incorporates a range of means of settling disputes and includes mediation, arbitration and negotiation. The process is consensual, but is increasingly encouraged. " ADR not only does it reduce the burden on courts, but it is normally better for people to reach their own agreements rather than have them forced upon them.

Settlement of disputes in an amicable way is the hall-mark of civilization. In ancient India, mediation system has been prevalent in one form or the other. It has continued in our villages and has also been preserved in its customary form in our tribal areas. So far as formal litigation system is concerned, mediation, along with other methods of Alternative Disputes Resolution, has been statutorily recognized by the Civil Procedure Code (Amendment) Act, 1999 which introduced section 89 thereto. An idea of the immense value that mediation imbibes in itself can be had by separately treating the wide array of unique features clustered under the mediation rubric. These features include severability, flexibility, party-participation, consensus, self-reflection, preservation of ongoing relationships and/or peaceful termination of relationships, etc. It fosters peaceable and healthier inter-personal interactions in the long term, thereby pre-empting the causes of conflict in the society.

The benefits of such processes as mediation are further fortified from the fact that imminent legal personalities, such as Mahatma Gandhi, Abraham Lincoln and Nani Palkhiwala, have taken pleasure and pride in continually settling cases out of court, in uniting the parties driven asunder by conflict and discouraging litigation. In the words of Guatam Budhha,

"Better than a thousand hollow words is one word that gives peace", which even is reflected in the famous Sanskrit quote “santosham paramamsukham”. Mediation is one of the modes for attainment of 'Peace'.

An evaluation of the usefulness of anything presupposes an awareness of what it is and the particular value that it has to offer. Though mediation as a process of dispute resolution is not new to our nation, in the changed social scenario an effective adaptation of the traditional methodology to the new conditions requires untiring efforts and devotion to be dutifully put into this reform process right from its inception to its culmination into an effective practice.

Settlement of disputes in an amicable way is the hall-mark of civilization. So far as formal litigation system is concerned, mediation, along with other methods of Alternative Disputes Resolution, has been statutorily recognized by the Civil Procedure Code (Amendment) Act, 1999 which introduced section 89 thereto. As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system. In fact, societies could not grow larger in size and complexity without first evolving a system of resolving disputes that could keep the peace and harmony in the society and keep trade and commerce growing efficiently.

In a democratic country timely justice is essential to prevent miscarriage of justice. Thus injustice anywhere is threat to justice every where. Justice delayed is Justice denied', but the pendency of cases in courts is mounting. As per data provided by the NJDG as on 08.11.2018, total pending cases in Hon’ble High Courts is 47,64,754 and in Subordinate Courts is 2,85,09,973.

| **Pending Cases in Hon’ble High Courts** | | | | | |
|---|---|---|---|---|---|
| Cases Pending (10 years and above ) | 545530 | 290955 | 193134 | 1029619 | (21.61%) |
| Cases Pending (Between 5 to 10 years) | 511623 | 296042 | 256106 | 1063771 | (22.33%) |
| Cases Pending (Between 2 to 5 years) | 604552 | 308723 | 337492 | 1250767 | (26.25%) |
| Cases Pending (Less than 2 years) | 670991 | 396763 | 352843 | 1420597 | (29.81%) |
| Total Pending Cases | 2332696 | 1292483 | 1139575 | 4764754 | (100%) |
| **Category Wise Pending Cases** | | | | | |
| Senior Citizen | 32539 | 15195 | 19219 | 66953 | (1.41%) |
| Filed By Women | 29593 | 10881 | 17371 | 57843 | (1.21%) |

**SUMMARY REPORT OF INDIA SUBORDINATE COURTS AS ON DATE :-- 08/11/2018**

| PARTICULARS | CIVIL CASES | CRIMINAL CASES | TOTAL CASES | PERCENTAGE |
|---|---|---|---|---|
| Cases Disposed In Last Month | 261122 | 757666 | 1018788 | |
| Cases Filed In Last Month | 258429 | 920354 | 1178783 | |
| Cases Disposed In Last Month(more than 10 years old) | 12542 | 22965 | 35507 | |
| **Pre-Registration** | | | | |
| Cases-Under Objection | 32844 | 67081 | 99925 | |
| Cases- Under Rejection | 1 | 2 | 3 | |
| Cases-Pending Registration | 244615 | 495090 | 739674 | |
| **Pending Cases** | | | | |
| Cases Pending over 10 years | 605831 | 1760847 | 2366678 | (8.3%) |
| Cases Pending (Between 5 to 10 years) | 1266689 | 3332286 | 4598975 | (16.13 %) |
| Cases Pending (Between 2 to 5 years) | 2567122 | 5592719 | 8159841 | (28.62 %) |
| Cases Pending less than 2 years | 4012182 | 9372297 | 13384479 | (46.95 %) |
| **Total Pending Cases** | **8451824** | **20058149** | **28509973** | **(100 %)** |

**Statistics of the State of Andhra Pradesh as on 08-11-2018:**

**SUMMARY REPORT OF ANDHRA PRADESH AS ON DATE :-- 08/11/2018**

| PARTICULARS | CIVIL CASES | CRIMINAL CASES | TOTAL CASES | PERCENTAGE |
|---|---|---|---|---|
| Cases Disposed In Last Month | 12551 | 10783 | 23334 | |
| Cases Filed In Last Month | 7603 | 8082 | 15685 | |
| Cases Disposed In Last Month(more than 10 years old) | 218 | 66 | 284 | |
| **Pre-Registration** | | | | |
| Cases-Under Objection | 1337 | 1242 | 2579 | |
| Cases- Under Rejection | 0 | 0 | 0 | |
| Cases-Pending Registration | 9099 | 8825 | 17924 | |
| **Pending Cases** | | | | |
| Cases Pending over 10 years | 4375 | 1366 | 5741 | (1.11%) |
| Cases Pending (Between 5 to 10 years) | 24150 | 7321 | 31471 | (6.06%) |

| PARTICULARS | CIVIL CASES | CRIMINAL CASES | TOTAL CASES | PERCENTAGE |
|---|---|---|---|---|
| Cases Pending (Between 2 to 5 years) | 93302 | 62924 | 156226 | (30.09%) |
| Cases Pending less than 2 years | 170109 | 155631 | 325740 | (62.74%) |
| Total Pending Cases | 291936 | 227242 | 519178 | (100%) |

**Statistics of Krishna District**

**SUMMARY REPORT OF KRISHNA AS ON DATE :-- 08/11/2018**

| PARTICULARS | CIVIL CASES | CRIMINAL CASES | TOTAL CASES | PERCENTAGE |
|---|---|---|---|---|
| Cases Disposed In Last Month | 1393 | 1394 | 2787 | |
| Cases Filed In Last Month | 1181 | 1498 | 2679 | |
| Cases Disposed In Last Month(more than 10 years old) | 39 | 18 | 57 | |
| **Pre-Registration** | | | | |
| Cases-Under Objection | 402 | 509 | 911 | |
| Cases- Under Rejection | 0 | 0 | 0 | |
| Cases-Pending Registration | 1781 | 981 | 2762 | |
| **Pending Cases** | | | | |
| Cases Pending over 10 years | 410 | 270 | 680 | (1.26%) |
| Cases Pending (Between 5 to 10 years) | 1888 | 864 | 2752 | (5.1%) |
| Cases Pending (Between 2 to 5 years) | 8366 | 6557 | 14923 | (27.67%) |
| Cases Pending less than 2 years | 17391 | 18195 | 35586 | (65.97%) |
| Total Pending Cases | 28055 | 25886 | 53941 | (100%) |

To deal with these cases, we have less than 16609 judges and judicial officers in the country (as per the recent consultation paper submitted by Sri Hon'ble Justice P.V.Reddy for 2nd National Judicial Pay Commission). The ratio of judge per million population in India is the lowest in the world. Thus, with this minimal strength, there is no chance of immediate disposal of the litigations pending before the various courts. In this context we need to understand the evolution of Alternative Disputes Resolution Mechanism.

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.

In the case of ***Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors., reported in 2010 (8) S.C.C. 24,*** Honourable Supreme Court of India considered the general scope of Section 89 of the Code of Civil Procedure (`Code' for short) and the question whether the said Section empowers the court to refer the parties to a suit to arbitration without the consent of both parties.

In the said reported decision, Hon'ble Apex court further considered the following two questions:

**(i) What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?**
**(ii) Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?**

In Para 7 of said judgment Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors. [2010 (8) S.C.C. 24], Hon'ble Apex Court held in this regard as follows:

*"If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short `ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits. In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in* ***Salem Advocate Bar Association v. Union of India reported in [2003 (1) SCC 49*** *- for short, Salem Bar - (I)] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. I****n Salem Advocate Bar Association v. Union of India [2005 (6) SCC 344*** *- for short, Salem Bar-(II)], this Court applied the principle of purposive construction in an attempt to make it workable".*

Hon'ble Apex Court held in the said decision [2010 (8) S.C.C. 24] held that **formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference.** It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process and that If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?. It is further held in the said decision [2010 (8) S.C.C. 24] that It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. This Court therefore diluted this anomaly **in Salem Bar (II)** by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a `summary of disputes' and not `terms of settlement' and that Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

In para 16 of the judgment [2010 (8) S.C.C. 24], Hon'ble Apex Court directed two changes to Section 89 CPC that Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. **It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference.** Secondly, the **definitions of `judicial settlement' and `mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error.**

**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.

**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 effect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.

**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.

**Choice of Cases for reference :**

As held by the Honourable Supreme Court of India in Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. And

Ors., (2010) 8 Supreme Court Cases 24, having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process:

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,

ii) All cases arising from strained or soured relationships

iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes

iv) All cases relating to tortious liability

v) All consumer disputes

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.

**FIRST HEARING**

In the case of **R.C. Sundaravalli vs T.D. Shakila, [AIR 2002 Mad 82]**, Hon'ble Madras High Court held in para 8 as follows:

"Para-8 : The word "first hearing" appears in the Code in several places. Under Order X, C.P.C, the Court has the power to ascertain whether the allegations in the pleadings are admitted or denied at the first hearing of the suit. The oral examination of parties to elucidate matters in controversy is also permissible at the first hearing of the suit under Order X, Rule 2, C.P.C. Order XIII, Rule 1, C.P.C, before the 1976 amendment had dealt with the

production of documentary evidence at first hearing. Since this led to some controversy, the words "first hearing" in the heading of Order XIII, Rule 1, C.P.C were replaced by the words "at or before the settlement of the issues" and Rule 1 was amended by replacing the words "at first hearing of the suit" with "at or before the settlement of the issues". Order XIV, C.P.C again contains the words "at the first hearing". Order XIV, Rule 1(5), C.P.C deals with settlement of issues and this again, uses the words "at the first hearing of the suit". The Court frames the issues for deciding the case right after examination under Order X, Rule 2, C.P.C and hearing the parties or other pleaders and after reading the plaint and written statement at the first hearing of the suit. Order IV, Rule 6, C.P.C provides that the Court need not frame and record issues where the defendant at the first hearing of the suit makes no defence. Therefore, the first hearing of the suit obviously extends up to the point issues are framed. If the defendant is set exparte, the Court does not frame or record issues. That is why the definition of "first hearing of the suit" is an inclusive definition. Under Order XIV, the Court is empowered to pronounce judgments at the first hearing of suit if it appears that the parties are not at issue. In fact, the heading of **Order XV** of the Code of Civil Procedure, 1908 **ORDER XV** : reads as **“Disposal of the Suit at the First Hearing”:**

1. **Parties not at issue (Rule 1)**

Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

2. **One of several defendants not at issue (Rule 2)**

(i) Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

(ii) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and the decree shall bear the date on which the judgment was pronounced.]12

3. **Parties at issue (Rule 3)**

(i) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as herein before provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the

finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(ii) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

4. **Failure to produce evidence (Rule 4)**

Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

**ADVAITA NAND VS. JUDGE, SMALL CAUSE COURT, MEERUT & ORS. 1995 (3) SCC 407** : In the said Judgment the Honourable Supreme Court held at para 10 as follows: *"when time is fixed by the court for the filing of the written statement and the hearing, these dates bind the defendant, regardless of the service of the summons".*

**Order X Rule 1** provides that the court shall, ***at the first hearing of the suit***, ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or in the written statement, if any, of the opposite party. After recording admissions and denials, the court shall direct the parties to the suit to settle out of court through arbitration, conciliation, judicial settlement, Lok Adalat or mediation. If there is no settlement, the case will again be referred to the court. Rule 2 further provides oral examination of parties to the suit with a view to elucidate the matters in controversy in the suit. The court, thus, ascertains with precision the proposition of law or facts on which the parties are at variance and on such questions issues are required to be framed. The main purpose behind these rules is to understand and inform the parties about their real dispute so that the area of conflict can be dealt with between the parties at the same time, later on if any party comes to realise about these issues, it would not be surprise to them.

Therefore, on the first hearing, the main task of framing of issues is done. Issue means a point in question or some important subject of discussion. Issues are points of contradictory averments made by the parties

that are to be decided by the court. Rules 1(2) and 1(3) of Order XIV of the Code of Civil Procedure provide that material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other shall form the subject-matter of a distinct issue.

Issues are framed by the court from the materials mentioned in sub rules (a) to (c) of Rule 3 or Order XIV viz., allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties; or allegations made in the pleadings or in answers to interrogatories delivered in the suit; or the contents of documents produced by either party or all of them.

In the case of State of **Gujarat v. Jaipalsingh Jaswantsingh Engineers and Contractors [(1994) 1 GLR 258]**, Hon'ble High Court of Gujarat laid down the importance of issues that *"such framing of issues in the first instance would facilitate the applicant to lead necessary evidence in support of the claim and the reliefs prayed pursuant thereto. In the second instance, it will avail the opponent an opportunity to confront and contradict the particular witness and thereafter to lead the evidence if he so desires to bring home the defence pleaded, and in the third instance, enlighten the trail court to test and appreciate the same in proper perspective to enable it to reach a just decision. It is hardly required to be told that issues are backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings, the trial court and even the appellate court- as to what is the controversy, what is evidence and where the way to truth and justice lies."*

In conclusion, the process of First Hearing and ADR is very important but it cannot be left as a tool in the hands of a party playing delaying tactics without co-operating for the same and necessary changes must be brought in to cut short the delay. A vibrant judicial system is the basis of a flourishing democratic tradition.

To conclude with a quote of **Joseph Grynbaum** (Principal Mediator and Engineer, Mediation Resolution, Monash University, Australia) **"An ounce of mediation is worth a pound of arbitration and a ton of litigation!".**

# SIGNIFICANCE OF SECTION 89, ORDERS X, XI, XII, XIII ETC., OF CODE OF CIVIL PROCEDURE

Paper presented by

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## (I) SECTION 89 CPC

(i) Resort to Alternative Disputes Resolution processes was found necessary to give speedy relief to the litigants and to reduce pendency in courts, through a user-friendly system of disputes resolution. But the litigants were not resorting to ADR processes with the desired frequency, either on account of ignorance or reluctance or indifference.

(ii) Section 89 as also Order 10 Rules 1 A to 1 C in the Code of Civil Procedure are inserted to ensure that ADR was resorted to before trial of suits.

(iii) The Statement of Objects and Reasons for introducing and the reasons for inserting Section 89 CPC is to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute before the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternative dispute resolution methods that the suit shall proceed further in the court in which it was filed.

(iv) Where a dispute has been referred ;

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 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 (39 of 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 (39 of 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.

(v) But the object behind Section 89 is sound and its constitutional validity was upheld in Salem Advocate Bar Association (I) v. Union of India .

(vi) It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the laws delays and the limited number of judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date.

(vii) In Salem Advocate Bar Association (II) v. Union of India it is observed 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 and if the parties do not agree, the court shall refer them to one or other of the said modes.

(viii) Section 89 refers to five types of ADR procedures: an adjudicatory process (arbitration) and four non-adjudicatory processes (conciliation, mediation, judicial settlement and Lok Adalat settlement).

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) 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 observations 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.

(ix) When a matter is referred to Lok Adalat for negotiated settlement, no fee is paid by the litigant. The Lok Adalats are conducted free of cost by the Legal Services Authorities.

(x) In the case of Kopparthi Krishna Murthy vs., District Legal Services Authorities (2018 (2) ALT 198 (D.B.) it is held that as per Regulation 25 (b) (ii) (a) of the Andhra Pradesh State Legal Services Authorities Regulation, 1996 what is prescribed is only the payment to the entitled person of the court fee,

and not the grant of certificate for exemption from payment of court fee by invoking stipulations contained the Government Order in G.O.Ms., No., 73 Law , dated 19-06-2007. Therefore, if a person satisfies the criteria prescribed under Section 12 of the Act, then only he can sought only the payment of court fee and not a certificate of exemption from payment of court fee.

(xi) Judgments relating to the topic :

(1) Bawa Masala Co. vs., Bawa Masala Co. Pvt. Ltd, AIR 2007 Delhi 284.

(2) Salem Advocate Bar Association vs., Union of India (II),AIR 2005 SC 3353.

(3) D.D.A. vs., Happy Himalaya Construction Co.,2009 (1) A.D. (Delhi) 383;

(4) Vallabh Das Gupta vs., Geeta Bai (2004 (4) RCR (Civil) 85;

(5) Basheer vs., Kerala State Housing Board – AIR 2005 Kerala 64.

(6) P.Anand Gajapathi Raju vs, PVA Raju - (2000) 4 SCC 539.

(7) Jagdish Chander vs., Ramesh Chander – 2007 (6) SCC 719,

**(II) ORDER XI CPC - DISCOVERY AND INSPECTION.**

(i) It deals with the discovery of interrogatories and, further empowers the court to dismiss the Suit for want of prosecution of the order passed by the court and in case defendant fails to comply with the order of the court, his defence may be struck out and where an order under this rule has been passed, the plaintiff is precluded to bring a fresh Suit on the same cause of action.

“In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties for any one or more of such parties and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such person is required to answer:

Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose:

Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.”

(ii) Rules 1 to 11 of Order 11 deal with discovery of facts, whereas Rules 12 to 20 deal with discovery, production and inspection of documents, in other words discovery of documents. Rule 21 lays down consequences of non-compliance with order of discovery, Rule 22 allows answers in interrogatories to be used in evidence by a party. Rule 23 deals with the application of the order to the minor children and the defendant. Thus, from the scheme of the Code and the arrangement of various Rules in the domain of Order 11 under the caption "discovery and inspection", the provisions deal with two aspects mainly viz., discovery by interrogatories and discovery by documents.

(iii) An election petition must contain a concise statement of the material facts on which the petitioner relies in support of his case. If such material facts are set out the Tribunal has undoubtedly the power to direct discovery and inspection of documents with which a Civil Court is invested under the Code of Civil Procedure when trying a suit. ( Ram Sewak Yadav vs., Hussain Kamil Kidwai And Others Visual, Raj Narain vs., Smt Indira Nehru Gandhi And Another Supreme Court Of India.)

(iv) Order XI Rule 21 CPC is the sole repository insofar as the power of the Court to strike off the defence is concerned and Section 151 is not at all available for the Courts to strike off the defence. ( D. Ram Mohan Rao vs., Sridevi Hotels Private Limited, Nizamabad Andhra Pradesh High Court (9 Jan, 2003)

(v) Adverse inference cannot be drawn against a party for not producing the documents when there was no direction of the court to produce the same, particularly, when the party had ever made any application, in this respect, nor he filed any application under Order 11 CPC submitting any interrogation or for inspection or production of document. (Union Of India vs., Ibrahim Uddin And Another Supreme Court Of India (17 Jul, 2012).

**(III) ADMISSIONS UNDER ORDER XII CPC**

(i) The Admissions in the Civil Law are spread over many of rules as envisaged in the Code. The Code describes the admissions in three categories :

1.Actual admissions, oral or by documents;

2.the express or implied admissions from the pleadings or by non traverse by agreement;

3.By agreement or by notice.

The admissions need not be proved unless the court otherwise is of the opinion or requires the same to be proved.

(ii) Order XIV Rule 6 and 7 and Order XXIII Rule 3 of the Code Order XIV Rules 6 & 7 and Order XXIII Rule 3 of the Code deal with the admissions by agreement.

(iii) Elements of admissions ,as defined under Order VIII Rule 5 of the Code are;

The admissions are not conclusive. They can be gratuitous or erroneous. The admissions can be withdrawn or explained away. The inference regarding admission could be concluded after considering the pleadings in entirety. Admissions could be proved to be wrong. Oral admissions prevail over the record of rights, or documentary evidence.

Admissions of the co-defendant cannot be allowed to be used as against the other defendants. The admissions made at any time can be proved to be collusive or fraudulent.

(iv) **Judgment on admissions**:

Besides a judgment which could be passed under Order 8 Rule 5 CPC and Order XV Rule 1, Order XII Rule 6 also relate to the judgment on admissions.

(v) While comparing Order 12 Rule 6, it is made out that the Order 12 Rule 1 is limited to admission by 'pleading or otherwise in writing', but Order 12 Rule 6 is wider enough to include all the pleadings or otherwise by documents. Similar observations were made in Uttam Singh Dugal and Co. Ltd. vs., United Bank of India 2000 (4) R.C.R. (Civil) 89.

Any answers to the interrogatories are also covered under this rule.

Admissions would have to be read along with first proviso to Order 8 Rule 5 (1) of the Code and the court may call upon the parties relying on such admissions to prove its case independently.

(vi) Where it is commercial transaction, like dispute with regard to rent, admission of non payment of rent, judgment can be rendered on admissions by the court.

(vii) The provisions of Order XII Rule 6 of the Code is enabling, discretionary and permissible and it is neither mandatory nor it is peremptory since the word “may” has been used.

(viii) Relief under Order XII Rule 6 is discretionary in nature. It also confers the court with wide discretion to decree the suit and it is not bound to pass decree in a proper and reasonable case and can call for the evidence before passing the decree. Where the averments made in the written statement gave rise to the trivial issues, the judgment on admission under Order XII Rule 6 CPC cannot be passed.

(ix) For passing a decree on the basis of admission of the defendants in the pleadings, law is well settled that the admission has to be unequivocal and unqualified and the admission in the written statement should also be taken as a whole and not in part.

(x) Had there been any intention of the legislature to decree the suit in case parties are not at issue, then there was no requirement to introduce Order XII Rule 6 or Order VIII Rule 5 of the Code. The existence of the dispute is the sine qua for the trial. When the court finds the parties prima facie at issue, in that event, the court was to hold enquiry after framing issues, otherwise, it is not open to the court to hold trial. Cause of action which is the main element of trial presupposes, denial or threat to the rights of the parties claiming such right.

(xi) Discretion of the court to award judgment on admissions:

Admissions before the same are relied upon, it should be clear, unequivocal, categorical and should not be vague and conditional. However, there is discretion of the court to exercise power to pass a decree on the basis of such admissions and the same has been held the Apex Court in the case Himani Alloys Ltd. vs., Tata Steel Ltd. 2011 (3) Civil Court Cases.

(xii) Uttam Singh Duggal & Co. Ltd. vs., United Bank of India [2000 (7) SCC 120], Karam Kapahi vs., Lal Chand Public Charitable Trust [2010 (4) SCC 753] and Jeevan Diesels and Electricals Ltd. vs., Jasbir Singh Chadha [2010 (6) SCC 601].

(xiii) Actually, the discretion to pass the decree has its roots in the locus classic-us as held in the case of Nagubai Ammal and others vs., B. Shama Road and others AIR 1956 SC 593.

(xiv) Razia Begum vs., Sahebzadi Anwar Begum, 1958 SC 886 it is held that court is not bound to grant declaration prayed for on the mere admission of the claim by the defendant, if the court has reason to insist upon a clear proof apart from admissions. The result of a declaratory decree confers status not only on the parties but for generations to come and so it cannot be granted on a rule of admission and, therefore, insisted upon adducing evidence independent of the admission and discouraged to pass the decree which affects not only the parties, but the generations to come. However, the provisions of Order XII Rule 6, Order VIII Rule 5 and 10 of the Code are meant for commercial transactions and not otherwise where the claim is based on such documents which need proof. It is also settled that normally admissions on the Will, gift, sale or coparcenary can be proved to be erroneous and cannot be treated as proved on the basis of such admissions. However, when the case is regarding commercial transactions, admission in a notice, minutes of meetings, resolutions passed by the Board of Directors,pleadings or other admission of signatures, then such admissions could be accepted and made the basis of the decree.

(xv) Similar view was taken by the Apex Court in case Uttam Singh Dugal and Co. Ltd. vs., United Bank of India 2000 (4) R.C.R. (Civil) 89, wherein it was observed as under:

As to the object of the Order XII Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the objects and reasons set out while amending the said rule, it is stated that where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the

extent of the relief to which according to the admission of the defendant, the plaintiff is entitled. We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed."

(xvi) The object of the provisions of Order XII Rule 6 of the Code were also interpreted in the judgment delivered in case M/s Puran Chand Packaging Industrial Pvt. Ltd. vs., Smt. Sona Devi and another, 2009 (2) C.C.C. 39.

This judgment also indicates that: (a) the admissions before being placed reliance must be made by the defendant or party to the proceedings; (b) it should be unequivocally made in unambiguous manner; and © it should not be conditional one or on a different context. The documents containing admissions should be read as a whole and the court is not to take out one or two sentences so as to treat it as admission.

Admissions made by a party in its own favour has no value.

(xvii) A perusal of the aforesaid provision would show that before a decree on the basis of admission in the pleadings can be passed, the admission must be made by the defendant or a party to the proceedings in an unequivocal, unambiguous manner. In other words the admission should not be vague or equivocal.

(xviii) Though the party can press for judgment on admissions as a matter of legal right on an admission made by the party.

However, provisions of Order XII Rule 6 as well as Order VIII Rule 5 of the Code, are enabling provisions conferring the court discretionary power to pass a decree over the same or call the parties for evidence to prove the fact or claim as raised by the plaintiff.

(xix) The Apex Court of India discussed Order XII Rules 1 and 6 and Order 8 Rule 5 of the Code in detail in the judgment delivered in case Karam Kapahi & others vs., M/s Lal Chand Public Charitable & Another, (2010) 4 SCC 753.

**(IV) ORDER XIII-PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS**

(i) *Order* 13 of *CPC* makes it clear that all documents on which the parties intend to rely on as substantive evidence, should be produced either with the pleadings or before settlement of issues, (In summary proceedings, where issues are not framed, the documents should be produced before commencement of evidence), or thereafter with an application assigning

reasons for non- production. Parties may however produce a document for the limited purpose of confronting it to a witness during his cross-examination to contradict him or to refresh the memory of a witness. It is clear from *Order* **13, Rule 2 of the** *CPC* **read with Section 145 of Evidence Act, 1872** that what can be produced during cross-examination, to confront a witness to contradict him, is only his previous statement in writing or reduced into writing. A witness cannot ,therefore, be confronted in cross-examination (without previous production as per law) a document executed by someone else.

(ii) When a document is produced and sought to be exhibited, the court should decide whether it is admissible or not immediately, so that the parties will know whether such document could be relied on or not. If a document is not admitted, by refusing to mark it, the party may take steps to let in other relevant and permissible evidence to prove the document. On the other hand, if the document is marked in evidence, the parties may not choose to let in further evidence on that aspect. When the question of marking of the document is left open, the parties will have to proceed with the evidence with considerable uncertainty. Therefore, Courts should consider and decide the question of admissibility of a document sought to be exhibited, before proceeding further with the evidence. If the court has any doubt, it may hear arguments on the question.

(iii) In the case of Bada Bodaiah And Anr vs., Bada Ungaswamy & Ors, 2003 (1) ALD 790 and John Santiyago, Mose vs., Climent Dass, Hon'ble AP High Court, dated 4-11-2013, it is held that ; the Court has no power to receive the documents produced subsequently. Order XIII Rule 1 and Order VII Rule 14 (3) have to be read together harmoniously. Mere non-mention of the documents in the plaint or subsequent incidental or supplemental proceedings in the suit does not in any manner affect the power of the Court to grant leave to produce the documents at the subsequent stage as it is a curable defect. With leave of Court, which is condition precedent under Sub-rule (3) of Rule 4 of Order VII read with Sub-rule (1) of Order 13 to receive the documents, documents can be produced at the time of trial.

(iv) G.Naram Naidu vs. K.Kumaraswamy - AIR 2003 AP 481 and **CABLE CORPORATION OF INDIA LIMITED VS., SANGHI INDUSTRIES LIMITED -** 2003 Law Suit (AP) 44, it is held that under Order 13, Rule 2 the party has to make a good cause and has to satisfy the Court of the reasons which prevented him from producing the documents at a proper time.

(v) The provisions of Order xiii cpc., production, impounding and return of documents have been elaborately discussed in the case of G.Sudhaker Reddy vs., M. Pullaiah (CRP no., 4998/2014 dated 6-3-2015)

(a) (1) In Bada Bodaiah v. Bada Lingaswamy , after considering *Order* **VII Rule 14(3) and** *Order XIII* **Rules 1 and 2 of** *CPC***,** it is held that mere non-mention of documents in plaint or subsequent incidental or supplemental proceedings in the suit does not in any manner affect power of the *Court* to grant leave to produce documents at subsequent stage. Non-mentioning of the documents sought to be produced at the subsequent stage is a curable defect. But, the power to grant leave must be exercised in rare cases and not in a routine manner.

(2) An objection that the mode of proof is irregular or initial should be taken before the document is admitted. When a document is exhibited before the trial *Court*, a party against whom it is being brought on record is entitled to question it on the ground of its inadmissibility if after the admission of a particular document it is later on found to be an irrelevant or inadmissible one, in the eye of law, it may be rejected at any stage of the suit as per *Order* 13 Rule 3 of Civil Procedure Code. It is the duty of a *Court* of Law to exclude all irrelevant or inadmissible evidence even if no objection has been taken by the opposite side.

**(b) In** K.Amarnath v. Smt.Puttamma **while dealing with the law relating to the documents under** *Order XIII* Rule 2 *CPC* read with Section 145 of the Evidence Act **it is held that whenever the document is sought to be marked in evidence, the** *Court* **is bound to consider the following three aspects; (a) what is the nature of the document; (b) whether it bears the requisite Stamp duty under the relevant Stamp Law; and (c) whether the registration of the document is compulsory.**

**(c) While relying on the judgment in the case of Bipin Shantilal Panchal v. State of Gujarat** , arising out of criminal proceedings, it is held that the practice of deciding objection raised as to admissibility of evidence and then proceeding further with the trial was found to be unacceptable.

It is held that whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial *Court* can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the *Court* finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration and there is no illegality in adopting such a

course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the *Court* has to decide the objection before proceeding further and for all other objections the procedure suggested above can be followed.)

(d) (1) A duty is cast upon every Judge to examine every document that is ought to be marked in evidence. The nomenclature of the document is not decisive. The question of admissibility will have to be decided by reading the document and deciding its nature and classification. The tendency to mark documents without inspection and verification should be eschewed. Even while recording ex parte evidence or while recording evidence in the absence of the Counsel for the other side, the *Court* should be vigilant and examine and ascertain the nature of the document proposed to be marked and ensure that it is a document which is admissible. The *Court* should not depend on objections of the other Counsel before considering whether the document is admissible in evidence or not. Section 33 of the Stamp Act casts a duty on the *Court* to examine the document to find out whether it is duly stamped or not, irrespective of the fact whether an objection to its marking is raised or not.

(2) When a document comes up before the *Court*, it has to examine and determine whether it is properly stamped. When the other side objects to it, the *Court* should consider such objection and hear both sides; (b) after hearing, if the *Court* comes to the conclusion that the document has been duly stamped, it shall proceed to admit the document into evidence; (c) on the other hand, if the *Court* comes to the conclusion that the document is not stamped or insufficiently stamped, it shall pass an *order* holding that the document is not duly stamped and determine the Stamp duty/deficit stamp duty and penalty to be paid and fix a date to enable the party who produces the document to pay the Stamp duty/deficit Stamp duty plus penalty; (d) if the party pays the duty and penalty the *Court* shall certify that proper amount of duty and penalty has been levied and record the name and address of the person paying the said duty and penalty and then admit the document in evidence as provided under the Stamp Act; and the *Court* shall send an authenticated copy of the instrument to the District Registrar together with a Certificate and the amount collected as duty and penalty, as provided under **the Stamp act; (e)** if the party does not pay the duty and penalty, the *Court* will have to pass an *order* impounding the document and send the instrument in original, to the District Registrar for being dealt with in accordance with law as per **of the Stamp Act.**

*(e) In* **Shalimar Chemical Works Ltd. v. Surendra Oil & Dal Mills** *it is held that admissibility of a document has to be decided at the stage of admission itself, instead of leaving it to be decided subsequently.*

(f) With regard to admission of a document, in T Basavaraju (died) per Lrs., vs., T.Nagaratnam, it is held that unless and until there is a judicial determination, it cannot be said that it has been admitted in evidence, though it is marked. Mere marking of the document itself is not sufficient and there should be judicial determination as to the nature of the document and its admissibility. Further, the words admitted in evidence appearing in Section 36 of the Stamp Act means admitted after judicial consideration of the circumstances relating to the admissibility. There shall be a judicial determination of the question whether the document can be admitted in evidence or not for want of stamp duty etcetera. Merely because the document was marked, it would not mean that the objection raised by the other side has been rejected. No opportunity was given to the other side and the document was mechanically marked without there being judicial scrutiny. In fact, even otherwise, the *Court* may, at any stage of the suit, reject any document, which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection (*Order XIII* Rule 3 *CPC*).

(g) In Musammat Sumitra Kuer (supra), the High *Court* of Patna held that a document which is inadmissible and marked without objection can be considered as to its admissibility at a later point of time by the *Court*.

(h) In Sait Tarajee Khimchand v. Yelamarti Satyam Alias Satteyya it is held that mere marking of exhibits does not dispense with proof in evidence.

(i) The Hon'ble *Supreme Court* in Javer Chand and others V. Pukhraj Surana, **AIR 1961 SC 1655**, held that :

> Where a question as to the admissibility of a document is raised on the ground that it has not been stamped or has not been properly stamped, the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the *Court*. The *Court* has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case.

(j) IVRCL Assets and Holdings Ltd., Hyderabad vs., A.P.State Consumer Disputes Redressal Commissioner, Hyderabad it is held that unregistered and insufficiently stamped document, if marked as a document, does not amount to admitting in documentary evidence. The difference between marking of document and admitting a document in evidence was made out in the said decision.

(k) The *Supreme Court* in R.V.E.Venkatachala Gounder (supra), held that the objection that the document , which is sought to be proved, is itself

inadmissible in evidence can be raised even at a later stage or even in appeal or revision. When the objection relates to mode of proof alleging the same to be irregular or insufficient, the objection should be taken before the evidence is tendered and cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. This later objection is an objection relating to the irregularity or insufficiency.

(l) In *order* to avoid delay in the trial of the suit, the *Court* can tentatively mark a document and examine its admissibility and the objection raised to it along with the pronouncement of judgment. After considering the decisions in **Basavaiah Naidu v. Venkateswarulu , Vemi Reddy Kota Reddy vs., Vemi Reddy Prabhakar Reddy and R.V.E.Venkatachala Gounder** (supra), the provisions of *cpc*, and the civil rules of Practice, it is held that :

When the order of the trial *Court* speaks of receiving of the document only ,without passing a judicial *order* on its admissibility, the other party can as well raise his objection as to its admissibility at a later stage, and the trial *Court* shall consider the same and pass appropriate orders thereon. The objection relating to relevancy of the document need not be decided at the time of marking the document. It relates to admissibility and can be raised by the defendant at a later stage and should be decided by the *Court* at the time of pronouncement of judgment.

(m) In the case of Syed Yousuf Ali vs., Yousuf and Ors (C .R.P.No.4794 OF 2015 05-02-2016 ) it is held that a co-joint reading of **Section 36 of Indian Stamp Act and** *order* **XII Rule 3 of** *CPC***,** there is little conflict as to rejection of any document which is already marked on the ground that the document is irrelevant or inadmissible in evidence after recording reasons. If really the bar contained in Section 36 is absolute which preclude the *Court* to entertain any objection as to admissibility at any subsequent stage, after the document is marked in evidence, *Order XIII* **Rule 3** become redundant. When *Court* did not determine judicially as to admissibility of a document and marked the same as Exhibit, without applying its mind, the admissibility of the document can be decided judicially and reject if the *Court* find that the document is inadmissible in evidence or reject the document at any stage of the proceedings.

(vi) In the case of Suraranga Muralikrishna Reddy vs., Surayerri Varaprasada Reddy (2018 (4) ALT 616) , it is held that when original of a document is not properly stamped, the question of admitting the copy of the same would not arise as the question whether or not stamp duty can be collected on a copy of a document is no longer res integra. It is also held that without application of mind and without first deciding the objection raised, as

ordained in the case of Bipin Shanthilal Panchal's case and refusing to exceed to the request of the party to party to the suit to de-exhibit the document or exclude/eschew it from evidence for deciding its admissibility or otherwise ,after adverting whether its original was duly stamped or not and whether it can be admitted in evidence for collateral purpose or not, is unsustainable.

(vii) In the case of Mrs. M.Prathima Reddy vs., Nicco Ucco Alliance Credit Limited, Kolkatta (2018 (1) ALT, 160 (D.B) it is held that when the proof of contents of a document is an issue, the author of the document or the attestor or person connected with the execution of a document is to be examined to prove the contents of the said document and mere marking is not proof of contents.

**(VI)** Orders XI to XIII of CPC., with regard **discovery by interrogatories, admission of documents and facts**, **discovery of documents and inspection thereof, production, impounding and returning of documents or other material objects**, has been extensively discussed in the case of **Rajesh Bhatia And Ors. vs G. Parimala And Anr. 2006 (3) ALD 415.**

**(i) it is held that** insofar as the production of income tax returns of a party is concerned, there has been a prohibition contained in the provisions of the Income Tax Act for producing those documents by the Department. The proper procedure in such cases seems to be to issue notice to the other party to file the income tax returns and if he fails to file them, the party can either lead secondary evidence by obtaining the certified copies thereof from the Department if granted or request the Court to draw the necessary adverse inference for non-production of the documents by the other party despite the notice. It is not the case of any discovery as regards the existence of the documents and the need to inspect those documents so as to shorten the litigation. It is a matter where trial process was on and has been going on. Thus the direction given to other party to produce the bank statements, accounts, etcetera was set aside and dismissed the petition insofar as the production of income tax returns are concerned.

(ii) It is also further held that A plain reading of Order XI, Rule 21 shows that the Court could have invoked the penal provisions of that rule only if there had been an order to answer interrogatories or for discovery or for inspection of documents under Rules 11, 12 and 18 of Order XI. When the party did not apply under any of the provisions of Order XI at all and merely gave a notice to produce under Order XII, Rule 8 and if there was default on the part of one party it enables the other party to adduce secondary evidence of the contents of the documents under Section 65, Clause (a) of the Evidence Act.

# ROLE OF REFERRAL JUDGES, LAWYERS AND PARTIES IN MEDIATION

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## INTRODUCTION

During ancient time, arbitration, conciliation and mediation were the means of settlement of disputes outside the formal legal system. In Ramayana, Angadha, the son of Vali, approached Ravana and delivered the message of Lord Rama to opt the path of peaceful settlement. In Mahabhartha, Lord Sri Krishna endeavoured to mediate between Pandavas and Kauravas. These alternative means were recognized not only in India but also in other parts of the world. Thus, settlement of dispute outside the scope of the formal legal system may be called as alternative means of settlement of disputes.

After the independence it was realized that there is need to have such alternative means of dispute resolving system or machinery which may be economical and less time consuming. Consequently emphasis was put on developing the alternative means for settlement of disputes which should be scientifically designed.

Thus, with the object of giving statutory recognition to alternative means of settlement of disputes, the Code of Civil Procedure introduced certain provisions giving the power to courts to settle the matters outside the Court. Section 89 provides for the settlement of disputes outside the Court. The provisions of this section are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the Court to refer the dispute for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternative dispute resolution method that the suit could proceed further. In view of the above, by Amendment of 1999 a new section 89 has been inserted in order to provide for alternative dispute resolution. This Section should be read with Rules 1-A, 1-B and 1-C of Order

X CPC as inserted by the Code of Civil Procedure (Amendment) Act 1999, which lays down the procedure for such settlement.

**OBJECT**

The object of Section 89 C.P.C. is to promote alternative methods of dispute resolution which may not be bound by any specific procedure and further it resolves the dispute expeditiously. A litigant is free to settle his dispute on a reference made by the court by resorting to (a) Arbitration, (b) Conciliation, (c) Judicial Settlement including settlement through Lok Adalat, or (d) Mediation. Resort to alternative disputes resolution processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the Courts.

In SALEM BAR ASSOCIATION-I case, it was held that it is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in Court need not necessarily be decided by the Court itself and keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end to a litigation between the parties at an early date.

The process of mediation consists of the Parties, Mediator, Referral Judge as well as Advocates of the concerned parties. There is misconception prevailing in the Advocates' community as well as Judicial System that the role of the Advocates and Judges in Mediation is optional. But, this conception is erroneous. The Advocates as well as Referral Judges have important role in the process of Mediation.

**ROLE OF REFERRAL JUDGES IN MEDIATION**

Judges who refer the cases for settlement through any of the ADR methods are known as referral judges. In mediation, the key to success depends on Judges referring appropriate cases, which occurs at the very beginning of the process. 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. Hence, "reference" is a prerequisite to initiate the mediation proceedings. Section 89 read with order X Rule 1A of the Code of Civil Procedure is the source of power of a Referral Judge.

The Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, formulated Alternative Dispute Resolution and Mediation Rules 2017 (hereinafter would be referred to as 2017 Rules) for the guidance of Subordinate Courts and Tribunals by

amending 2005 Rules in accordance with the Judgments of the Hon'ble Supreme Court, particularly the judgment of the Hon'ble Supreme Court in **AFCONS INFRASTRUCTURE LTD. v. CHERIANVARKEY CONSTRUCTION CO. PVT. LTD.** [(2010) 8 SCC 24].

A procedure for directing the parties to opt for alternative modes of settlement in suits suitable for Alternative Dispute Resolution is envisaged in **Rule 3** of the said Rules, which reads as follows:

"3. Procedure for directing parties to opt for alternative modes of settlement in Suits suitable for Alternative Dispute Resolution; and reading Clauses (c) and (d) of Section 89 (2) of the Code : —

(1) (i) the Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 of Order X, Code of Civil Procedure 1908, direct the parties to opt for one of the modes of settlement of dispute outside the Court as specified in clauses (a) to (d) of sub section 1 of Section 89, Code of Civil Procedure 1908, r/w. Rule 1A of Order X and on their failure the Court shall ascertain consent for Arbitration or Conciliation; if there is no consent the Court shall select Lok Adalat for simple cases and Mediation for all other cases, reserving reference to a Judge assisted settlement (Judicial Settlement, in accordance with the procedure as may be prescribed) only in exceptional / Special cases.

(ii) it is not necessary for the Court, before referring the parties to an Alternative Dispute Resolution process to formulate or re- formulate the terms of a possible settlement. It is sufficient if the Court describes the nature of dispute (in a sentence or two) and makes the reference.

(iii) Subject to clause (i) above, the Court may resort to Alternative Dispute Resolution Processes at any stage of the proceedings.

(2) The following categories of Suits and Cases of civil nature, which can be subjected to just exceptions or additions, are normally considered to be not suitable for Alternative Dispute Resolution process having regard to their nature : (i) representative suits. (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 government.

(3) In all other Suits reference to Alternative Dispute Resolution process is a must and the Court shall briefly record reasons for not resorting to any of the Alternative Dispute Resolution processes.

(4) The words 'Judicial Settlement' and 'Mediation' in Clauses (c) and (d) of Section 89(2) of the Code shall have to be interchanged to read as under: (i) (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 Authorities Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act; (ii) (d) for Judicial Settlement, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

Thus, the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of Section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Therefore, the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the referral Judge will have recourse to Section 89 of the Code and such recourse requires the Court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes by simply describing the nature of the dispute in a sentence ro two. The referral Judge may resort to ADR process at any state of the proceedings.

As per Rule 3, the following suits and cases are not suitable for ADR proceess:

(i) Representative suits.

- Disputes relating to election to public offices.
- Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

In all other suits, reference to ADR process is a must and if the referral judge feels that any other matter is not suitable, he shall briefly record reasons for not resorting to any of the ADR processes.

(vi) The words 'judicial settlement' and 'mediation' in clauses (c) and (d) of Section 89 (2) shall have to be read interchangeably.

A referral Judge should keep in mind the above provision while referring the matter for any of the Alternative Dispute Resolutions. Before directing the parties to exercise option under Rule 3, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to relevant factors, which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely : (i) that it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one or other of these modes of settlement referred to in Section 89 of the Code.

**Rule 6** of 2017 Rules also lays down the procedure to be adopted by a referral Judge, which reads as follows:

"6. Procedure to be adopted by the Court: — (1) The procedure to be adopted by a court under section 89 of the Code is as under: (i) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties. (ii) The court should first consider whether the case falls under any of the categories of the cases which are required to be tried by courts and not fit to be referred to any Alternative Dispute Resolution processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to Alternative Dispute Resolution processes. It will then proceed with the framing of issues and trial. (iii) In other cases (that is, in cases which can be referred to Alternative Dispute Resolution processes) the court should explain the choice of five Alternative Dispute Resolution processes to the parties to enable them to exercise their option. (iv) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, the matter should be referred to arbitration. (v) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the Arbitration and Conciliation Act 1996. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with Section 64 of the Arbitration and Conciliation Act 1996. (vi) If parties are not agreeable for arbitration or conciliation, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three Alternative Dispute Resolution processes : (a) Lok Adalat; (b)

mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement. (vii) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled, the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the parties opt for the guidance of a Judge to arrive at a settlement, the court shall follow such procedure as may be prescribed. (viii) If the reference to the Alternative Dispute Resolution process fails, on receipt of the Report of the Alternative Dispute Resolution Forum, the court shall proceed with hearing of the case in accordance with law. (ix) Failure to arrive at a settlement would not preclude the Court from making fresh reference of the case for Alternative Dispute Resolution. (x) if the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the Arbitration and Conciliation Act 1996 (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). (xi) If any term of the settlement is ex facie illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability. (2) The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code : (i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet. (ii) If the reference is to any other Alternative Dispute Resolution process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference. (iii) If the court refers the matter to an Alternative Dispute Resolution process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the Alternative Dispute Resolution Report. (iv) Normally the court should not send the original record of the case when referring the matter for an Alternative Dispute Resolution forum. However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Coordinator appointed by the High Court, the original file may be made available wherever necessary. In all other cases it is sufficient to send only the referral order to the Alternative Dispute Resolution Forum. (3) (i) No next friend or guardian for the Plaintiff/Defendant shall without the leave of the Court, expressly

recorded in the proceedings of the Court opt for any one of the modes of Alternative Dispute Resolution nor shall enter into any settlement on behalf of a minor person under disability with reference to the suit in which he acts as mere friend or guardian. (ii) Where an application is made to the Court for leave to enter into a settlement initiated into the Alternative Dispute Resolution proceedings on behalf of a minor or other person under disability and such minor or other person under disability is represented by Counsel or pleader, the counsel or pleader shall file a certificate along with the said application to the effect that the settlement is, in his opinion, for the benefit of the minor or other person under disability. The decree of the Court based on the settlement to which the minor or other person under disability is a party, shall refer to the sanction of the Court thereto and shall set out the terms of the settlement."

Thus, after pleadings are complete and before framing of issues, the Court/referral Judge shall fix a date for appearance of parties for their option to refer the matter to any of the modes of alternative dispute resolution. Even in *M/s. Afcons Infrastructure Ltd., case* (supra) the Hon'ble Supreme Court held that for referring the matter for arbitration the consent of all parties to a suit is necessary when there is no pre-existing arbitration agreement between them, as arbitration is an adjudicatory ADR process. It was also held that even for reference to Conciliation also the consent of both parties is a must in view of Section 62 of the Arbitration and Conciliation Act, observing that if both parties do not agree, there can be no conciliation. It was further held in this decision that if the parties do not agree for either arbitration or conciliation, the Court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement), *which do not require the consent of parties for reference*, is suitable and appropriate and refer the parties to such ADR process. Thus, ***for reference to Arbitration or Conciliation the consent of both parties is necessary and for reference to other three ADR processes i.e., Lok Adalat, Mediation and Judicial Settlement, consent of both parties is not necessary.***

**If the reference is to arbitration or conciliation, the Court has to record that the reference is by mutual consent and nothing further need be stated in the order sheet. If the reference is to any other ADR processes, the Court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement and there is no need for an elaborate order for making the reference. The requirement in Section 89(1) that the Court should formulate or reformulate the terms of settlement would**

**only mean that Court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process**.

Normally the referral judge shall not send the original record of the case when referring the maater for ADR forum unless it is court annexed mediation centre. It is sufficient to send only the referral order to the ADR forum. No next friend/guardian of the plaintiff/defendant, as the case may be, shall opt for any one of the modes of ADR without the leave of the Court. If the minor/person under disability is represented by a pleader, a certificate along with such leave application to the effect that the settlement is in his opinion for the benefit of the minor or other person under disability, shall be filed by such pleader. This has to be checked by the referral judge.

If there is a settlement, in case of civil nature, the Court shall examine the settlement agreement and make a decree/order in terms of it, apply the principles of Order 23 Rule 3 CPC, and in compoundable criminal cases, the Court shall refer to the settlement agreement in its judgement. If the settlement disposes of only certain issues in a suit and if the issues are severable and if a decree could be passed to the extent of settlement, the Court can pass a decree on those issues settled. If the issues are not severable the Court shall wait for a decision of the Court on the other issues which are not settled. Every settlement agreement entered into through the process of mediation shall be deemed to be a decree of a civil court. (Rule 33)

**ROLE OF LAWYERS AND PARTIES IN MEDIATION**

It is a common belief that in Mediation the participation of Advocates is optional and/or that they have no role to play. This belief is erroneous. Advocates, being the officers of the Court, do play prominent and active role in the mediation process during preparation, during mediation and after the conclusion of such mediation. Mediation of a case cannot normally be one without the consent of the parties, without the presence and the active participation of the Advocates representing the parties in the mediation process. Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. Though the role of the Advocate in mediation is functionally different from his role in litigation, the services rendered by the Advocate to the party during the mediation process is a professional service.

The vital role to be played by Advocates in mediation is to assist the parties by preparing their clients, motivating them by informing the benefits of mediation and assist them in mediation. Advocates play a critical role in many society's negotiations. It was echoed long long ago by Abraham Lincoln that

'because of their skills and experience, Advocates have superior opportunities to do good'.

They can advise their clients on questions of law, on disadvantages of Court litigation and uncertainties ahead in adjudicative process. They can help assessing the merits of the case, preparing to present mediation briefs and contribute very effectively at every stage of mediation. *Most importantly, the presence of their Advocates during mediation process will give greatest security to the clients process wise and also substance wise.*

Advocates play a great role in all the three phases i.e., (i) pre-mediation, (ii) during mediation and (iii) post-mediation. Advocate must first consider whether there is scope for resorting to any of the ADR mechanisms. Where mediation is considered the appropriate mode of ADR, educating the party about the concept, process and advantages of mediation becomes an important phase in the preparation.

The role of Advocates is very important during mediation also. Advocates may attend mediation sessions and participate directly in mediation in the same manner as they participate in Arbitration. Advocates can help their clients in choosing appropriate process and assist their clients to participate in mediation.

After conclusion of mediation also, the Advocate plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism. To maintain and uphold the spirit of the settlement, the Advocate must cooperate with the Court in the execution of the order/decree passed in terms of the settlement. It may be imperative to remember here that Bar members are officers of the Court and owe a duty to the Courts to be fair and assist the Court in dispensation of justice. Similarly, in mediation they are expected to render assistance in settlement of cases, there by contributing actively to the dispensation of justice in the country.

The **parties** to the lis are also having great role to play. They should not forget that they are in the human society. Whenever a problem arises, the parties should look at to resolve the same, but they should not resort to take revenge against the other party. They should understand that if the problem is resolved amicably, there would be haromny in the Society, thereby they can lead peaceful and happy life.

A duty is also cast on the parties to appear before the Court when the matter is posted for their appearance after pleadings are over and before settlement of terms, and they should also appear before the mediator on all sessions. Rule 21 of 2017 Rules mandates the parties to personally appear or

appear through their counsel. Sub Rule (3) of Rule 21 of 2017 Rules also postulates that if a party fails to appear as stated above, the Court may take action against such party by imposing costs and proceed to dispose of the suit in one of the modes directed in that behalf by Order IX CPC or make such order as it thinks fit treating the absence as non-appearance before the Court. Thus, the appearance of parties before the authorities under mediation is a must. It is a different matter whether the matter is settled or not, but their appearance is mandatory.

The parties may also offer settlement to the other party at any stage of the proceedings with notice to the mediator (as per Rule 23 of 2017 Rules). As per Rule 25, parties alone are responsible for taking decision. As per Rule 27, parties have to act in good faith and they should participate in the proceedings with an intention to settle the dispute, if possible. As per Rule 28 (3), parties have to maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any proceeding. Therefore, the Advocates and Parties are also having great role to play in mediation and settlement of disputes under ADR mechanism.

**CONCLUSION**

Mediation has significant potential not merely for reducing the burden of arrears, but more fundamentally for bringing about a qualitative change in the focus of the legal system from adjudication to the settlement of disputes. The trial Judge must have the knowledge of mediation and should also be convinced of the benefits of mediation to be able to motivate the Advocates, and encourage them and the parties to resort to mediation. However, care has to be taken that mediation is not used as a tool for delay and the participation of the party must be *bona fide* but not *mala fide*.