DISTRICT COURT, ANANTHAPURAMU

WORK SHOP ON MEDIATION AND CONCILIATION

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HISTORICAL PERSPECTIVE

The concept of mediation evolved in the latter half of the 20th century. However, the roots of mediation can be traced back to the ancient Indian 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 Mahabharata Lord Sri Krishna endeavored to mediate between the Pandavas and Kauravas. The method of mediation to resolve dispute is not new to Indian culture, this has its recognition from time immemorial.

Gramapanchayaths and Nyaya panchayaths were popular and widely prevalent in ancient rural India. Though these systems still exist in many parts of rural India. People lost faith in panchayaths because of influence of powerful persons residing in those areas.

Indian government is making incessant efforts to revive these indigenous justice delivery methods by allocating funds and trying to make better rules for their unbiased functioning.

The present justice delivery system is adversary litigation method. This process of litigation is usually an expensive and involves a lot of technicalities which causes lot of delay and costs leaving a stain and stigma of enmity on both the parties. Thus it causes ill will amongst disputing parties and harms their social relationship.

In the wake of globalization and liberalization, friendly, speedy, less costly justice delivery systems become need of the day. This is where an alternative to the usual justice system becomes most essential.
LEGAL RECOGNITION OF MEDIATION IN INDIA

➤ The concept of mediation first received legal recognition as method of dispute resolution in the Industrial Disputes Act, 1947.

➤ The Arbitration and conciliation act, 1996 was the first statute to introduce the Indian legal system to mediation. Due to lack of proper enforcement, it has been rendered defunct. This was rectified to some extent by the introduction of section 89 of civil procedure code, 1908.

➤ In 1999, the code civil procedure amendment was passed by the parliament. It provides for Section 89 of civil procedure code, 1908 which allowed the courts to refer to alternative dispute resolution methods to settle the disputes outside the courts. This special provision has been introduced in order to help the litigant to settle his dispute outside court instead of going through the elaborate process in the court trial. Under this provision the consent of the parties is mandatory.

➤ The courts is required to direct the parties to opt for any one of the modes of alternative dispute resolution under section 89 and Order X Rule 1A of code of civil procedure, 1908. This appropriate stage for making reference in civil cases is after the completion of pleadings before framing the issues.

➤ In salem advocates bar association vs union of india (2003):

The Supreme court of India had requested the law commission of India to prepare draft model rules for ADR and also frame draft rules for mediation under section 89 of civil procedure code, 1908. As such the law commission framed the draft Mediation Rules, 2003 which framed a comprehensive set of principles for undertaking
mediation. Taking a cue from the report of the law commission, High Courts of various states enacted rules for mediation.

Andhra Pradesh civil rules of practice and circular orders, 1980 was amended and inserted chapter xx "CIVIL PROCEDURE ALTERNATIVE DISPUTE RESOLUTION AND CIVIL PROCEDURE MEDIATION RULES, 2005 which came into force with effect from 22-2-2006. The complete procedure relating to mediation is laydown in this chapter. Its effective implementation is the need of hour.
CONCEPT OF MEDIATION

Mediation is an alternative method of resolving disputes and negotiation process where neutral third party assists the disputing parties in amicably resolve their dispute. As a party-centered process, it focuses on the interests, needs and rights of the parties. The method of Mediation has found rising popularity in India. Especially in case of commercial and marital disputes.

In mediation, mediator facilitates the interaction between parties and also assists each of the parties in evaluating situation to arrive at an amicable settlement. There are many advantages of mediation over litigation in terms of costs, effectiveness, time consumption and flexibility.

Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties. In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".

The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation. Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.

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TYPES OF MEDIATION

> COURT- REFERRED MEDIATION - It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

> PRIVATE MEDIATION - In private mediation, qualified mediators offer their services on a payment of fee for service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation.
UNDERSTANDING OF CONFLICT

➢ The understanding the nature of conflict is the important part of the mediation process. It helps the mediator to adopt negotiation method to resolve conflict effectively.

➢ Life comprises of several differences between and among people, groups and nations. There are cultural differences, personality differences, differences of opinion, situational differences. Unresolved differences lead to disagreements. Disagreements cause problem. Disagreement unresolved becomes dispute. Unresolved disputes become conflicts.

➢ The study of the nature of Conflict is classified into three broad dimensions.

➢ (1) The Conflict Core – The sense of threat which drives the conflict.

➢ (2) The Conflict Spiral – What happens when conflict escalates.

➢ (3) The Conflict Triangle – For three primary aspects of conflict that mediation needs to address.

THE DIMENSIONS OF CONFLICT

1) THE CONFLICT CORE: The Conflict Core diagram shows how at the very core of any conflict, there lies a sense of threat concerning individuals, groups, communities or nations. This sense of threat emerges when any disagreement, annoyance, competition or inequity threatens any aspect of human dignity, personal reputation, physical safety, psychological needs, professional worth, social status, financial security, community concerns, religious membership or national pride. This list is not exhaustive and only indicates broad areas of threat. By the time parties get to the negotiating or mediation table, they are threatened both by the opposite side and within themselves! There is fear, suspicion, helplessness, frustration, embarrassment, anger, hurt, humiliation, distrust, desperation, vengeance and a host of mixed emotions that need to be addressed.
Failure to address these emotions will prevent the parties from resolving their dispute.

2) **THE CONFLICT SPIRAL:** When a given conflict intensifies, the initial tensions start spiralling outwards, affecting individuals, relationships, tasks, decisions, organizations and communities. This outward manifestation of the conflict is called the Conflict Spiral.

**Personal responses:** The stress of conflict provokes strong feelings of anxiety, anger, hostility, depression, and even vengeance in relationships. Every action or inaction of the other side becomes suspect. People become increasingly rigid in how they see the problem and in the solutions they demand. It can be difficult for them to think clearly. Hence what the parties really need is a forum which will understand and address their emotions and not just their dispute. Without emotions being addressed it is difficult to find real solutions.

**Community responses:** Emotions have a vital community and cultural context, even though individual responses may not always be the same for all members of the same culture or community. Any dispute takes colour from its community and cultural context. When the dispute begins to affect those around it, people may take sides or leave. Communities and families get polarized when the dispute involves a family or community member. However, a solution for a family dispute in one part of the country may not necessarily be perceived to be the solution in another part of the country. Similarly, a solution in the context of a metropolitan urban city may not be the same as for a rural area. A solution for a voluntary organisation working with education may not be the solution for an information technology firm.

**Legal advice:** Legal advice often becomes important in a conflict. This may add to the increasing tensions and inability of parties to control the situation themselves. Through process of interaction between the parties,
assisted by a neutral person, a possible solution acceptable to all can be evolved.

**Conflict becoming public:** Sometimes the conflict becomes public. Each side develops rigid positions and gathers allies for the cause. The conflict may spread beyond the original protagonists' control. It may also attract public and media attention. The relationships of the old and new protagonists become more complicated. Resolving the original conflict therefore becomes more difficult.

3 ) **THE CONFLICT TRIANGLE:** The Conflict Triangle arranges the three primary aspects of Conflict namely: the People, the Process and the Problem into three sides of the triangle. This Conflict Triangle becomes the Acknowledgement of concepts and ideas of the Conflict. Elements of each side of this Conflict Triangle differ from person to person, situation to situation and problem to problem requiring different solutions.

1. **People.** Dealing with any conflict involves dealing with people. People come from different personal, social, cultural and religious backgrounds. They have their own individual personalities, relationships, perceptions, approaches and emotional equipment to deal with varying situations.

2. **Process.** Every conflict has its own pattern of communication and interaction between and among all the parties. Conflicts differ in the way each one intensifies, spreads and gets defused or resolved.

3. **Problem.** Every conflict has its own content. This comprises of all the issues and interests of different parties involved, positions taken by them and their perceptions of the conflict.

Thus by understanding the nature of conflict helps in adopting methods and strategies to resolve disputes.
THE CONFLICT CORE AND CONFLICT SPIRAL

Conflicts emerge when something important is threatened and creates initial tensions.

THE CONFLICT TRIANGLE

- Past history
- Values, meanings
- Relationships
- Emotions
- Behavior
- Abilities
- Personalities

- How people communicate issues and feelings
- Structures, systems, procedures
- Norms about how to behave in a conflict
- Decision-making
- Roles, jobs

PEOPLE  PROCESS

PROBLEM

- Facts
- Positions
- Issues
- Consequences of events
- Perceptions
- Interests, Needs
- Solutions
- Consequences of possible outcomes
EVOlUTION OF MEDIATION IN INDIA

➢ The first elaborate training for mediators was conducted in Ahmedabad in the year 2000 by American trainers sent by Institute for the Study and Development of Legal Systems (ISDLS). It was followed by a few repeated advance training workshops conducted by Institute for Arbitration Mediation Legal Education and Development (AMLEAD) a Public Charitable Trust settled by two senior lawyers of Ahmedabad.

➢ On 27th July 2002, the Chief Justice of India, formally inaugurated the Ahmedabad Mediation Centre, reportedly the first lawyer-managed mediation centre in India.

➢ The Chief Justice of India called a meeting of the Chief Justices of all the High Courts of the Indian States in November, 2002 at New Delhi to impress upon them the importance of mediation and the need to implement Sec. 89 of Civil Procedure Code.

➢ Institute for Arbitration Mediation Legal Education and Development (AMLEAD) and the Gujarat Law Society introduced, in January 2003, a thirty-two hours Certificate Course for "Intensive training in Theory and Practice of Mediation".

➢ The U.S. Educational Foundation in India (USEFI) organized training workshops at Jodhpur, Hyderabad and Bombay in June 2003.

➢ The Chennai Mediation Centre was inaugurated on 9th April, 2005 and it started functioning in the premises of the Madras High Court. This became the first Court-Annexed Mediation centre in India.

➢ The Delhi Judicial Academy organized a series of mediation training workshops and opened a mediation
centre in the Academy’s campus appointing its Deputy Director as the mediator. Delhi High Court Mediation and Conciliation Centre has been regularly organizing mediation awareness workshops and Advanced Mediation Training workshops.

➢ The Mediation and Conciliation Project Committee (MCPC) was constituted by the then Chief Justice of India Hon’ble Mr. Justice R.C. Lahoti by order dt. 9th April, 2005. Hon’ble Mr. Justice N. Santosh Hegde was its first Chairman. It consisted of other judges of the Supreme Court and High Court, Senior Advocates and Member Secretary of NALSA. The Committee in its meeting held on 11th July, 2005 decided to initiate a pilot project of judicial mediation in Tis Hazari Courts. The success of it led to the setting up of a mediation centre at Karkardooma in 2006, and another in Rohini in 2009. Four regional Conferences were held by the MCPC in 2008 at Bangalore, Ranchi, Indore and Chandigarh.

➢ MCPC has been taking the lead in evolving policy matters relating to the mediation. The committee has decided that 40 hours training and 10 actual mediation was essential for a mediator. The committee was sanctioned a grant-in-aid by the department of Legal Affairs for undertaking mediation training programme, referral judges training programme, awareness programme and training of trainers programme. With the above grant-in-aid, the committee has conducted till March, 2010, 52 awareness programmes/ referral judges training programmes and 52 Mediation training programmes in various parts of country. About 869 persons have undergone 40 hours training. The committee is in the process of finalizing a National Mediation Programme. Efforts are also made to institutionalize its functions and to convert it as the apex body of all the training programmes in the country.
SUPREME COURT OF INDIA GUIDELINES WITH REGARD TO MEDIATION:

1) In *B.S. Krishnamurthy v. B.S. Nagaraj* (2010), the Supreme Court speaking through Justice Markandey Katju emphasized the need for lawyers to advise their clients to try mediation especially where family relationships are involved.

2) In *Afcons Infrastructure Ltd. and Anr. V. Cherian Varkey Construction Co. Pvt. Ltd. and Ors.*, the Supreme Court laid down guidelines pertaining to the kind of cases that would be eligible for ADR and those not. It ruled that the following nature of cases would be considered unsuitable for ADR

- Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court.

- 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.

- Cases involving prosecution for criminal offences.

All other civil suits and cases were to be considered suitable for ADR, such as-
1. All cases relating to trade, commerce and contracts, including:
   - Disputes arising out of contracts (including all money claims);
   - Disputes relating to specific performance;
   - Disputes between suppliers and customers;
   - Disputes between bankers and customers;
   - Disputes between developers/builders and customers;
   - Disputes between landlords and tenants/licensor and licensees;
   - Disputes between insurer and insured;

2. All cases arising from strained or soured relationships, including:
   - Disputes relating to matrimonial causes, maintenance, custody of children;
   - Disputes relating to partition/division among family members/co-partners/co-owners;
   - Disputes relating to partnership among partners.

3. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including:
   - Disputes between neighbours (relating to encroachments, nuisance etc.);
   - Disputes between employers and employees;
   - Disputes among members of societies/associations/Apartment owners Associations;

4. All cases relating to tortious liability including:
   - claims for compensation in motor accidents/other accidents;
5. All consumer disputes including:

- Disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

3) Supreme court decisions in the recent past appear to point out that the courts are gradually developing a favourable attitude towards mediation.
CONCLUSION

- The Judicial system is based upon a representation of submission of parties before court through lawyers. The lawyer should suggest the parties for mediation as alternative dispute resolution. But the lawyer always have an apprehension that delving into mediation would probably deprive them of income by encouraging the settlement of case prematurely and thereby significantly reducing the legal fees that could otherwise be earned during the ongoing and prolonged judicial proceedings. Lawyers should also extend their contribution to make method of mediation as alternative dispute resolution, a successful one.

- There are number of challenges and potential obstacles still exist in modern context that prevents ready adoption of Mediation and other process. Many people feel that proceedings before ADR forums are likely to get challenged before the court resulting in further proceeding. It would be apt to say that Mediation can only be achieved if people understand that this fast paced process of ADR is not an independent procedure but procedure that is connected with the judicial system and that compliments and does not supplant the justice system as a whole. In achieving this level of understanding the litigants must put their faith in court annexed mediation which is a vital element in development and evolution of Mediation as Dispute Resolution.

- Encouragement is very much needed for making provisions mandatory for alternative dispute resolution, especially mediation.
- Awareness has to be aimed at the common people with countrywide publicity in various media. Creating awareness in the society about the mediation process as
alternative and its benefits will help expedite the shift from adversarial litigation to method of alternative dispute resolution in a big way. This will help in reducing the backlog pending cases in Indian courts.
PAPER PRESENTATION

on comparison between
judicial process and
various ADR processess
and process of
Mediation
**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 non 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 field of law and commercial sectors both at National and International levels. Its diverse methods can helps 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 Indian Constitution’s preamble 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 Supreme Court made it clear that this stage of affair must be addressed: ‘An independent and efficient judicial system in 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 fir 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
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 worthwhile 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 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.

(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 the 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.

On joint reading of Section 89 read with 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.

2. **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.
3. 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 an 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.

5. 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 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

<table>
<thead>
<tr>
<th>JUDICIAL PROCESS</th>
<th>ARBITRATION</th>
<th>MEDIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome.</td>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.</td>
<td>Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration &amp; Conciliation Act, 1996.</td>
<td>Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.</td>
</tr>
<tr>
<td>The decision is binding on the parties.</td>
<td>The award in an arbitration is binding on the parties.</td>
<td>A binding settlement is reached only if parties arrive at a mutually acceptable agreement.</td>
</tr>
<tr>
<td>Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.</td>
<td>Adversarial in nature as focus is on determination of rights and liabilities of parties.</td>
<td>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.</td>
</tr>
<tr>
<td>Personal appearance or active participation of parties is not always required.</td>
<td>Personal appearance or active participation of parties is not always required.</td>
<td>Personal appearance and active participation of the parties are required.</td>
</tr>
<tr>
<td>A formal proceeding held in public and follows strict procedural stages.</td>
<td>A formal proceeding held in private following strict procedural stages.</td>
<td>A non-judicial and informal proceeding held in private with flexible procedural stages.</td>
</tr>
<tr>
<td>Decision is appealable.</td>
<td>Award is subject to challenge on specified grounds.</td>
<td>Decree/Order in terms of the settlement is final and is not appealable.</td>
</tr>
<tr>
<td>No opportunity for parties to communicate directly with each other.</td>
<td>No opportunity for parties to communicate directly with each other.</td>
<td>Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.</td>
</tr>
<tr>
<td>Involves payment of court fees.</td>
<td>Does not involve payment of court fees.</td>
<td>In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.</td>
</tr>
<tr>
<td>MEDIATION</td>
<td>CONCIALATION</td>
<td>LOK-ADALAT</td>
</tr>
<tr>
<td>-----------</td>
<td>--------------</td>
<td>------------</td>
</tr>
<tr>
<td>Mediation is a non adjudicatory process.</td>
<td>Conciliation is a non adjudicatory process.</td>
<td>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.</td>
</tr>
<tr>
<td>Mediator is a neutral third party.</td>
<td>Conciliator is a neutral third party.</td>
<td>Presiding officer is a neutral third party.</td>
</tr>
<tr>
<td>Service of lawyer is available.</td>
<td>Service of lawyer is available.</td>
<td>Service of lawyer is available.</td>
</tr>
<tr>
<td>Mediation is party centered negotiation.</td>
<td>Conciliation is party centered negotiation.</td>
<td>In Lok Adalat, the scope of negotiation is limited.</td>
</tr>
<tr>
<td>The function of the Mediator is mainly facilitative.</td>
<td>The function of the conciliator is more active than the facilitative function of the mediator.</td>
<td>The function of the Presiding Officer is persuasive.</td>
</tr>
<tr>
<td>The consent of the parties is not mandatory for referring a case to mediation.</td>
<td>The consent of the parties is mandatory for referring a case to conciliation.</td>
<td>The consent of the parties is not mandatory for referring a case to Lok Adalat.</td>
</tr>
<tr>
<td>The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.</td>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>Not appealable.</td>
<td>Decree/order not appealable.</td>
<td>Award not appealable.</td>
</tr>
<tr>
<td>The focus in mediation is on the present and the future.</td>
<td>The focus in conciliation is on the present and the future.</td>
<td>The focus in Lok Adalat is on the past and the present.</td>
</tr>
<tr>
<td>Mediation is a structured process having different stages.</td>
<td>Conciliation also is a structured process having different stages.</td>
<td>The process of Lok Adalat involves only discussion and persuasion.</td>
</tr>
<tr>
<td>In mediation, parties are actively and directly involved.</td>
<td>In conciliation, parties are actively and directly involved.</td>
<td>In Lok Adalat, parties are not actively and directly involved so much.</td>
</tr>
<tr>
<td>Confidentiality is the essence of mediation.</td>
<td>Confidentiality is the essence of conciliation.</td>
<td>Confidentiality is not observed in Lok Adalat.</td>
</tr>
</tbody>
</table>
CONCLUSION:-

Thereby, I am submitting my paper with profound obedience and thanking the legal luminaries including our Hon’ble Administrative Judge and Hon’ble Principal District Judge for giving me this opportunity.

G.KARTHIK,
Judicial Magistrate of I Class,
Special Mobile Court,
Ananthapuram.
INTRODUCTION

Historical Background of the ADR System in India

Dispute resolution outside of courts is not new; societies world-over have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes.

1. Alternate Dispute Resolution system is not a new experience for the people of this country also. It has been prevalent in India since time immemorial. Legal history indicates that down the ages man has been experimenting with procedure for making it easy, cheap, unfailing and convenient to obtain justice.

2. Procedure for justice is indicative of the social consciousness of the people. Anywhere law is a measuring rod of the progress of the community. Ancient system of dispute resolution made a considerable contribution, in reaching resolution of disputes relating to family, social groups and also minor disputes relating to trade and property. Village level institutions played the leading role, where disputes were resolved by elders, comprising Council of Village (popularly called Panchayats), which was an informal way of mediation. In earlier days disputes hardly reached courts. Decisions given by the elderly council were respected by all. But subsequently boon accompanied bane, the very system lost its impression due to intervention of political and communal elements.

Mediation in The Indian Legal System

The use of mediation as an example of modernization in the Indian’ legal system is ironic in two respects. First, the words “mediation” and “modernization” hardly seem to belong in the same sentence; mediation is one of the oldest forms of peaceful dispute resolution. Second, India has been a latecomer to recognize the benefits of mediation; other cultures have used mediation to resolve disputes for centuries.

Having finally realized the benefits of mediation as a dispute resolution mechanism, India has made mediation a critical part of its efforts to solve its serious court congestion and backlog. In most jurisdictions in India, mediation is offered as one of several alternatives to the traditional legal process. Indeed, in many jurisdictions, mediation has become the most popular method of alternative dispute resolution.

WHAT IS MEDIATION?

Mediation is a procedure designed to resolve disputes through agreement, i.e., through the mutual consent of the parties. Although the procedure is frequently confused with arbitration, it is fundamentally different. In arbitration, the neutral reaches a decision based upon evidence presented by the parties; in mediation, the neutral facilitates discussion between the parties with the objective of reaching an agreement between the parties. Mediation relies upon the consent of the parties; arbitration does not.

A successful mediation is thus dependent upon two inter-related factors: The willingness of the parties to resolve their dispute; and the skill of the mediator in guiding the parties to the point
where agreement is possible. One of the most skilled mediators in India—and a frequent participant in programs—has said that there exists a point in every dispute where the parties can reach agreement; it is the duty of the mediator to help the parties find that point. The existence of parties acting in good faith to resolve their differences, however, will significantly assist even the best mediators in achieving their objectives. The combination of a talented mediator and motivated parties will generally result in resolution of even the most difficult disputes.

**THE BENEFITS OF MEDIATION?**

The benefits of mediation are so obvious; it is surprising that it took a clogged judicial system for India to embrace the concept only when the courts began to be overburdened with civil cases.

**Mediation as an alternative dispute resolution mechanism is:**

1. **Fast**
   As the amount of time necessary for the parties and the mediator to prepare for the mediation is significantly less than that needed for trial or arbitration, mediation can occur relatively early in the dispute. Moreover, once mediation begins, the mediator can concentrate on those issues he or she perceives as important to bring the parties to agreement; time consuming evidence-taking can be avoided, thereby making the best use of the parties’ time and resources. Even if the entire evidence gathering has already occurred, it almost invariably takes less time to mediate a dispute than to try it in a court.

2. **Flexible**
   There exists no set formula for mediation. Different mediators employ different styles. Procedures can be modified to meet the needs of a particular case. Mediation can occur late in the process—even during trial—or before any formal legal proceeding begins. The mediation process can be limited to certain issues, or expanded as the mediator or the parties begin to recognize during the course of the mediation problems they had not anticipated.

3. **Cost Efficient**
   Because mediation generally requires less preparation, is less formal than trial or arbitration, and can occur at an early stage of the dispute, it is almost always less expensive than other forms of dispute resolution. If the mediation does not appear to be headed in a successful direction, it can be terminated to avoid unnecessary costs; the parties maintain control over the proceedings.

4. **Brings parties together**
   In India, parties often form opinions about their dispute that over time become intractable. The other side becomes the “enemy”; winning becomes a matter of principle. The only side a party can see—even if counseled otherwise by their attorney—is their own. Sitting down in a neutral setting with the opposing side can bring a better understanding of the problems with one’s own case, particularly if guided by a skilled mediator. Listening to the opponent’s case—
and having it evaluated by a neutral—can give pause to even the most ardent believers in their own cause.

5. Convenient
The parties can control the time, location, and duration of the proceedings to a significant extent. Scheduling is not subject to the convenience of overworked and sometimes bureaucratic courts.

6. Creative
Resolutions that are not possible through arbitration or judicial determination may be achieved. For example, two parties locked in a dispute that will be resolved by an arbitrator or a judge may be limited to recovery of money or narrow injunctive relief. A good mediator makes the parties recognize solutions that would not be apparent—and not available—during the traditional dispute resolution process. Two companies may find it more advantageous to work out a continuing business relationship rather than force one firm simply to pay another money damages. The limit on creative solutions is set only by the variety of disputes a mediator may encounter.

7. Confidential
What is said during a mediation can be kept confidential. Parties wishing to avoid the glare of publicity can use mediation to keep their disputes low-key and private. Statements can be made to the mediator that cannot be used for any purpose other than to assist the mediator in working out a resolution to the dispute. Confidentiality encourages candor, and candor is more likely to result in resolution.

WHAT MAKES A GOOD MEDIATOR?
Because mediation differs from arbitration, a good arbitrator will not always make a good mediator. Obviously the two forms of dispute resolution have some overlap, and there certainly exist individuals who are both excellent arbitrators and mediators. However, the ability to render a decision is not the same skill as that required bringing parties together to reach agreement. The following are some of the qualifications that make a good mediator:

1. Trust:
This is the most important characteristic. If the parties do not respect the mediator, the chances of success are small. Mediation often involves private discussions between a party and the mediator. If the party does not trust the mediator to keep confidences disclosed at such a session, there will exist little chance of success. Similarly, if the parties cannot trust the mediator to evaluate their positions impartially, the mediation is doomed.

2. Patience:
Parties frequently come to the mediation with set positions that take a long time to modify. A mediator must have the patience to work with the parties to bring them to the point where agreement is possible.

The chances of success are greater if the mediator has some knowledge or expertise in the area
of dispute. Because mediation does not result in a decision by the neutral, knowledge of the subject matter is not as crucial in mediation as it is in arbitration. However, the parties in a complicated dispute over software, for example, will have more confidence in a mediator who knows something about software technology than they would in a mediator who knew nothing about the subject. Furthermore, such expertise will enable the mediator to better assist the parties in identifying nontraditional solutions to their dispute.

4. Intelligence.

A mediator must be resourceful and attentive to understand not only the nature of the dispute, but also the motivations of the parties. Through an understanding of what is important to each of the parties, the mediator can bring them into agreement much more quickly. The requirements are thus not only an ability to understand the subject matter, but an ability to understand people and their motivations as well.

5. Impartiality.

This characteristic is closely related to trust. A mediator must be impartial. Some mediators will express their opinions about the position of a party, or will use their powers of persuasion in order to bring the parties to agreement. Other mediators will not analyze or evaluate the merits of a dispute, but will cause the parties to realize on their own where the settlement potential lies. In either case, the parties must be satisfied that the mediator is neutral. In the former situation, if the mediator is not viewed as neutral, any opinions will carry no weight; in the latter situation, the parties will refuse to follow a biased leader.

6. Good communication skills.

An arbitrator needs only to listen to the evidence and render a decision based upon knowledge of the law and good judgment. Although these talents are extremely valuable ones, an arbitrator need not have the ability to communicate with the parties. A mediator needs good judgment and good communication skills; it is the mediator's job to evaluate and understand the motivations of the parties, foresee potential solutions, and then bring the parties to an agreement. Without good communication skills, this task is impossible.

TYPES OF MEDIATION

1. Statutory.

There are some types of cases that are required by law to go through the mediation process. Labor disputes and domestic (family law) disputes are two prime examples. In India, however, this type of mandatory mediation is rare.

2. Court ordered.

Most jurisdictions in India require some form of alternative dispute resolution before a case may be resolved through the traditional judicial process. As soon as a case is filed, the parties are provided a number of ADR options. They must, unless exempted by the Court, select and pursue one of these options. Included, as an option is mediation. The Court maintains a list of mediators—skilled and experienced attorneys selected by the Court—who are available to the parties. For parties who elect this option, the Court will appoint a mediator and designate a
date by which the mediation must be completed. The results of the mediation are confidential—the Court will not know what occurred at the mediation, unless of course, an agreement (or partial agreement) is reached. If an agreement is reached, that agreement is enforceable as a judgment of the Court.

3. Contractual.
The parties to a contract, as part of the terms of their agreement, may include a mediation clause as a mechanism to resolve disputes. Although binding arbitration is a much more common contractual term since it will always result in a resolution, mediation can be an effective tool to resolve contractual disputes before they blossom into a protracted battle. The selections of the mediator, as well as the conditions of the mediation, are usually stated in the contract. If the mediation is successful, the results can be enforced as a judgment of a court.

4. Voluntary.
The parties to a dispute may decide to seek mediation without being compelled by law, court order, or contract. They may choose to mediate their dispute at any time: as the dispute is developing, before initiating legal action, or even while legal action is pending. The conditions of the mediation—e.g., who will be the mediator, when the mediation will occur, the rules of the mediation—are controlled by the parties.

The topics of subject assigned to me for today’s Workshop are:

A. 1) Stages of Mediation
    2) Role of Mediators
    3) Communication in Mediation
    4) Negotiation & Bargaining in Mediation
    5) Impasse
B. 1) Settlement of Disputes Outside Court
    2) First hearing

PART-A. STAGES OF MEDIATION
A. (1)
The four functional stages of the mediation process are:

1) Introduction and Opening Statement
2) Joint Session
3) Separate Session(s)
4) Closing

**STAGE 1: INTRODUCTION AND OPENING STATEMENT**

**Objectives**

* Establish neutrality
* Create an awareness and understanding of the process
* Develop rapport with the parties
* Gain confidence and trust of the parties
* Establish an environment that is conducive to constructive negotiations
* Motivate the parties for an amicable settlement of the dispute
* Establish control over the process
* Seating Arrangement in the Mediation Room

At the commencement of the mediation process, the mediator shall ensure that the parties and/or their counsel are present. There is no specific or prescribed seating arrangement. However, it is important that the seating arrangement takes care of the following:

a. The mediator can have eye-contact with all the parties and he can facilitate effective communication between the parties.

b. Each of the parties and his counsel are seated together.

c. All persons present feel at ease, safe and comfortable.

**At the beginning the Mediator must have to give the following mode of Introduction:**

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the case to him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.
• The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions.

• The mediator will discuss with the parties and their counsel any time constraints or scheduling issues.

• If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

**The Mediator shall give an opening statement called “Mediator's Opening Statement”**

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

• Concept and process of mediation

• Stages of mediation

• Role of the mediator

• Role of advocates

• Role of parties

• Advantages of mediation

• Ground rules of mediation

**The mediator shall highlight the following important aspects of mediation:**

• Voluntary

• Self-determinative

• Non-adjudicatory

• Confidential

• Good-faith participation

• Time-bound

• Informal and flexible

• Direct and active participation of parties

• Party-centred

• Neutrality and impartiality of mediator

• Finality

• Possibility of settling related disputes

• Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

• Ordinarily, the parties/counsel may address only the mediator

• While one person is speaking, others may refrain from interrupting

• Language used may always be polite and respectful

• Mutual respect and respect for the process may be maintained

• Mobile phones may be switched off
• Adequate opportunity may be given to all parties to present their views

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

**STAGE 2: JOINT SESSION**

**Objectives:-**

• Gather information

• Provide opportunity to the parties to hear the perspectives of the other parties

• Understand perspectives, relationships and feelings

• Understand facts and the issues

• Understand obstacles and possibilities

• Ensure that each participant feels heard

**Procedure:-**

• The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge.

  **Firstly**, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words.

  **Secondly**, counsel would thereafter present the case and state the legal issues involved in the case.

  **Thirdly**, defendant/respondent would thereafter explain his/her case/claim in his/her own words.

  **Fourthly**, counsel for defendant/respondent would present the case and state the legal issues involved in the case.

• The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.

• The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.

• The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.

• Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.

• The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.

• The mediator should be in control of the proceedings and must ensure that parties do not 'take over' the session by aggressive behaviour, interruptions or any other similar conduct.

• During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the
Separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

**STAGE 3: SEPARATE SESSION**

**Objectives:**

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

**Procedure:**

(i) **RE - AFFIRMING CONFIDENTIALITY**

During the separate session each of the parties and his counsel would talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.

(ii) **GATHERING FURTHER INFORMATION**

The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:

- Parties vent personal feelings of pain, hurt, anger etc.,
- The mediator identifies emotional factors and acknowledges them;
- The mediator explores sensitive and embarrassing issues;
- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);
- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.
(iii) **REALITY-TESTING**

After gathering information and allowing the parties to vent their emotions, the mediator makes a judgment whether it is necessary to challenge or test the conclusions and perceptions of the parties and to open their minds to different perspectives. The mediator can then, in order to move the process forward, engage in REALITY-TESTING. Reality-testing may involve any or all of the following:

(a) A detailed examination of specific elements of a claim, defense, or a perspective;
(b) An identification of the factual and legal basis for a claim, defense, or perspective or issues of proof thereof;
(c) Consideration of the positions, expectations and assessments of the parties in the context of the possible outcome of litigation;
(d) Examination of the monetary and non-monetary costs of litigation and continued conflict;
(e) Assessment of witness appearance and credibility of parties;
(f) Inquiry into the chances of winning/losing at trial; and
(g) Consequences of failure to reach an agreement.

**Techniques of Reality-Testing:**

Reality-Testing is often done in the separate session by:

1. Asking effective questions,
2. Discussing the strengths and weaknesses of the respective cases of the parties, without breach of confidentiality, and/or
3. Considering the consequences of any failure to reach an agreement (BATNA/WATNA / MLATNA analysis).

(I) **ASKING EFFECTIVE QUESTIONS**

Mediator may ask parties questions that can gather information, clarify facts or alter perceptions of the parties with regard to their understanding and assessment of the case and their expectations.

**Examples of effective questions:**

- OPEN-ENDED QUESTIONS like 'Tell me more about the circumstances leading up to the signing of the contract'. 'Help me understand your relationship with the other party at the time you entered the business'. 'What were your reasons for including that term in the contract?'
- CLOSED QUESTIONS, which are specific, concrete and which bring out specific information.
  
  For example, 'it is my understanding that the other driver was going at 60 kilometers per hour at the time of the accident, is that right?' 'On which date the contract was signed?' 'Who are the contractors who built this building?'
- QUESTIONS THAT BRING OUT FACTS: 'Tell me about the background of this matter'.
What happened next?

- QUESTIONS THAT BRING OUT POSITIONS: 'What are your legal claims?' 'What are the damages?' 'What are their defenses?'

- QUESTIONS THAT BRING OUT INTERESTS: 'What are your concerns under the circumstances?' 'What really matters to you?' 'From a business / personal / family perspective, what is most important to you?' 'Why do you want divorce?' 'What is this case really about?' 'What do you hope to accomplish?' 'What is really driving this case?'

(II) DISCUSSING THE STRENGTHS AND WEAKNESSES OF THE RESPECTIVE CASES OF THE PARTIES

The mediator may ask the parties or counsel for their views about the strengths and weaknesses of their case and the other side's case. The mediator may ask questions such as, 'How do you think your conduct will be viewed by a Judge?' or 'Is it possible that a judge may see the situation differently?' or 'I understand the strengths of your case, what do you think are the weak points in terms of evidence?' or 'How much time will this case take to get a final decision in court?' Or 'How much money will it take in legal fees and expenses in court?'

(III) CONSIDERING THE CONSEQUENCES OF ANY FAILURE TO REACH AN AGREEMENT (BATNA/WATNA/MLATNA ANALYSIS).

<table>
<thead>
<tr>
<th>BATNA</th>
<th>Best Alternative to Negotiated Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>WATNA</td>
<td>Worst Alternative to Negotiated Agreement</td>
</tr>
<tr>
<td>MLATNA</td>
<td>Most Likely Alternative to Negotiated Agreement</td>
</tr>
</tbody>
</table>

One technique of reality-testing used in the process of negotiation is to consider the different alternatives to a negotiated settlement. In the context of mediation, the alternatives are 'the best', 'the worst' and 'the most' likely outcome if a dispute is not resolved through negotiation in mediation. As part of reality-testing, it may be helpful to the parties to examine their alternatives outside mediation (specifically litigation) so as to compare them with the options available in mediation. It is also helpful for the mediator to discuss the consequences of failing to reach an agreement e.g., the effect on the relationship of the parties, the effect on the business of the parties etc. While the parties often wish to focus on best outcomes in litigation, it is important to consider and discuss the worst and the most likely outcomes also. The mediator solicits the viewpoints of the advocate/party about the possible outcome in litigation. It is productive for the mediator to work with the parties and their advocates to come to a proper understanding of the best, the worst and the most likely outcome of the dispute in litigation as that would help the parties to recognize reality and thereby formulate realistic and workable proposals.

If the parties are reaching an interest-based resolution with relative ease, a BATNA/WATNA/MLATNA analysis need not be resorted to. However if parties are in difficulty at negotiation and the mediator anticipates hard bargaining or adamant stands, BATNA/ WATNA/ MLATNA analysis may be introduced.
By using the above techniques, the mediator assists the parties to understand the reality of their case, give up their rigid positions, identify their genuine interests and needs, and shift their focus to problem-solving. The parties are then encouraged to explore several creative options for settlement.

(iv) **BRAIN STORMING**

Brain Storming is a technique used to generate options for agreement.

There are 2 stages to the brain storming process:

1. Creating options
2. Evaluating options

   1. Creating options:- Parties are encouraged to freely create possible options for agreement.

      Options that appear to be unworkable and impractical are also included. The mediator reserves judgment on any option that is generated and this allows the parties to break free from a fixed mind set. It encourages creativity in the parties. Mediator refrains from evaluating each option and instead attempts to develop as many ideas for settlement as possible. All ideas are written down so that they can be systematically examined later.

   2. Evaluating options:- After inventing options the next stage is to evaluate each of the options generated. The objective in this stage is not to criticize any idea but to understand what the parties find acceptable and not acceptable about each option. In this process of examining each option with the parties, more information about the underlying interests of the parties is obtained.

This information further helps to find terms that are mutually acceptable to both parties.

Brainstorming requires lateral thinking more than linear thinking.

   **Lateral thinking:** Lateral thinking is creative, innovative and intuitive. It is non-linear and non-traditional. Mediators use lateral thinking to generate options for agreement.

   **Linear thinking:** Linear thinking is logical, traditional, rational and fact based.

Mediators use linear thinking to analyse facts, to do reality testing and to understand the position of parties.

(v) **SUB-SESSIONS**

The separate session is normally held with all the members of one side to the dispute, including their advocates and other members who come with the party. However, it is open to the mediator to meet them individually or in groups by holding sub-sessions with only the advocate (s) or the party or any member(s) of the party.

Mediator may also hold sub-session(s) only with the advocates of both sides, with the consent of parties. During such sub-session, the advocates can be more open and forthcoming regarding the positions and expectations of the parties.

If there is a divergence of interest among the parties on the same side, it may be advantageous for the mediator to hold sub-session(s) with parties having common interest, to facilitate
negotiations. This type of sub-session may facilitate the identification of interests and also prevent the possibility of the parties with divergent interests, joining together to resist the settlement.

(vi) **EXCHANGE OF OFFERS**

The mediator carries the options/offers generated by the parties from one side to the other. The parties negotiate through the mediator for a mutually acceptable settlement. However, if negotiations fail and settlement cannot be reached the case is sent back to the referral Court.

**STAGE 4: CLOSING**

**(A) Where there is a settlement.**

Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

1. Mediator orally confirms the terms of settlement;
2. Such terms of settlement are reduced to writing;
3. The agreement is signed by all parties to the agreement and the counsel if any representing the parties;
4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
5. A copy of the signed agreement is furnished to the parties;
6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
8. The mediator thanks the parties for their participation in the mediation and, congratulates all parties for reaching a settlement.

**THE WRITTEN AGREEMENT SHOULD:**

- clearly specify all material terms agreed to;
- be drafted in plain, precise and unambiguous language;
- be concise;
- use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN, WHERE and HOW (passive voice does not clearly identify who has an obligation to perform a task pursuant to the agreement);
- use language and expression which ensure that neither of the parties feels that he or she has 'lost';
- ensure that the terms of the agreement are executable in accordance with law;
- be complete in its recitation of the terms;
- avoid legal jargon, as far as possible use the words and expressions used by the parties;
- as far as possible state in positive language what each parties agrees to do;
- as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) Where there is no settlement.

• If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.

• The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

A. (2) 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.

The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) FUNCTIONS OF A MEDIATOR

The functions of a mediator are to -:

(i) facilitate the process of mediation; and

(ii) assist the parties to evaluate the case to arrive at a settlement

(i) FACILITATIVE ROLE

A mediator facilitates the process of mediation by-

• creating a conducive environment for the mediation process.

• explaining the process and its ground rules.

• facilitating communication between the parties using the various communication techniques.

• identifying the obstacles to communication between the parties and removing them.

• gathering information about the dispute.

• identifying the underlying interests.

• maintaining control over the process and guiding focused discussion.
• managing the interaction between parties.
• assisting the parties to generate options.
• motivating the parties to agree on mutually acceptable settlement.
• assisting parties to reduce the agreement into writing

(ii) EVALUATIVE ROLE
A mediator performs an evaluative role by-
• helping and guiding the parties to evaluate their case through reality testing.
• assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) Mediator and Conciliator
The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case through reality testing and assisting the parties to evaluate the options for settlement. But in the process of a conciliation, the conciliator himself can evaluate the cases of the parties and the options for settlement for the purpose of suggesting the terms of settlement. The role of a mediator is not to give judgment on the merits of the case or to give advice to the parties or to suggest solutions to the parties.

(ii) Mediator and Adjudicator
A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it. In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

(C) 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 behavior.

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.

(D) QUALIFICATIONS OF MEDIATORS

The Supreme Court of India in Salem Advocate Bar Association V Union of India, (2005) 6SCC 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. As per the Model Rules the following persons are qualified and eligible for being enlisted in the panel of mediators:

(a) (i) Retired Judges of the Supreme Court of India;

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status;

(b) Legal practitioners with at least fifteen years standing at the Bar at the level of the Supreme Court or the High Court or the District Courts of equivalent status;

(c) Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;
(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

(E) ETHICS AND CODE OF CONDUCT FOR MEDIATORS

1. Avoid conflict of interest A mediator must avoid mediating in cases where they have direct personal, professional or financial interest in the outcome of the dispute. If the mediator has any indirect interest (e.g. he works in a firm with someone who has an interest in the outcome or he is related to someone who has such an interest) he is bound to disclose to the parties such indirect interest at the earliest opportunity and he shall not mediate in the case unless the parties specifically agree to accept him as mediator despite such indirect interest. Where the mediator is an advocate, he shall not appear for any of the parties in respect of the dispute which he had mediated. A mediator should not establish or seek to establish a professional relationship with any of the parties to the dispute until the expiry of a reasonable period after the conclusion of the mediation proceedings.

2. Awareness about competence and professional role boundaries

Mediators have a duty to know the limits of their competence and ability in order to avoid taking on assignments which they are not equipped to handle and to communicate candidly with the parties about their background and experience.

Mediators must avoid providing other types of professional service to the parties to mediation, even if they are licensed to provide it. Even though, they may be competent to provide such services, they will be compromising their effectiveness as mediators when they wear two hats.

3. Practice Neutrality

Mediators have a duty to remain neutral throughout the mediation i.e. from beginning to end. Their words, manner, attitude, body language and process management must reflect an impartial and even handed approach.

4. Ensure Voluntariness

The mediators must respect the voluntary nature of mediation and must recognize the right of the parties to withdraw from the mediation at any stage.

5. Maintain Confidentiality

Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless:

a. the mediator is specifically given permission to do so by the party concerned; or
b. the mediator is required by law to do so.

6. Do no harm

Mediators should avoid conducting the mediation process in a manner that may harm the participants or worsen the dispute. Some people suffer from emotional disturbances that make mediation potentially damaging psychologically. Some people come to mediation at a stage when they are not ready to be there. Some people are willing and able to participate, but the mediator handles the process in a way that inflames the parties' antagonism towards each other rather than resolving. In such situations, the mediator must modify the process (e.g. meet the parties separately or meet the counsel only) and if necessary withdraw from mediation when it becomes apparent that mediation, even as modified, is inappropriate or harmful.

7. Promote Self-determination

Supporting and encouraging the parties in mediation to make their own decisions (both individually and collectively) about the resolution of the dispute rather than imposing the ideas of the mediator or others, is fundamental to the mediation process. Mediator should ensure that there is no domination by any party or person preventing a party from making his/her own decision.

8. Facilitate Informed Consent

Settlement of dispute must be based on informed consent. Although, the mediator may not be the source of information for the parties, mediator should try to ensure that the parties have enough information and data to assess their options of settlement and the alternatives to settlement. If the parties lack such information and data, the mediator may suggest to them how they might obtain it.

9. Discharge Duties to third parties

Just as the mediator should do no harm to the parties, he should also consider whether a proposed settlement may harm others who are not participating in the mediation. This is more important when the third parties likely to be affected by a mediated settlement are children or other vulnerable people, such as the elderly or the infirm. Since third parties are not directly involved in the process, the mediator has a duty to ask the parties for information about the likely impact of the settlement on others and encourage the parties to consider the interest of such third parties also.

10. Commitment to Honesty and Integrity

For a mediator, honesty means, among other things, full and fair disclosure of:

   a. his qualifications and prior experience;
   b. direct or indirect interest if any, in the outcome of the dispute;
   c. any fees that the parties will be charged for the mediation; and
d. any other aspect of the mediation which may affect the party's willingness to participate in the process.

Honesty also means telling the truth when meeting the parties separately, e.g. if party 'A' confidentially discloses his minimum expectation and party 'B' asks the mediator whether he knows the opponent's minimum expectation, saying 'No' would be dishonest. Instead, the mediator could say that he has discussed many things with party 'A' on a confidential basis and, therefore, he is at liberty to respond to the question, just as he would be precluded from disclosing to party 'A' certain things what was told by party 'B'. When mediating separately and confidentially with the parties in a series of private sessions, the mediator is in a unique and privileged position. Hemust not abuse the trust the parties placed in him, even if he believes that bending the truth will further the cause of settlement. Apart from the fee/remuneration/honorarium, if any, prescribed under the rules, the mediator shall not seek or receive any amount or gift from the parties to the mediation either before or after the conclusion of the mediation process. Where the mediator is a judicial officer he shall not mediate any dispute involved in or connected with a case pending in his Court.

In brief the mediator's ultimate role is to do anything and everything necessary to assist parties to reach agreement. In serving this ultimate end, the mediator may take on any or all of the following roles:

**Convener**: The mediator may assist in contacting the other party(ies) to arrange for an introductory meeting. Mediation parties may be assisted by an advocate, legal procurator or any individual designated by them whether before or during the mediation proceedings.

**Educator**: The mediator educates the parties about the mediation process, other conflict resolution alternatives, issues that are typically addressed, options and principles that may be considered, research, court standards, etc.

**Communication Facilitator**: The mediator seeks to ensure that each party is fully heard in the mediation process.

**Translator**: When necessary, the mediator can help by rephrasing or reframing communications so that they are better understood and received.

**Questioner and Clarifier**: The mediator probes issues and confirms understandings to ensure that the participants and the mediator have a full understanding.

**Process Advisor**: The mediator comes to be trusted to suggest procedures for making progress in mediation discussions, which may include caucus meetings, consultation with outside legal counsel and consultation with substantive experts.

**Angel of Realities**: The mediator may exercise his or her discretion to play devil's advocate with one or both parties as to the practicality of solutions they are considering or the extent to
which certain options are consistent with participants' stated goals, interests and positive intentions.

**Catalyst:** By offering options for considerations, stimulating new perspectives and offering reference points for consideration, mediator serves as a stimulant for the parties reaching agreement.

**Responsible Detail Person:** The mediator manages and keeps track of all necessary information, writes up the parties' agreement, and may assist the parties to implement their agreement.

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**A.3 COMMUNICATION IN MEDIATION**

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

1.2 Communication is not just TALKING and LISTENING. Communication is a process of information transmission.

1.3 The intention of communication is to convey a message.

1.4 The purpose of communication could be any or all of the following:
   
   • To express our feelings/thoughts/ideas/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.

1.5 Communication is conveying a message to another, in the manner in which you want to convey it. For example, a message of disapproval of something can be conveyed through spoken words or gestures or facial expressions or all of them.

1.6 Communication is also information sent by one to another to be understood by the receiver in the same way as it was intended to be conveyed.

1.7 Communication is initiated by a thought or feeling or idea or emotion which is transformed into words/gestures/acts/expressions. Then, it is converted into a message. This message is transmitted to the receiver. The receiver understands the message by assigning reasons and attributing thoughts, feelings/ideas to the message. It evokes a response in the Receiver who conveys the same to the sender through words/gestures/acts/expressions.

1.8 Consequently, a communication would involve :-

A Sender- person who sends a message.

A Receiver - person who receives the message.

Channel - the medium through which a message is transmitted which could be words or gestures or expressions.

Message - thoughts/feelings/ideas/emotions/knowledge/information that is sought to be communicated.
Encoding - transforming message/information into a form that can be sent to the receiver to be decoded correctly.

Decoding - understanding the message or information.

Response - answer/reply to a communicated message.

A deficiency in any of these components would render a communication incomplete or defective.

1.9 Communication may be unintentional e.g., in an emotional state, the feelings could be conveyed involuntarily through body language, gestures, words etc. A Mediator should be alert to observe such expressions.

1.10 Communication may be verbal or non-verbal. Communication could be through words – spoken or written, gestures, body language, facial expressions etc. Studies reveal that in any communication, 55% of the meaning is transmitted through body language, 38% is transmitted through the attitude/demeanor of the communication, and 7% is transmitted through words.

VERBAL AND NON-VERBAL COMMUNICATION

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. It is often more spontaneous than verbal communication and takes place under less conscious control. Therefore, it can provide more accurate information. It is important for a mediator to pay adequate attention to non verbal communications that take place throughout the mediation. It is also important for a mediator to analyze the message sent by the parties through such non verbal communication.

1.11 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.

1.12 CAUSES OF INEFFECTIVE COMMUNICATION:
i) Differences in perception i.e. where the Sender's message is not understood correctly by the Receiver.

ii) Misinterpretation and distortion of the message by the Receiver.

iii) Differences in language and expression.

iv) Poor listening abilities and skills.

v) Lack of patience.

vi) Withholding or distortion of valuable information by a third party/intermediary, where a message is transmitted by the sender to the receiver through such third party/intermediary.

1.13 BARRIERS TO COMMUNICATION:

PHYSICAL BARRIERS:

i) lack of congenial atmosphere.

ii) lack of proper seating arrangements.

iii) presence of third parties.

iv) lack of sufficient time.

EMOTIONAL BARRIERS:

i) temperaments of the parties and their emotional quotient.

ii) feelings of inferiority, superiority, guilt or arrogance.

iii) fear, suspicion, ego, mistrust or bias.

iv) hidden agenda.

v) conflict of personalities.

1.14 COMMUNICATION IN ADVERSARIAL SYSTEM AND MEDIATION

ADVERSARIAL SYSTEM MEDIATION

GOAL To win. To reach mutually acceptable solutions.

STYLE Argumentative. Collaborative.

SPEAK To establish and convince. To explain.

LISTEN To find flaws and develop counter arguments. To understand.

COMMUNICATION SKILLS IN MEDIATION

Communication skills in mediation include :-

(A) Active Listening.

(B) Listening with Empathy.

(C) Body Language.

(D) Asking the Right Questions.

(A)ACTIVE LISTENING:

Parties participate in mediation with varying degree of optimism, apprehension, distress, anger, confusion, fear etc. If the parties understand that they will be listened to and understood, it will help in trust building and they can share the responsibility to resolve the
dispute. In active listening the listener pays attention to the speaker's words, body language, and the context of the communication. An active listener listens for both what is said and what is not said. An active listener tries to understand the speaker's intended message, notwithstanding any mistake, mis-statement or other limitations of the speaker's communication. An active listener controls his inner voices and judgments which may interfere with his understanding the speaker's message. Active listening requires listening without unnecessarily interrupting the speaker. Parties must be given uninterrupted time to convey their message. There is a difference between hearing and listening. While hearing, one becomes aware of what has been said. While listening, one also understands the meaning of what has been said. Listening is an active process.

**Following are the commonly used techniques of active listening by the mediator:**

1. **Summarising:** This is a communication technique where the mediator outlines the main points made by a speaker. The summary must be accurate, complete and worded neutrally. It must capture the essential points made by the speaker. Parties feel understood and repetition by them is minimized.

2. **Reflecting:** Reflecting is a communication technique used by a mediator to confirm they have heard and understood the feelings and emotions expressed by a speaker. Reflecting is a restatement of feelings and emotions in terms of the speaker's experience, e.g. "So, you are feeling frustrated". Reflecting usually demonstrates empathy.

3. **Re-framing:** Re-framing is a communication technique used by the mediator to help the parties move from Positions to Interests and thereafter, to problem solving and possible solutions. It involves removal of charged and offensive words of the speaker. It accomplishes five essential tasks:

   1. Converts the statement from negative to positive.
   2. Converts the statement from the past to the future.
   3. Converts the statement from positions to interests.
   4. Shifts the focus from the targeted person to the speaker.
   5. Reduces intensity of emotions.

**Example:**

Party: "My boss is cruel and indifferent. It is impossible to talk to him. I should be able to meet him at least once a day. He doesn't make any time for me and always ignores me."

Mediator Re-frames: "You want regular access and communication with your boss and you want him to be considerate, is that right?" This re-frame has converted the employee's complaint from negative to positive, past to future, position to interest and shifted the focus back to the employee's needs/interests.

**NOTE:** Position: A position is a perception ("my boss is cruel and indifferent") or a claim or demand or desired outcome ("I should be able to meet him at least once a day").
Interest: An interest is what lies beneath and drives a person's demands or claims. It is a person's real need, concern, priority, goal etc. It can be tangible (e.g. property, money, shares etc.) and/ or intangible (e.g. communication, consideration, recognition, respect, loyalty etc.).

4. Acknowledging: In acknowledgment the mediator verbally recognizes what the speaker has said without agreeing or disagreeing. Example "I see your point" or "I understand what you are saying. This way mediator assures the speaker that he has been heard and understood.

5. Deferring : A specialized communication technique where the mediator postpones the discussion of a topic until later. While deferring a mediator should write down the topic he has deferred and re-initiate the discussion of the topic at the right time.

6. Encouraging: The mediator can encourage parties when they need reassurance, support or help in communicating. Example : " what you said makes things clear" or "this is useful information"

7. Bridging: A technique used by a mediator to help a party to continue communication. Example:

"And-----", "And then-----", The word "And" encourages communication whereas the word
"But " could discourage communication.

8. Restating : In this the mediator restates the statement of the speaker using key or similar words or phrases used by the speaker, to ensure that he has accurately heard and understood the speaker. Example: "My husband does not give me the attention I need." Mediator restates "Your husband does not give you the attention you need."

9. Paraphrasing: Is a communication technique where the mediator states in his own words the statements of the speaker conveying the same meaning.

10. Silence: A very important communication technique. The mediator should feel comfortable with the silence of the parties allowing them to process and understand their thoughts.

11. Apology: It is an acknowledgment of hurt and pain caused to the other party and not necessarily an admission of guilt. Parties should be carefully and adequately prepared by the mediator when a party chooses to apologise.

Example: "I am sorry that my words/act caused you hurt and pain. It was not my intention to hurt you"

12. Setting an agenda: In order to facilitate better communication between the parties the mediator effectively structures the sequence or order of topics, issues, position, claims, defences, settlement terms etc. It may be done in consultation with the parties or unilaterally.

For example, when tensions are high it is preferable to select the easy issue to work on first. The mediator may determine what is to be addressed first so as to provide ground work for later decision making.
BARRIERS TO ACTIVE LISTENING:

(i) Distractions: They may be external or internal. The sources of external distractions are noise, discomfort, interruptions etc. The sources of internal distractions are tiredness, boredom, preoccupation, anxiety, impatience etc.

(ii) Inadequate time: There should be sufficient time to facilitate attentive and patient listening.

(iii) Pre-judging: A mediator should not prejudge the parties and their attitude, motive or intention.

(iv) Blaming: A mediator should not assign responsibility to any party for what has happened.

(v) Absent Mindedness: The mediator should not be half-listening or inattentive.

(vi) Role Confusion: The mediator should not assume the role of advisor or counselor or adjudicator. He should only facilitate resolution of the dispute.

(vii) Arguing/imposing own views: The mediator should not argue with the parties or try to impose his own views on them.

(viii) Criticising
(ix) Counseling
(x) Moralising
(xi) Analysing

(B) LISTENING WITH EMPATHY

In the mediation process, empathy means the ability of the mediator to understand and appreciate the feelings and needs of the parties, and to convey to them such understanding and appreciation without expressing agreement or disagreement with them. Empathy shown by the mediator helps the speaker to become less emotional and more practical and reasonable. Mediator should understand that Empathy is different from Sympathy. In empathy the focus of attention is on the speaker whereas in sympathy the focus of attention is on the listener.

Example: Wife: "I had such a hard day at work"
Husband: "I am so sorry you had a hard day at work" (focus is on listener/husband)
Husband: "You had a hard day at work, mine was worse" (focus on listener/husband)
- Sympathy
Husband: "You feel it was hard for you at work today.
Would you like to talk about it?" (focus on speaker/wife)
- Empathy

Reflecting' is a good communication technique used to express empathy.
(C) BODY LANGUAGE : The appropriate body language of the listener indicates to the speaker that the listener is attentive. It conveys to the speaker that the listener is interested in listening and that the listener gives importance to the speaker.

In the case of mediators the following can demonstrate an appropriate body language :-

(i) Symmetry of posture - It reflects mediator's confidence and interest.
(ii) Comfortable look - It increases the confidence of the parties.
(iii) Smiling face - It puts the parties at ease.
(iv) Leaning gently towards the speaker - It is a sign of attentive listening.
(v) Proper eye contact with the speaker - It ensures continuing attention.

(D) ASKING THE RIGHT QUESTIONS

In mediation questions are asked by the mediator to gather information or to clarify facts, positions and interests or to alter perception of parties. Questions must be relevant and appropriate. However, questioning is a tool which should be used with discretion and sensitivity. Timing and context of the questioning are important. Different types of questions will be appropriate at different times and in different context. Appropriate questioning will also demonstrate that the mediator is listening and is encouraging the parties to talk. However, the style of questioning should not be the style of cross examination. Questions should not indicate bias, partiality, judgment or criticism. The right questions help the parties and the mediators to understand what the issues are.

TYPES OF QUESTIONS :

(a) Open Questions: These are questions which will give a further opportunity to the party to provide more information or to clarify his own position, retaining control of the direction of discussion and maintaining his own perspective. They are broad and general in scope.

Examples:
"Can you tell me more about the subject?"
"What happened next?"
"What is your claim?"
"What do you really want to achieve?"

(b) Closed Questions: These questions are limited in scope, specific, direct and focused. They are fact-based in content and tend to elicit factual information. The response to these questions may be 'Yes' or 'No' or a very short response and may close the discussion on the particular issue.

Examples:
"What colour shirt was the man wearing?"
"On which date was the contract signed?"
"What is the total amount of your medical bills?"
"Were you present in the market when the event occurred?"
(c) Hypothetical Questions: Hypothetical questions are Questions which allow parties to explore new ideas and options.

Examples:
"What if the disputed property is acquired by Government?"
"What if your husband offers to move out of the parental house and live separately?"

Other types of questions like Leading Questions and Complex Questions are not ordinarily asked in mediation, as they may not help the mediation process.

A.4 NEgotiation and Bargaining in Mediation

Though the words Negotiation and Bargaining are often used synonymously, in mediation there is a distinction. Negotiation involves bargaining and bargaining is part of negotiation. Negotiation refers to the process of communication that occurs when parties are trying to find a mutually acceptable solution to the dispute. Negotiation may involve different types of bargaining.

What is Negotiation?

Negotiation is an important form of decision making process in human life. Negotiation is communication for the purpose of persuasion. Mediation in essence is an assisted negotiation process. In mediation, negotiation is the process of back and forth communication aimed at reaching an agreement between the parties to the dispute. 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. The mediator assists the parties in their negotiation by shifting them from an adversarial approach to a problem solving and interest based approach. The mediator carries the proposals from one party to the other until a mutually acceptable settlement is found. This is called ‘Shuttle Diplomacy’. 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. The mediator facilitates negotiation by resorting to reality-testing, brainstorming, exchanging of offers, breaking impasse etc.

Why does one negotiate?

a. To put across one's viewpoints, 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.

Negotiation Styles

1) Avoiding Style

Unassertive and Uncooperative: The participant does not confront the problem or address the issues.
2) Accommodating Style Unassertive and Cooperative: He does not insist on his own interests and accommodates the interests of others. There could be an element of sacrifice.

3) Compromising Style Moderate level of Assertiveness and Cooperation: He recognizes that both sides have to give up something to arrive at a settlement. He is willing to reduce his demands. Emphasis will be on apparent equality.

4) Competing Style Assertive and Uncooperative: The participant values only his own interests and is not concerned about the interests of others. He is aggressive and insists on his demands.

5) Collaborating Style Assertive, Cooperative and Constructive: He values not only his own interests but also the interests of others. He actively participates in the negotiation and works towards a deeper level of understanding of the issues and a mutually acceptable solution satisfying the interests of all to the extent possible.

What is 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.

The two forms of distributive bargaining are:

Positional Bargaining: is characterized by the primary focus of the parties on their positions (i.e., offers and counter-offers). In this form of bargaining, the parties simply trade positions, without discussing their underlying interests or exploring additional possibilities for trade-offs and terms. This is the most basic form of negotiation and is often the first method people adopt. Each side takes a position and argues for it and may make concessions to reach a compromise. This is a competitive negotiation strategy. In many cases, the parties will never agree and if they agree to compromise, neither of them will be satisfied with the terms of the compromise.

Example: Varun and Vivek are quarrelling in a room. Varun wants window open Vivek wants it shut. They continue to argue about how much to leave open - a crack, halfway, three quarter
way. Rights-Based Bargaining: This form of bargaining focuses on the rights of parties as the basis for negotiation. The emphasis is on who is right and who is wrong. For example, "Your client was negligent. Therefore, she owes my client compensation." "Your client breached the contract. Therefore, my client is entitled to contract damages."

Rights-based bargaining plays an important role in many negotiations as it analyses and defines obligations of the parties. It is often used in combination with Positional Bargaining (e.g., "Your client was negligent, so she owes my client X amount in compensation."

Rights-Based Bargaining can lead to an impasse when the parties differ in the interpretation of their respective rights and obligations.

Negative consequences of Distributive Bargaining are:

(a) By taking rigid stands the relationship is often lost.
(b) Creative solutions are not explored and the interests of both parties are not fully met.
(c) Time consuming.
(d) Both parties take extreme positions often resulting in impasse.

(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 on-going relationships and / or interests they want to preserve.

Example: The story of two sisters quarrelling over one orange. They decide to cut the orange in half and share it, although both are not happy as it would not adequately satisfy their interest. The mother comes in to enquire what is the real interest of each one. One says that she needs the juice of one orange and the other says that she needs the peel of one orange. The same orange could satisfy the interest of both parties. Both sisters go away happy. Three steps in interest-based bargaining. There are three essential steps in interest-based bargaining.

(a) Identifying the interests of parties.
(b) Prioritizing the parties' interests.
(c) Helping the parties develop terms of agreement/settlement that meets their most important interests.

(iii) Integrative Bargaining: Integrative Bargaining is an extension of Interest Based Bargaining. In Integrative Bargaining 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 to figure out ways to "sweeten the pot", by adding to or changing the terms for settlement.

To continue the earlier example of Varun and Vivek quarrelling in the room. Ashok comes into the room and enquires about the quarrel.
Vivek says that the cold air blowing on his face is making him uncomfortable. Varun says that the lack of air circulation is making the room stuffy and he is uncomfortable. Ashok opens the window of the adjoining room and keeps the connecting door open.

Both parties are happy. The cold air is not directly blowing into Varun's face and Vivek is comfortable as there is adequate air circulation in the room.

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.

Another example of integrative bargaining. A car salesman may reach an impasse with a customer on the issue of the price of a new car. Instead of losing the deal, the car salesman will offer to throw in fancy leather seats as part of the deal while maintaining the price on the car. If necessary the salesman may also agree to help the customer to sell his old car at a good price. The fancy leather seats and the offer to help in the sale of the old car are integrative terms because they result from an exploration of whether additional terms or trade-offs could be of interest to the customer. Similarly, the Mediator can help parties avoid or overcome an impasse by actively exploring the possibility and desirability of additional terms and trade-offs.

NOTE : Position: A position is a perception ('my boss is cruel and indifferent') or a desired outcome ('My boss should meet with me once a day to talk'). The claim or demand, itself, is a position.

Interest: An interest is a person's true need, concern, priority, goal etc.. It can even be intangible (not easily perceivable) e.g. respect, loyalty, dependability, timing, etc. An interest is what lies beneath and drives a person's demands or claims.

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 the 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.

Principal and Agent Barriers:

The behaviour 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 perceptual limitations which could occur due to human nature, psychological factors and/or the limits of our senses. These perceptual 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.

Example of Cognitive Barriers

Risk Aversion: People tend to be averse to risk regarding gain and would rather have a certain gain than an uncertain larger gain. They are ready to bear risk with regard to loss. They would avoid a certain loss and take a risk of greater loss. For example, some parties would rather postpone a certain loss through settlement at mediation for an uncertain outcome of the trial in the future. A good mediator will assist the parties in addressing these realities.

Assimilation bias: The tendency of negotiators to ignore any unfavorable information. For example, a court decision which could prejudice the case. To counter this, repeat the important information, provide documentary and other tangible evidence and reduce information to writing.

Inattentional blindness: Negotiators sometimes fail to focus on the entire picture and instead focus only on specific details. To counter this, the mediator may frequently shift focus from the specific to the larger picture.

Reactive devaluation: People in conflict have a tendency to minimize the value of offers from the other side. To counter this, mediator can change the focus from the source of the offer to the terms of the offer. For example, instead of saying "the plaintiff offers 5 lakhs" the mediator may say "will you be satisfied with something like 5 lakhs".

Endowment effect: The tendency for people with property or interests in something to over value it. (their house, their land, a lawyer's evaluation of their case etc.) . To counter this, the mediator may enquire about the actual value, use objective criteria like the Sub-registrar's valuation, ask for the latest Court judgment supporting the submission etc.

Psychological impediments: People make unwarranted assumptions about the motives and intentions of the other parties. Anchor Price, Aspiration Price and Reservation Price To facilitate meaningful and successful negotiation the mediator should be aware of the Anchor Price, the Aspiration Price and the Reservation Price. Anchor Price is a base number or a set of terms or an opening offer that has to be assessed by the mediator from the information given by the parties. This will serve as a parameter in the negotiation. If the anchor price is defined appropriately, parties tend to treat it as a real and valid bench mark against which subsequent adjustments are made. It must be based on complete information and if not it can be misleading. Mistaken or misguided anchor prices can increase the chance of impasse and can
have unintended consequences in a negotiation. Aspiration Price is the price that a party aspires to obtain from the negotiation. Reservation Price is the lowest a party may be open to receive.

ELEMENTS OF PRINCIPLED NEGOTIATION

(a) Separate the parties from the problem
A mediator should help the parties to separate themselves from the problem.
For example, if Aparna has been consistently late to work for the past 2 weeks, a perception may develop that "The problem is Aparna." Viewed in this manner the only way to get rid of the problem is to get rid of (dismiss, transfer etc.) Aparna. This is an example of merging the people with the problem and illustrates how it limits the range of options that are available for resolving the problem. To separate people from the problem, the key is to focus on the problem itself, independent of the person. In the above example, the employer might frame the problem as lack of punctuality. The employer can ask Aparna about her record of being on time for many years and the reasons for the recent two weeks of late arrival enquiring specifically whether there are circumstances that are resulting in Aparna's late arrivals. She may answer that she was involved in a motor vehicle accident recently and her vehicle repairs will be completed shortly. She might say that she had to change the route to work due to road repair, or she might say that she has to ride in a car pool to work and the driver has a temporary problem that caused the delay. By focusing on the problem itself, the employer has opened the door to understanding the root of the problem, which may lead to various options for handling it.

(b) Be hard on the issues and soft on the people.
In being hard on the issues, the Mediator will request documentation on damages, verify the accuracy of numbers and confirm the evidence provided by both parties. At the same time, the mediator will encourage the parties to be polite and cordial with each other and the mediator will demonstrate the same qualities during mediation.

(c) Focus on interests
In negotiation, focus must be on interests rather than on positions. Hence the mediator should help the parties to shift the focus from their positions to their interests.

(d) Create variety of options
The Mediator is required to facilitate generation of various options and selection of the option most acceptable to the parties.

(e) Rely on objective criteria
When perceptions of the parties differ, in appropriate cases objective criteria like expert's opinion, scientific data, valuation report, assessor's report etc. can be relied on by the parties to examine the options and arrive at a settlement.

AN EXERCISE TO IDENTIFYING UNDERLYING INTERESTS
Mohan Industries V/s All India Express
Facts for Mohan Industries

The owner of a small plastic supply company called Mohan Industries is a party at mediation. He is the defendant in a contract dispute with a large manufacturer called All India Express ("All India"). The dispute centers around his company's shipments of supplies to All India, which have been 7-10 days late for the past 3 months. All India's shipments to its customers consequently have been late and its customers have started to complain. Until 3 months ago, Mohan Industries had delivered timely shipments to All India. All India's attorney demanded that Mohan Industries make its shipments on time and pay for the damages resulting from the 3 months of delayed shipments. If the case continues in Court, All India probably will win a suit for breach of contract. Mohan Industries has had a profitable business relationship with All India having a supply contract for 10 years. It would be profitable for Mohan Industries to work with All India in the future. The reason the shipments have been late for the past 3 months is that Mohan Industries is in the process of upgrading its computers for better service. This is a temporary problem that probably will be cleared up in 3 more months. A good deal of their operating expenses is going towards this computer upgrade and they generally operate on a thin profit margin. Hence they do not want to spend a large amount of money on litigation. Mohan Industries is also in the process of bidding on a supply contract with another large manufacturer. They would like to use All India as a good reference in submitting their bid. The President of Mohan Industries is 84-years-old and he is not in good health. He has planned to turn over the company to his eldest son this year, but that is doubtful now that this legal dispute has come up. He does not want the final phase of his career in business to be tied up in litigation.

Facts for All India Express

The party at mediation is All India Express (All India). The counsel for All India has advised them that they have a right to sue Mohan Industries for breach of contract and that it will probably prevail in court.

All India has stated that it has had a good and profitable working relationship with Mohan Industries for the past 10 years. There are no other suppliers available that makes the plastic product as well as Mohan Industries. The price charged by Mohan Industries is reasonable. All India is in the process of introducing its products on an international level. It is very important to All India that there be no interruption in plastic supplies for the next few years. All India is operated by a young man (37-years-old) who recently suffered a severe setback in his health (diabetes). He would like to focus his time and energy on the international expansion and getting better physically. This is the right time for All India to expand internationally because its main competitor, another Indian company, is not yet ready for such as expansion (though it will be ready soon). All India has explained that it values its customers and it is worried that it will lose them if plastic supply shipments continue to be late.
IMPASSE

During mediation sometimes 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. It may also be due to resistance to workable solutions, lack of creativity, 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

Emotional impasse can be caused by factors like:

* Personal animosity
* Mistrust
* False pride
* Arrogance
* Ego
* Fear of losing face
* Vengeance
* 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
  * adamant attitude of the parties
* Procedural impasse can be caused by factors like:
  * Lack of authority to negotiate or to settle
  * Power imbalance between the parties
  * Mistrust of the mediator

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 which may include following techniques:

(a) Reality Testing
(b) Brainstorming
(c) Changing the focus from the source of the offer to the terms of the offer.
(d) Taking a break or postponing the mediation to defuse a hostile situation, to gather further information, to give further time to the parties to think, to motivate the parties for settlement and for such others purposes.
(e) Alerting and cautioning the parties against their rigid or adamant stand by conveying that the mediator is left with the only option of closing the mediation.
(f) Taking assistance of other people like spouses, relatives, common friends, well wishers, experts etc. through their presence, participation or otherwise.
(g) Careful use of good humour.
(h) Acknowledging and complementing the parties for the efforts they have already made.
(i) Ascertaining from the parties the real reason behind the impasse and seeking their suggestions to break the impasse. Role-reversal, by asking the party to place himself/ herself in the position of the other party and try to understand the perception and feelings of the other party.
(k) Allowing the parties to vent their feelings and emotions.
(l) Shifting gears i.e. shifting from joint session to separate session or vice-versa.
(m) Focusing on the underlying interest of the parties.
(n) Starting all over again.
(o) Revisiting the options.
(p) Changing the topic to come back later.
(q) Observing silence.
(r) Holding hope
(s) Changing the sitting arrangement.
(t) Using hypothetical situations or questions to help parties to explore new idea and options.

PART-B

B.1 SETTLEMENT OF DISPUTES OUT OF COURT

India being a developing nation is going through major economic reforms within the frame of the law, where for the resolution of disputes and to decrease the burden on the courts, alternative dispute resolution (ADR) is introduced. Indian courts experience a serious accumulation of cases which is
mostly due to less number of judges and the lack of infrastructure which is incapable of handling the caseload.

Section 89 of the Code of Civil Procedure, which gives importance to mediation, conciliation, and arbitration, makes it compulsory on the part of the Court to refer the matter for resolution.

It has become a global phenomenon to resolve commercial disputes through arbitration. Alternative Dispute Resolution is comparatively low-cost in comparison with the usual legal procedure. It helps litigants who are incapable of meeting the expenses involved in the ordinary process of dispute resolution through Courts.

The government has to play a pro-active role in this direction. Overall, in order to make Alternative Dispute Reform mechanisms more successful then, there must be the restricted area of application and wide in the area of its procedure.

An out-of-court settlement occurs when the two parties make an agreement on any claim without having a judge come to a decision in the case. Generally, an out-of-court settlement allows one party to pay a sum of money to the other and in return the other party will close their lawsuit. Mainly, a settlement is a lawfully binding agreement which ends the case exclusive of going to court. The best ways to record an out of court settlement is to enter into an agreement that is binding on both parties detailing the terms of settlement. This agreement must be carefully drafted.

It is also possible to do an out of court settlement even when a court case is going on.

However, the most common way to reach a solution in a dispute without having to go to court, which in India is expensive and can take decades to come to a conclusion, is “Alternative Dispute Resolution” (ADR).

- Alternative Dispute Resolution (ADR) mainly refers to dispute resolution outside of the courtroom which mainly includes arbitration, mediation or mini-trials. ADR techniques can be applied in some categories of disputes, especially, civil, commercial, industrial and family disputes.

- Alternative Dispute Resolution is a term used to express several different modes of resolving lawful disputes. It is practiced by the business world with common men because it is impossible for many people to file lawsuits and get appropriate justice on time. To resolve this problem of unsettled justice, ADR method has been developed in answer to thereof.

- Alternative Dispute Resolution is generally less official, less expensive and less time-consuming than a usual trial. It provides people additional opportunity to settle on when and how their dispute will be determined. The key reasons that the parties may prefer ADR procedures are often two-way and let the parties to recognize each other’s positions.

- It also allows the parties to come out with more innovative solutions that a court may not be legally permitted to enforce. Using Alternative Dispute Resolution (ADR) method to resolve disputes can save time, money, provide more control over the case and on the outcome.

Types Of Alternative Dispute Resolution

The most common types of ADRs are –

1. Arbitration
2. Conciliation
Halsbury’s Laws of England has defined arbitration as “a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved with binding effect by a person or persons acting in a judicial manner in private rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it.”

**Arbitration is a form of alternative dispute resolution that provides a final and binding outcome to litigation which does not require recourse to the Courts. It is a consensual process in the sense that it will only apply if the parties agree it should.**

Generally regarded as an alternative to court litigation, the existence of a valid agreement to arbitrate should mean that state courts refuse to hear disputes falling within the scope of that agreement.

In arbitration, the parties submit a dispute to an appointed decision-maker (arbitrator), or panel of arbitrators (the tribunal). This is typically done by providing for arbitration in the contract (the arbitration agreement).

The agreement should also cover the number of arbitrators, the location (also known as the seat) of the arbitration, and the procedural rules that will govern the arbitration. The tribunal will generally give its decision (the award) following a hearing during which each party will have the opportunity to present its position.

If appropriate, arbitrations can be conducted on paper only, for example, where the sums or issues in dispute do not justify a hearing. Generally, the tribunal will decide the dispute in accordance with the law governing the relevant contract.

**The General Principles Were –**

1. The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

2. The parties should be free to have the same opinion on how their disputes are resolved, subject only to such safeguard as are compulsory for the public interest and

3. Court intervention should be restricted.

- **A conciliation is the form of alternative dispute resolution process where the parties to a dispute make use of a conciliator, who meets with the parties individually in order to determine their differences.** They do this by lowering tensions, improving interactions, interpreting issues, providing & exploring possible solutions for the settlement.

- Conciliation is a voluntary process where the parties concerned are open to having the same opinion and attempt to the resolution of the dispute by conciliation.

- It is flexible, allowing parties to define the time, constitution and content of the conciliation procedures. These proceedings are not often public. It involves discussions between the parties and the conciliator with an intend to explore sustainable resolutions by a look into the existing issues concerned in the dispute and creating options for an arrangement that are suitable for all.
The conciliator does not make a decision for the parties but tries to sustain them in generating options in order to find a resolution that is well-suited to both parties. It is risk-free and not obligatory on the parties till they agree & sign the agreement.

- Formerly a resolution is reached among the disputing parties prior to a conciliator, the agreement had the outcome of an arbitration award and is lawfully acceptable in any court in the country.

- Mediation differs from arbitration in that the impartial third party (the mediator) does not impose a resolution. The objective of mediation is to help the parties determine their own dispute so, a mediator's functions can differ depending on the requirements of the parties and their attorneys, the past record of the dispute and the individuality and skills of the mediator.

  - The mediator does not make a decision on the dispute but helps the parties be in touch so that they can try to resolve the dispute themselves. Mediation leaves organized outcome with the parties.

  - Mediation may be mainly helpful when parties have an association they want to defend like – if family members or business partners have an argument, mediation may be the ADR method to use.

- Mediation is also effectual when emotions are getting in the means of resolution. An efficient mediator can hear the parties out and help them to be in touch or communicate with each other in an effective way. Mediation may not be effectual if one of the parties is reluctant to help or compromise and if one of the parties has a significant advantage in control over the other.

In neutral evaluation, both the parties get an opportunity to present the case to a neutral person (an evaluator). The evaluator hears shortened arguments, reviews the strength and weakness of each party and offers an assessment of possible court outcomes in an attempt to promote settlement. The evaluator is skilled in the subject matter of the dispute.

Even though the evaluator’s view is not binding, the parties usually use it as a source for trying to discuss a resolution of the dispute. The evaluator may also give case planning regulation and settlement support with the consent of the parties. The neutral evaluation may be most suitable in cases where there are technical issues that need special skill to resolve the issue in the case is the amount of compensation.

It may be either compulsory or voluntary. In settlement conferences, the parties, and their attorneys meet up with a judge (or a neutral person), called a settlement officer, to talk about the possible resolution of their dispute. The settlement officer does not make a resolution in the case although, assists the parties in evaluating the strengths and weaknesses of the case and in negotiating a resolution. These are appropriate in any case where a resolution is an option.
8. 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.

9. 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 referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement. 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.


11. 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.

12. 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.

13. 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.

14. Confidentiality is the essence of mediation. Confidentiality is the essence of conciliation. Confidentiality is not observed in Lok Adalat.

CONCLUSION

Mediation is a valuable dispute resolution tool because the means of reaching an agreement can be as varied as the disputes that need to be resolved. Mediation procedures can be tailored to a variety of factors: the personality of the mediator; the nature of the dispute; the time or resources available; and the antagonism between the parties. The procedure can thus minimize contentiousness, cost, and resources. If it is unsuccessful, the parties can always resort to the courts or other means of dispute resolution. In short, mediation is a valuable weapon against delay, cost, and injustice.

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FIRST HEARING

After a suit is instituted with the plaint and a written statement is given by the defendant there comes a stage called first hearing. But what does the first hearing comprise of? What exactly happens when summons which were served to both parties appear to the court? All these are important questions and it is equally important to understand its object and at the same time why issues are so important.

Basically after the presentation of plaint by the plaintiff and filing of written statement by the defendant, there arrives a stage called first hearing. Order 14 of the Code of Civil Procedure, 1908 deals with the first hearing. The word first hearing as such is nowhere defined in the Code, but the literal meaning of the term is the day on which the court goes into the pleadings of parties in order to understand their contentions. While Order 10 of the Code enjoins the court to examine parties with a view to ascertain matters in controversy in the suit. It has been held by the Supreme Court that First hearing is the day on which the court applies its mind to the case either for framing issues or for taking evidence.

The 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 conciliation, arbitration, mediation or Lok Adalat. If there is no settlement, the case will again be referred to the court. Rule 2 further provides that for oral examination of parties to the suit with a view to elucidating matters in controversy in the suit. The court, thus, ascertain with precision the propositions of law or fact 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 come 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 and decide by the court. When one fact is asserted by the party and the same is denied by other, that is oppositions, such per se facts, which will be called material propositions will constitute issues. Order X Rule 1(2) and 1(3) provides 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.

Basically the framing of issues requires some conditions and material which is inclusive of mainly three things. Firstly, the allegations made on oath by the parties, or by any persons present on their behalf, or statements made by the pleaders appearing for the parties. Secondly, the allegations made in pleading or in answers to interrogatories and thirdly,
documents produced by the parties. Therefore their important has been realised appropriately in leading judgement in State of Gujarat v. Jaipalsingh Jaswantsingh Engineers and Contractors wherein it was stated 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 trial 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.”

Therefore the framing of issues is the duty of the court since only the court can frame the issues in a suit. They are decided by the Presiding Officer of the court that is the Judge. At the same time, parties and their pleaders thereof must also assist the court in framing the issues wherever required. While issues are supposed to be clear and specific, vague and evasive issues creates irregularities in the administration of justice. Order X also provides that the court may examine witnesses or inspect documents before framing issues, to amend the issues or to frame additional issues or to strike out issues that may appear to the court to be wrongly framed.

But in circumstances wherein there is the omission of court to framing of issues, such is not considered fatal to the suit. But in case, such omissions leads to affect the disposal of suits on merits then the case must be remanded to the trail court for fresh trial. While on the other hand, it was held that where the parties knew that certain point of proposition would have been an issue and yet its disposition would not be fatal to the suit, such omission of court on framing issue is acceptable provided it has caused no prejudice or substantial injustice. Order 15 deals with various situations where a suit can be disposed off on the first hearing itself. Therefore, issues are extremely important for a proper proceeding of a suit and right decision of the case and omission thereto can be caused, bearing valid reasons and while if framed properly, all issue must be normally decided at one and same time. This constitutes all we need to know about first hearing.

Code of Civil Procedure, 1908 ORDER XV : DISPOSAL OF THE SUIT AT THE FIRST HEARING

1. Parties not at issue

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
[(1)] 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.

[(2) 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.]

3. Parties at issue

(1) 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.

(2) 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

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.

It was rendered by Hon'ble Madras High Court in a case of R.C. Sundaravalli vs T.D. Shakila
MLJ 681) that in

“Para . 8: The word "first hearing" appears in the Code in several places. Under
Order 10, 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 10, Rule 2, C.P.C. Order 13, 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 13, 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 14, C.P.C again contains the words "at the first hearing". Order 14, 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 10, 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 14, 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 ex parte, 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 14, 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 15 itself reads thus: "Disposal of the suit at the first hearing". Then, Sub-rule 3 of Order 15 deals with the manner in which suit shall be disposed where parties are at issue. The Rule says that where issues have been framed, since parties are at issue, the Court can still pronounce judgments if without further argument or evidence than the parties can at once adduce is required, the Court may still proceed to determine such issues and pronounce judgments. If not, Rule 2 requires the Court to postpone the further hearing of the suit and thereafter, fix a date for production of further evidence or for further arguments as the case requires. The Court is empowered to adopt the procedure under Sub-Rule 1 of Rule 3 or Sub-rule 2 irrespective of whether summons has been issued for the settlement of issues only or for the final disposal of the suit. But, if the summons has been issued for final disposal of the suit, then Rule 4 provides that the Court in the absence of either party, producing evidence on which he seeks to rely, may pronounce judgments or may alter framing and recording issues, adjourn the suit for production of such evidence that is necessary for decision on those issues. Therefore, from this, it is clear that the first hearing of the suit can be any of the dates up to the date on which issues are actually framed."
ROLE OF REFERRAL JUDGES, LAWYERS AND PARTIES IN MEDIATION

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Mediation is one of the effective alternative dispute resolution processes. The process of mediation consists of the Parties, Mediator, Referral Judge as well as Advocates of the concerned parties. It is misconception prevailing in the judiciary system that the role of advocates and judges is optional. But the role of referral judges and advocates is very crucial in the mediation process. The role of judges, advocates and parties is discussed below:

The role of referral judges in the mediation:

The judges who refer the cases for settlement through any of the ADR methods are called as referral judges. The role of referral judge is of more significance in the Court referred mediation. The referral judges should refer the suitable cases for mediation. The role of referral judge can be categorized under the following heads:

1) Motivating and preparing the parties for mediation.
2) Giving referral order.
3) Role after conclusion of mediation.

1) Motivate and preparing the parties for mediation:

The referral judge shall motivate the parties to resolve their disputes through mediation by explaining its advantages. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reasons for such disinclination and motivate them for mediation. The success of
mediation process mainly depends on selection of case to be referred to mediation. Even though, the case in its entirety is not suitable for mediation, the referral judge may consider whether any of the issues involved in the dispute can be referred for mediation. If the referral judge explains the concept and process of mediation and its advantages, the parties can be easily motivated to resolve their disputes through mediation.

2) **Giving referral order**: The referral order is the foundation of the Court referred mediation. The referral judge shall understand the matter of referral order in the process of mediation. The referral order shall not be passed in a casual approach. An ideal referral order shall contain the details like name of the referral judge, case number, names of the parties, date and year of institution of cases, trial and nature of dispute, the statutory provision under which the reference is made, next date of hearing before the referral Court, where the parties have given consent for mediation, name of the institution or mediator to whom the case is referred, date and time for the parties to report before the institution or mediator, time limit for completing the mediation, quantum of fee if payable and contact details of the parties and their counsels.

3) **Role after conclusion of mediation**: The referral judge retains the control and jurisdiction over the matter referred to the mediation. The result of mediation will have to be placed before the Court / referral judge for passing consequential orders. Before considering the report of the mediator, the referral judge shall ensure that the presence of parties or their authorized representatives in the Court. If there is no settlement between the parties, the Court proceedings shall continue in accordance with the law. The referral judge shall not ask the parties about the reasons for failure of mediation, to maintain confidentiality of mediation process. But is open to the referral judge to explore the possibilities of settlement between the parties. The referral judge shall not
communicate with the mediator regarding mediation or after process of mediation to protect the confidentiality of the mediation process. If the disputes have been settled in the mediation, the referral judge should examine whether the agreement is lawful and enforceable. If it is found to be unlawful and unenforceable, the referral judge shall bring the same to the notices of the parties and shall desist from acting upon the said agreement. If it is found to be lawful and enforceable, the same can be acted upon and the referral judge shall pass consequential orders. To overcome any technical defects or procedural defects in implementing the said agreement, the referral judge can modify or alter the terms and conditions of the settlement with the consent of the parties. Therefore, the role of referral judge is very crucial in adopting the mediation process for a fruitful settlement of disputes between the parties, with limited expenses.

Role of Lawyers in Mediation

It is a wrong notion that the role of advocate in mediation is optional. But, mediation of a case is incomplete without the consent, presence and active participation of the advocates representing the parties in the mediation process. Hon’ble Sri Justice C. Nagappan, emphasized the vital role played by advocates in mediation to assist the parties by preparing their clients, motivating them by informing of the benefits of mediation and assist them to reach an amicable settlement, which is a statutory obligation under section 89 of Code of Civil Procedure, 1908.

The role of advocates in mediation can be divided into three phases:
1) Pre-mediation.
2) During mediation.
3) Post mediation.

1) Pre-mediation: The role of advocates is very important for effective
settlement of disputes outside the court. Initially, the advocates must consider whether there is scope for resorting to any alternative dispute resolution mechanism. If there is such scope, he shall educate the parties about the concept, process and advantages of mediation. The advocates are the best placed to assist their clients to the role of mediator as a facilitator. They must help the parties to address their needs and necessities and to explore the creative solution to satisfy their underlying interest. So, the advocates shall assist the mediators to put forth their legal contentions urged in the cases and explain them about validity and sustainability of such contentions. They may prepare mediation report to summarise the legal issues / claims and defects in order to facilitate the mediator. So, the advocates shall discuss with their clients about their strengths and weaknesses of their cases, their overall pattern of negotiations opening offer, bottom line, prior to the mediation and shall guide their parties to end litigation in fruitful manner. So, the advocates have to play major role in motivating the parties to choose the mediation process for settlement of disputes and to avoid litigation going to the Court by using their skills of mediation.

2) During mediation: The role of advocates is very crucial during mediation. The advocates may attend the mediation sessions and actively participate directly in the mediation and to report to the parties in choosing appropriate process. Their attitude and conduct influence their parties. So, the advocates must have positive attitude and must demonstrate faith in the mediation process. They must observe the ground rules of mediation explained by the mediator and advise the parties to observe them. They must respect the mediator, opposite parties as well as their counsels. The advocates must prepare the facts, law and precedents related to the issue. They must encourage the parties to present their cases before the mediator and must alert and be vigilant to supplement the parties while referring documents. With the
help of reality-testing, using the BATNA (Best Alternative to a Negotiated Agreement), WATNA (Worst Alternative to a Negotiated Agreement) and MLATNA (Most Likely Alternative to a Negotiated) analysis, the lawyer must constantly evaluate the cases of the parties and advise the parties to change their approach, demands and to extend the concessions. They must attend sub sessions held by the mediator to arrive at a settlement. They can request the mediator to hold sub-sessions, for settlement of the dispute.

The advocates shall participate in finalization and drafting the settlement between the parties. They must ensure that such settlement or agreement recorded is complete, clear and executable. They must explain the same to the parties. The advocates shall assess the relative strengths and weaknesses of each other cases to ascertain the reality check which assists the mediator in mobilizing the parties towards resolution of disputes. They shall provide legal information and judgments regarding similar disputes, so that the settlement will not be contrary with the prevalent laws. Appropriate advise rendered by the advocates to their clients on legal assessments will hep the mediator for amicable settlement. If the advocates adopt these skills of mediation, the possibility of fruitful settlement can be explored between the parties.

3) Post mediation: The role of advocates is significant even after conclusion of mediation. If no settlement has been arrived, the advocates shall guide the parties either to continue with the litigation or to consider the option of another alternative disputes mechanism. If the settlement between the parties has been arrived, he is responsible to re-assure their clients about the appropriateness of the disputes. They must co-operate with the Court in the execution of the order or decree passed in terms of the settlement. So, if the advocates adopt skills of mediation, the disputes can be settled effectively, efficiently and fruitfully.
Role of the parties in mediation

Mediation is a process in which the parties have a direct, active and decisive role in arriving at an amicable settlement of their dispute. The decision of the parties is final. Neither the mediator nor the lawyers can take the decision for the parties and they must recognize and respect the right of self-determination of the parties. The parties shall be with open mind to adopt the mediation process. They shall not try to fix on particular outcomes. They must listen to the other parties and shall maintain harmonious behaviour. They shall control their anger, they shall be with patience in the mediation process, as sometimes, it can take much time for harmonious settlement of the disputes. The parties shall focus on their interests rather than their entitlement or legal technicalities. They shall participate in the mediation in good faith and they shall be open and honest to convey disputes and negotiate to the dispute. The parties shall evaluate the feasibility of options. They shall re-assess the negotiable strategy in the light of new information. They must trust the mediator. They must adhere to the terms and conditions of the settlement of the said agreement arrived in the mediation. They have to fulfill their part, as per the terms and conditions of the said agreement prepared in the mediation process. If the parties adopt all these methods with patience, then beneficial and amicable settlement can be acquired in the mediation process.
Significance of Section 89, Orders X, XI, XII and XIII etc., of Civil Procedure Code

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The Civil Procedure Code is a procedure adopted by civil courts and parties appearing thereunder. The pendency of cases has been rising day by day due to several reasons such as limitations of the traditional system and limited number of judges. In light of the same, a provision is provided under Section 89 of the Code which calls for settlement of disputes outside courts to overcome the judicial lag existing in India. The said Section 89 of the code is an attempt to bring about resolution of disputes between parties, minimize costs and reduce the burden of the courts and also to ensure swifter and speedier justice.

Section 89 of the Code of Civil Procedure runs as under:

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

(b) conciliation

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

(d) mediation.
(2) Where a dispute had been referred-

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

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

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

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

Section 89 came into being in its current form on account of the enforcement of the CPC (Amendment) Act, 1999 with effect from 1.7.2002 in pursuant to the recommendations of Law Commission of India and Malimath Committee report, to resolve disputes without conducting trial. The aim and objective of reviving Section 89, as stated in the Statement and Objects of the Bill Code of Civil Procedure (Amendment) Bill initiated in 1997, was to ensure effective implementation of Conciliation schemes, following recommendations of
the 129th Law Commission and make it obligatory for courts to refer to
disputes to alternate forums, so that initiation of suits in courts shall be
the last resort of parties if all other alternatives fail.

Section 89(1) CPC provides that where it appears to the court
that there exists an element 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 re-formulate 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.

These five different methods of ADR can be summarized as follows:

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

**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. However, 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. In relation to Arbitration, the Arbitration costs involve each party paying for their own costs.

Conciliation:

It is a process whereby the parties to a dispute with the assistance of a dispute resolution practitioner (the Conciliator) identify the issues in dispute, develop options, consider alternatives and aim to reach an agreement. The benefits are that the Conciliator may have an advisory role on the content of the dispute or the outcome of its resolution but does not have a determinative role. This means the Conciliator is involved in the process. In relation to Conciliation, costs are apportioned between the parties equally. The benefits of Conciliation include: a process where the parties to the dispute with the assistance of the neutral third party, the Conciliator identifies the disputed issues, develops options and considers alternatives.

The disputes such as commercial, financial, family, real estate, employment, intellectual property, insolvenecy, insurance, service, partnerships, environmental and product liability, labour disputes, service matters, antitrust matters, consumer protection, taxation, excise etc are usually conducive for conciliation.

Mediation:

It involves a process whereby the parties to a dispute with the assistance of a dispute resolution practitioner, (the Mediator) identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The Mediator has no advisory role
with regard to the content of the dispute or the outcome of its resolution but may advise on or determine the process of Mediation whereby the parties aim at resolving a dispute. In relation to a Mediation, the Mediator’s fees will be apportioned between the parties.

The benefits of a Mediation include the parties meeting on a “without prejudice basis”, the parties being guided by a Mediator who acts on an impartial basis and facilitates the parties by encouraging the parties to mediate but does not get involved in any decision making, the parties being guided by a Mediation position paper which sets out what they are seeking and ultimately wishing to concede including claims for damages, restitution and a claim for costs. The confidentiality is also maintained.

**JUDICIAL SETTLEMENT:**

There are no specified rules framed for such settlement. However, it has been provided under section 89 of the Code 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.

**LOK ADALAT:**

Lok Adalat is one of the alternative dispute redressal mechanisms, it is a forum where disputes/cases pending in the court of law or at pre-litigation stage are settled/ compromised amicably. Lok Adalats have been given statutory status under the Legal Services Authorities Act, 1987. 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. Under the said Act, the award (decision) is final and binding on all parties and no appeal against such an award lies before any court of law. If the parties are not satisfied with the award of the Lok Adalat though there is no provision for an appeal against such an award, but they are free to initiate litigation by approaching the court of appropriate jurisdiction by filing a case by following the required procedure, in exercise of their right to litigate. There is no court fee payable when a matter is filed in a Lok Adalat. If a matter pending in the court of law is referred to the Lok Adalat and is settled subsequently, the court fee originally paid in the court on the complaints/petition is also refunded back to the parties.

The persons deciding the cases in the Lok Adalats are called the Members of the Lok Adalats, they have the role of statutory conciliators only and do not have any judicial role; therefore they can only persuade the parties to come to a conclusion for settling the dispute outside the court in the Lok Adalat and shall not pressurize or coerce any of the parties to compromise or settle cases or matters either directly or indirectly. The Lok Adalat shall not decide the matter so referred at its own instance, instead the same would be decided on the basis of the compromise or settlement between the parties. The members shall assist the parties in an independent and impartial manner in their attempt to reach amicable settlement of their dispute.

**Nature of Cases to be Referred to Lok Adalat**

1. Any case pending before any court.

2. Any dispute which has not been brought before any court and is likely to be filed before the court.
Provided that any matter relating to an offence not compoundable under the law shall not be settled in Lok Adalat.

Which Lok Adalat to be Approached

As per section 18(1) of the Act, a Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of -

(1) Any case pending before; or

(2) Any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised.

Provided that the Lok Adalat shall have no jurisdiction in respect of matters relating to divorce or matters relating to an offence not compoundable under any law.

How to Get the Case Referred to the Lok Adalat for Settlement

(A) Case pending before the court.

(B) Any dispute at pre-litigative stage.

The State Legal Services Authority or District Legal Services Authority as the case may be on receipt of an application from any one of the parties at a pre-litigation stage may refer such matter to the Lok Adalat for amicable settlement of the dispute for which notice would then be issued to the other party.

IMPORTANT CASE LAWS-

The following are the important case laws related to Section 89 of the CPC:

1. Anand Gajapathi Raju and Ors. vs. P.V.G. Raju (Dead) and Ors., (2000) 4 SCC 539 - The cases where arbitration is agreed upon before or a pending suit, is governed by the 1996 Act. However,
the 1996 Act does not speak about a contingency mentioned in section 89 where the Court directs the parties to go for the plausible settlements of arbitration, conciliation et cetera and the parties go with the option of arbitration. The High Court is empowered to frame rules under the 1996 Act for the purposes involving alternate litigations under Section 89 and Order X, Rule 1A, 1B and 1C of the CPC. The 1996 act comes into play only after both the parties are referred for conciliation. However, the rules pertaining to conciliation will not apply under the 1996 act, if the parties in question are allowed to have a say in the type of Alternate Dispute Resolution they will choose; the rules will only apply when they are specifically asked to refer to conciliation. Thus, the court gets to play supervisory role and frame rules for conciliation under the 1996 Act, only if it provided the reference for the same.

2. Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) Ltd (2010) 8 SCC 24- The Ho'ble Supreme Court has summarized the procedure to be adopted by a court under section 89 of the Code as under :

a) 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.

b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR 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 ADR processes. It will then
proceed with the framing of issues and trial.

c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

d) 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, and also agree upon the arbitrator, the matter should be referred to arbitration.

e) 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 AC Act. 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 AC Act.

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR 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.
(g) 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 and there is no personal animosity between the parties (as in the case of motor accident claims), 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 facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) 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 AC Act (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). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

32. 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 ADR 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) 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.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make
available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

3. 2nd Salem Bar Association case (Salem Advocate Bar Association v. Union of India (II), AIR 2005 SC 3353) – It was held by the Hon'ble Supreme Court that the legislature’s intention behind Section 89 of CPC is to make use of the even slight chance of settlement between the parties. If there is an element of settlement, which are acceptable to the parties, the court will give them a chance to choose any of the five methods mentioned under section 89 and if the parties do not reach any conclusion as to which method to go for, the court will refer them to any of the given modes. If the reference is made for Arbitration under section 89 of the CPC, the Arbitration and the Conciliation Act, 1996 will be applicable on after the reference is made and not at any point before the reference was made under section 89 of CPC.

4. P. Moideen Sevamandir vs. A.M. Kutty Hassan, 2009 (2) SCC 198 – It was decided in the case that while deciding upon a case on merits, the court should not carry any sort of prejudice against a party for their account in front of the ADR forum. If the court does so, it will violate the guarantee against bias or prejudice in the decision making process.

Categories of cases which are not suitable for ADR process:

As per the decision in Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) Ltd (2010) 8 SCC 24, the following
categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(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.

(vi) Cases involving prosecution for criminal offences.

Categories of cases which are suitable for ADR process:

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

(i) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts (including all money claims);
- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including
- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/co-parceners/co-owners; and
- disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including
- claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes including
- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

(This list is not exhaustive)

Effect of decision of the Forums:

The decision of the forums specified under Section 89 shall be as effective, having same binding effect, as court orders/decrees and arrived at a relatively cheaper cost and within a short span of time.

Significance of ORDER X CPC:

Section 89 along-with rules 1A, 1B and 1C of Order X of CPC have been implemented by Section 7 and Section 20 of the CPC Amendment Act and cover the ambit of law related to Alternate Dispute resolution. The clauses under Order X are specified to ensure proper exercise of jurisdiction by the court. Sub-Section (1) refers to the different mediums for alternate resolution and sub-section (2) refers to various Acts in relation to the mentioned alternate resolutions. So, Section 89 has to be read with Order X CPC, which runs as follows: -

EXAMINATION OF PARTIES BY THE COURT

1. Ascertainment whether allegations in pleadings are admitted or denied.- At the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.
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.

1-B. **Appearance before the conciliatory forum or authority.**

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

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

   Where a suit is referred under rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest Civil Revision No. 3188 of 2010 [5] 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.

Thus, **Order 10 CPC provides for examination of parties by the court.** Rule 1 thereof provides that at the first hearing of the suit, the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom these are made. The Court shall record such admissions and denials. Rule 1-A provides that after recording the admission and denial, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in **Section 89** (1) CPC. On the option of the parties, the court shall fix the date of appearance before such forum or authority, as may be opted. The rules inserted under
Order X provide for when court may direct to take recourse to alternate means to resolve disputes, the duty of parties to appear before such forums and the responsibility of the presiding officer to act in interest of justice and return the suit if better suited for the court. Where a dispute is referred to any of the forum/authority under Order 10 Rule 1-A CPC, the parties are to appear before such forum or authority. Rule 1-C of Order 10 CPC provides that on failure of efforts of conciliation, the matter shall be referred back to the Court.

**Important case laws:**

- The Honourable Supreme Court in *M/s Kapil Corepacks Pvt. Ltd. and others v. Shri Harbans Lal* (since deceased) through Lrs., 2010(4) Civil Court Cases 63 has examined the scope and ambit of the Courts powers under Order 10 of the Code of Civil Procedure, 1908 and held that the scope of the power of the Court is limited to identifying 'matters in controversy' and not to prove / disprove facts.

- In *Manmohan Das v. Mt. Ramdei & Anr.* [AIR 1931 PC 175], the Privy Council observed:

  No doubt under Order 10, Rule 2, any party present in Court may be examined orally by the Court at any stage of the hearing, and the Court may if it thinks fit put in the course of such examination questions suggested by either party. But this power is intended to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18.

- A Division Bench of the Madras High Court in *Arunagiri Goundan v. Vasantharoya Koundan & Ors* (AIR 1949 Madras
18

707), held as follows referring to Order 10 Rule 2 of the
Code:

At the outset it must be pointed out that this (Order 10 Rule 2) does not
provide for an examination on oath. This provision was intended to be
used to elucidate the matters in controversy in suit before the trial
began. This is not a provision intended to be used to supersede the
usual procedure to be followed at the trial.

Thus, the object of the above rules under Order X CPC is to clear
up the obscure points by getting information and to get admission to
narrow down the issues, but, not to elicit admissions.

**Significance of ORDER XI, XII and XIII CPC etc:**

Order XI CPC deals with discovery by interrogatories and by
inspecton of documents. Every party to a suit is entitled to know the
nature of his opponent’s case to enable him to know beforehand what
case he has to meet at the hearing. Every suit contemplates two sets of
facts, namely, (1) facts which constitute a party’s case and

(2) facts by which a party’s case is to be proved.

The first set of facts discloses the nature of a party’s case and the
second set forms the evidence of his case. A party is entitled to know
beforehand only the first set of facts, and not the facts which constitute
exclusively the evidence of his opponent’s case. If the second set was
also available to the opponent beforehand, it would enable an
unscrupulous party to tamper with his opponent’s witnesses, and to
fabricate evidence in contradiction, and so shape his case as to defeat
justice.
The lacuna in the first set of facts mentioned above can be filled up by discovery i.e., obtaining information by one party to the suit on oath from another party. Such discovery enables a party to ascertain the nature of his opponent’s case or the material facts constituting his case. It proceeds on the principle that every party to a suit is entitled to know the nature of his opponent’s case so that he may know beforehand what case he has to meet at the hearing. It also enables a party to obtain admissions from his opponent to facilitate the proof of his own case. It is of two kinds Viz.,

1) **Discovery by interrogatories** of facts relevant to the issues in the action and within the knowledge of the party interrogated; and

2) **Discovery of documents** relating to the matters in the action and in the possession of the third party.

**Discovery by Interrogatories:**

Either the plaintiff or defendant may administer interrogatories to the opposite party, if the nature of the other’s case as disclosed in his plaint or written statement, as the case may be, does not sufficiently disclose the nature of the party’s case. Before interrogatories are administered to the other party, it is necessary to obtain leave of the court to do so.

The object of interrogatories is

(1) To ascertain the nature of your opponent’s case or the material facts constituting his case;

(2) To support your own case, either

   (a) Directly, by obtaining admissions, or

   (b) Indirectly, by impeding or destroying your adversary’s case.
This results in narrowing the points in issue and also eliminates proving facts which are, admitted.

Interrogatories will not be allowed in the following cases:

1. For obtaining discovery of facts which constitute exclusively the evidence of his adversary’s case of title.

2. For any confidential communications between his opponent and his legal advisers.

3. For any disclosure injurious to public interests.

4. An interrogatory although relevant to and bona fide for the purposes of a suit may be premature, in which case it will not be allowed.

5. Interrogatories must not be fishing in nature, that is to say, they must refer to some definite and existing state of circumstances, and must not be put merely in the hope of discovering something which may help the party interrogating to make out some case.

Procedure:

Any party to a suit by leave of the court may deliver written interrogatories for examination of the opposite parties or anyone or more of such parties, stating at the foot thereof which of such interrogatories each of such persons is required to answer. No party shall deliver more than one set of interrogatories to the same party without an order for that purpose and interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant. (Order XI, Rule 1).

Object of the Interrogatories—to obtain information to destroy opponent’s case:

The purpose of this rule is to enable a party to require information from his opponent to the purpose of maintaining his own case or for
destroying the case of the adversary. The main object of interrogatories is to save expenses and shorten the litigation by enabling a party to obtain from his opponent information as to facts material regarding the question in dispute between them or to obtain admission of any facts which he has to prove on any issue which is raised between them. A party is entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on and to limit the generality of the pleadings and find out what is really in issue.

**Time limit:**

Interrogatories shall be answered by affidavit to be filed within ten days, or within such further time as the court, may allow. (Order XI, Rule 8).

Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may obtain orders from the court requiring him to answer further either by affidavit or viva voce examination. (Order XI, Rule 11).

**Objections to interrogatories by answer:**

The party answering any interrogatory may take objection on the ground that it is:

(a) scandalous or

(b) irrelevant or

(c) not exhibited bona fide for the purpose of the suit, or

(d) that the matters inquired into are not sufficiently material at that stage, or

(e) on the ground of privilege or

(f) may take any other ground. (Order XI, Rule 6).

Any interrogatories may be set aside on the ground that they have
been exhibited: (a) unreasonably or (b) vexatiously. (Order XI, Rule 7).
Any interrogatories may be struck out on the ground that they are: (a) prolix, (b) oppressive, (c) unnecessary, or (d) scandalous. (Order XI, Rule 7).

**Discovery of documents:**

Any party may, without filing any affidavit, apply to the court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. The court may either refuse or adjourn the application if satisfied that such discovery is not necessary or not necessary at that stage of the suit, or make such order as may be thought fit (Order XI, Rule 12).

**Classes of Documents subject to Discovery:**

Documents in respect of which discovery is claimed may be divided into two classes:

(a) Those which the adversary is entitled to inspect and

(b) Those which he is not entitled to inspect.

The adversary is entitled to inspection of all documents which do not come within class (b). Where a party is ordered to make his affidavit of documents, he must set forth in the affidavit all documents which are or have been in his possession or power relating to all matters in question in the suit.

**Grounds of objection:**

A party who is directed by court to make discovery of documents should file an affidavit specifying which of the documents he objects to produce, or state on oath if he has no such documents. [Order XI, Rule
There are three grounds on which production of documents can be resisted as of right. They are:

(1) A party is not bound to produce for the inspection of his **opponent documents which of themselves evidence exclusively the party’s own case of title**;

(2) A party is not bound to produce any **confidential communications** between him and his legal adviser; and

(3) A party is not bound to produce any **public official document**, if its production would be injurious to public interests.

The court may at any time during the pendency of any suit order any party to produce on oath any documents in his possession or power relating to the suit. [Order XI, Rule 14].

**Inspection of documents referred to in pleadings or affidavit:**

Every party to a suit may give notice to any other party, in whose pleadings or affidavits reference is made to any document, or who has entered any document in any list annexed to his pleadings, to produce such document for the inspection of the party giving such notice, or of his pleader and to permit him or them to take copies thereof.

The party not complying with such notice shall not afterwards be allowed to put any such document in evidence on his behalf in such suit unless he satisfies the court that such document relates only to his own title, he being a defendant to the suit, or that he had some other sufficient cause or excuse. (Order XI, Rule 15).

The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers’ books,
account books or books in constant use for any trade or business, at
their usual place of custody, and stating which, if any, of the
documents he objects to produce and on what ground. (Order XI, Rule
17).

**Non-compliance with order of discovery:**

When any party fails to comply with any order to answer
interrogatories, or for discovery or inspection of documents, he shall, if
a plaintiff, be liable to have his suit dismissed for want of prosecution,
and, if a defendant, to have his defence, if any struck out, and to be
placed in the same position as if he had not defended, and the party
interrogating or seeking discovery or inspection may apply to the court
for an order to that effect, and an order may be made on such
application accordingly after notice to the parties and after giving them
a reasonable opportunity of being heard. Where an order is made
dismissing the suit, the plaintiff shall be precluded from bringing a fresh
suit on the same cause of action. (Order XI, Rule 21). The provisions of
Order XI, Rule 21, C.R.C. are not applicable to cases of non-compliance
with the order for production of documents under Order XI, Rule 14,
C.R.C. The suit cannot be dismissed for non-compliance of the directions
of Order XI, Rule 14, C.P.C. under Order XI, Rule 21(2), C.P.C. and at best
the Court could draw an adverse inference because of non-production
of documents by the plaintiff.

**Significance of ORDER XII and XIII of CPC**

Order XII CPC deals with admissions. Any party may, by notice in
writing at any time not later than nine days before the day fixed for the
hearing, call on any other party to admit, for the purpose of the suit
only, any specific fact or facts mentioned in such notice. (Order XII,
Rule 4). Where admissions of fact have been made, either on the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order, or give such judgment, as it may think fit having regard to such admissions. (Order XII, Rule 6). Where the suit was decreed in view of written statement filed by the defendant admitting the claim of petition as correct, it is judgment on admission and not a compromise decree.

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.

Rule 6 of Order XIV of the Code deals with the issue where the parties are in agreement on some issues of fact or law. If the parties agree and limit the question of fact or law to be decided between them, they may state the same in the form of issues and enter into an agreement in writing that, upon findings of the court, negative or affirmative, on such issues, the court would ascertain the right of the parties. Some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them or as that other may direct; or one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.
Order XIII CPC deals with the procedure to file documents. It emphasizes to compel the parties to file documents on which their respective case rests upon, at the time of filing plaint or written statement, before settlement of issues, except under circumstances where documents are
(a) Produced for the cross-examination of the witnesses of the other party; or
(b) Handed over to a witness merely to refresh his memory. (Order XIII, Rule 1).

Such provision enables the court to restrain the parties to introduce new and fabricated documents, except under reasonable circumstances and to avoid the parties to delay the trail. It also enables the parties to narrow down the issues.

Order XIV Rule 7 of the Code indicates that when the court is satisfied:
a) that the agreement was duly executed by the parties;
b) that the parties have a substantial interest in the decision of such question as aforesaid; and
c) If the court finds that such agreement is fit to be tried and decided, then the court shall proceed to record and try the issue and state its findings or decision thereon and thereafter decide the case according to the terms of the agreement.

In *Maria Margadia Sequeria v. Erasmo Jack De Sequeria* (2012), where in the Honourable Supreme Court, held that discovery was one of the main purposes of the existence of courts and further made some telling observations:

“A judge in the Indian System has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise
of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that “every trial is a voyage of discovery in which truth is the quest”. In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

41. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized.

42. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be frequently used is rarely pressed in service by our judicial officers and judges.”

The Court also quoted from the report of the Malimath Committee, which had highlighted the drawbacks in a strictly adversarial system and recommended that courts be statutorily mandated to become active seekers of truth. This fundamental shift in the Indian approach to disputes must be borne in mind when one invokes the mechanisms for discovery. In A. Shanmugam v. Ariya K.R.K.M.N.P.Sangam (2012), the Court, apart from reiterating the ratio of Maria Margadia Sequeria, categorically observed that ensuring discovery and production of documents and a proper admission or denial is imperative for the effective adjudication of civil cases.

Conclusion:

As referred above, the main object of section 89 CPC is to shorten the litigation, narrow down the issues and settle the disputes at early stage, with the consent of parties and with less expenses, without adhering to the traditional and lagging procedure by way of
conducting trial. Further, strict adherence to Section 30 and Orders X, XI, XII, XIII, XVI, and XVIII of CPC which deal with the powers of court for discovery and interrogatories to ascertain what case he has to meet and the facts relied on and to limit the generality of the pleadings and find out what is really in issue, to save expenses and shorten the litigation. So, compliance of these provisions in proper manner at proper time enables the Court to settle the disputes at the earliest point of time.