

Paper/Article by

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in the unit of District Judge, Srikakulam**

Role of Referral Judges, Lawyers and Parties in Mediation:

1. Mediation is about communicating, persuading and being persuaded for a settlement. The process of Mediation consists of Parties, Mediator, Referral Judge as well as Advocates of concerned parties. Mediation being a somewhat a new process there is little support from the Advocates and there is a misconception prevailing in the Advocates as well as Judicial System that the role of the Advocates and Judges in Mediation is optional but the said conception is erroneous and the Judges who are the Referral Judges and the Advocates play a vital role in the entire process of Mediation.

2. A Referral Judge is a Judge, who refers the cases for settlement through any of the ADR Methods and the Referral Judges shall refer the cases for Mediation, which are suitable for Mediation and the success of Mediation, will depend upon the proper selection and reference of the suitable cases, by the Referral judges. The Mediation is one of the modes of ADR, where parties are encouraged to communicate, negotiate and settle their disputes, with the assistance of Mediator, who is also called as Neutral Facilitator.

3. The role of a lawyer in Mediation is functionally different from his role in Mediation and the service rendered by the lawyer to the party, during the Mediation process, is a professional service. The Lawyers should know the concept and process of Mediation and must play a positive role by assisting the parties in Mediation. The Role of the Lawyer, commences even before the case, comes to the Court and continues through-out the Mediation process, though the dispute had been settled or not.

4. The parties, whose case is referred for Mediation, though get the assistance of their advocate and the Neutral Mediator, the final decision is of the parties and with regard to the parties are concerned, the whole process of Mediation, is voluntary, though the consent of the parties, is not mandatory, for referring a case to Mediation and they have the authority to

decide whether the dispute should be amicably settled or not and about the terms of the settlement.

5. Section 89 of Code of Civil Procedure, reads as follows :

Section 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 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."

And

Order-X Rule-1A of Code of Civil Procedure, reads as follows :

Order-X Rule-1A :

"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".

6. As per above mentioned provision of Law, the Court is required to direct the parties to opt for any of the Five methods of Alternate Dispute Resolution and refer the case for Arbitration, Conciliation, Judicial Settlement, Lok-Adalat or Mediation. In the light of judicial pronouncements, a Referral Judge is not required to formulate the terms of settlement and to make them available to parties for their observation and the Referral Judge is required to acquaint with the case and nature of the

dispute between the parties, to assess the suitability of the case for reference to ADR. The appropriate stage for referring the matter to ADR process is after completion of pleadings and before framing of the issues and if the Court did not refer the case to ADR Process, before framing issues, the same can be considered at a later stage also.

7. The consent of all the parties to the suit, is necessary to refer the suit for arbitration, but under Section 89 of CPC, the consent of the parties, is not mandatory for referring the case for Mediation, Lokadalat or judicial settlement, and, mere absence of consent for reference, does not affect the voluntary nature of the Mediation process, as the parties, still retain the freedom to agree or disagree for settlement during Mediation. The Referral Judge shall post the case for further proceedings on a specific date, by granting time to complete the Mediation process to avoid delay in the trial of the case.

8. Cases relating to trade, commerce and contracts including disputes relating to money, disputes relating to specific performance, disputes between suppliers and customers, bankers and customers, landlords and Tenants, insurer and insured; cases relating to matrimonial causes (maintenance, custody of children), dispute relating to partition, dispute relating to partnership; cases relating to disputes between neighbours (easementary rights, encroachments, nuisance etc), disputes between employers and employees, disputes among members of society or associations; cases relating to tortious liability and claims for compensation in motor accidents and all consumer disputes, are suitable for the ADR Process.

9. The Referral Judge must play a crucial role in motivating the parties to resolve their disputes, through Mediation and the Referral judge may try to ascertain the reason, if the parties are not inclined to agree for Mediation, in order to persuade and motivate them for Mediation. It is the duty of the Referral judge to explain the concept and process of Mediation and its advantages.

10. The Lawyers play an important role in Mediation process, which is divided into 3 phases. They are : 1) Pre-Mediation, 2) During Mediation and 3) Post-Mediation.

11. During the Pre-Mediation process, the Lawyer must first consider whether there is scope for resorting to any of the ADR mechanisms and

when the Lawyer considers that the Mediation is the appropriate mode and suitable to the parties, he must educate the party, about the concept, process and advantages of Mediation and the Lawyer is best placed to assist his client to understand the role of the Mediator, as a Facilitator. The Lawyer helps the client to understand the process of Mediation, which is not merely to settle the dispute and dispose-off the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy the underlying interests of the parties.

12. The Role of Lawyers during the Mediation process and their participation, is often constructive, but sometimes, it may be non-cooperative and discouraging and the attitude and conduct of the lawyer influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and success of Mediation, the Lawyers must have a positive attitude and must demonstrate faith, in the Mediation process. It is the duty of the lawyer to observe the ground rules of the Mediation, explained by the mediator and advise the party also to observe them. It is also the duty of the lawyer to get prepared on the facts, law and the precedents and he must enable and encourage the party to present his case, before the mediator and the lawyer must be alert and vigilant at the time of presentation of the case, by his client. The duty is cast upon the Lawyer to participate in finalizing and drafting the settlement between the parties and ensure that the settlement recorded, is complete, clear and executable and make the client understand every term of settlement.

13. After conclusion of the Mediation process, if no settlement has been arrived, the Advocate must assess and guide the parties, either to continue with the litigation or to consider opting for another ADR mechanism. If the settlement between the parties, has been reached, before the Mediator, it is the responsibility of the lawyer, to reassure the client, about the appropriateness of his client's decision and to advise against any second thoughts. The lawyer must also co-operate with the Court in execution of the Order, passed in terms of settlement by upholding the spirit of settlement.

14. During the process of Mediation, the parties should focus on their interests rather than their entitlements or legal technicalities and the parties are free to avail the services of Lawyers, in connection with Mediation. Each party needs to communicate its view to the other party and should be open

to receive such communication in return, as speaking and listening are equally important. A settlement duly arrived at between the parties in Mediation, is binding on the parties and the parties are bound to co-operate in the execution of the order, passed in terms of the settlement.

15. In Anubhandari Vs. Pradeep Bhandari, 2018 (2) ALT SC, 99 (D.B.), it was held that the jurisdiction of a Family Court, is not just to decide a dispute, but also to involve itself in the process of Conciliation or Mediation between the parties, for assisting them, not only to settle the disputes, but also to secure speedy settlement of disputes and also prevent sporadic litigations between the parties.

16. In Krishnaveni Nagam Vs. Harish Nagam 2017 (5) ALT SC 4 (D.B.), it was held that if the parties seek Mediation, the transferee Court may explore the possibility of amicable settlement through Mediation Process.

17. In Suresh Narayan Kadam & others Vs. Central Bank of India & others, 2016(3) ALT (D.N) (SC) 35 (D.B.), it was had held that **DISPUTES FOR AMICABLE SETTLEMENT Mediation** centre functioning in Supreme Court premises itself Mediation centres across the Country in a large variety of disputes, including matrimonial disputes, in spite of the encouragement given by Supreme Court, for one reason or another, institutionalized Mediation, has yet to be recognized, as an acceptable method of dispute resolution.

18. In Sailesh Dhairyavan Vs. Mohan Balakrishna Lulla 2016 (3) ALT (D.N.) (SC) 2 (D.B.), it was held that as per Section 89 of Code of Civil Procedure, Court hearing a suit may formulate terms of Settlement between the parties and settle the same or refer the same, for settlement, by Conciliation, Judicial settlement, Mediation or Arbitration and the purpose of Section 89 of CPC, is to encourage the parties to settle the disputes, by adopting one of the Four methods, provided in Section 89 of CPC.

THE REFERRAL ORDER

19. The Referral judge should understand the importance of Referral order in the Mediation process and should not have a casual approach in passing the order as the Referral order is the foundation of a Court referred Mediation.

20. An ideal Referral Order should contain the details like the name of the Referral Judge, Case Number, Name of the parties, Date and Year of institution of the case, Stage of trial, Nature of dispute, Statutory provision under which the reference is made, next date of hearing, before the Referral court, whether the parties had consulted for Mediation, Name of the Institution/Mediator, to whom the case is referred for Mediation and the time limit for completing the Mediation, alongwith the quantum of fee and complete address and telephone numbers of the parties and advocates.

21. After conclusion of Mediation, the Referral Judge, plays a crucial role, as the Court retains its control and jurisdiction over the matter and the result of Mediation, will have to be placed before the Court, for passing consequential Orders and before considering the report of the Mediator, the Referral Judge shall ensure the presence of the parties in the Court. It is open to the Referral Judge, to explore the possibilities of settlement between the parties and to protect the confidentiality of the Mediation process and there should not be any communication, between the Referral Judge and the Mediator regarding the Mediation, during or after the process of Mediation.

22. The Referral Judge should examine the Agreement between the parties whether the same is Lawful and enforceable, if the dispute has been settled in Mediation and if the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the Referral Judge shall desist from acting upon such agreement. But, if the agreement is found to be Lawful and enforceable, the Referral Judge should act upon the terms and conditions of the agreement and pass Consequential Orders. The Referral Judge can also modify or amend the terms of settlement, if there is any technical or procedural difficulty in implementing the settlement between the parties with the consent of the parties.

DO's for Referral Judges :

There are certain positive actions to be taken by the Referral Judges, while referring the matter for Mediation process. They are:

- 1) Ensure the presence of parties, before Referral for information.
- 2) Assess the relevant facts of the case.
- 3) At the time of Referral, interest with the litigants, eliciting information and explaining the process.
- 4) Explaining the benefits, such as no cost, refund of Court fees, timely resolution of disputes and process of the Mediation to the litigants.
- 5) Pass an appropriate Referral order and obtain signature of the parties/Advocates, on Referral order.

- 6) Direct the parties as well as their advocates to appear before the Mediation cell on a fixed date and time.
- 7) Fix date, schedule of the trial, i.e. next date of effective hearing, before the Court, at the time of Referral.

DON'Ts for Referral Judges :

There are certain things, which should not be done by the Referral Judges, while referring the matter for Mediation process. They are:

- 1) Do not refer a case, where either of the parties, are exparte.
- 2) Cases pertaining to Constitution/Public policy, should not be referred.
- 3) Mediation should not be allowed, as a tool for delay of the Trial.
- 4) The case should not be referred for Mediation, only for the sake of the reference.
- 5) Do not refer the case, without making any objective assessment of the case.
- 6) Do not have any communication with the mediator, as the Mediation proceedings are Confidential.

23. Mediation has significant potential, not merely for reducing the burden of arrears, but more fundamentally for bringing about a qualitative change in the focus of the legal system from adjudication, to the settlement of disputes. The success of Mediation will depend not merely upon the evolution of an appropriate legal and regulatory framework, but upon addressing basic issues of Human Resource Development. Inducing a system to evolve from litigation, oriented approach, to a more curative or preventive approach, involves much more than the development of Law. Above all, confidence in the Mediation process will be fostered only, if the Mediator discharges in positive terms, the ethical concerns of a process to which the role of a Mediator is central.

24. Hon'ble Justice C.Nagappan emphasized that the Role of the Judges, is very important both at Pre-Mediation stage as well as Post-Mediation and the trial Judge must have the knowledge of Mediation and should also be convinced of the benefits of Mediation to be able to prevail upon the advocates and encourage them and motivate the parties to resort to Mediation. However, care has to be taken that Mediation shall not be used as a tool for delay and participation of the party, must be in good faith.

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