Pivotal Role of the Counsel in Mediation from Advocate to Advisor

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Abstract:

Pending cases across various courts in India are moving towards the five crore-mark with an over 4.32 crore backlog in subordinate Courts, over 69,000 cases are pending in the Supreme Court, while there is a backlog of more than 59 lakh cases in the High Courts. Courts in India are extremely burdened and desperately congested, and in view of the alarming rate of high pendency of cases, dispute resolution mechanism like mediation is an important tool.

Mediation is a structured procedure in which the parties discuss their disputes with the objective of resolving their conflicts with the assistance of a trained impartial third person(s) known as the mediator. The parties try to reach a settlement through effective communication and negotiation. In mediation, the central role is played by the disputants, because it is the parties who have to enter into a settlement amicably. The mediator encourages the parties to resolve their disputes, but in this whole process, a major role is played by Advocates.

They quickly became aware that the mediation process required a modified skill set. To assist their clients and advance the goals of mediation, it is often useful for lawyer to shift gears, adopt different strategies and emphasize skills which may lean more heavily towards being an advisor than an advocate.

Key Words: Mediation, Legislative framework, Judiciary, Role of Advocate

I. Introduction:

Alternative Dispute Resolution system (herein after referred as ADR) refers to any method of resolving disputes without litigation. ADR regroups all processes and techniques of conflict resolution that occur outside of any governmental authority. The most famous ADR methods are Mediation, Arbitration, Conciliation and Negotiation.

Mediation is not something new to India, centuries before the British arrived, India had utilised a system called the *panchayat* system, whereby respected village elders assisted in resolving community disputes. Also, in pre-British India, mediation was popular among businessmen. Impartial and respected businessman called '*Mahajans*' were requested by business association members to resolve disputes using an informal procedure, which combined mediation and arbitration.[1]

[1] David Spencer, "Liability of lawyers to advice on Alternative Dispute Resolution options", Australian Dispute Resolution Journal, 1998, p. 302.

In India, in spite of 'Delivery of Justice' being the objective of judiciary people are not accepting the verdict of Court to end their disputes. Many a time, even the final binding decisions by the highest Courts is bringing an end to the litigation but not to the actual dispute, consequently giving birth to a fresh litigation through the old dispute. In such a situation ADR mechanism play a vital role in the resolution of disputes.[2]

Mediation provides a comfortable platform for the disputing parties to work together to erase their perceived injustice to the extent possible and replace the same with their own perceived justice.

II. Concept of Mediation: The parties have ultimate control over the outcome

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute. It can also be called as essential search for a solution by the parties to the dispute with the assistance of a third party or mediation is assisted communications for agreement.[3]

Mediation is voluntary. The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

It is said that the pendency of cases across Indian courts has increased by 38% in the last decade. The mediation is required to be tailored to the needs of potential litigants as to quality and responsive justice within time and within minimum cost.[4]

Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator and Advocate have active roles in mediation, the parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process. The mediation process itself is structured and formalized, with clearly identifiable stages. However, there is a degree of flexibility in following these stages.

In mediation, mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute. The mediator is a guide who

[2] S. Susheela., Mediation Readers Handbook,1st ed., Asian Law House, Telangana, 2012, p.25.
[3] Dr. Mahabhushi Sridhar, Alternative Dispute Resolution- Negotiation and Mediation, 1st ed., Lexis Nexis Butterworth's Publications, 2006, Great Britain, p.38.
[4]Available at www.prsindia.org (PRS Legislative Research Centre for Policy Research, New Delhi).

helps the parties to find their own solution to the dispute. The mediator's personal preferences or perceptions do not have any bearing on the dispute resolution process.

In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator facilitates when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement.

III. Reasons to Choose Mediation Instead of Litigation:

Mediation contributes to the ultimate satisfactory resolution of a matter and thus more advantageous than the traditional way of litigating. Some of the advantages of mediation are:

1. **Voluntary process:** Mediation is voluntary. No one can force the parties to accept an agreement. The mediator does not make any rulings or decisions. The parties are free to craft the resolution, whether it would otherwise be available in court or not, that will work best for them. Creativity in the outcome is highly valued and the resolution is reached only if both parties agree that it will work.
2. **An independent person Listen to the issues:** An independent third party, the mediator, will really listen to the issues. In litigation, very often the real issues become hidden by the legal technicalities, the arguments between counsel, and the procedural entanglements. In mediation, a skilled mediator will listen to issues described by the parties themselves, and help direct them to an agreeable resolution.
3. **Low cost:** The first advantage is that mediation is available at no cost to the parties or in other words, it is free of cost. But now since mediation process is being institutionalised and made professional, it requires expenditure of a minimum amount of money from the parties. Mediation is generally less expensive as compared to the expense of litigation which is spent in courts.
4. **Speedy and Time Saving:** Mediation is much quicker than waiting for a trial, and an appeal, of a legal dispute. The parties will eliminate the fear, anxiety, and risk of going through the legal system, and will be able quickly to put the dispute behind them with a satisfactory solution that they have created. Mediation often provides a timelier way of resolving disputes.
5. **A Fair and neutral:** The Mediation process is very fair being given a chance to the parties and being heard on both sides, the settlement to the parties to the dispute is made when both the parties agree. The mediator do not favour any party and plays neutral role.
6. **To both parties it's a Win-win situation:** Since both the parties come to a mutual understanding and finally agree to end the litigation, nobody is a looser and both are winners.
7. **Avoids further Litigations:** Mediation is less expensive than the usual law suits and also avoids the uncertainty of judicial outcome.
8. **Solutions are tailor made in mediation:** The mediation just being a neutral party assists both the parties in reaching a voluntary mutually beneficial resolution to which both the parties are satisfied.

9. Parties may express their views: Both parties in mediation discuss openly their views on the underlying dispute. This improved communication can lead to a mutually satisfactory resolution. People who negotiate their own settlement often feel powerful then those who use lawyers to represent them. People are happy for given a chance to represent themselves.

IV. Legislative framework on Mediation: Ancient to Recent

As recorded in Mulla's Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. and it is possible that some of the Vedic hymns were composed at a period earlier than 4000 B.C. The early Aryans were very vigorous and unsophisticated people full of joy for life and had behind them ages of civilized existence and thought. They primarily invoked the unwritten law of divine wisdom, reason and prudence, which according to them governed heaven and earth.

The concept of Mediation is ancient and deep rooted in India. From Lord Krishna mediating between Kauravas and Pandavas in the Mahabharata, to family elders resolving domestic issues, to the resolution of disputes at the community level through *Panchayats*, there exists a strong culture of mediation in India. With the passage of time, there are certain statutes which provide for mediation as a mode of settlement of disputes between the parties.

Government through the Constitution (Forty-second Amendment) Act, 1976 added Article 39A to the Directive Principles of State Policy (DPSP). The language of Article 39A is known in mandatory terms, it mandates free legal aid to weaker sections of the society.

The following legislative framework provided in India to settle the dispute by way of ADR system.

1. The Industrial Disputes Act, 1947:

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are " charged with the duty of mediating in and promoting the settlement of Industrial disputes." Detailed procedures were prescribed for conciliation proceedings under the Act.

2. The Special Marriage Act, 1954:

Section 29 (2) of the Special Marriage Act, 1954 states that, in disposing of any application under this Section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the district court shall have regard to the interests of any children of the marriage, and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year.

Unlike the adversarial system in which the competing claims of parties are represented by legal representatives who have interest in the outcomes of dispute, in matrimonial and family matters, it is important to visualize

and analyse the underlying interest of the parties, no matter however diverse may be their positions. It is the skill of the mediator to facilitate the parties to try to arrive at an amicable settlement.

3. The Hindu Marriage Act, 1955:

Section 14 (2) of the Hindu Marriage Act, 1955 states that, in disposing of any application under this Section for leave to present a petition for divorce before the expiry of one year from the date of marriage, the court shall have regard to the reasonable probability of reconciliation between the parties before the expiry of one year. Therefore, the intent of the legislators is that the court should in the first instance attempt mediation between the parties.

4. Legal Services Authority Act, 1987:

Legal Services Authorities at the Centre, State, District and taluka level are statutory authorities established by the Legal Services Authorities Act, 1987 with the object to provide free legal service to the weaker sections of the society to ensure that justice is not denied to any citizen on account of economic or any other disability.

As per Section 89 (2) of CPC, where a dispute has been referred to *Lok Adalat*, the Court shall refer the same to the *Lok Adalat* in accordance with the provisions of Section 20 (1) 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*.

Lok Adalats have been given statutory status under the Legal Services Authorities Act, 1987. It has been provided under Section 21 of the Legal Services Authority Act, 1987 that a award (Settlement) made by *Lok Adalat* is deemed to be a decree of a court and is a final and binding on parties. No appeal against such an award lies before any court of law.

5. The 129th Law Commission of India Report, 1988:

The 129th Law Commission Report has recommended making mediation as mandatory for the courts to refer disputes for resolution through ADR rather than litigation.

6. The Code of Civil Procedure (Amendment) Act 1999:

In 1999, the Indian Parliament passed the Code of Civil Procedure (Amendment) Act, 1999 inserting Section 89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation.

As per Section 89 read with Order X Rule 1A of the CPC, after recording the admission and denial of documents, the Court shall direct the parties to the suit to opt for any of the modes of settlement outside Court as specified in Section 89 (1) of the CPC that is arbitration, conciliation, judicial settlement including settlement through *Lok Adalat* or mediation.

Therefore, it provides for the reference of the cases pending before the courts to the aforesaid modes of dispute resolution.

7. Mediation and Conciliation Rules, 2004:

In exercise of its powers under Part X and Section 89 (2) (d) of CPC, the High Court of Delhi has framed these rules. It is further pertinent to note that India is a signatory to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Mediation Convention) which gives mediation settlements the force of law.

On the analysis of the aforesaid statutory provisions, it can be said that we have provisions concerning mediation or use of conciliation in resolving the disputes. A uniform legislation concerning mediation would create legal sanctity and avoid the inconsistencies between the various pieces of existing legislations. Even though various statutes have given the parties the autonomy to get their disputes resolved via mediation and there exist court referred as well as private means of engaging in mediation, there is lack of procedural guidance in this regard.[5]

Through a unique step, Supreme Court has set up a panel to have a draft legislation to give a legal sanctity to disputes settled through mediation, which would then be sent to the Government as a suggestion from Apex Court. An Indian Mediation Act as suggested by the Supreme Court is indeed a promising proposal in India.

8. The Micro, Small and Medium Enterprises (MSME) Development Act, 2006:

Section 18 of the Micro, Small and Medium Enterprises (MSME) Development Act, 2006 provides that any party to a dispute with regard to any amount due under Section 17 (disputes regarding the payment of amount to MSMEs), make a reference to the Micro & Small Enterprises Facilitation Council. On receipt of a reference, the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply.

9. Companies Act, 2013 read with the Companies (Mediation and Conciliation) Rules, 2016:

Section 442 of the Companies Act, 2013 provides that the Central Government shall maintain a panel of experts called the Mediation and Conciliation Panel consisting of such number of experts, having such qualifications, as may be prescribed for mediation between the parties during the pendency of any proceedings before the Central Government or the Tribunal or Appellate Tribunal under this Act. Rule 3 of the Companies (Mediation and Conciliation) Rules, 2016 provides for a Panel of Mediators or Conciliators.

[5] http://www.mondaq.com/india/arbitration-dispute-resolution/957898/mediation-current-jurisprudence-and-the-pathahead- visited on 03.01.2021 at 5.35 pm.

The aforesaid provisions provide for referral of disputes pending adjudication before the National Company Law Tribunal and Appellate Tribunal, to mediation.

10. The Commercial Courts Act, 2015:

Pre-Institution Mediation and Settlement is dealt under Chapter IIIA of the Commercial Courts Act, 2015 which is inserted by 2018 amendment to the Act. Section 12A clearly states that a suit, which does not contemplate any urgent interim relief, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government. It is therefore, mandatory for parties to exhaust remedy of pre-institution mediation under the Act before the institution of a suit.

11. The Real Estate (Regulation and Development) Act, 2016:

Section 32 of the Real Estate (Regulation and Development) Act, 2016 provides for the functions of the Authority for the promotion of real estate sector. Sub clause (g) of Section 32 of this Act states that the Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government of the competent authority as the case may be, to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations.

12. The Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018:

The Central Government has framed and thereafter notified these Rules on July 3, 2018 in exercise of its powers conferred by sub-section (2) of Section 21A read with sub-section (1) of Section 12A of the Commercial Courts Act, 2015.

13. The Consumer Protection Act, 2019:

It has been clearly provided under Section 37 (1) of the Act that at first hearing of a complaint after its admission or at any later date, if it appears to the District Commission that there exist elements of a settlement which may be acceptable to the parties, it may direct the parties to give in writing within 5 days, their consent to refer the matter to mediation and the provisions of Chapter V of the Act shall apply.

V. Role of Judiciary in promoting Mediation:

Hon‘ble Justice P.N. Bhagwati and Hon‘ble Justice Krishna Iyer of the Supreme Court of India, emphasized the need for revival of the informal dispute resolution system in India.

Supreme Court in *Salem Bar Association v. Union of India*[6] observed that "the provision of Section 89 of the CPC has been inserted to ensure that all the cases which are filed in the courts need not necessarily be decided by the courts." It opined the need to promote Alternate Dispute Resolution. It therefore, considered Section 89 to be a welcome step. It was therefore suggested by the Supreme Court, that a Committee be constituted so as to ensure that the amendments made to the Code of Civil Procedure become effective and result in quicker dispensation of justice.

Apex Court in *Afcons Infrastructure v. Cherian Varkey Construction Co. Ltd*.[7] observed that, although it is not possible to lay down an exhaustive list concerning the matters which may be mediated, yet an illustrative list was laid down. This list comprises of all cases related to trade and commerce, all cases arising from stained relationships, all cases where there is a need of continuation of the pre- existing relationship, inspite of the disputes, all cases related to tortious liability and all consumer disputes. All such matters as laid down supra may be mediated. Further, the Apex Court explained the anomalies in Section 89 of the Code of Civil Procedure, when it may be invoked; the categories of cases which are not suitable for Alternate Dispute Resolution and the scope and ambit of conciliation.

In *MR Krishna Murthi v. New India Assurance Co. Ltd*.[8] the Supreme Court while considering a plea seeking reform in the Motor Vehicle Accident Claims system, asked the Government to consider the feasibility of enacting Indian Mediation Act to take care of various aspects of Mediation in general and issued several directions to the Government. The Supreme Court further directed the Government to examine the feasibility of setting up a Motor Accidents Mediation Authority (MAMA) by making necessary amendments in the Motor Vehicles Act. The Apex Court further directed National Legal Services Authority (NALSA) to set up Motor Accident Mediation Cells (MAMC), which can function independently under the aegis of NALSA or can be handed over to Mediation and Conciliation Project Committee (MCPC).

A Constitution bench of the Supreme Court ordered a court-monitored mediation in the *Ayodhya dispute (M. Siddiq (D) v. Mahant Suresh Das*[9]. In this case Supreme Court observed that, "We have considered the nature of the dispute arising. Notwithstanding the lack of consensus between the parties in the matter we are of the view that an attempt should be made to settle the dispute through mediation."

Further, it has observed that, "Considering the provisions of CPC, indicated above, we do not find any legal impediment to making a reference to mediation for a possible settlement of the dispute(s) arising out of the appeals."

It also observed that, "mediation proceedings should be conducted with utmost confidentiality so as to ensure its success which can only be safeguarded by directing that the proceedings of mediation and the views expressed therein by any of the parties including the learned Mediators shall be kept confidential and shall not

[6] (2003) 1 SCC 49
[7] (2010) 8 SCC 24
[8] 2019 SCC Online SC 315
[9] Civil Appeal No. 10866-10867 of 2010) vide its Order dated March 8, 2019.

be revealed to any other person. We are of the further opinion that while the mediation proceedings are being carried out, there ought not to be any reporting of the said proceedings either in the print or in the electronic media."

The reference of the highly sensitive *Ayodhya* dispute to mediation by the Supreme Court has brought the mediation process to the attention of the people. In order to take the mediation ahead and use it in the best possible manner, it is important to spread its awareness amongst the public. Those engaged in mediation must acquire mediation skills in a scientific and structured manner. Many relationships can be saved through mediation and also the burden of cases upon the courts will reduce.

VI. Role of the Counsel in Mediation from Advocate to Advisor: Going Beyond Mere Problem-Solving

In mediation, the role of lawyer is fundamentally different from his role in litigation. Since the lawyers have very proactive role to play in this, they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. Since lawyers have a proactive role to play in the mediation process, they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. The role of lawyer starts even before the case comes to the court and it continues throughout the mediation process and even thereafter, whether the dispute has been settled or not.

The features of mediation include severability, flexibility, party-participation, consensus, self-reflection and preservation of ongoing relationships etc., it fosters peaceable and healthier inter-personal interactions in the long term, thereby pre-empting the causes of conflict in the society.

The right mediator is one who demonstrates overriding neutrality in evaluating and resolving the case. The effective mediator will help the parties to recognise the strengths and weaknesses of both sides of case, so that at the end of mediation both parties are reasonably satisfied with the outcome. The effective mediator will also help the parties to consider the risks and costs of resolving a dispute before a Court, without necessarily meeting the expectations of either party.[10]

Some Advocates see their role as advisors in mediation process as quite limited. They explain the process to the client, may make the opening statement, provide legal advice and leave them in to the process without a real lifesaver. Others try to dominate the process and behave in an adversarial manner, as if they were at trail and often prevent their client's participation in the process.

[10] Available at http://www.mediate.com/articles/krikorian.cfm (Andrienne Krikorian, Litigate or Mediate?: Mediation as an alternative to lawsuits).

Generally, the role of advocates in mediation process can be divided into three phases: pre-mediation, during mediation and post-mediation. In these phases Advocate has a central role in, and responsibility for, making mediation work for their client in a constructive, creative and productive way.

The Advocate in order to be a successful Advisor in the mediation process he should possess certain qualities for effective mediation to name few, first he should analyse himself that the present problem is a chance given to him to do his best,[11] he should have good verbal, listening skills, think 'outside the box', he should be impartial, build rapport among parties, trustworthy, have respect for the parties and ability to gain confidence and learn to remain calm under pressure.

Further, an Advocate can become more effective as an Advisor in mediation process in the following ways;

a) Client preparation and participation:

Preparing and giving inputs to a client is the most important step. Client is also more central to the process in mediation and should be ready to play that role. If clients who can speak well then let them interact with each other. A well-prepared client does not need to be protected and can be most useful weapon to endanger sincerity and empathy.

Advocate has to explain the process to client in detail including the stages of mediation. Decide who will attend at the mediation process and what their roles will be. Prepare the client for participation in the process. Talk about the possible settlement options before mediation. Know your file well and reality tests of client. Be honest in your assessment of the strengths and weaknesses of the case. Know client's desired outcome and the probable outcome.

b) Interest based negotiation:

A mediation session is not a trial based on legal and factual positions. It is facilitated negotiation with active listening skills. If any questions to be asked make them open ended, it is not an examination for discovery or cross examination at trial. Pay attention to body language. Pick up what others are saying and use that information to assist the client. Highlight the positive points but do not ignore the negative aspects in a dispute. Encourage the clients to speak directly to each other in the session. If possible, separate the people from the problem. Be seen as a problem solver. Mediation is generally interest based so try to move positions to interests and on to mutual interests.

c. Strategy:

Device a strategy about what the client want to achieve by way of settlement and how as a mediator you are going to do it. Consider options, well prepared, organised, know the law and facts of the case.

[11]Noble, Cinnie, L, Leslie Dizgun and D. Paul Emond., Mediation Advocacy, Effective Client Representation in mediation proceedings,1st ed., Emond Montgomery Publications,Toronto,1998.p.74.

d. Be part of the solution, not part of the problem:

In mediation, an Advocate is truly "counsel" to the client. An Advocate helps the client present their side of the dispute and interests to the other party in such a way that mediator's presence should be almost redundant. An Advocate as problem solver has the ability to analyse situations through taking in to account of client or party positions in to interests, generating and assessing conventional and novel options to address the problem, counsel performs a valuable service to the client who often cannot steps back from the conflict to carry out this duty. Perhaps most importantly, counsel can work to build consensus around an option which best addresses the goals and interests of a client or the involved participants.[12]

VII. Conclusion and Suggestions:

Advocates play a pivotal role in the process of speedy justice through mediation. Advocates must encourage the clients to resolve their disputes otherwise than litigation which ensures the win -win situation and also keeps the relationship between them intact. In order to provide justice to his client by ADR mechanism, he should equip himself with all the skills through training and regularly enhancing those skills by participating in ADR system.

In the light of the above discussion mediation is considered as one of the best mode of ADR system. The need of the hour is to resort to mediation not as an Alternate mode but as a Primary or First mode of Dispute Resolution.

To become from Advocate to Advisor one must feel his responsibility towards dispute settlement in speedier effective manner. Therefore, Advocate must be the vehicle for transformation of justice system in to a dynamic dispute resolution system.

Suggestions:

1. Training should be imparted to those who intend to act as a facilitator, mediator, and conciliator.
2. Judicial officers must be trained to identify cases which would be suitable for taking recourse to a particular form of ADR.
3. Mediation Centres to be set up at each District and Taluka places in each State with a view to mediate all disputes.
4. Through Legal Services Authorities ADR literacy programs have to be undertaken for awareness among the public.

[12] Galton Eric., Representing Clients in Mediation, American Lawyers Media,1st ed., Texas Lawyers Press, USA, 1994., p.115-119.