pen ACCLAIMS

Volume 6, July 2019 ISSN 2581-5504

"Mediation-The Best Way to Access Quick Justice in India"

Faeeza Murshida. S
SASTRA (Deemed to be University)

ABSTRACT

How mediation can solve all the problems? How would mediation be a future of Judiciary? In this paper we are going to see, the current scenario of mediation. The role of mediators in mediation, how the process of mediation works and reach the common people. Comparative study between mediation and litigation. Advanced techniques which can be adopted in the process and a clarity of how a mediation can access quicker justice in India.

INTRODUCTION

Mediation is a form of dispute resolution, found outside the court-room, where parties in dispute or conflict utilise the assistance of a third-part neutral to attempt to resolve the their dispute. It is different from other form of 'alternative' dispute resolution- such as negotiation, conciliation, arbitration, and early- neutral evaluation- in that the third party neutral, the mediator, is present and assigned a number of qualities that are not as evident, or strictly adhered to, in the other forms of dispute resolution.

MEDIATION IN TRADITIONAL SOCIETIES

There is firmer evidence for the existence of 'mediation' in many traditional societies, despite their lacking a formal state system and legal institutions. There were often well-organised systems for managing conflict within families, clans, tribes and villages. It is often said that 'mediation' was, and is, the preferred method of dealing with disputes in these societies, though there were tendency to overdraw the comparisons between the traditional processes and modern forms of mediation. The communal nature of traditional societies, the kinship system, strong societal norms, cultural traditions and religious beliefs, as well as economic systems based on mutual dependence, encouraged and developed the processes in which third parties with high social status assisted disputants to deal with their problems. These processes not only settled disputes but also reinforced social values and social cohesion. They had a function in maintaining the equilibrium of the social system. They occurred against a coercive background and tended to be authoritarian in nature. In these pre-legal circumstances 'mediation' was not an alternative dispute resolution process but, apart from violence and avoidance, the predominant one. The breakdown of traditional societies meant these processes lacked supportive social infrastructure. Somewhere buried by the forced of modernisation and the development of formal institutions of law and government.

CONCEPT OF MEDIATION

- Mediation is a voluntary, party-centred and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. 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 communication and negotiation, the parties always retain over the outcome of the dispute.

Volume 6, July 2019 ISSN 2581-5504

- 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. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. The 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 proceeding at any stage before its termination and without assigning any reason.
- As we earlier told mediation is a party-centred negotiation process. The parties, and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. Though the mediator, advocates, and other participants also have active roles in mediation, the parties play the key role in the mediation process. They are actively engaged 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.
- Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, laws, and underlying interests of the parties, such as personal, business, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.
- Mediation provides an efficient, effective, speedy, convenient, and less expensive process to resolve a dispute with dignity, mutual respect and civility.
- Mediation is conducted by a neutral third party- the mediator. The 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 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's process.

ADVANTAGES OF MEDIATION OVER LITIGATION

- The parties have **control** over the mediation in terms of its scope and its outcome whereas in litigation the the parties have no control over the proceedings.
- Mediation is **participative** parties get an opportunity to present their case in their own words and to directly participate in the negotiation. In litigation only advocates are the active participants.
- The process is **voluntary** and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached. Litigation is non-voluntary process, a party cannot quit until the case ends.
- The mediation process is **speedy**, **efficient** and **economical** and litigation fails to fulfil the above said factors.

Volume 6, July 2019 ISSN 2581-5504

- The procedure is **simple** and **flexible**. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to day activities. Litigation is a rigid process and the dates will be fixed by the judges, the parties won't have control over the dates.
- The process is conducted in an **informal**, **cordial** and **conducive** environment. Litigation can be held only in court rooms and only during court timings.
- Mediation is a **fair process**. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation but in litigation it is a dependant process and the judgment will be favouring only one party.
- The process facilitates better and effective **communication** between the parties which is crucial for a creative and meaningful negotiation. Litigation never gives an opportunity of communication between the parties.
- Mediation helps **to maintain , improve, restore** relationships between the parties. Whereas litigation focus on the satisfaction of a single party.

QUALITIES OF A MEDIATOR

- Commitment to peace making
- Commitment to the skills and craft of mediation
- Commitment to making a living through mediation work
- Strategic planning and implementation of their mediation career
- Reflection and continual re-evaluation
- Successful models and mentors.

Here are some of the skills which are essential to be a successful mediator, the following passages will give a brief note on how the skills work.

Communication skills

A successful mediator, however that person is defined, is one who must have an excellent communication skills. Here we are going to look into those communication skills and attributes

Preparation for meetings

The economy and simplicity of arriving at a joint mediation meeting "to see what happen" has apparently been discarded by most of this group. Initially, the mediator will decide how many meetings would be required to solve the problem in the first meeting itself regarding the intensity of the dispute and the wavelength of the parties.

Communication devices

Surprisingly, the majority use whiteboards and flip charts to record questions and goals and brainstorm solutions.

Reframing and summarizing the questions

The mediator must not be partial so his questions should not be in favour of any of the parties. So, in a neutral way he must frame the question to come for a solution.

Volume 6, July 2019 ISSN 2581-5504

Handling in a way to let the process work by itself

This is a fascinating theme emanating from this group of renowned mediators. It is a process of not to work and let the parties to come for a decision.

Let the parties speak more than the lawyers

Once again, this group of experts shatters some stereotypes which prevail among less experienced mediators. They attempts to give more opportunity to client , rather to skilled

Sustain to joint meeting

Although diversity of process is a key theme, the majority of these mediators also emphasise that the more experienced they become, the more they try to keep clients in joint meetings. This development raises a challenge to a widespread practice of mediators who routinely separate all disputants soon after opening statements are made.

Listening skills

An overwhelming emphasis of good practice and of what has been learned in the school of hard knocks by this group is: listen, listen, listen. This virtual unanimity raises challenges for training in the micro-skills of listening both at law schools and in mediation courses.

Persistence and patience

These qualities raise predictable questions for administrators who attempt to set up mediation programs which have rigid and short meeting times.

Attentive listening

Attentive listening involves eye contact, a appropriate environment and a 'listening' posture with little of attention on both the parties.

Active and involved listening

Involves asking open questions, paraphrasing and reflecting back on what has been heard and understood.

ROLE OF A MEDIATOR IN MEDIATION

- 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 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. A mediator when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.
- The mediator employs certain specialized communication techniques to facilitate the process they are able to overcome negotiation impasses and find mutually acceptable solutions.
- In the event of failure to settle the dispute, the mediator does not maintain the reason for the failure.

Volume 6, July 2019 ISSN 2581-5504

- The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.

TYPES OF MEDIATION

Court referred mediation

It applies to cases pending in Court and which the court would refer to mediation under section 89 of the Code of Civil Procedure, 1908.

Private mediation

In private mediation qualified mediators offer their services on a private, 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. Private mediation is used in connection with disputes pending in court and pre-litigation disputes.

THE STAGES OF MEDIATION

The functional stages of the mediation process are:

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

At the commencement of the mediation process, the mediator shall ensure that the parties and their counsel are present

STAGE1: INTRODUCTION AND OPENING STATEMENT

Opening statement's main objective is to establish neutrality, to develop rapport with the parties, to establish an environment that is conducive to constructive negotiations. Motivate the parties for an amicable settlement of the dispute and to establish the control over the process.

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 wll 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.

Volume 6, July 2019 ISSN 2581-5504

Opening Statement

The opening statement is an important phase of the mediation process. The mediator in a language and manner understood by the parties and their counsel. The mediator shall explain the ground rules of mediation to the parties like while one person is speaking, others will refrain from interrupting, language used will always be polite and respectful, mutual respect and respect for the process will be maintained, mobile phones will be switched off and adequate opportunity will 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

The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties. The mediator may ask questions 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. Upon completion of the joint session, the mediator may suggest that he meets each party with his counsel separately, usually with the plaintiff/petitioner going first. The timing of holding a separate session may be determined by the mediator's judgment concerning the productivity of the on-going joint session, silence by the parties, loss of control, on request by the parties or if the parties are getting repetitive.

STAGE 3: SEPARATE SESSION

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 process, parties vent personal feelings of pain, hurt, anger etc., the mediator finds the emotional factor 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 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 and the possibility of any trade off is ascertained. The mediator formulates issues for resolution.

The effective question sessions

- 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

Volume 6, July 2019 ISSN 2581-5504

60 kilometres per hour at that 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 defences?'
- 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?'

Sub-sessions

The separate session is normally held with all the members of one side o the dispute, including their advocates and other members who come with the party. However, it is also possible for the mediator to meet separately with sub-groups, such as only advocates or parties, an advocate or a party individually, or various groupings of parties/ advocates in a multi-party dispute. Mediator may hold a sub-sessions with only the advocates, with the parties consent, in order to discuss the legal issues. During a sub- session, the advocates may be more open and forthcoming regarding their positions and settlement goals. Similarly, is there is a divergence of interest among the parties on the same side, it is permissible and, at times, advantageous for the mediator o meet with sub- groups of parties with common interest to facilitate negotiations. This type of sub-session may facilitate the identification of interests and also prevent the dynamics of the whole group, independent of consistent or conflicting interests, joining together to resist the claims. There can be several separate sessions. The mediator could revert back into a joint session at any stage of the process if he feels the need to do so.

STAGE 4: CLOSING

Mediator orally confirms the terms of settlement. Parties reduce to writing the terms of settlement with the assistance of the mediator. The agreement should be signed by all parties to the litigation and their respective counsel. Thereafter, a copy of the agreement would be furnished to the parties while the original would be sent to the referral Court for drawing up a decree in accordance with the agreement. Mediator's Closing Comments –the mediator should briefly thank the parties for their participation and work during the mediation and, where appropriate, congratulate all parties on 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
- Ensure that neither of the parties feels that he or she has 'lost';
- Be sufficiently clear and definite in its terms to ensure that the terms of the agreement are executable in accordance with law;
- Include definite dates for performance by the parties;
- Be complete in its recitation of the terms

Volume 6, July 2019 ISSN 2581-5504

The mediator should not sign the settlement/ agreement. If a settlement the parties could not be reached, the case would be returned to the referral Court simply reporting non-agreement/ failure to settle. The report will not assign any reason for such failure or fix responsibility on any one for the failure. The statements made during the mediation will remain confidential and should not be conveyed by any party, advocate, or mediator to the Court without the prior written consent of all parties. Whether a settlement is reached or not, the mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for the settlement.

MEDIATION TO THE NEXT LEVEL

The importance of mediation as an ADR way has gain much importance and significance in the recent times. It may, however, be noted here that as per the Souvenir-National Conference on Mediation 2012 by Mediation & Conciliation Project Committee, Supreme Court of India, New Delhi, the success of mediation and its acceptance varies across the country. The Souvenir gives the statistical number of mediation activities carried on various states as on 12th March, 2012, showing the highest success rate of mediation is 73.41 % in Delhi and lowest being in the state of Goa. In order to take mediation ahead and use it in the best possible manner, it is imperative to spread its awareness amongst the public. More crucially, those engaged in mediation must acquire mediation skills in a scientific and structures manner. Law students must be exposed to mediation skills training at the University level itself. Lawyers are the professionals who wish to mediate must undergo courses of mediation and they must be trained by the proper professionals to hone their mediation skills. It is because professionals from a legal background have a crystal clear knowledge about mediation that they can inform and guide their client to avail of the benefits of mediation. Many relationships can be saved through mediation and also the burden of cases upon the Courts will reduce. Encouraging, mediation as an Appropriate Dispute Resolution mechanism may well be the way forward for ensuring speedy delivering of Justice.

SCOPE OF ONLINE MEDIATION

Online mediation, the first relating to the place in which the legal relation for the dispute was created, and the second having its basis in the online tools used to resolve the dispute, regardless of the place of its creation. A typical model for the process of online mediation starts when an e-mail is sent to the parties containing the basic information on proceedings. Virtual meetings are conducted in chat rooms which would constitute virtual reality meeting rooms. The electronic tools used for communication purposes improve on the classic form of ADR and enable increased flexibility because virtual mediation becomes sometimes electronic negotiation and vice versa. Online mediation is usually conducted through text-based communication, and meetings in real time- such as teleconferences which happen more rarely. The electronic form enables new possibilities that were previously unavailable , such as the simultaneous presence of many parties without the hindrance of needing personal attendance at a specific place and time. In accordance with quoted research, asynchronous online mediation is the most popular form, allowing greater flexibility because of 24 hours to the platform. Cost savings resulting from a lack of need for the presence of a professional proxy or the delivery of documents are also important. Moreover, online mediation conducted via an electronic platform allows the whole process to be registered, and therefore to be replayed. In assessing the practice of online mediation, it can be stated that such a form is not appropriate for all types of dispute. The use of internet tools changes the rules of

Volume 6, July 2019 ISSN 2581-5504

communication, depriving it of its direct character and verbal elements. In extreme cases, the mediating person may be replaced with an electronic tool, distorting the nature of mediation to a significant extent.

Analysing the concerns of parties on the use of mediation in civil proceedings, it may be suggested the most of these are the same as in the case of the online version, such as concerns about the lack of impact on the course of proceedings, excessive costs or the protractedness of the process.

THE ETHICS OF MEDIATION

The duties imposed on lawyers representing parties in negotiation and mediation reflect the general duties imposed on lawyers of representation, to inform, advice and act on instructions, to continue act, of competence and diligence, of loyalty and confidence. Lawyers also owe certain duties to their opponents. These duties are founded, in the case of solicitors, in the retainer, in the fiduciary relationship that exists between a solicitor and his or her client; and in tort. For barristers, these duties arise in the law of tort. The duties are also founded in the rules of professional conduct established by relevant professional bodies. The ethics mostly rely on the mediators who conduct the mediation and the above are the ethical values which exhibits the trust worthy relationship between the advocates and the clients.

COURT CONNECTED MEDIATION

The court connected mediation programmes provides a structured opportunity for settlement discussions to take place earlier in the litigation process, it encourages negotiation between the lawyers and the clients which gives a quicker remedy to solve the dispute. This would subject to fairness within the process . this emphasised the need to clarify expectations, even if the intention is that mediation practice be limited to legal issues and that there be limited opportunities for direct disputant participation. Court connected mediation with improved measures to ensure fairness, in keeping with general obligations to provide due process and equal protection before the law. Quality control measures may include gathering feedback from participants about their experiences of the programme and the establishments of complaints in handling mechanisms. Pre-mediation meetings, advertisement of differences in style between mediators and guidelines about the nature of programme would help to promote the court connected mediation. court connected mediation has the potential to extend opportunities for participants to deal with their conflict in a way that responds to their individual preferences, promotes their own determination of the dispute and is a co-operative experience. It would help in broad legislative and policy frameworks. Court connected mediation as a whole recommends that knowledge and skills within the legal profession about the potential benefits and how to actively pursue those benefits be enhanced.

CONCLUSION

From the above study of mediation it is clear that, the future of judiciary will rely on mediation to improve quick access of justice. If this elegant method was adopted it will give solution to lakhs of pending cases in courts. This would be a promising profession to all the budding lawyers out there. Naturally the biggest dream of quick access to justice would be achieved.