Critical appraisal of court-annexed Mediation in India

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Abstract

In India, Mediation, no doubt, is the idea whose time has come, but the quest for a best model of mediation is still on. The issues agitating the minds of most of the judicial reformers and policy makers is, not what is mediation or why it is necessary but how it can be best institutionalized to supplement the existing justice delivery system. In this article, the author has analyzed the current mediation practice in India from both perspectives of actual working of mediation centres as well as efficiency of the legal instruments governing mediation practice. For the purpose of the study, author has visited and interviewed various stake-holders in the mediation procedure like judges, mediators, lawyers, parties indulging in mediation process.

***Key Words*:** Court-annexed mediation; Mandatory Mediation;Qualification of Mediators; Mediation Training; Role of Referral Judge; Honorarium to Advocate Mediators; Pre-litigation Mediation.

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Court-annexed Mediation in India

In India, Court-annexed mediation started with amendment of Code of Civil Procedure (CPC) 1908 in 1999 when Section 89[2] was incorporated in it. Section 89, CPC mandates the court to refer matters to any of the five methods of ADR, if in the opinion of the court there exists elements of settlements. To implement Section 89, Mediation Centres were established throughout the country and Mediation Rules were framed by all the High Courts. These Rules are based on the draft Mediation Rules framed by the Justice JagannadhaRao Committee which were approved by the Supreme Court[3]. In India, there is no law governing mediation. Hence, the Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) to oversee the effective implementation of the Mediation and Conciliation in the country in 2005. It consists of Judges of Supreme Court High Court, Senior advocates and Member Secretary of National Legal Service Authority (NALSA).

Under Section 89 CPC,when the court refers the matter to mediation, the matter is referred to the Mediation Centre of that Court which has a roster of trained mediators[4]. In case a settlement is reached, the matter is sent to the referral court so that the court can pass a decree in conformity with the agreement. If no settlement is reached between the parties, then the case is sent back to the court for future course of action in the court[5].

In Delhi, there are three different types of Mediation Centres; Mediation Centre at the District Courts, Delhi High Court Mediation Centre (SAMADHAN) and Mediation Centres established by the Delhi Dispute Resolution Society (DDRS). The Delhi High Court Mediation Centre is run by the Bar and only advocate mediators are appointed to offer the services of mediation. This model was followed for the first time in Ahmedabad[6]. The District Court Mediation Centres are run by the Judicial Officers. All the other States follow this model in the District Courts. The Mediation Centres under DDRS are run by the Delhi Government. In order to evaluate the working of these Mediation Centre, an extensive field study regarding the working of the Mediation Centres in Delhi was conducted. The author focused only on the Mediation Centres of the NCR of Delhi as it has a fair blending of all the modelswhich are used all over the country.

[2]Section 89, Code of Civil Procedure, 1908, No. 5, Acts of Parliament, 1908.
[3]*Salem Advocate Bar Association, Tamil Nadu v. Union of India*, A.I.R. 2005 S.C. 3353.
[4]Rule 3, Mediation and Conciliation Rules 2004 (Delhi).
[5]Rule 24, Mediation and Conciliation Rules 2004 (Delhi).
[6]Niranjan Bhatt, "*Evolution and Legislative History of mediation*", GNLU Journal of Law, Development and Politics, Vol.I, Issue 2, December, 2009.

The author has personally elicited the views of the judicial officers, advocates, parties, staff members of Mediation Centres in Delhi. However, the information from the judicial officers and mediators was disclosed subject to maintaining confidentiality. In order to understand the theory and practice of mediation as used by the mediators, the author has taken special permission and herself undergone the 40-hour training at the Dwarka Court Complex. This has helped the author to have first-hand information about the course-designing, training methodology and actual practice of mediation in Delhi.

Critical evaluation of the legal provisions relating to mediation

Problems in Implementing Section 89, CPC

Problems in implementing Section 89, CPC was noted by the Supreme Court in *Salem Bar Association v. Union of India* (Salem Case I) where it observed that there are "creases which needs to be ironed out" and modalities have to be formulated for the manner in which section 89 of the Code may have to be operated. For this purpose, a Committee headed by the than Chairman of the Law Commission of India (Justice M. JagannadhaRao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. The Committee submitted draft Rules for ADR and Mediation. These Rules were approved by the Supreme Court in Salem case II in 2005[7].

In Salem case II, the Supreme Court laid down various guidelines like mediation services should be provided free of cost to the parties, refund of court fees for cases settled under section 89, CPC, etc.However, all anomalies in section-89 were finally addressed by the Supreme Court in*Afcon Infrastructure Ltd. v. Cherian V. Construction*.[8]The court held that proper interpretation of Section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or reformulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman's error.

While dealing with the issue of whether the reference to ADR processes is mandatory, the Supreme Court held that, having a hearing, after completion of pleadings, to consider

[7]Salem Bar Association v. Union of India, AIR 2005 SC 3353.
[8]Afcon Infrastructure Ltd. v. Cherian V. Construction,(2010) 8 S.C.C. 24.

recourse to ADR process under Section 89 of the Code, is mandatory. But actual reference to an ADR process is not mandatory." The Court also held that for reference to arbitration and conciliation, consent of the parties is mandatory but not for the other three processes[9].

This judgment of the Supreme Court has resolved most of the problems but there is a need for the legislature to amend the provisions of Section 89 and Order X of CPC on the lines suggested by the Court. The Law Commission in its 238th Report has suggested amendments in Section 89 on the lines of the guidelines laid down by the Supreme Court in Afcons case. But still there is lack of clarity on whether parties' consent is required for court-connected mediation. The Supreme Court, in a subsequent decision[10], held that the willingness of parties is a prerequisite for referring the case to mediation. This back and forth not only reflects a misunderstanding of the very process of mediation, but it also muddles the scope of court-connected mediation in India.

Analysis of Mediation and Conciliation Rules, 2004 (Delhi)

There is a need to reformulate/amend Mediation and Conciliation Rules 2004 as these Rules are not meant for court-annexed mediation but private mediations[11]. Apart from this, various usages and practices which are followed in the court-annexed mediation needs to find their place in these Rules like mandatory 40-hour training, free mediation services for parties, honorarium of the mediator, etc. Apart from these Rules, there is also a need to draft sub-rules or separate Rules regarding number of issues like process for de-empanelment, running of Mediation Centre, funds for Mediation Centre, etc.

According to the Supreme Court of India, there is a difference between the conciliation and mediation[12]. Rule 16 talks about the role of the mediator as being purely facilitative in nature. Rules 16 and 17 again makes it clear that the mediator shall not be imposing any terms of settlement or decision on the parties. However, the role of conciliator under Arbitration and Conciliation Act, 1996 is pro-active. The conciliation is authorized to make proposals for the settlement of the dispute.[13] Under the Act of 1996, the conciliator can formulate terms of a

[9] *Ibid.*
[10] *K. SrinivasRao v. D.A. Deepa*, (2013) 5 S.C.C. 226.
[11] Ruhi Paul, "*Need to Re-Look into the Rules Governing Mediation,*" MDU Law Journal, 2017.
[12] Salem Bar Association v. Union of India, AIR 2005 SC 3353.
[13] Section 67(4), Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996.

possible settlement if he feels there exist elements of a settlement. He is also entitled to reformulate the terms after receiving the observation of the parties.[14]

This is an artificial distinction being maintained between 'mediation' and 'conciliation' in India, especially when the difference between 'mediation' and 'conciliation' is not very clear and both the terms have been used sometimes synonymously and sometimes as different processes[15]. There seems to be no uniformity across the world as to whether these are different methods of resolving disputes or just two different approaches of one method. The definitions of both the processes also differ from one continent to another. Often the terms are used interchangeably.[16]A significant consequence of this difference is that a settlement reached under Part-III of the Arbitration and Conciliation Act of 1996 is at par with a court decree but a settlement reached at mediation is not[17]. This difference becomes a cause of concern as in case of court-annexed mediation, settlement is authenticated by a court-appointed trained mediator[18] but in case of conciliation under Part III of the Act of 1996 there is no qualification prescribed as is there for a mediator.

Another important difference is that the cases which are pending in the court and are referred to Mediation Centre under Section 89 CPC are governed by the Mediation Rules of the HighCourts but the cases at the pre-litigation stage in the Mediation Centres is governed by Part III of the Arbitration and Conciliation Act 1996[19].

In view of the internationally accepted view that there is no difference between mediation and conciliation as in different countries different words are used to signify a method of dispute resolution where a third neutral party helps the parties to amicably settle their dispute but does not possess any adjudicatory role, this artificial difference between the two processes should be done away with in India also. Both the terms are being used interchangeably internationally and ADR practitioners are of the view that both the processes are the same

[14]Section 73, Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996.
[15] In US, mediation means a more pro-active role for the neutral third party than a conciliator where as In England and under UNCITRAL Model Rules, conciliator plays a more pro-active role and mediator plays a facilitative role.
[16]Henry J. Brown and Arthur L. Marriot, ADR PRINCIPLES AND PRACTICE, 1997, 2nd ed., Sweet & Maxwell, p. 272.
[17]Section 74, Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996.
[18]Rule 4, Mediation and Conciliation Rules 2004 (Delhi).
[19]SudhanshuBatra, Regarding Pre-litigation Mediation at the Delhi High Court Mediation Centre,https://barandbench.com and Pre-Litigation Mediation Notification of Punjab & Haryana Mediation Centre,http://mediationcentrephhc.gov.in/, also *Afcons* Case, para 28.

and the difference is only of the approach[20]. The approach of the neutral depends upon the fact that whether (s)he is following evaluative or facilitative model of mediation.

Working of Mediation Centers

The author has shadowed hundreds of mediation proceedings (with special prior permission of the parties[21]) being conducted by Judge and advocate mediators. The responses given by the respondents are analyzed by the author in the next section.

Location and infrastructure of the Mediation centers

The Mediation Centres are located in the Court complexes. This has dual advantages; firstly, the parties as well as their advocates do not have to travel to some other place to attend to mediation meetings and secondly, as most of the government complexes are very well connected so the access to the Mediation Centres is not a problem. Most of the Centres have a de-stressing and comfortable atmosphere to discuss the problems of the parties.

The author has found that in the District Courts, there is no separate budgetary allocation for the Mediation Centre as is there in case of the Delhi High Court Mediation Centre. The money given to the Centres is disbursed from the Contingency Fund. There is a need to have separate budgetary allocation of funds for all the Mediation Centres. The author has observed that the High Court Mediation Centre has good facilities for litigants as well as the mediators.

Qualification of the Advocate Mediators

Earlier, the qualification for empanelment for advocates was a minimum of 10 years[22] of experience at the Bar and 40-hour training. The training used to be imparted free-of-cost to the prospective mediators. Recently, there has been a change in the policy in respect of the qualifications for advocates. Now, an advocate who has a minimum income of three lakhs per annum only can apply[23]. This additional requirement is made to ensure that advocates do not join mediation with the only purpose to earn money. This is a welcome step to check the quality of advocates at the entry level.

[20] Leonard L. Riskin, Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, I Harv. Negot. L. Rev. 7, 13 (1996).
[21] Rule 21, Mediation and Conciliation Rules 2004 (Delhi).
[22] Rule 4, Chandigarh High Court Mediation Rules (as amended in 2013), provides for minimum of five years of practice at the Bar instead of 10 years. Rule 4, Mumbai Mediation Rules provides for minimum 15 years of experience at the Bar.
[23] The Mediation and Conciliation Project Committee passes guidelines, time to time for working of Mediation Centres.

The requirement that only experienced advocates can become mediators is slightly doubtful, especially, because the two most important skills needed for a mediator; communication skills and facilitative skills can be acquired by anybody. Moreover, there is a policy in various countries to involve young law professionals in court-annexed ADR services. The Delhi Dispute Resolution Society encourages and empanels fresh law graduates as well as people from other walks of society like members of RWAs, psychologist, etc. Justice Madan B. Lokur, Judge Supreme Court of India, who is member of Mediation and Conciliation Project Committee (MCPC), was of the view that advocate-mediators should not consider mediation as a source of income but practice it in the spirit of service to the society. The reason for fixing a minimum of 10 years of experience, must be that advocates with 10 years of practice are comfortably settled in life and will not opt for mediation just to earn money. Additional benefit of this requirement in advocate-mediators is that the advocate-mediator will be well-versed with the working of the court system and also in a position to understand the psychology of the litigants.

Recently, the MCPC has introduced a practical component to the training[24]. Now after completing the training, the mediator has to complete ten successfully mediated cases with a senior mediator as co-mediator. Another, welcome step initiated by the Delhi Mediation Centre is that they have started charging an amount of ₹3000 towards the administrative cost of the training. The author is of the view that this amount can be increased to help the already fund-starved Mediation Centres.

Attitude of the Parties

The author has found during the course of her field study that the parties are more or less satisfied with the process of mediation. The entire concept of ADR as means of resolving the dispute in a court-annexed setting is new to the large category of masses. So, most of the people were not in a position to comment on the process but they were atleast ready to explore the option due to the application of Section 89 of CPC. For most of the respondents, the experience at the Centre was a pleasant one and very different from the court system. They liked the informality and relaxed atmosphere where they are not intimidated by the system. Litigants were also happy to be able to participate directly in the proceedings.

It is going to take at least a decade for Indian masses to be able to comment on the quality of mediation process, competence of mediator, etc. Though the system is still in its infancy, the

[24] Mediation Training Manual of India, http://www.sci.gov.in.

author has observed that some parties have already started taking the system for granted by not turning up on the dates fixed even after reminders from the Centre staff through phone. As the process is free of cost, the parties, at times, take it lightly. Some parties abuse the process just to gain time from the court proceedings. This can be avoided by a firm attitude of the mediator. There is a need for closer cooperation between mediator and Centre In-charge to keep the parties under check. In some western countries in acute cases, Mediation Centre may recommend imposition of cost on parties for not taking the mediation process seriouslyand courts have imposed sanctions on the parties.[25] In India, few State's Mediation Rulesexpressly provide for imposition of costs on the parties who fail to attend mediation session the Court may take action against the party[26] or by taking action for contempt[27]. However, in India, we have not adopted the concept of sanctions for breach of good-faith participation requirement[28] in ADR process.

Attitude of the Advocates Representing the Litigants

There are two mutually exclusive views about the role of advocates in mediation process[29]: according to the first view, advocates should not be allowed to be present during the mediation process as they have adversarial tendencies ingrained in their personality and so they will try to hinder the parties from entering into any kind of settlement. Apart from this, also if parties fail to reach a settlement then the matter will go back to the Court and advocates will be able to earn and in case parties reach a settlement at the Mediation Centre, not only the present case but all the connected matters also get settled which will mean a loss to the advocates. These reasons obviously create a bias in the minds of the advocate against settlement. According to the second view, the advocates can be allowed in the process because the presence of advocates may help the successful completion of the mediation process. The advocates can act as negotiators on behalf of the parties so that the party may not enter into any unjust settlement but as advocates are well-versed with all the legal technicalities of the matter they are in a better position to negotiate a settlement which can maximize the benefits to their parties[30]. Moreover, the mediator can take the help of the

[25]*Dunnett v Railtrack,[*2002*]* EWCA Civ 2002, *Rolf v. Guerin,* [2011] EWCA Civ 78.
[26]Rule 13, Karnataka Civil Procedure (Mediation) Rules 2005, Rule 13, Civil Procedure Mediation Rules 2006 (Mumbai).
[27]Rule 12, Punjab & Haryana Mediation/Conciliation Rules2011.
[28]Nell, "Making Mediation Mandatory: A Proposed Framework", 7 Ohio St. J. on Disp. Resol. 287, 204 (1992) and David S. Winston, Note and Comment, "Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water …", 11 Ohio St. J. on Disp. Resol. 1993-97, (1996).
[29]Dwight Gloann, THE ROLE OF LAWYERS IN MEDIATION, JAMS International, 2008.
[30]Leonard Riskin, "Mediation and Lawyers", 43 Ohio St. L. J. 29, 43 (1982).

advocates of the parties at the times of 'reality-testing' as sometimes the parties have lofty demands from an exaggerated claim of their rights which hardens their position. In such situation, the advocates can help parties to come to the ground realities. However, the mediator has to be very cautious while using the advocate for reality testing as if the mediator discloses the weakness of the case in front of the party there is a chance that the party may lose faith in its advocate and this may offend the advocate.

Initially the Mediation Centres had to face a lot of opposition from the Bar because advocates considered it to be blow to their earnings and in fact Karkardooma Centre initially faced lot of opposition and it was boycotted by the Bar for few months. Slowly, the attitude of lawyers started changing[31]. The change is brought by Awareness Programmes which are organized periodically at all the District Courts in Delhi for educating the lawyers on the benefit of ADR and court-annexed mediation. More so, the court is under a mandate to refer the cases to mediation / LokAdalat, etc., under Section 89 of CPC and lawyers do not have a choice but to follow the orders of the court. But it is equally true that you can take the horse to the well but you cannot make it to drink the water. Similarly, even now there are lot of advocates who still consider mediation to be a mere waste of time and just another step in the civil proceeding. These advocates tutor the parties before they go for mediation to keep sticking to their positions.

In India, litigants are so unaware of their rights and legal complexities that they are totally dependent on their advocates. The author has observed the advocates to be telling their clients in the waiting-lounge not to settle at the mediation as they have a very strong case and they will win it in the court of law. But equally important is the fact that majority of lawyers have understood the benefits of ADR methods. Some advocates have started looking mediation as an alternative career option which apart from generating money will also be very satisfying. Some advocates are of the view that earlier they will have only one case to fight for years, now they can have more cases as some cases will get settled in mediation and hence more business for them. Other advocates have devised methods of securing their full-fee before the mediation process commence so that even if the case get settled they do not suffer any loss.

Attitude of Mediators

There are two categories of mediators in Delhi as well as in India: judge mediators and advocate mediators. For both the categories, 40-hour training is necessary. The Judge

[31]Hiram E. Chodosh, "*Mediating Mediation in India*," http://lawcommissionofindia.nic.in/.

mediator offer mediation services as part of their judicial duty and advocate mediator offer mediation services apart from their regular practice for which they receive an honorarium. When a judge is mediating a case, the author has observed that automatically the office of a judicial office generates respect in the mind of parties, wisdom, integrity, honesty, are some of the qualities which a judge-mediator brings along with him as these are qualities which are attached to all judicial offices. So, acceptability of the mediator is not an issue in case of judge mediator. Also, a judge-mediator is in a better position to handle the advocates of the parties, in case, they are creating hurdles in the process whereas an advocate-mediator cannot very straight-forwardly handle such situations as the other advocates are also brethren and he cannot be very strict with them. The author has found the judge-mediators to be doing the work of mediation very sincerely. Most of the judge-mediator were very passionate about the concept of ADR and consider this opportunity tobe able to help the masses in a better way by getting their cases settled. Initially, judge-mediators had some problem in adjusting their work in five days but later due to numerous refresher course and orientation programs on case-management and ADR, now there is no problem.

However, the authorobserved that while mediating, the judge-mediator find it very difficult to control the urge to give an evaluation on the merits of the case. Without questioning the appropriateness of these gestures by the Judge-mediator which the author know was done in best of intentions to help the parties but these gesturesare against the process of mediation which require the parties to decide for themselvesand mediator to be playing only a facilitative role[32].

The advocate-mediators are also equally devoted to their work as mediators. They try to help the power imbalance between the parties as well as general ignorance of the masses in a subtle and oblique manner without directly giving any legal opinion about their cases. Most of time, it was observed that the mediators have to do a reality check with the parties in caucuses. The advocate-mediators are, also, respected by the parties. The advocate-mediators told the author that this work gave them a satisfaction which they never achieved after winning a case in the court. The mediators are also of the view that the training has actually changed their perception of the disputes and dispute resolution. Most of the mediators were very appreciative of the mediation as a method of dispute. For most of the advocate-mediators, this is an opportunity to do some community service and they feel that mediation has actually helped them in broadening their horizons.

[32]Rule 16 & 17, Mediation and Conciliation Rules 2004 (Delhi).

However, there were also a considerable number of respondents who were agreeable to the positive aspects of mediation but were slightly skeptical about their future in this area. Some were of the view that it is affecting their practice as for one whole day they are expected to sit in the Centre and not allowed to attend to their work in the court. Whereas, most of the mediators were of the view that mediation is not affecting their practice negatively but rather positively as they are now getting more clients due to their good reputation as mediators.

Judge in-charge of the Mediation Centers

The role of the Judge In-charge is very crucial in the successful running of the mediation program. Every Centre has an In-charge who is an Additional District Judge. The Judge-In-charge is relieved of their judicial work to enable them to perform their work at the Mediation Centre.The In-charge is responsible for receiving the cases from the referral courts. On receiving a case, s/he is required to call the parties and talk to them to ensure consent of both the parties for mediation. In case, there is no consent either on part of one or both the parties to the dispute, s/he is expected to discuss the merits of the mediation process and try to get their informed consent for the process. Now-a-days, as the court files are not sent to the Centre but only a referral order. So, the In-charge can briefly ask the parties regarding the nature of the dispute. After this, s/he may assign the case to either the Judge or the advocate mediators who are present on that day. The In-charge can himself act as mediator, in case, he wants to do it. One of the most important works of the In-charge is the assignment of the cases. Proper assignment of cases to the mediator is very important for the success of the program.

The In-charges generally assign cases depending on the area of expertise of the advocate mediators and difficult categories of cases are marked to the Judge-mediator.[33]This requires a very close co-ordination between the mediators and the In-charge so that the In-charge is well-versed with the area of interest of the mediators of his Centre. In most of the Centres, the author observed the Judge In-charge to be very cordial with the mediators of his/her Centre and mediators also feeling comfortable to approach the In-charge in case of any difficulty either at mediation or otherwise. The author has observed that towards the evening when the work is slightly relaxed, the mediators informally meeting the In-charge over a cup of tea and discussing their problems and gaining lot of insight from the In-charge's

[33]Rule 7, Mediation and Conciliation Rules 2004 (Delhi).

experience and expertise. This showed great administrative skills of the Judges In-charge for making themselves available to their colleagues.

Apart from assigning cases to the mediators, the Judge In-charge is also required to co-ordinate with the court for sending the files back to the court both, in case of a settlement or no settlement. The mediators are allowed to communicate with the court under few circumstances[34] so in case they want extension of time, they are required to approach the In-charge and he can in turn request the court on behalf of the Centre. The In-charge is also required to prepare a statistical data of number of cases assigned to each mediator and the fate of those cases. As periodically, the Centre has to send to MCPC a data of total number of cases marked to the Centre and total number of cases settled as well as the total number of connected cases settled.

Judge In-charge is also required to manage the working of the Centre and its various facilities. S/he is also expected to organize refresher courses for the mediators as well as periodical meeting of the mediators to know their experiences and problems. The In-charge has to hear complaints of the parties against the mediator, the Centre staff or any other problem regarding their case and the mediators can also complain regarding the behavior of any party or its advocate to the In-charge. Hence, the role of the In-charge is very important for the working of the Centre.

The author observed that most of the In-charges were performing their work very efficiently. However, there is a need for the In-charge to take some more initiative to explore the problems being faced by the mediators as their job-satisfaction is very crucial for the success of the process. Also, the In-charge are required to keep a check on the office-staff so that everyone perform their duties effectively. The In-charge can be pro-active in order to improve upon the facilities in his Centre so that it gives an overall good experience to all the stakeholders. Also, the author in her view thinks that there is no need to have a judicial officer as a Centre In-charge and should save the scarce judicial resources that we have for the adjudicatory system. There can be an administrative officer or a manager at the Centre who is tuned into the process of mediation.

Role of Referral Judge

[34]Rule 23, Mediation and Conciliation Rules 2004 (Delhi).

In mediation, the key to success depends on referral of appropriate cases at the appropriate time. Though Section 89 read along with Order X, Rule-1A, Code of Civil Procedure provides that a case can be referred after recording the admission and denials and before framing of the issues by the court. However, it was told to the author by the respondents that the courts are referring case at any stage of the case if the parties are willing to explore the option of mediation. In some matrimonial case, the matter is referred immediately after the sending of summons to the defendant. The Supreme Court has observed "….in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements."[35]

Referring cases at such early stage has its own advantages as well as disadvantages. The positive aspect is that the positions of the parties are not very much hardened at the initial stage because it was experienced that after the pleadings are completed the stand of the parties become more rigid due to allegations and counter-allegations of the parties which is generally there in exaggerated form. Sometimes, it is very difficult for the mediator to help the parties to settle the cases as parties come to the court with very high expectations and unless and until they have a real-time experience of court and court procedure they are not in a position to understand the importance of resolving the dispute amicably. Moreover, some of the judges were also of the view that in India people have a very revengeful attitude in actuality and they derive some sadistic pleasure in causing inconvenience to the opposite party by dragging them in the court, especially, when in India being involved in court proceedings are still considered to be causing loss of reputation to the respectable people. The author herself while mediating has found that it is very difficult to convince people that they will not get anything by dragging the matter in the court as the response of the parties to such discussion is that if they will not get anything the other party will also have to suffer loss of time, money and reputation.

In the backdrop of such mental attitude of the litigants, the role of a referral judge becomes very important. The Supreme Court while interpreting Section 89 and Order X, Rule IA of

[35]Afcons Infrastructure Ltd. and Anr.v. CherianVarkey Construction Co. (P) Ltd. and Ors., (2010) 8 S.C.C. 24.

CPC in Salem Bar IICase[36], has held that even if the parties are not agreeable to explore any option under Section 89 then also the court may refer them to an appropriate mode keeping in mind the nature of the dispute. The fact that consent is the basis of any settlement makes the work of referral judge more crucial as it should not appear to the parties that they are forced to adopt any mode of ADR under Section 89. Hence, it is the duty of the referral judge to inform the parties regarding the various modes available to them and educate them, in case of need to do so and help them to understand the benefits of exploring these modes like these processes are free of cost and even the court-fees will be refunded in case a settlement is reached and that the parties cannot be forced to enter into any settlement even at mediation. In order to bring uniformity, a uniform format of referral order is followed in the Delhi Mediation Centre which has necessary features like nature of the case, stage of referral, phone numbers of the parties and their advocates so that the Mediation Centre can contact them easily. The Delhi Mediation Centre has also passed Guidelines for Referral Judges regarding do's and dont's for referral judges and categories of cases fit for mediation[37]. The nature of the referral order is judicial and hence it requires the referral judge to first see whether the case can be settled and then obtain an informed consent of the parties. The author observed that about 20% of the cases were returned back to the court under the category 'not fit for mediation' which implies that the referral judges are mechanically sending the cases to the Centres. In order to avoid that the mediation become just another stage of the court proceeding, there is a need to create more awareness among the members of the Bench. There is also a need for the referral judges to write referral orders giving reasons.

Referral Judges have other important roles to play apart from referring cases to the Centre, like keeping a check on the parties to ensure that the parties are not getting the case referred to mediation just to gain time and prolong the proceedings. The referral judge also has to see that the settlement which is achieved during the mediation process was voluntary and the parties were not coerced into the settlement. The referred judge has to closely scrutinize the settlement to check its legal authenticity[38].

Honorarium of the Advocate Mediators

Initially, the mediators were not aware that they would be paid. According to the first Organizing Secretary of SAMADHAN, it was all pro bono work. According to him, the

[36]Salem Advocate Bar Association, Tamil Nadu v. Union of India, A.I.R. 2005 S.C. 3353.
[37]Supreme Court Training Manual for Referral Judges, prepared by the MCPC, Supreme Court of India,http://www.sci.gov.in.
[38]Mediation Training Manual of India, http://www.sci.gov.in.

motivation for the work was service. The advocates wanted to do something good for the society. The lawyers were of the view that this was the way they could help the system cope with arrears. Rule 26provides for fee of mediator and other cost whereas the court-annexed mediation is free for the parties as per the directions of the Supreme Court in the Salem Case II. Mediators are not to be paid by the parties but are given an honorarium on the successfully mediated cases from the Mediation Centre. The parties are also not expected to bear the administrative cost for the conduct of mediation.

There are three different models currently followed in Delhi, mediators are paid only on successfully mediated cases (District Courts), mediators are paid more on successfully mediated cases and less on unsuccessful cases (Delhi High Court) and sitting fees to the mediators (Delhi Dispute Resolution Society). Mediators who are only paid on successfully mediated cases are unsatisfied by this criterion because if a case does not get settled that does not mean that the mediator has not put in efforts. This pressure can also result in mediators coercing parties to enter into settlements.

Some of the advocate mediators were of the view that the honorarium is too less as compared to the efforts which are needed to help parties reach an amicable settlement. However, when the author discussed with Hon'bleMr.Justice MadanLokur, Judge Supreme Court of India, one of the pioneers of the mediation movement in India, regarding the issue of honorarium, he was of the view that the mediator should not consider mediation as source of income at this moment but consider it as a way of service to the society, especially, when the process is free for the parties. His Lordship was of the view that if the honorarium is increased it can lead to more corruption in the system. Advocates running SAMADHAN were hopeful that in future commercial litigation will ultimately be sent to Mediation Centres and then the mediators will be able to charge their fees.

However, the author thinks that either there should be no payment to the mediators or some payment on the basis of sittings at the Centre. The fear that this will be a de-motivator to the mediator to make efforts to settle the case is not very significant but the fact that the person is sitting in the Centre and not doing any of his work on that day is also important. Moreover, paying honorarium only for settled cases may have its side effects like the mediators coercing parties to settle the caseor the mediator not spending much time in cases which they feel are difficult.

Another problem that the mediators are facing is the way these honorariums are calculated. The author was told by most of the advocates that there were errors in calculations and they were paid less than what was their due. All these discrepancies can be avoided by effective management of the Centre and its staff so that harassment of mediators can be avoided. It is very important that mediators should be happily doing their work and should not be de-motivated by such issues which could be easily handled.

Definition of success in the Mediation Process

The issue of how success is defined in mediation is very relevant for evaluation of ADR Programs and for improving the training methodology and conduct of mediators. In any court-annexed mediation, main reason for having any ADR method is development of alternatives to courts with case-loads and full dockets. In this background, the practical question of whether the parties have reached an agreement, is very important. However, treating agreement as the final stage of mediation should not be the approach as is there in the training module as well as practical application because though agreement should always be goal of any mediation but it is not the only goal of mediation. There are other goals or purpose which can be fulfilled by sincerely undergoing mediation process like the mediation process can open the channel of communication between the parties; it can clear misunderstanding between the parties; even an unsuccessful mediation can help in narrowing down the issues of conflict between the parties; the mediation process can help the parties to be able to realize what are the real causes of conflict between them and can also help the parties and their counsel in prioritizing the issue[39]. Hence, it is generally said that a mediation effort never fails. This aspect of mediation process needs to be highlighted.

There are other reasons also as to why reaching an agreement should not define success in mediation. One very important reason is a mediator is paid only for a successfully settled case which sometime can force the mediator to coerce the parties to somehow reach a settlement without bothering about the long-term life of the settlement. Also, it creates an artificial division between the mediator which makes some mediator as successful and other classified as unsuccessful without appreciating the fact that mediators may have honestly helped the parties on various other counts if not on settlement.

[39]Robert A. B. Bush and Sally G. Pope, "Transformative Mediation: New Dimensions in Practice, Theory and Research", 3 Pepp. Disp. Resol. L. J. 1 (2002)

The author has also observed that another negative aspect of this issue is that it has made the mediators to explore a way to artificially increase their statistics of success rate. In the mediation form used by the Centre there are six categories of reasons as to why a case has not been settled (which is used by the Centre for research purposes). These categories are: not fit for mediation; one or more parties could not obtain authority to negotiate; one or more necessary parties never appeared; parties did not participate/deferred to participate; parties appeared and participated but later referred; and parties could not reach agreement on terms.The mediators by now have realized that if they return an unsettled case as "not fit for mediation" then it will not change their statistics i.e. it will not be treated as an unsuccessful case on part of the mediator. So, the author has seen, irrespective of the reason for not reaching a settlement, the mediator sends back the case under this category even after one or two meetings (because if a case is not fit for settlement it can be observed by the mediator in 10-15 minutes of discussion with the parties). This practice is highly unethical on part of the mediators. The author also is of the view that some of these categories are highly artificial and impractical. Also, having a category "not fit for mediation" is slightly controversial as it gives a scope to the mediator to question the competence of the referral judge and is conveniently being misused by mediator.

Periodic Meetings and Refresher courses at the Mediation centers

Though the mandatory 40-hour training is compulsory for all to be empaneled but equally important is to monitor the progress during training and subsequently. In Dwarka Mediation Centre in its initial months of establishment, the Judge In-charge used to call meetings of the mediators on every Saturday. Such experiments can be repeated in other Centres as well. In Karkardooma Mediation Centre, the author has participated in one of the refresher courses for the mediators. The Judge In-charge had called good and expert speakers to talk on some of the tricky issues of mediation process like an impasse, etc. The refresher course was very informative for the mediators.

Awareness Campaign

According to the Organising Secretary of Samadhan, apart from training equally necessary is to create awareness among the legal fraternity and the public at large. The Bar must believe in mediation and the judiciary must believe in it as the success of mediation depends on the right cases being referred at the right time. Hence, there is a need not only to create awareness among the masses but among the lawyers and the judges as well. The Centres are

doing lot of activities to create awareness among the people, by using radio and television, newspapers and magazines for advertisement of the mediation process and its advantages. One very innovative step by the Delhi Mediation Centre is to send the pamphlet of mediation with the summons of every case to the defendants as well as the witnesses. The Mediation Centres also organize awareness programmes for the advocates so as to explain to them that mediation should not be considered by them as something which has come to hamper their practice but realize its positive aspects so as to help them in adopting mediation, as part of the practice at the Bar and a good and satisfying alternative or additional career. Such awareness programmes are also conducted periodically to educate them in the use of ADR methods.

Evaluation Programme

Mediation programs and mediators have the responsibility to ensure they are providing high quality dispute resolution services. The courts are responsible for the quality of service provided by any mediator to whom they refer matter directly or indirectly. Quality control efforts are thought not only to protect consumers but also to maintain the legitimacy and public confidence in both the mediation process and the courts. Presently, there is no process to evaluate the mediator's performance. However, feedback forms are kept in all the Centres. In order to meet their responsibility for ensuring the quality of services provided, courts or the Mediation and Conciliation Project Implementation Committee needs to monitor the performance of the mediators as well as the operation of the mediation programme more broadly.

In 2013, an amendment was made in Chandigarh High Court Mediation Rules to provide that empanelment will be for a period of three years only and renewal shall be at the discretion of the High Court[40]. Internationally recognized methods for assessing on-going mediator performance include education, training and experience; Written Exams; Settlement Rates; Performance-Based Assessment; User Complaints and assessments; etc[41]. The various methods have their own advantages and disadvantages and measure different aspects of mediator competence. Accordingly, any assessment program should not rely on a single method to assess mediation quality but should use several of these methods.

Pre-Litigation Mediation

[40] Rule 3, Mediation/Conciliation Rules (Punjab & Haryana High Court).
[41] Christopher Honeymoon, "On Evaluating Mediator's", 6 Negotiation J. 23, (1990).

In India, apart from court-annexed mediation for pending matters, pre-litigation mediation is also offered now-a-days under various initiatives. Recently, in *K. Srinivas Rao v. D.A. Deepa*[42](a matter relating to matrimonial dispute), the Supreme Court discussed Mediation as a tool of the larger ADR jurisprudence. The court observed:

"The idea of pre-litigation mediation is also catching up. Some mediation centres have, after giving wide publicity, set up "Help Desks" at prominent places including facilitation centres at court complexes to conduct pre-litigation mediation. We are informed that in Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre, several matrimonial disputes are settled. These centres have a good success rate in pre-litigation mediation. If all mediation centres set up pre-litigation desks/clinics by giving sufficient publicity and matrimonial disputes are taken up for pre-litigation settlement, many families will be saved of hardship if, at least, some of them are settled."

Pre-Litigation Mediation at the Delhi dispute resolution society

It's a first joint venture of its kind between the Government of Delhi and the Delhi High Court to set up Mediation Centres in all districts to take up all kinds of civil and petty criminal cases whether or not pending in the courts. Its Mediation Centres are functional in various parts of the city of Delhi. TheseCentres entertain complaints from the people at a pre-litigation stage. The cases are also referred to these Centres from the Consumer Forums, Women Cell and Police Stations.

The procedure followed at these Centres involves a party to approach the Centre either telephonically or in person with his/her complaint. Then, the Centre sends a notice to the other party regarding the complaint received by the Centre stating the date of appearance before the mediator. The Centre sends three notices to the parties, but if the other party does not put in appearance then the file of the concerned case is closed and the complainant is suggested to approach the court or other forum, as the case may be. These Centres are also run by a Co-ordinator/Director who is a qualified mediator, mostly from a legal background. The Centres have its office-staff for receiving the complaints, sending notices to the parties and for other official work.

The Delhi Dispute Resolution Society has been using extensively print as well as electronic media for creating awareness among the people regarding this forum for resolving their

[42]K. Srinivas Rao v. D.A. Deepa,(2013) 5 S.C.C. 226.

dispute without going to the court. The mediation services are offered free of cost to the parties. But, there is a plan to charge for the services once the program acquires acceptability among the general public. The author observed that the Centres, though at a very nascent stage, has started functioning successfully.

There are certain concerns which the mediators have shared with the author like sometimes parties wants suggestion on future course of action in case if no settlement, like which forum they should approach, which advocate would be good. Hence, there is a chance that the mediator may suggest his name or name of his friend to the party. So, some of the mediators were suggesting that the possibility to have a panel of advocates can be explored, some kind of legal-counseling can be done for the parties if they want, by a separate set of advocates. Also, the Centres can have contacts with counselors, psychologists, rehabilitation centres so that their help can be taken by the mediators in appropriate cases. The cases at these Centres do not only have legal issues but also non-legal issues as the parties are at a very early stage of dispute.

Pre-Litigation Mediation in the Court-annexed Mediation and Conciliation Centre

Few of the Mediation Centres[43] are also offering pre-litigation mediation since few years. The process of dispute resolution is governed by the Part III of the Arbitration and Conciliation Act 1996[44]. A party can approach the Centre with their complaint and then the Centre sends a notice to the other party twice. In case, even after two notices, the opposite party does not put in appearance then the file is closed and the party is suggested that they can file a case in the court and again come to the Centre through section 89 of CPC. For the pre-litigation mediations, the parties are expected to share the expenses of the Centre and the fees of the mediator. The fee has to be submitted to the Centre and not to be paid directly to the mediator.

At the District Court Mediation Centres also the author noticed that some cases are referred to it from the Women's cell at a pre-litigation stage.

[43]SAMADHAN, Punjab & Haryana High Court mediation Centre, Bangalore Mediation Centre, etc.
[44]Sudhanshu Batra, Member of SAMADHAN, Regarding Pre-litigation Mediation at the Delhi High Court Mediation Centre,https://barandbench.com and Pre-Litigation Mediation Notification of Punjab & Haryana Mediation Centre,http://mediationcentrephhc.gov.in/.

Way Forward

There is a need to improve the Program through Quality Control. There is a need to develop measure for quality control in Indian court-annexed mediation program. Some of the ways can be:

1. Court programs should provide ongoing mediator development programs like Refresher Courses, Lectures, workshop on newer techniques and skills, etc.
2. Courts should also create a mechanism for parties to voice their complaints or grievances when dissatisfied with their mediator or services of the Mediation Centre. These programs should be sufficiently publicized.
3. There is a need to have more checks to ensure that people who become mediators are actually competent to be so. Presently, whoever undergoes the training can become a mediator and in the training method there is no way to check whether the trainees have acquired all the skills needed for the mediation services. Even in the requirement of doing ten successfully mediated case for getting the certificate of successful completion of training also does not specify the role of the trainee in these mediations.
    a) Some suggestions can be / devising a written as well as practical examination of the trainees after the training is over. Written examination can have questions regarding theory, concept, core values, ethical consideration, etc. in mediation and practical test can be either a simulation exercise or a role-play.
    b) During the co-mediation, it may be made necessary that the report of the senior mediator as well as feedback of the parties in those cases should be considered relevant in evaluating the performance of the trainee.

(i) Success of a mediator should be cumulative of both the yardsticks like his success-rate and parties feedback.

(ii) There is a need to incorporate mediation courses in the educational curriculum. In case of law schools and Law Faculties, ADR courses should not be only theory courses but should include both theory and practical component. The course curriculum as designed by the researcher in National Law University Delhi, (NLUD) can be used as a model. The clinic-I course of NLUD include theory of negotiation, conciliation, mediation and arbitration; case-study on these concepts; role-plays to demonstrate and acquire the skills

of negotiation and mediation. The course also includes a module on institutionalization of ADR processes through Section 89 of CPC and the Legal Services Authorities Act 1987. Another very important component of the course is client-consultation and role-plays on it. In this component, students are taught their responsibility of advising the appropriate mode of resolution of disputes to their clients and about other ethical issues.

Suggestions regarding various aspects of setting-up mediation centers

1. There is a need for improvement of facilities in the Mediation Centres so as to provide a good experience to all the stakeholders. While deciding upon facilities for a Centre, the interest of all the stakeholders should be kept in mind and mediators being the most important part of the Centre, their needs should also be kept in mind.
2. There is a need to reconsider the qualifications needed to become a mediator. It is understandable that for a court-annexed mediation advocates will be needed for mediation but the requirement of a minimum 10 years' experience is not understandable. As told to the researcher by the mediators working for Delhi Dispute Resolution Society, there is no requirement for advocates to have a minimum of ten years of experience. Inspite of the fact that court-annexed mediation is different from pre-litigation mediation, still this aspect can be given a thought.
3. There is also a need to include professionals from field like sociology, psychology, etc. to become mediators as even in court-annexed mediation it is not only legal issues which are important but other issues are also important and at times more important than legal issues. There can be provision for co-mediation with these experts in cases involving serious emotional or psychological issues and matrimonial matters.
4. The additional condition of an advocate to be having a minimum income of three lakhs also require more research as simply because an advocate is earning more than three lakhs a year does not mean he is a very good lawyer as being a successful lawyer does not necessarily imply that the lawyer is good in all the aspects.
5. The researcher recommends that there should be some arrangement of cost of mediation to be taken from the parties as any system cannot run for free for eternity. For the initial years, in order to make people aware of the program it was appropriate

to keep the system free-of-cost. But now, it is being more than ten years since these Centres are set-up. There can be various ways of achieving this purpose like imposing the cost on both the parties to be shared equally as both the parties get benefit from the mediation process. The yardstick should be minimum or maximum depending upon the nature of the disputes.

6. Another way of helping the Centres to become self-sufficient is designating a specific budgetary allocation for mediation.
7. There can be some small amount taken at the time of filing of case for funding mediation program to discourage filing of non-serious cases.
8. The Centres may be allowed to generate their own funds by conducting mediation training programs for other professionals on payment.
9. The researcher recommends imposition of some amount as cost for mediation services so as to avoid the misuse and abuse of the process by the parties.
10. There is a need to create more awareness among advocates regarding the mediation process, its advantages, their role in the process and the fact that it can also be an alternative or additional career option for them.
11. There is a need to reconsider whether a Judge is necessary for the post of Centre In-charge keeping in mind the fact that the work of In-charge does not require any skills which only a Judge can posses. More so when in India, the number of judge vis-à-vis the population is still very low. The judges can continue as mediators and as trainers but for the post of Centre In-charge, the researcher, suggests that any person expert in managerial skills can be employed after imparting him/her 40-hour training. Still if officials from court system are required to be employed, the researcher suggests that officers from the administrative side of the courts can be employed for this post.
12. There is a need for adequate staff to help the In-charge in preparing every day statistics of all the mediators and also for the purpose of research work regarding various issues like success rate, reasons for non-settlement, categories of cases in which settlement is taking place quickly, categories of cases which require more time, etc. so as to help in development of future strategies and plans.
13. There is a need for creating more awareness among the referral judges regarding their role. The judges should be aware of the fact that they have to take informed consent of the parties to refer them for ADR process in spite of the fact that Section 89 mandate referral of cases in case the Judge is satisfied that there are elements of settlement. Judges need to explain the advantages of these processes, nature of these

methods and help them in choosing the appropriate mode. The role of the referral judge does not end after referral of case, he should give short dates to check on the parties. However, a referral judge should not be stepping into the confidential aspect of the process in his over-enthusiasm to promote ADR process and reduce his own docket. Even after failure of first attempt, the Judge should be open to give another opportunity to the parties for mediation, in case, the parties genuinely want to do so. Referral judges should be able to select the appropriate case and appropriate time for referring it for ADR processes.

14. The researcher feels that if the cases are referred at an appropriate time or mediation it can become a very effective tool for case management.
15. The researcher suggests that the referral Judges should be required to write a reasoned referral order instead of using the formatted referral order so as to avoid mechanical referral of cases to mediation.
16. There is a need to reconsider the entire criteria of payment of honorarium to the advocate mediators in the District Courts. The methods followed in Delhi High Court Mediation Centre and Delhi Dispute Resolution Society are better and can be given a consideration. Regardless of whether a case has been settled or not, mediator is required to put in his efforts. The reasons as to why a particular case could not be settled may be many and mediator's incompetence may or may not be a reason.
17. The researcher also wants to recommend that there is a need to revise the scale of honorarium.
18. The researcher is of the view that the mediators should also be allowed to practice private mediations.
19. The ideal that mediation should be considered not as a source of income but as a means of social service is very high but forcing anybody to do social service is also not advisable. So as is the requirement, in the Delhi Dispute Resolution Society that there is a form which needs to be filled, in which there is a column regarding the preference of the trainees as to whether they want to do pro bono work or want to be paid for their services, the same can be adopted in other Centres as well and people who want to do pro bono work can be allowed to do so without any compulsion.
20. The currently charged Rs.3000/- towards administrative cost of training can be increased so as to help the Centres for using this fund for other activities like creating awareness, organizing refresher courses, etc.

21. The researcher suggests that training module should also include discussion of other models of mediation.
22. There is a need to create more awareness among the mediators as to their role in mediation, core values of mediation, ethical duties of mediator, and its difference from court procedures.

Miscellaneous suggestions

1. There is a need to clarify that there is no difference between mediation and conciliation. The only difference is in the approach followed by the neutral. In the view of the researcher, if we do away with this distinction, then we can safely say that Part-III of the Act of 1996 will deal with private mediation/conciliation and Mediation Rules will deal with court-annexed mediation/conciliation.
2. There is a need to initiate a second phase of reforms of the institutionalization of mediation practice.
3. There is a need for further research on issues like the impact of court-annexed mediation on court's work-load and the long-term effect of settlements reached in mediation.
4. As far as codification of mediation is concerned, the researcher is of the view that now there is no need to pass a Mediation Act because the mediation field is still growing and codification at this stage will hamper its growth. However, amendments of Mediation Rules should be done, at the earliest.
5. There is a need to have proper Rules drafted regarding the running of the Mediation Centre and various aspect of the working of the Centre.

Conclusion

In India, the first phase of institutionalization of mediation was a great initiative in the form of amendment of Section 89 in the Code of Civil Procedure, passing of Mediation and Conciliation, 2004, setting up of Mediation Centres, designing 40-hour training, etc. But, now with the experience gained during the first phase, there is a need to bring changes in the institutionalization of mediation. The model and structure of the mediation practice of the future, the development and professionalization of the various fields of mediation, the linkage between mediation practice and court systems, all of these remain compelling topics of research and analysis.