COURT ANNEXED MEDIATION

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LEGISLATIVE INITIATIVE FOR COURT ANNEXED MEDIATION IN INDIA

Mediation, Conciliation and Arbitration are historically more ancient than Anglo-Saxon adversarial System of law. Mediation was very popular amongst businessmen during pre-British rule in India. The Mahajans – the impartial and respected businessmen used to resolve disputes between members of the business associations by the end of the day. This informal procedure, once in vogue in the province of Gujarat, was a combination of mediation and arbitration, now known in the western world as med-arb. This type of mediation had no legal sanction in spite of its common acceptance in the business world.

The concept of mediation got legislative recognition for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are "charged with the duty of **mediating** in and promoting the settlement of industrial disputes". A complete machinery for conciliation proceedings is provided under the Act. The conciliators appointed under the Act and the services provided by them are part and parcel of the same administrative machinery provided under the Act.

Arbitration, as a dispute resolution procedure was recognized as early as in 1879 and found its place in the Codes of Civil Procedure Code1879, 1882 and 1908. When the Arbitration Act was enacted in the year 1940, the provision for arbitration made in Section 89 of the Code of Civil Procedure, 1908 was repealed.

The Indian Legislature made a headway by enacting The Legal Services Authorities Act, 1987 by constituting the National Legal Services Authority as a

Central Authority with the Chief Justice of India as its patron in chief. The Central Authority has been vested with duties to perform, inter alia, the following functions:-

(1) To encourage the settlement of disputes by way of negotiations, arbitration and conciliation.

(2) To lay down policies and principles for making legal services available in the conduct of any case before the court, any authority or tribunal.

(3) To frame most effective and economical schemes for the purpose.

(4) To utilize funds at its disposal and allocate them to the State and District Authorities appointed under the Act.

(5) To undertake research in the field of legal services.

(6) To recommend to the Government grant-in-aid for specific schemes to voluntary institutions for implementation of legal services schemes.

(7) To develop legal training and educational programmes with the Bar Councils and establish legal services clinics in Universities, Law Colleges and other institutions.

(8) To act in coordination with governmental and non-governmental agencies engaged in the work of promoting the cause of legal services.

Arbitration and Conciliation Act, 1996 has made elaborate provisions for conciliation of disputes arising out of legal relationship whether contractual or not and to all proceedings relating thereto. It provides for commencement of conciliation proceedings, appointment of conciliators and the assistance of a suitable institution for the purpose of recommending the name(s) of the

conciliator(s) or even appointment of the conciliator(s) by such an institution and submission of statements to the conciliator. It also provides that conciliator is not bound by the Code of Civil Procedure or the Evidence Act. It defines the role of the conciliator in assisting the parties in negotiating the settlement of their disputes.

Finally the introduction of ADR mechanisms in the Code of Civil Procedure, 1908 is one more radical step taken in recent times by Indian legislature by enacting Section 89 and Order X Rules 1A, 1B and 1C providing for ADR machinery even in cases pending before the civil courts and has further authorized the High Courts to frame rules for the purpose. Thus, now the Indian legislature has made sufficient provisions in law to facilitate introduction of court annexed mediation.

The introduction of ADR mechanisms in the Indian justice system has raised great expectations and hopes in the minds of the litigants for a more satisfactory, acceptable and early resolution of their disputes. Skeptics out with their sharp tongued criticism pose a challenge to the visionaries by raising questions, “Do we have the **know how**, **wherewithal** and the **will** to implement the law reforms systematically and in right earnest ?” As stated above, legislative foresight in introducing ADR procedures and vesting ample power in the judicial administration to carry out the reforms, are now required to be supported **by a strong will and administrative ability to provide for a redressing machinery to utilize ADR procedures with advantage**.

Till court **annexed** mediation services are made available, how mediation reference can be effectively made by the courts? The courts may have to depend upon private mediators or non-governmental organizations providing mediation services, if at all available. However, till mediation is popularized in the country as an accepted dispute resolution mechanism, litigants will be slow to accept private mediators. The questions are - where and to whom the

court will refer the cases for mediation? Are there persons equipped, trained or experienced enough to handle complex civil and commercial disputes? How the courts will be able to monitor the cases sent to mediation? If appropriate machinery for providing mediation services is not made available, the moot question the administration will have to answer is – Are the ADR provisions introduced in legislation to remain in the statue books?

The answers can be found by drawing on the experience of and implementation of such provisions made in other countries who have successfully achieved the results. In USA the number of cases where the parties choose to go to mediation has shot up much higher in percentage than the ratio of disposal by the courts. However, USA took nearly 20 years to introduce court annexed mediation in their system as a result of continued efforts, experiments and research. Their rewards are that the parties are happier, the courts are less burdened and spared for cases that deserve handling by Courts and the system has become cost efficient.

ADVANTAGES OF COURT ANNEXED MEDIATION

In COURT ANNEXED MEDIATION the mediation services are provided by the court as a part and parcel of the same judicial system as against COURT REFERRED MEDIATION, wherein the court merely refers the matter to a mediator. The advantage of court annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving to them a feeling that negotiated settlement is achieved by all the three actors in justice delivery system. When a judge refers a case to the court annexed mediation service, keeping overall supervision on the process, no one would feel that the system parts with the case. The Judge would feel that he refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants feel that they are given an opportunity to

play their own participatory role in the resolution of disputes. This will also give a larger public acceptance for the process as the same time tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. The court is the parental institution for resolution of disputes and if ADR models are directed under court's supervision, at least in those cases which are referred through courts, the effort of dispensing justice can become more coordinated. ADR services under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complimentary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus provide additional tool by the same system providing continuity to the process, and above all, court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

THE CHALLENGE AHEAD AND THE NEED FOR ADMINISTRATIVE WILL

The concept of the mediation, as a part of judicial system is comparatively a new idea recently introduced in India. The introduction of Court annexed mediation may look difficult in this vast country. A pessimist may see many obstacles in the implementation of the court annexed mediation programme

and may imagine the unavailability of sufficient funds to introduce the machinery in the country. However, for a country which provided large priority funds for establishing fast track courts for expeditious disposal of criminal cases in the recent past, it is not impossible to make budgetary provisions for a beneficial cause, which, in the long run, can solve one of the naughtiest problems of a fast developing country. If court annexed mediation programme can be implemented with a determination, it will enable the country to carry out a major legislative intent and provide to the nation a stimulant for the growth of its commerce, industry and global interests. It will provide a new and fresh solution to the ailing problem of delays in the court. The present delay in disposal of the cases is mounting in a geometrical proportion and likely to create a crisis of confidence and therefore, it requires a resolute determination and strong will to introduce the court annexed mediation in the Indian legal system at the beginning of twenty-first century. The task is not easy but not impossible. In USA it took 20 years to gradually introduce and develop mediation as a comprehensive court system. In India the establishment of lok adalat and the administrative machinery for implementation thereof has also taken almost 20 years. The lok adalat is now only one of the ADR mechanisms implemented in the country. Though arbitration is used privately by parties it has not really been expeditious and has proved very expensive. Since the law has now contemplated various alternatives for dispute resolution mechanisms including mediation, separate state machinery for providing mediation can be very useful. The legislative foresight and the global acceptance of court annexed mediation provide sufficient justification for its introduction in the system. It is necessary, however, to first introduce the court annexed mediation in a few selected courts as pilot projects and watch, monitor and analyze its advantages and success rates. This will require Indian legal visionaries and able administrators to work together and evolve a scheme to provide an additional legal service in the form of the court annexed mediation. A judicial council to establish pilot programmes and to assess the benefits would be a prudent

first step. Adequate funds would be required to be allocated for implementation of the pilot programmes which can be evaluated with a number of criteria, including the settlement ratio, the time factor for achieving settlements, satisfaction of the litigants and the costs involved. The funds earmarked for the pilot programmes would be required to be used for providing infrastructural facilities, administrative staff and compensation to the mediators. The deadlines for starting and operation of the pilot programmes will be required to be prescribed. The appointment of an administrator for the court annexed mediation, knowledgeable and conversant with the mediation process has proved very helpful in California in USA. Such administrator would be able to assist the courts in implementation of the programme including evaluation and monitoring thereof. He has to be provided with a minimum skeleton staff and infrastructural facilities initially. His duties may include preparation of a panel of mediators having the knowledge, experience and mind set to work as mediators. It would be necessary to organize training programmes for such mediators as a first step. The experience in USA suggests that a 32 hour training programme would be ideally necessary. Literature on mediation, including mediation journals published all around the world where mediation has become part of the system can be subscribed which can help in speeding and spreading the education. A continuing education programme for lawyers, judges and even litigants as a part of the pilot programme can be very effective. The World Bank Group for Legal and Judicial Reforms can be requested to provide international knowledge, experience and training in the subject. As observed by World Bank's law reform group, "Legal training ensures that legal and judicial reforms contribute to changing the attitudes and behaviours of lawyers and citizens. For this reason, legal training should be an integral part of the legal and judicial reform strategies that are anchored on the rule of law and reflect a country's societal values. Legal education strengthens professionalism, builds public confidence and facilitates consensus and momentum for further reforms. The legal education also improves the performance of legal professionals, enhances

service quality and stimulates public respect. As a result the training programmes should be designed not only to enhance performance but also to instill the values of the impartiality, professionalism, competency, efficiency and public service."

Mediators should not use coercive, authoritative and intimidating techniques that are used by untrained mediators. Some judges use authoritative influence in judicial settlements, and it is therefore opined in some quarters that judges do not make good mediators. However, in India there could be more public acceptance of retired judges acting as mediators because of their multiple years of judicial experience. If such retired judges can be invited to be on the panel of the court annexed mediators in India with minimum basic training to change their mind set for their intended role of mediators, their services can be utilized with advantage. In the words of Hon'ble Benjamin F. Overton, a retired Chief Justice of Florida Supreme Court, "Judges are the most experienced neutrals in the justice system and should be excellent mediators but they need to fully understand the process and know when to bite their tongue and eliminate their authoritative face".

The court annexed mediators can also include experienced lawyers at the bar, law professors, leading and respected businessmen and even the retired bureaucrats. However a basic training for mediators, from whichever class they are chosen, would be essential.

An administrator for the court annexed mediation can seek the services of experienced lawyers who have taken basic mediation training and persuade them to spare a given time for accepting mediation assignments. The payment schedule for mediators can be fixed, though it may be possible to obtain pro bono services of some lawyers in India. The experience of other countries suggests that the parties who are referred to mediation are asked to contribute towards mediation expenses including mediation fees. If the parties

have made their own investment in the process they are more likely to work hard to resolve issues. It is considered necessary for the parties to contribute towards mediation compensation because, as mediation develops more and more as an alternative to trial, the administrative duty of a mediator will grow and become burdensome. In most cases, the parties do not fully appreciate the skill of a mediator because much of what a skillful mediator does is invisible to them. What seems like an "easy" mediation to a party may, in fact, have considerable professional challenges to the mediator. It is, therefore, necessary to educate the parties to the very difficult role a mediator plays. Initially it may become necessary to invite mediators on the panel to provide pro bono services for a short duration during the mediation process and compensate them for additional time put up by them.

The court annexed mediation will be a challenge worth undertaking. If such a system can provide a compassionate assistance to the litigants for negotiated settlements, the parties will go home with greater satisfaction, and lesser time spent for resolution of their disputes more amicably, will gradually bring their willing participation in the process. The parties will become partners in the solutions rather than partners in problems. The court annexed mediation is expected to solve problem of delay in civil and commercial litigation and thereby contribute towards economic, commercial and financial growth and development in the country while providing satisfaction to the litigants.

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