NATIONAL JUDICIAL ACADEMY

WORKSHOP ON APPLICABILITY OF ADR TECHNIQUES TO REDUCE PENDENCY IN COURTS

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DAY 1 – 26TH NOVEMBER, 2016

INTRODUCTION BY DIRECTOR, NJA

SPEAKER: HON'BLE JUSTICE G. RAGHURAM

CHAIR: HON'BLE JUSTICE D. M. DHARMADHIKARI, *Former Judge, Supreme Court of India.*

HON'BLE JUSTICE MANMOHAN SARIN, *Lokayukta, National Capital Territory of Delhi, Former Chief Justice Jammu & Kashmir High Court.*

HON'BLE JUSTICE DR. P. DEVADASS, *Judge, Madras High Court.*

The workshop commenced with the introductory address by Justice Raghuram, Director, National Judicial Academy. Justice Raghuram explained the role played by NJA in judicial education and the vision and mission of the Academy which is dedicated towards the enhancement of the justice delivery system. He informed the participants and the speakers present that the current programme would be the 1002nd programme in the Academy since 2004. The Academy has been involved in the process of training judges from all the ranks of judiciary. NJA was inaugurated in the year 1994, by the then President of India, in the presence of Hon'ble Mr. Justice Venkatachalaiah, Chief Justice of India. He also brought to the notice of the participants that NJA has conducted programmes for SAARC Countries, wherein many foreign dignitaries attended the programme.

Thereafter the Director mentioned in brief the outline of the sessions to be conducted:

Session 1 - Challenges in Implementation of ADR systems in Subordinate Courts- A Critical Analysis.

Session 2 – ADR, Mediation and Section 89 of CPC.

Session 3 – Understanding conflict, their bases and groundings: Strategies and Techniques.

Session 4 – Reducing differences between parties: Role of different stakeholders.

Justice Raghuram then requested Justice Dharmadhikari to carry forward the discussion for Session 1.

SESSION 1 – CHALLENGES IN IMPLEMENTATION OF ADR SYSTEM IN SUBORDINATE COURTS – A CRITICAL ANALYSIS (10:05 AM – 11:00 AM)

SPEAKER: HON'BLE JUSTICE D. M. DHARMADHIKARI, *Former Judge, Supreme Court of India.*

Justice Dharmadhikari thanked the Director for introducing the session. He further reminded Justice Raghuram how during the establishment of NJA, all the Supreme Court Judges opposed for Bhopal to be the place of establishment, suggesting that Delhi or any other metropolitan city would be a better choice. After Justice Digvijay Singh showed the area where it was to be built in Bhopal, everyone seemed impressed and they went ahead with the plan. Justice Dharmadhikari said he was glad that they took the correct decision, he went on to appreciate the facilities provided at the Academy and said that one who comes to the Academy, involuntarily feels peace and motivation towards gaining knowledge.

The discussion then moved on to the core subject of the session. Justice Dharmadhikari mentioned that when they started working, there were no Alternative Dispute Resolution (ADR) Techniques in use. He clarified that since he did not work on the trial court level, the Principal District Judges attending the workshop would be in a better position to explain the lacuna in the use of ADR in the subordinate judiciary. He referred to Justice Manmohan Sarin to request for the experience of the participants in his address.

Section 89 of CPC is the main reason for empowering and motivating the Judges to refer matters to ADR, he said. According to him, there are many difficulties which arise when a matter is referred to arbitration, mediation or the like.

Some of the difficulties faced by him in his experience as a Referral Judge were:

1. If the parties are asked to use one of the ADR techniques under Section 89 of CPC, majority of the times parties feel that the Judge is biased and if not that, the parties have a preconceived notion that no other method of resolution is better than trial.
2. Many Judges and advocates who have become Mediators are not sufficiently trained to mediate even though they have received the appropriate training for mediation.
3. It also becomes expensive sometimes, if at first the case is given to a lawyer, then the lawyer's fee is incurred, further the court fee and once referred to mediation, then the

mediators fee and if mediation is not successful then again the lawyers fee. In this way it would become more expensive;

4. Also a time taking process if the above mentioned path is taken, it will still not be as time taking as trial but still a time taking mechanism which also requires experienced mediators to be successful.
5. Referral to the same judge is a very prevalent problem. Justice Dharmadhikari suggested that if mediation fails, case should not go to the same Judge who referred the matter in the first place.
6. The declaration required from a Judge when he refers a matter for ADR are a discouragement. The main aim with which ADR has been introduced is that conflicts can be resolved timely and inexpensively. This must be kept in mind while deciding to refer matters to ADR as well as during the whole process.

Where arbitration is concerned, with the amendment to the Arbitration Act, 1940, the intervention of the court suddenly increased. There was a wide ground of 'Public Policy' which became an increasingly used ground to set aside an award. Arbitration with the amendment, has no longer remained an efficacious remedy. Our traditional courts have a commercial court wing; this would make the need for ADR minimal.

ADR in India has been monopolized by corporate companies and big business houses. Small trader disputes, disputes in contracts, suppliers etc. are not arbitrated, they usually go to trial.

As it is, our Civil Court's burden has reduced, there are many cases in Lok Adalat, if these are not solved in Lok Adalat, they are referred to Mega Lok Adalat. If the case still fails to get resolved, it goes to the court. As a rhetorical remark Justice Dharmadhikari mentioned that to make the case a success in Mega Lok Adalat the work should be kept pending. The parties which are not satisfied with the outcomes of ADR referred matters are mostly the parties that are only satisfied with Adversarial form of dispute settlement. He referred to the Director and his co-chair Justice Sarin to send in suggestion from NJA that both the systems i.e. Adversarial or Tradition system of dispute resolution and the ADR system adopted from America should be kept separate from each other. Our Judges would do the Adversarial dispute resolution and there should be separate institution for mediation and separate institution for Lok Adalat, which are present but there should be proper encouragement to the people to approach these institutions directly. Only

those cases should be taken up in Lok Adalat where Legal Aid is required and it should also be left to the Lok Adalat to decide who should appear from among the members of the bar.

Justice Dharmadhikari gave a suggestion that ADR should be taken up seriously, the Judges of previous generation did not persuade litigants to take up mediation/Lok Adalat, they instead asked them a mandatory question on whether they would want to refer their matter to ADR and only record their statements which would usually be in the negative. Mediation requires dedication of time. In America, most of the Judges refer the case to mediation and almost 80% of the cases are decided by mediation. This is something India would not be able to implement, but they can separate the ADR institutions and persuade parties in order to encourage them to go for ADR rather than the traditional method.

The Speaker gave an example of a property dispute wherein both the parties are arguing over what is written in the will. Here the mediator has the discretion to ask them to forget about the will and only to think about what they personally need and express their interest. This cannot happen with the Judge because a Judge has to decide according to the documents presented to him, he does not have as much discretion as a Mediator. With this remark Justice Dharmadhikari concludes and passes on the discussion to Justice Sarin.

Justice Sarin continues the discussion from the note that Arbitration Act, 1940 was repealed by the 1996 Act. This was to cater to a specific need. When we recall the years 1991 & 1992, when Globalization & Liberalization came into picture, the legislature took up UNCITRAL & the Act of 1996 was derived from it. The mistake that the law makers did was to not see how the 1996 Act would be suited for Indian conditions. As for UNCITRAL, every member state has the liberty to modify the provisions according to their requirements as long as the substance of the law remained the same. This way the working of the 1996 Act, did not suit the Indian requirements.

Justice Sarin further added that the countries with active ADR climates also have an appropriate environment for conduction of ADR. With this he said that “we did not create a country which was ready to implement 1996 Act.”

Singapore has an exclusive bar dedicated to ADR. This being one of the major reasons why ADR was not catching up in India.

According to Justice Sarin, the culture among the parties is very important to decide whether ADR is suitable for the party. Whether the party goes for multilateral arbitration or sole

arbitration is also an issue. This is because in multilateral arbitration all parties have to agree on dates, and such other miniscule details, which will cause delay.

There is also a problem of Nominee Arbitrator, for eg. NHAI has a favored arbitrator who is a Nominee Arbitrator. However objectively the arbitrator tries to decide the case, an arbitrator who has dealt with 20 cases of the same party will have some, even negligible, amount of bias, thus creating the problem of partiality.

Justice Dharmadhikari added that this amendment came because of the misdeeds done by some of their colleagues, he also said that the problem with the Nominee Arbitrators can only be solved when there is a restriction on the number of cases referred by the same party to the same arbitrator.

Justice Sarin continued with his discussion, agreeing with Justice Dharmadhikari, saying that a judge who refers should not be given the same case that he referred when such referral fails.

Justice Devadass gave his opinion on this matter, he said that the problems can be avoided by refraining from bias and maintaining neutrality. They have to take it upon themselves to facilitate ADR.

Justice Sarin added that the main problem with court annexed mediation is that the Judges themselves are mediators. Some only practice as mediators. When a case goes to a Judge acting as a mediator, therein the problem will be that the Judge will decide the case as a Judge and not as a Mediator. Justice Dharmadhikari added that there needs to be delinking of court work from mediation work. If matter could go directly for mediation, it would work the best and if there are trained mediators then there would be nothing better.

In the opinion of Justice Sarin, whenever anyone files a written statement, at that time itself, the Judge should evaluate their case, the evaluation should be whether they have evidence for plea or not. If not, then they should right away reject the case. This would result in curtailment of unnecessary pleadings.

Judge gives an example of his own experience, where one had to draft a written statement for a London based magazine. He took up the pleading, at a later stage when he had to look up the evidence for the pleading, he found that there was a false plea. This in the opinion of Justice Sarin can be avoided once there is proper evaluation of evidence to support the case.

Ills of ADR in India: Judges should not simultaneously indulge in both Judiciary and ADR. Justice Dharmadhikari concluded by saying that if institutional arbitration came into picture it

would be a better scenario and the problems would also decrease. He further requested the participants to introduce themselves and share the problems they face in the context of ADR referral.

At first, a Principal District Judge from Trivandrum mentioned that he faced no problem since ADR referral was not discouraged and rather encouraged in his district.

Next a PDJ from West Bengal said that in his district there were only advocates who were mediators and even if the Judge is willing to refer matter to mediation, the advocates would oppose it. Less than 10% cases have been settled through ADR in his district.

Another Lady Judge from Kerala said the problem in her district was that there were no Judges who were Mediators.

Justice Rekha Rani, PDJ from Delhi mentioned the vibrant ADR culture in the dispute resolution process in Delhi, to this Justice Sarin added that, it had to be so because that was the national capital and it was one of the primary places where Mediation Centre was established.

Justice Sarin also mentioned the process of fear psychosis and how it worked. To this he mentioned that there was a need to look into the fact that retired judges should not be mediators.

The discussion continued with a PDJ from Dhanbad, Jharkhand mentioning the problems faced by the Judiciary there, he said that there was a common problem of solicitation i.e. trained mediators trying to persuade advocates to take their case back to the referral judges. Many settlements through ADR were paid by the Legal Services Authority.

Justice Sarin replied to him saying that these are correctable issues, that they were only aberrations and not problems in the system itself. The main problem to be focused upon here was that there should not be mediocre Lawyers and Mediators, this would make the dispute settlement process unsatisfactory.

Lastly, one PDJ from Modasa, Gujarat mentioned that there were 90% unsuccessful case there unlike Ahmedabad. He mentioned that there is a need to first educate the public about the techniques of ADR and then move on to its implementation.

Due to paucity of time Justice Sarin asked the participants to share their view throughout the sessions and the 1st session concluded on this note for a brief tea break.

SESSION 2– ADR, MEDIATION AND SECTION 89 OF CPC (11:00 AM – 12:00 PM)

SPEAKER: HON'BLE JUSTICE MANMOHAN SARIN, *Lokayukta, National Capital Territory of Delhi, Former Chief Justice Jammu & Kashmir High Court.*

CHAIR: HON'BLE JUSTICE D. M. DHARMADHIKARI, *Former Judge, Supreme Court of India.*

Justice Sarin introduced the 2nd session by explaining the need for ADR (Pendency of cases, the Judges to cases ratio 3.5 Cr arrears, 25 Lakh Pending cases, Judge population ratio being very less). He said, even if the Judges work full time, to the maximum of their capacity, the arrears will remain, unless there are measures taken specifically towards reducing arrears. He explained ADR by the giving the example of an artery blockage, he said when an artery blockage has to be treated the doctors have to perform a bypass, similarly ADR is the bypass route for dispute resolution. When we talk about mediation, what is the philosophy behind it, was it practiced in the ancient dispute resolution system also? The answer is, historically we resolved dispute through use of wisdom, reason and prudence. This philosophy has not been practiced in other countries, the different states in India with the barriers of language and other socio-economic barriers, different communities followed different non-adversarial methods of resolution, which were indigenous. Yagnavalkya, a scholar propounded a tribunal known as *Kula*, which dealt with the disputes between members of the family, community, tribes, castes or races. Another tribunal known as *Shreni*, a corporation of artisans following the same business, dealt with their internal disputes. Among the Mahajans there was a custom that if one did not approach the tribunal before going to court then they would be out casted. *Puga* was a similar association of traders in any branch of commerce.

Buddhism propounded mediation as the wisest method for resolving differences. Buddha is known to have said "Meditation brings wisdom, lack of meditation, leaves ignorance" Leaves ignorance means that one has failed to utilize an excellent method for resolution and one continues to live in ignorance. "Know well, what leads you forward and what hold you back. Choose what leads to wisdom." This aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. According to ancient Indian Jurist Patanjali, "Progress comes swiftly in mediation for those who try hardest, instead of deciding who was right and who was wrong." A good mediator according to Justice Sarin is not restricted to case in dispute but strives to find an innovative solution. It is a recorded fact that complicated cases were

resolved not in the King's courts but by the King's mediator. During Mughal rule, Emperor Akbar depended upon his mediator minister Birbal. The most famous case was when two women claimed motherhood of a child, the Mediator suggested cutting the child into two and dividing its body and giving one-half to each woman. The real woman gave up her claim to save the child's life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this is not a fully-developed example for modern day mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying concerns and needs of the parties. He gave another example: There was a man who had 17 camels, he had three sons and wanted to divide his camels among them before he died. Thus said that his eldest son would get ½ of the total number of camels, the middle son 1/3rd and the youngest one 1/9th. The question came up on how to divide the camels among the sons. The sons went to an old man for a solution, he asked them to take his camel with them and come back tomorrow for a solution. One of the sons counted the number of camels and divided the total of 18 in the required portion, it came out to 17 and 1 was left. Justice Sarin from this story passed on the message that when there is a subject matter of dispute, parties are adamant and the subject matter cannot be divided, the mediator will inquire from them what all assets they own and other details of how much business they own. After this he will suggest that, X part of the business will be given to you, and then the unequal portions are divided, this can only happen in mediation, in other cases it will have to be divided equally.

Further Justice Sarin moved on to explain the method followed under ADR in America, he said in America before a case is taken up, there is a pre-lit stage where there is a level of confidence exhibited and unlike India, the lawyers usually do not fake documents. In this pre-lit stage there is an Early Neutral Evaluation (ENE). A research scholar or a qualified lawyer, once the pleadings are complete is asked to evaluate and then based on that evaluation the parties are called. In pleading unlike India all the documentary evidence and other supporting documents have to be presented before the court. These documents are sent for investigation thereof. After ENE the judge calls the parties and tells them their merits and how likely or unlikely is it for them to succeed. He also adds that in America 70 % or more cases are settled in pre-lit stage itself. The judge who does the ENE, he is not the one who tries the case.

Justice Sarin mentions Professors Sander, who said that in a courtroom, when a consumer of justice comes, there is chaos there, he is met by a person well versed in law, this is called the multi door courtroom. This person would then guide him as to which ADR technique to go forward with.

Gujarat was the pioneer of mediation in India. The concept of mediation found recognition in the Industrial Disputes act also, the conciliation officer is responsible for mediating and promoting settling industrial disputes. The Legal Services act also talks about ADR - Encourage settlement of disputes, by the way of negotiation & arbitration, to make policies on making the legal services available. Arbitration and Conciliation Act made elaborate provisions on conciliation of disputes. CPC was amended in 1999 inserting S 89 which talks about ADR.

In the case of *Salem Bar Association, Tamil Nadu vs Union of India* [(2005) 6 SCC 344] the constitutional validity of S 89 was upheld and a committee under Justice Jagannadha Rao was constituted to frame model rules which found approval of the court. After this each High Court was asked to frame its own rules in accordance with the model rules.

In the case of *Afcon Infra Structure v Cherian Varkey Construction Co. Pvt. Ltd. [(2010) 8 SCC 24]* Court found that S 89 had a monumental drafting error and that it could not be implemented without the reversal of the S 89 (2) (c) & (d). The court held that (c) and (d) be reversed. This in the opinion of Justice Sarin is not required to be done by a referral judge as he is not required to formulate the terms of settlement. For mediation a judge is only meant to refer the case to the suitable ADR technique and not formulate terms of settlement. The case also gives in Para 18 the cases that are not suitable for ADR and in Para 19 where the cases suitable for ADR are mentioned.

In the case of *Vikram Bakshi v Ms. Sonia Khosla [2014 (6) SCALE 514]* decided by Justice Sikri, in Para 15, acrimony between the parties also destroys the relation between the parties. When one party wins, the other one is left with anger and would like to challenge it. The settlement should be such that the relationship continues in future. The Justice providers are the ones responsible for providing mechanisms which result in timely settlements with the least expenditure under least possible stress. Mediation is one such mechanism which has been statutorily brought into place in our Justice System. It is one of the methods of Alternative Dispute Resolution and resolves the dispute in a way that is private, fast and economical. It is a

process in which a neutral intervener assists two or more negotiating parties to identify matter of concern, develop mutually acceptable proposals to resolve those concerns. It embraces the philosophy of democratic decision-making. Para 16, 17, 18 & 19 of the judgement are sufficient to explain all there is to arbitration.

To sum up Justice Sarin said that mediation is a voluntary, party centered and structural participatory process where the mediator assists the Party in amicably resolving their disputes by using specialized communication and negotiation techniques. The focus shifts from the Judge to the Parties, the Parties themselves have to decide on what they want to settle on. The mediator's function is to suggest them the different possible solutions.

He also discussed the difference between mediation and conciliation, a mediator tells the parties the different ways that they can settle the matter, the consequences of not settling the matter etc. In conciliation the role is proactive, the conciliator tells the parties what they need to do.

There are certain requisites that a mediator needs to fulfill to have a successful mediation:

- Mediator should convince the part that he/she is neutral.
- He should have a good posture which emanates confidence and calm.
- He should abide by the confidentiality of parties.
- There should be active listening on the part of the mediator.

Justice Sarin provided the participants with three I's which are important for a mediator to function:

1. Integrity to inspire confidence. Build trust.
2. Impartiality and fairness in conducting mediation.
3. Ingenuity – finding creative solutions.

He further gave three P's:

1. Patience to have and address all concerns including emotive issues (even those which defy rationality).
2. Perseverance – not to give in to the stubbornness of the parties.
   Eg: if a stubborn person comes to mediate, the mediator should try to persuade person that he understands the problems faced by the party.
3. Persuasion to make the parties settle.

Justice Sarine provided a term to understand the feelings felt by parties when they approach the mediatoror when they lose a case, FAILURE:

1. Frustration, discontent & unfulfilled demands of the parties.
2. Inability of the mediator to contain Aggressive, Self-Assertive behavior of parties.
3. To make them rid of Insecurity and Unsafe feeling
4. Loneliness
5. Uncertainty
6. Resentment
7. Emptiness- not being able to find ingenuity in solutions.

SESSION 3 – UNDERSTANDING CONFLICT, THEIR BASES AND GROUNDINGS: STRATEGIES AND TECHNIQUES (12:15 PM – 1:30 PM)

SPEAKER: HON'BLE JUSTICE DR. P. DEVADASS, *Judge, Madras High Court.*

CHAIR: HON'BLE JUSTICE D. M. DHARMADHIKARI, *Former Judge, Supreme Court of India.*

HON'BLE JUSTICE MANMOHAN SARIN, *Lokayukta, National Capital Territory of Delhi, Former Chief Justice Jammu & Kashmir High Court.*

Justice Devadass commenced the session with a brief explanation of mediation, mediation according to him, is based on the principle of peaceful co-existence in a philosophical sense. He reiterated the words spoken by Justice Sarin that it is also based on wisdom, reason and prudence.

According to him conflict is the basic difference which grows in the parties that leads to disagreement. Unless resolved, these conflicts will expand to become several disputes which will further be difficult to resolve. Justice Devadass gave a simple escalation chart on how conflicts escalate:

1. The first stage starts with a disagreement.
2. Moves on to personalization of disagreement, i.e. we identify ourselves or other party with the disagreement.
3. Due to this the problem expands.
4. The communications between the parties cease i.e. there is an abandonment of dialogue.
5. There is an enemy image that develops in the minds of the parties towards each other.
6. The parties become openly hostile in the presence of each other.
7. This would ultimately result in permanent polarization i.e. they would completely cut off their ties and would not communicate at all unless in hostility towards each other.

He further explained the need to understand the core reason of conflict. He explained how the to understand the underlying interest, which is important to the parties as well as the mediator so as to resolve the conflict.

After understanding the conflict Justice Devadass said, the mediator should try to understand the source of such a conflict, this would be important when it comes to formulating the appropriate strategy and technique required to solve the conflict.

There are generally four sources of conflict:

1. Information – either the lack of it or its misinterpretation
2. Relationships – poor communication, distrust, negative behavior etc.
3. Structural Conflicts
4. Values- Different beliefs, ideologies, goals, aims etc.

Justice Devadass also explained that conflict has different styles and there are different strategies for resolving it, such as:

1. avoidance i.e. denying, withdrawing or ignoring a small difference, this would be helpful in situations when the differences are unimportant and are not a frequently occurring phenomenon.
2. Then there is accommodating behavior such as when someone agrees out of habit, or for flattery in such cases the accommodating behavior may lead to resentment in future. In some relationships, a sense of competition overwhelms the relation itself.
3. Compromise which can be seen when there is bargaining, decreased expectations, in this case compromise is only good when the person who compromises can continue without expectations, otherwise the situation will gradually lead to difference of opinion and further to dispute.
4. Lastly, Justice Devadass mentioned Collaboration i.e. thinking of strategies and techniques through which one can solve their problems mutually, this can be done by gathering information, looking for alternatives, dialogue, by welcoming disagreement. Collaboration can be termed appropriate when the issues and relationships are both significant, cooperation is important and there is reasonable hope to address all concerns, but it would not work in cases where there is a shortage of time and the issues are not that important.

The discussion moved forward to the question of how a mediator should handle conflicts. According to Justice Devadass a mediator should always believe that all conflicts are born with solutions. The duty of a mediator would be to find out where the solution lies and so as to arrive at a solution, the mediator has to objectively analyse the conflict. On identifying the conflict, the mediator has to separate the people and their problems, to do this one has to change the position of the party from the past to the future, this according to Justice Devadass can be done by posing

open ended questions. Open ended questions make the person share their concerns, underlying issues and further information on the conflict.

Justice Devadass also elaborated on the satisfaction triangle, this gives the categories of satisfaction the parties would get out of a settlement:

- First would be substantive satisfaction, the parties must get the relief they want.
- Second is procedural satisfaction, that is a substantive satisfaction through a fair procedure.
- Lastly, emotional satisfaction, during the whole process the parties must be allowed to freely vent their emotions.

Therefore, once the conflict is identified. Using the appropriate strategy, the parties themselves collaborate and give solutions for their problems and if they come up with the solution, it would not just be a solution that is mutually acceptable, but will also result in them respecting the demands and giving effect to the solutions they themselves came up with. This would ultimately result in a win-win situation.

Justice Sarin also had a few comments on the subject of the session, he said that since records are never sent to a mediator, a legal solution is not arrived at, the solution is more of a practical, party centered one, which does not dwell on the legal aspects. A conflict emerges when parties have differences. In contractual or other differences, it gets aggravated and becomes conflict. Justice Sarin also emphasized that all conflicts cannot be resolved but all conflicts can be managed. Value based conflicts are informal kind of conflicts, they can only be resolved when there are open discussions and there is a venting of emotions.

Justice Dharmadhikari reaffirmed the stance by Justice Sarin saying that formal and informal sessions have to be dealt with differently and they do not always have similar outcomes.

SESSION 4 – REDUCING DIFFERENCES BETWEEN PARTIES: ROLE OF DIFFERENT STAKEHOLDERS (2:30 PM – 4:00 PM)

SPEAKER: HON'BLE JUSTICE DR. P. DEVADASS, *Judge, Madras High Court.*

CHAIR: HON'BLE JUSTICE D. M. DHARMADHIKARI, *Former Judge, Supreme Court of India.*

HON'BLE JUSTICE MANMOHAN SARIN, *Lokayukta, National Capital Territory of Delhi, Former Chief Justice Jammu & Kashmir High Court.*

The session commenced with a question from Principle District Judge, Devas, Indore who asked for suggestions on how to motivate advocates towards the use of Alternative Dispute Resolution Techniques. Justice Dharmadhikari responded to the query saying that new entrants need to be brought in and according to him a class of advocates need to be selected and trained for the sole purpose of making ADR readily available and training them accordingly.

In Justice Sarin's opinion the Legal Aid Panel under Legal Services Authority should look after this. He said that the Judge himself/herself is the most knowledgeable person who knows how to motivate the lawyers. Further he asked the Judges to inform the lawyers that they would not lose their livelihood if they promote ADR, on the contrary it would only bring them more clients.

The speaker of the session, Justice Devadass introduced the topic for discussion, he said that to understand how to reduce differences between the parties, one should primarily understand why these differences arrive in the first place. There are mainly three reasons according to Justice Devadass which would have resulted in the differences:

1. Unwillingness of parties to negotiate.
2. Stubborn stance of parties (in the context of what they want from the other party)
3. A situation of Impasse or deadlock.

The speaker further continued to explain the different stakeholders involved in the process of Mediation:

- Parties
- Referral Judges
- Mediators
- Advocates

- Registry of the Court

He also explained that all the stakeholders involved are to be informal and polite during the process, there should be an atmosphere of trust present during mediation. The focus of the whole process should be on solving the problem in the present and the action to be taken in future, so that a conflict of the similar nature could be avoided. All these outcomes are met without use of any adversarial method. In adversarial method, as mentioned by the speaker, either of the parties or both of them are found at fault and their wrongs are disclosed, whereas this is exactly what is avoided in mediation.

The speaker went on to explain how communication plays a vital role in the flow of information from the parties to the mediator. The information is also passed on mutually between the parties and this results in the identification of needs of the parties, which would end up in mutually acceptable solutions. Though it is the parties who themselves come to a settlement but the role of other stakeholders should not be underweighted. Different techniques have to be used to bring out the best possible solution. The speaker gave an example of a land dispute wherein the main question in court would be how to divide the property equally or in the way mentioned in a will. This would not be the case in mediation, this is because in mediation the ultimate aim would not be to divide property equally but to satisfy the needs of both the parties while being in consonance with the law in place.

The next subject which the speaker talked about was barriers to negotiation. He gave four main barriers:

1. <u>Strategic Barriers</u>

   These are barriers where one party even though they understand the benefits of settlement does not want to do the same strategically.
2. <u>Principal Agent Barrier</u>

   Justice Devadass explained this with an example: An employee of the company may be signing his company attendance and going home straight in the name of attending Court Proceeding. He will also get reimbursement from the company. He will simply call the Advocate and find out what happened in Court. Therefore, he is interested in prolonging the litigation. Similarly, in many matters, the agent who is actually present before the

Court may have a different interest while the actual litigation reduces the differences and willingness to settle the issue.

3. Cognitive Barriers

   The barriers which come up due to immediate needs for the parties such as poverty, hunger etc.

4. Psychological barrier

   There are people who are nervous and will not talk at all. There might be fear in the mind of the party who will be worried about confidentiality, or how to face the other party. This barrier can only be broken when the emotions are vent out and the parties trust the mediator completely.

Justice Devadass talked about the types of impasse that can take place:

- Emotional: These mainly include personal animosity, frustration, pride mistrust, fear of losing, vengeance etc.
- Substantive: such as lack of knowledge, lack of bargaining power, strong positions, 3rd party involvement & investment in time and money.
- Procedural: Lack of trust in the Process, in mediator, or assumption that the court is shrinking its responsibility to decide.

Justice Sarin also emphasized on this fact, he said that many times there is a situation of impasse when there is under-confidence in the mediator, mainly his partiality. In such a situation Justice Sarin suggested that either the mediator declare that the case is unfit for mediation or adopt the different strategies that will help in bringing up the confidence in the mediator.

Justice Devadass continued with the discussion wherein he talked about strategies which a mediator may adopt in a situation where there is a deadlock, he said:

- Firstly, the process should be started over and the issues have to be discussed as a whole.
- Secondly, there should be separate sessions for the parties to determine the reason for not reducing differences.
- Thirdly, according to the need of the case, a break may be necessary to ensure smooth functioning of further mediation sessions.
- Fourthly, in cases where it is most likely resolve some issues it is preferable to settle those while postponing the others.

- Fifthly, there should be review of progress made in mediation, the problem can be approached from a new angle, new frame work and options can be proposed.
- Lastly, confronting the parties in private sessions as to their Worst Alternative To a Negotiated Agreement (WATNA), Best Alternative To a Negotiated Agreement (BATNA) and Most Likely Alternative To a Negotiated Agreement (MLATNA).

Justice Sarin also elaborated on the correct juncture when the Reality Test Technique should be used, he said when the solution is decided, the best alternative solution should be given and if the parties do not agree on the solution they should also be given the Worst Alternative Solution.

Mediator's Role

Justice Devadass started the discussion about the mediator's role in streamlining the negotiations, this should be in the way that the parties negotiate on their interests rather than their rights. He gave an example of a boundary dispute wherein if the mediator asks the parties what they are entitled to, they will negotiate on the basis of their right. But instead if the mediator asks them what they need or why the suit was filed in the first place, the parties would look at it from an interest based perspective and thus will be more inclined towards understanding each other's perspectives.

Justice Devadass thus emphasized that a mediator's role should be to separate the parties from the problem and only focus on the problem separately and how the parties would agree in resolving it. The Mediator should focus on the long term interest and the future relationship of the parties instead of focusing on what they pray in Court.

Advocate's Role

Moving on Justice Devadass explained the Advocate's role is also an important one, since the parties repose enormous trust in their advocates. In this context, the Advocates should realize their role in mediation is unlike that of the Court. Instead of indulging in legal arguments, portraying their knowledge of law and the merits of their claims, the Advocates should prepare their parties for negotiations. The Counsel should inform them about the benefits of settlement, teach them how to negotiate better and to lead them to the mediation room with all the knowledge of relevant facts and figures.

According to Justice Devadass, when the Mediation Agreement is drafted, the counsels who are involved in the drafting should not insist in particular wording, in the adjudicating phrases, which is usually done to incorporate the 'why' of the Agreement. Instead the Agreement is to clarify as to who, what, when, where and how the settlement has been formulated.

Justice Sarin had an opinion that the Mediator, when he is faced with the Advocate and the Party, can politely tell the advocate to let the party present their problem, but this communication between the Mediator and the Advocate has to be done in a very refined manner so that the Lawyer doesn't take offense.

Role of the Referral Judges

Further is the role of the Referral Judges, this Justice Devadass said, is very important since in a country like India parties do not prefer to directly go into mediation, the Referral Judges play a vital role in assigning mediation to the required cases. There is no fixed stage in a case when the Judge has to refer it to mediation, as and when the Judge finds that, a case has reached the appropriate stage wherein mediation would be an effective way to resolve the matter, at such a stage the Judge may refer the matter to mediation.

The Referral Judges should summon the parties either in Court or to their chambers along with the Lawyers for both the sides to explain in brief about Mediation and then pass appropriate referral order. The speaker also emphasized that the type of referral would go a long way in aiding the parties in resolving the differences between the them.

The Speaker stated a second important aspect which is monitoring the Mediation without interfering with the confidentiality of the process. The process can also go on without any monitoring, but in such cases, if it happens that one party arrives for mediation and the other party doesn't, the mediation may fail, thus effective monitoring plays an important role in preventing such situations.

Lastly, the Speaker stated that innocuous clauses should not worry the judges because words of comfort are often used in agreements to help parties resolve their disputes.

Justice Sarin stated that when a judge is trained as a mediator, the vestiges of authority as a Judge should be removed from the Judge when he becomes a mediator. As a mediator the judge

should not delve on "what is the law?", keeping in mind the law, the mediation agreement should be in consonance with the need of the Parties.

Justice Dharmadhikari concluded the topic with the statement, "Lawyers are argumentative, Judges are judgmental and both these qualities are bad for a mediator."

Role of the Parties

The Speaker moved forward to the role of the Parties, he stated that parties being the primary beneficiary, should understand their role. They must differentiate between their 'wants' and 'needs'. Only a party's need could be considered in a settlement and not their wants. The parties should also have an open mind towards the opponents view point, there should be politeness and honesty in their communication and verbal fights in the guise of negotiation should be avoided. The parties need to understand the benefits of mediation and the time consuming nature of litigation. Their view about the situation should be futuristic rather than delving in the past.

Justice Sarin clarified to one of the participants that any agreement reached in mediation should be in accordance with law. Mediators can decide on issues more than what has been referred to them. In his words "In mediation there should be no patent violation of the law, apply that yardstick and everything will fall into place"

Role of the Registry

Conclusively, Justice Devadass stated the role of the Registry, he informed the participant Judges that the registry plays a very important role in ensuring a comfortable atmosphere which is conducive of negotiation. The parties must be received and guided properly, the records of the sessions must be maintained properly and agreements to be forwarded to the courts and recorded without waste of time.

A brief video clip was shown at the conclusion which was mainly about the concept of mediation, how every stakeholder plays a role in it and how the parties can benefit from it.

After the video clip Justice Sarin conducted a role play from a hypothetical case wherein there was a dispute between the owner of a coaching class and the owner of a restaurant. The role play was conducted successfully and Justice Sarin explained the participants the methods through

which the confidential information from the parties can be understood by a mediator and how it would then help in a peaceful and amicable settlement of the case.

Justice Dharmadhikari recommended that the court and case management techniques should be learned from American Judges and he also had a last word about the manner of settlement of disputes, he said "Doing Justice is more important than who does Justice."

Concluding the session Justice Sarin mentioned the different stages when the case is referred to mediation:

1. First stage where the parties are the strongest, they know their positions.
2. Second stage when initial frustration sets in before the litigation fatigue.
3. Third stage wherein parties lose interest in the case and faith in the justice delivery system, here there is litigation fatigue.

These in the view of Justice Sarin could only be avoided when there is pro-active referral and identification of cases in the first stage itself, which need to be referred to mediation, thus preventing the lengthening of the litigation process.

DAY 2 – 27TH NOVEMBER, 2016

SESSION 5 – EFFECTIVE RESOLUTION OF FAMILY AND MATRIMONIAL DISPUTES (10:00 AM – 11:30 AM)

SPEAKER: HON'BLE JUSTICE MANJU GOEL, *Former Judge, Delhi High Court.*

CHAIR: HON'BLE JUSTICE D. M. DHARMADHIKARI, *Former Judge, Supreme Court of India.*

HON'BLE JUSTICE MANMOHAN SARIN, *Lokayukta, National Capital Territory of Delhi, Former Chief Justice Jammu & Kashmir High Court.*

The session commenced with Justice Dharmadhikari giving a brief introduction of the topic, he stated how females and males are different physically as well as emotionally, he said majority of the problems between spouses takes root from the emotional aspect in a relationship.

Justice Sarin thanked Justice Dharmadhikari for his opening remark and carried forward the discussion. He pointed out to the change in the value system, today women are getting career oriented and are moving out of the homemaker regime. There are greater demands of a woman, to work, to take care of her children as well as her home. The problem in this case, Justice Sarin said, arises when the concept of gender equality does not change according to the changing value system. He gave an example for this: When a wife and husband both arrive home after a tired day, the husband expects a hot cup of tea from his wife, who is equally exhausted. This mindset has to change. He cited Bhutan as an example for gender equality, the country goes for pursuit of happiness.

Justice Sarin went on to explain how to resolve a purely commercial dispute, one has to first resolve the commercial matter in dispute only then resolve ego, hurt feelings at the final stage. Whereas in matrimonial disputes, the emotional issue has to be taken up first, because in majority of the case the emotional issue is the main issue which needs resolution, other issues get resolved automatically once the emotional issue is resolved.

Supporting the stance of Justice Dharmadhikari, Justice Sarin also suggested that the notion of having only female judges in family courts has to change. There should be equal number of judges from both genders in family courts.

Justice Sarin also emphasized on the importance of the correct stage of intervention of mediation, he said that the intervention of mediation should be at an early stage. With this Justice Sarin concluded his introductory remark.

Justice Manju Goel, the speaker for the session introduced herself and started on a light note. She mentioned how the environment at NJA was much more relaxed than what was present before, there is a lot of scope for open discussion in such an environment, she said. She posed a question to the audience on how many trained mediators were present in the room, few participants raised their hands and she took note of the people who did so. She commenced the discussion by explaining how differences arise, according to her differences do not arise due to presence of emotion between parties, differences arise when these emotions become facts. The most difficult journey, is the journey inside, she said and the difficulty for a mediator lies in helping people know themselves and what they want.

The mindset of most parties when they are involved in a matrimonial dispute be it in court or in mediation:

1. I must win
2. I must ruin the other side

According to Buddha, true victory is only when both sides are victorious. In commercial matters when a dispute or conflict arises, it is not very difficult to solve.

The Speaker went on the explain who a mediator really is, she said, a mediator is a neutral person, who does not take sides about the position of the parties, has no judgment or pre-conceived notion about the parties and the only job of a mediator is to try to resolve the dispute in front of him.

She gave some pointers as to the characteristics of a mediator:

- Non-Judgmental
- In control of proceeding (to see that parties do not get overwhelmed)
- In control of himself (must not lose his cool)
- Completely professional

Justice Manju further explained how the process of mediation is to proceed:

1. Extract Facts - The mediator is to gather all the facts, knowing that what is written in the petition is nothing, what is not written is very important. If the mediation is a court annexed, then the pleadings should not be taken into view by the mediator.

   Catharsis: It is process wherein the mediator keeps the conversation going by asking questions and making the parties speak. This would in turn have an healing effect on the person who is speaking. When *Catharsis* takes place the other party also hears.

   A participant judge Justice Rekha Rani had a question on whether there can be emotional outbursts from parties? The speaker replied in affirmative saying that emotional outbursts are a very important part of the healing process therefore a mediator should allow emotions to come out but also have control so that the mediation does not go wayward.
2. Active Listening - Because the problems might be found in the smallest of conflicts.
3. Decipher the Real Cause - with active listening the mediator should also keep trying to decipher the real cause of the conflict.

   Example: Women thought husband tried to kill her, when the mediator asked her the reason for separation and why he wanted to kill her, the woman just repeated that the husband wanted to kill her and later the mediator got to know that the woman's lawyer had made her lie about her husband and now the woman wanted to go back to her husband.
4. Think out of box - The mediator has to find innovative ways to try interacting with he parties and make the parties open up and interact with each other about their differences.
5. Help parties understand themselves.
6. Help third parties understand the conflict between the parties involved: these are also central to the dispute, it is imperative for them to understand the differences.

The Speaker reminds the participants that justice should not be forgotten. She asks how empowerment is a problem? Participants respond to the question and the Speaker herself has an example of a couple in her family who have complete equality in their daily chores. Justice Sarin said that the mail ego is to blame for the non-acceptance of empowerment of a woman. To which Justice Manju responds saying that it is the social norm which is difficult to change.

7. Future should always be seen. All decisions taken and every resolution arrived at should have a futuristic view. The future should never go out of focus when you delve in the problems of the past.
8. Focus on Past?

   Justice Manju said that, if it is a glorious past, something that will remind the parties of good times they have spent with each other, such a past should never be missed out. Recalling a positive part of one's life always changes the way they look at a problem presently before them.
9. Children as bridge: Children should be involved in the process after careful calculation of the reaction of the parents as well as the child. They might or might not bridge the gap or resolve the conflict.

   A participant Judge from Tamil Nadu had a question on how to explain the children when they are already biased. Justice Manju in reply to the query said that a trained mediator would only bring in children when he/she knows that the child would not be inclined towards either of the party and as it is this would be a very difficult decision therefore it is imperial to understand the situation correctly in order to involve the child in a such a conflict.

Justice Manju concluded the 5th Session on the note that divorce should not come as a trauma, it should come as a relief and keeping this in mind every case has to be dealt with differently.

SESSION 6 – APPLICATION OF MEDIATION TECHNIQUES: ROLE PLAY IN MEDIATION (11:30 AM – 1:00 PM)

SPEAKER: HON'BLE JUSTICE MANJU GOEL, *Former Judge, Delhi High Court.*

Justice Manju Goel commenced the last session with a role play. Every participant judge was given a hypothetical case wherein the Speaker selected one of the participant who was pre-trained in mediation and two volunteers who would play the two aggrieved parties. The case study was about a Hospital and an equipment making company who provided equipments after providing tender to the Hospital. The Hospital after considering the low price decided to buy the product and on the day of the equipment being used for the first time, there was a short circuit and the patient suffered due to this. Now the matter is in mediation.

As the role play began, the Speaker guided the mediator through the collective as well as private sessions. The parties had enough time to present their side of the story and explain the mediator what is it they want and why do they want that settlement. The parties after having their private session and collective session came to a settlement that the equipment company would have to pay 50% of the damages to the patient and in return the hospital would continue its business relations with the company. In this way the mediation ended on a positive futuristic note.

After the role play Justice Manju Goel continued with session explaining that parties settle for various reasons, one of them primarily being reputation. In case the matter is litigated, when there is fault on both the sides of the party there is a fair chance of either of the parties losing and the other winning, in either case there will be a loss of reputation to both the parties involved since the matter will become public. Ultimately it comes to the bargaining power of the parties during litigation, the company, in case of the role play, took an intelligent step by bargaining for future business relation.

If there was no mediation, the court would have been the option and the result would have been:

1. Costly
2. Time taking
3. Harmful to the reputation

One of the participants asked the speaker whether in the view of public good and the "right to know" of the public, the mediator would have the right to disclose anything which would be

against public interest. Justice Manju replied saying due to the confidentiality of the process, a mediator does not have the right to disclose any information to the public but they have a right to refuse the mediation and refer the matter back to the court. Thus the Mediator will also take care of justice and will also not violate the confidentiality.

Justice Manju also said that the responsibility is also on the parties to ensure public interest and any bargain in this regard would entirely depend on the power of the parties to negotiate a settlement.

Justice Manju concluded the two day workshop on the note that Mediation in general is not concerned with the outcome but only the process used to get the outcome, this, she said, would not work in India because we are justice oriented and therefore will also see to a proper outcome which delivers justice.