

SPEECH DELIVERED

BY

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AT

**THE FUNCTION OF SAMVAAD
HELD AT ALLAHABAD
ON THE TOPIC
'MEDIATION'**

My Brother Judges, Learned Members of the Bar, Ladies and Gentlemen,

The topic on which I am speaking today is mediation as a method of resolving disputes. I have selected this topic because the Indian Judiciary today is facing an alarming situation due to the massive arrears in our law courts and the consequential long delay in disposal of cases.* People in our country are simply fed up with the long delay in deciding cases. Not only are the litigants facing great hardship due to the massive arrears but even the lawyers and Judges- the lawyers because there is pressure of the clients on them whose cases are not being taken up for hearing, and Judges because of the huge daily cause lists which are humanly impossible to clear.

In an age when an e-mail reaches America in ten seconds, people are not willing to wait 10 or 20 years for a case to be finally decided. We are blamed by the public for this delay, but people often do not know our difficulties. While most of the Judges are working hard to reduce the backlog, yet, because of the heavy filing and huge pendency it is not humanly possible for the judiciary to carry this massive load of cases alone. After all the Judge has to read the papers, hear the counsels, deliberate over the matter, and only then can he deliver a high quality judgment. All this takes time. Hence alternative dispute resolution mechanisms have urgently to be evolved, and the best method in my opinion is Mediation.

In USA probably, 80 to 90% civil matters and also some criminal matters are resolved by mediation, sometimes during the pendency of the litigation, and sometimes even before going to a Court of Law. Mediation is also practiced in some European countries. In America mediation has been practiced extensively for several decades. However, it is new to India.

* This situation is not new in the world. In Charles Dickens' novel 'Bleak House' in the very beginning is a scene showing The Lord Chancellor of England hearing a case called "Jarndyce Vs. Jarndyce" which has been going on for several decades, having consumed several generations of litigants and lawyers. Similarly, before Warren Burgher became Chief Justice of the U.S. Supreme Court an alarming situation of huge arrears had developed in the U.S.A.

The pioneering work in this connection has been done by Tamil Nadu, and particularly the Madras High Court which established the Tamil Nadu Mediation and Conciliation Centre, the first centre of its kind in India, with a team of excellent mediators under the leadership of Mr. Sriram Panchu, Mr. Arvind Datar, Ms. Aparna Vasu, Ms. Geetha Ramaseshan etc. who have done excellent work, including training of others as mediators not only in Tamil Nadu, but also in other States such as Delhi, and from tomorrow in Allahabad also.

Mediation is being done in other cities also e.g. In Bombay and Ahmedabad, etc. but that is in an ad hoc and individual manner and not in an institutionalized Court annexed Mediation Centre. However, excellent mediation work is being done by Mr. Niranjana Bhat of Ahmedabad, and Mr. Karachiwala of Bombay.

The Tamil Nadu Mediation and Conciliation Centre was the first of its kind in India established within the Madras High Court premises, and mediation is being done and taught systematically there. In fact, the Tamil Nadu Mediation Centre has established its branches in the Madurai Bench of the Madras High Court and even in many district Courts of Tamil Nadu, and it has been enthusiastically welcomed by the litigant public and the bar.

After the first court annexed mediation centre was established in India in Tamil Nadu, a similar court annexed centre in the Delhi High Court was established on the lines of the Tamil Nadu model, with Justice Manmohan Sarin as its Chairman, and Mr. J.P. Singh, Advocate as its Organizing Secretary. The Tamil Nadu lawyers came to Delhi and trained the Delhi lawyers, and now the Delhi High Court Mediation Centre is also functioning very well, with wide support by the Bar and Judges.

The Tamil Nadu Mediation and Conciliation Centre and Delhi High Court Mediation Centre are located in prominent places in the Court premises,

which sends a message to the litigants and lawyers that this process is under the umbrella of the Court. These features have contributed to the success of the mediation movement in Tamil Nadu and Delhi. Experience in all countries has shown that the best mediators are lawyers and some retired Judges. We have a large body of advocates in our country, and we can therefore harness this tremendous resource by training many of the lawyers as mediators as is done in America and Europe.

In my opinion, our legal system as a whole will be hugely benefited by the adoption of mediation. We can reduce our backlogs significantly because a large number of cases can be resolved through mediation instead of adjudication, which is often very dilatory. Nowadays, people are losing faith in the capacity of the Courts to render justice because of the delays. Some are turning to illegal bodies like the mafia, criminals, and unauthorized 'panchayats'. If this continues to happen, it will lead to a breakdown of the legal system and anarchy will be the result. It is therefore all the more necessary that the Courts should actively encourage mediation.

WHAT IS MEDIATION?

I would now like to clarify what exactly is mediation. Mediation is a voluntary and confidential process by which through the intervention of a person called the 'mediator', who is a neutral and impartial person, the parties are helped to come to a voluntary mutually acceptable resolution of their dispute. The mediator guides the process but cannot impose any decision on the parties. The parties remain in control of the process throughout, and they can terminate the mediation at any time if they feel it is not serving their interests. However, once an agreement is reached and signed by the parties, it becomes binding and then can be enforced by the legal process.

Mediation is very different from Arbitration or Lok Adalats. In an arbitration there is a verdict given by the arbitrator, whereas in mediation there is no verdict, and instead the parties are helped by the mediator to come to a voluntary settlement of their own. In an arbitration once the matter is

referred to an arbitrator the parties have no control over the proceedings. On the other hand, as I have mentioned already, in mediation the parties are in control over the proceedings throughout, and they can terminate the mediation proceedings whenever they wish to. In an arbitration the parties place their respective case before the arbitrator as they do before a Judge in an adjudication, whereas in a mediation there is no adjudicator, and instead the parties actively participate in the proceedings with the help of the mediator and themselves give suggestions (very often very good suggestions) as to how the dispute can be resolved.

Mediation is also different from Lok Adalats which have been functioning for many years in our country. Normally, Lok Adalats have been useful only in resolving certain specific kinds of disputes e.g. Motor Accidents Claims etc. Also, in a Lok Adalat the parties are not active participants in the proceedings as in mediation. In a Lok Adalat usually a Judge, sitting or retired, presides over the proceedings, whereas in mediation there is no one presiding over the proceedings, and instead it is a mediator (who is usually a lawyer) who acts as a friend to both the parties and tries to promote and facilitate an amicable settlement.

Mediation has become absolutely essential for our country today because in recent years there is a litigation explosion in our country and all the Courts are heavily overloaded with overflowing dockets and are simply unable to cope up with this massive load of cases.

If we can divert a section of this load to mediation instead of adjudication, then the Courts can concentrate in deciding important cases which require adjudication and cannot be resolved by mediation or by some other alternative dispute resolution process e.g. deciding a legal or constitutional principle.

Apart from that, mediation reduces Court arrears in two ways- (1) when a dispute pending in the trial court is resolved by mediation, all offshoots/

proceedings (such as appeals or revisions filed in the higher Courts against interlocutory orders in the trial court) automatically come to an end; (2) in mediation the dispute comes to an end finally whereas a decision by the trial court does not put an end to the dispute because there may be appeals/ revisions/ writs before the higher Courts (including second appeals and even appeal to the highest Court).

I may mention that when mediation was started in western countries initially there was an opposition from lawyers, because lawyers thought it would adversely affect their practice. However, subsequent experience showed that far from reducing their practice mediation opened up a new dimension for law practice, because it is mainly the lawyers who appeared in mediation, and this greatly enlarged the dimension of law practice. The lawyers who were also trained in mediation saw their practice and income increase because people preferred to go to such persons as they would quickly resolve their disputes. A satisfied client brings more work to the lawyers, and hence lawyers who are also mediators will attract more clients, as experience in western countries has shown. Moreover, the great delay in disposal of cases has resulted in an alarming phenomenon which has arisen in many parts of country, namely, that the litigants are choosing not to go to courts for resolution of their disputes but to extra-constitutional entities like criminals, mafia etc. Hence, unless we go for mediation on a large-scale, it will be the lawyer community which will be the losers, because the litigants will not go to the lawyers but will go to the criminals and other anti-social elements for resolving their dispute by illegal and forcible methods. Hence, it is in everybody's interest that disputes are resolved quickly, and this is only possible when mediation is practiced on a large-scale.

FEATURES OF MEDIATION

As I have already stated, mediation is a process where the parties are helped by a neutral person, a mediator, to come to an amicable settlement.

For the success of any mediation it is absolutely essential that the mediator must be a person who is held in high respect by the parties. This means that

the mediator must be a person who has a high reputation in society. Thus it is not any one who can be a good mediator. He must be a person of high ethics and good reputation, who can win the confidence of the parties about his neutrality and sincerity.

It must be emphasized that the proceedings in a mediation are totally confidential, and the parties have to agree before the mediator that they will not reveal anything said or done in the proceedings to any other person, and the mediator must also keep the information given by the parties strictly confidential.

TRAINING OF MEDIATORS

Before mentioning how mediation actually takes place, I would like to state that for a successful mediation, training of the mediator is absolutely essential. One may be a good Judge or a good lawyer, but one may not be a good mediator. The qualities and skills required by a mediator are of a very different kind from those required of a Judge or a lawyer. This does not, of course, mean that the mediator should not know the law. In fact, normally a good knowledge of law is absolutely essential to be a good mediator. That is why lawyers, in particular, are found to be the best mediators in all countries, though, of course, retired Judges and also professionals in various fields e.g. Engineers, Chartered Accountants etc. can also be good mediators in cases relating to their specialized fields. However, the best mediators everywhere in the world have been found to be lawyers, and hence the mediation programme should be mainly concentrated for training lawyers as mediators, though some other persons can also be included. I may mention in this connection that in the American Bar Association Annual Meetings, the majority of the lawyers who participate are lawyers who are also trained as mediators.

As already mentioned earlier, training in mediation is absolutely necessary even for senior lawyers or retired Judges. There are skills that need to be learnt, and learning them will save the mediator and the parties much time and failed mediations. However, the training does not take long. Given

legal experience, a training programme of a few days would be sufficient to impart basic mediation skills. After the initial discussion on the need for mediation and its theoretical aspects the training should focus on how to conduct a mediation. Role plays and simulated exercise enable participants to get the feel of the actual mediation exercise and receive corrections and suggestions from the trainers. After the basic course, a subsequent would be useful for the training. Each of these courses would be of 2 or 3 days duration. While we may use training material from abroad e.g. from USA, that must be integrated with our legal social and institutional culture.

HOW MEDIATION ACTUALLY TAKES PLACE

I may now like to state how mediation actually works. There is no fixed pattern for mediation, and it is a flexible process depending on the facts and circumstances of the case. However, usually what happens in a mediation is that to begin with
