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Implementation of Mediation in District Courts: Issues, Challenges and Solutions

Sudhir Kumar Jain*

Abstract

Justice Delivery System in India is described by technical procedures with characteristics of the adversarial system with accompanying delays, arrears and taxing cost. Justice delivery system reliance on win-lose situation leads to repeated use of the legal process. The unwarranted delays in dispensation of justice undermine the credibility of entire justice delivery system of the country. It leads to instances where people are settling disputes on their own, resulting in emergence of criminal syndicates and mob justice indicative of loss of confidence of the people in the rule of law and constitutional mechanisms. The adversarial system may be appropriate method where authoritative interpretation or establishment of rights are required. To make rule of law a reality, assurance of speedy justice should be extended to citizens. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays. Justice Delivery System in India is under stress mainly because of the huge pendency of cases in courts. It emphasizes the desirability to take advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of a conventional trial. In a developing country like India with major economic reforms, Alternative Dispute Resolution Mechanism could be one of the best strategies for quicker resolution of disputes to lessen the burden on the courts and to provide suitable mechanism for expeditious resolution of disputes.

Keywords: *Mediation, District Courts, ADR Mechanism, Arbitration, Conciliation, Lok Adalat*

* Principal Judge, Family Court (West), Delhi

INTRODUCTION

In Indian Legal System, appropriate methods of disputes resolution are available, such as arbitration, conciliation, mediation and Lok Adalat etc. These methods are less formal, encourage disputants to communicate and participate in the search for solutions, focus better on the root causes of the conflict, salvage relationships, and have significant savings in time and cost.

Mediation is one of the tools to resolve a dispute by direct negotiation with the opposite party. Mediation in comparison to a lawsuit is quick, private, fair and inexpensive. Mediation is a different paradigm and path from litigation which focuses on the past, establishing blame and liability and a win-lose results. In mediation, the emphasis is on the future cooperation and direct communication with objective of sustainable solutions with win-win situation for all parties.

In India, after the incorporation of Section 89 in Code of Civil Procedure, 1908, mediation in the legal way, was first introduced. Mediation was stated to be a new concept in justice delivery system for the resolution of the disputes outside the traditional court mechanism. When the section 89 was introduced, concept of mediation was not known, trained mediators were not available and mediation centres were not established in the judicial districts.

The Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) on 09.04.2005. This committee in its meeting held on 11.07.2005 had decided to initiate a pilot project on Judicial Mediation in Delhi. Mediation as such was introduced in justice delivery system. The 30 Judicial Officers were imparted 40 hours training on *"Techniques of Mediation"* by the experts invited from ISDLS. In Delhi District Courts, formal Judicial Mediation was started w.e.f. 13.09.2005 with six judicial officers functioning as trained mediators. The encouraging success on mediation leads to the establishment of mediation centres District Courts. In Delhi till 31.08.2018, 2,32,611 cases have been referred for mediation, out of which 1,65,228 cases have been settled including 36,342 connected cases.

Despite success of Mediation, many challenges have come into path of success of mediation. The exposure of mediation to different stakeholders in justice delivery system was limited. The Advocates, Judicial Officers and the litigants were apprehensive about the future relationship between the mediation and adjudication. There was a cynicism over the application of mediation to the variety of legal disputes outside commercial disputes.

The Judicial Officers were not aware about the workplace mechanism for the referral of

the cases to Mediation. The adequate trained mediators were not available. Mediation Centres was not properly established with adequate infrastructures. Mediation was taken as to compromise with settled values and principles of Justice Delivery System.

Issues and Challenges

There were various issues and challenges in the implementation and establishment of mediation at institutional level. The various issues and challenges in implementation and establishment of Mediation with proposed solutions are as under:-

Introduction of Mediation in Judicial System

The accepted way of the dispute adjudication was the court litigation although Section 89 was incorporated in the Code of Civil Procedure, 1908 and became operative w.e.f. 01.07.2002. The utility and application of mediation in dispute resolution other than dispute adjudication was not known in Courts. The Judicial Officers perceived Mediation as undermining of their authority to adjudicate. Lawyers perceived mediation as dilution of their professional work and alarming drop in revenue. There was lot of resentment among members of Bar regarding the introduction of mediation. The litigants were apprehensive of utility of mediation in resolution of dispute which was to be conducted by a non-judicial person. So, introduction of mediation as a tool of disputes resolution was one of the challenges in implementation of mediation.

Proposed Solution

i. The sensitization/awareness programmes should be conducted for the members of Bar and potential litigants to generate acceptability and confidence in mediation process by highlighting the benefits and utility of mediation as a viable and suitable alternative to dispute adjudication.

Selection of Proposed Mediators and Training in 'Concept and Techniques of Mediation'

The availability of trained mediators was a substantive problem in implementation of Mediation. The selection of mediators and their training is another challenge which required urgent attention and solution. If the mediation is to be introduced and established in justice delivery system, the proper selection and training of proposed mediators is mandatory.

Proposed Solutions

i. The proposed mediators should be both Judicial Officers and Advocates. The participation of Judicial Officers at threshold gives credibility to the system.

ii. The eligibility criteria for section of potential mediators must be systematic and regulated. The judicial officers and advocates having positive mind-set for mediation should be selected as mediators.

iii. The strict guidelines should be laid down for process of selection of mediators.

iv. There should be adequate number of trained Mediators in a mediation centre but there should not be surplus Mediators.

v. Proposed Mediators must be neutral and must possess common understanding of human nature, behaviour and psychology besides having communication skills for better output qualitatively and quantitatively.

vi. The training in the "Concept and Techniques of Mediation" must be of high quality and as per international norms and standards.

vii. The training tools and methodology must match with international standards but suitable and modified as per local needs and requirements. The specialised topics like understanding of human psychology, mediation and judicial reforms, mediation and spirituality, mediation jurisprudence and mediation management should also be included in training curriculum.

Establishment and Management of Mediation Centre

Another big challenge for introduction and implementation of the mediation was the establishment of mediation centre and its management. The organizational governance and structure of mediation centre are crucial for its efficiency at functional level. The crucial factors are:

i. Adequate infrastructure

ii. Appointment of Coordinator

iii. Posting of mediation friendly supporting staff

iv. Mediator's own Commitment and positive Behaviour towards mediation

Proposed Solutions

i. The sufficient financial assistance for the establishment of the mediation centres.

ii. Periodical evaluation of functioning of mediation centres.

iii. Periodical review of performance of Mediators.

iv. Mediation centre should be given distinct identity from Legal Services Authority. However, there should be proper coordination and understanding between Legal Services Authority and Mediation Centre.

v. An efficient coordinator is backbone of a mediation centre. A full time coordinator preferable a senior Judicial Officer should be appointed in Mediation Centre to coordinate between the Referral Judges and Mediators and to regulate affairs of mediation centre and flow of cases.

vi. Proper infrastructure in a mediation centre.

vii. The staff/officials posted in the mediation centre should be litigants friendly. The sensitization programme should be conducted regularly to make them litigants friendly and to develop positive mind-set necessary for the proper functioning of the mediation centre.

Referral of Suitable and Adequate Cases for Mediation

The mind-set/attitude of judicial officers needs to be changed for referral of cases for mediation. They should be motivated to overcome psychological barrier of opposing mediation, and should refer adequate cases for mediation. If adequate cases are not referred for mediation, it will render mediation centres and mediators non-functional. There should be sufficient work for mediators.

Proposed Solutions

i. The sensitization Programmes for Judicial officers to sensitize them regarding identification of cases suitable for mediation and to refer adequate cases for mediation.

ii. Monitoring of referral of cases for mediation per Judge/per year.

iii. There should be regular interaction between Mediators and the Referral Judges for better output of mediation qualitatively and quantitatively.

iv. Unfit cases should not be referred for mediation.

Awareness about Benefits and Utility of Mediation

The judicial officers and advocates are basically trained and expertise in adversarial system. To implement mediation, the issue of awareness is a big challenge for concerned authorities.

The need of spreading and generate proper awareness about mediation process and its benefits among various stakeholders required to be addressed immediately. The lack of proper awareness about the mediation process and its benefits among different stakeholders such as Judicial Officers, Advocates, Litigants, etc. can render the institution of mediation futile and non-operational. The litigants should be encouraged to take recourse to mediation for resolution of disputes in place of court litigation. The proper and systematic awareness programmes shall help to counter the resistance to mediation and to change the negative perception of different stakeholders in justice delivery system about the utility of mediation.

Proposed Solutions

i. In every judicial district, awareness programmes highlighting its benefits must be conducted urgently and promptly.

ii. Awareness among judicial officers, advocates, litigants etc. should be generated to the fact that Mediation is an independent method of disputes resolution apart from court adjudication.

iii. Awareness camps should be organized periodically about mediation and its benefits.

iv. The senior members of the Bar and executive members of District Bar Association should be involved in the awareness programmes.

v. The awareness about mediation may be generated through documentaries, posters, hand-outs, pamphlets, etc.

vi. The pamphlets highlighting the mediation process and its benefits should be annexed with the summons of the case at the time of service.

vii. Awareness among the advocates should be generated that mediation does not adversely affect their legal practice and professional income.

Credibility and Acceptability of Mediation

To establish credibility and acceptance of mediation is another issue which needs urgent attention. The litigants, lawyers and judicial officer/judges should accept mediation as a part of judicial and legal work. The different stakeholders must have confidence in the system of mediation and in the mediator as a person of integrity, free of prejudice and pressures.

Proposed Solutions

i. Mediation spirit must be developed among different stakeholders of justice

delivery system.

ii. The Judicial Officers must consider mediation as a part of dispensation of judicial work.

iii. Apprehensions that mediation postulates destruction of the traditional sources of work for the legal professionals should be dispelled.

iv. The lawyers should be sensitized to take mediation as a source of additional income as lawyers can also function as professional negotiators in mediation process for the parties.

v. The Litigants should be made to understand that mediation is better option than litigation.

vi. The message should be spread that mediation provides effective intervention before disputes assume formal legal character of a court case.

Upgrading of Standards of Mediation and Mediation Practices

In future, upgrading of standard of mediators and mediation process would be a big challenge. To match with international standard, constant upgrading of mediators and mediation practices would be required.

Proposed Solutions

i. Refresher Courses/Advance Courses/Orientation Programmes for Mediators should be conducted periodically to refine and enhance their functional knowledge and skills.

ii. Constant up gradation of infrastructure in mediation centres keeping in view the anticipated increase in cases referred for mediation.

iii. The litigants may be asked to give option for mediation by filling a simple form at the time of filing of first pleading.

iv. Fee of Advocate Mediators must be reviewed periodically.

v. Online/E-mediation should be developed and encouraged.

vi. The government litigation should be encouraged to be resolved through mediation.

vii. Mediation must be set up as an independent institution of Disputes Resolution.

viii. Code of Conduct for mediators must be developed.