

MANDATORY COURT REFERRAL FOR MEDIATION - PARTIES RETAIN THE RIGHT TO VOLUNTARY DECISION

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The backlog of cases in the Judicial system in India has made Alternative Dispute Resolution (ADR) mechanisms an urgent need. Mediation is one of the ADR mechanisms that is gaining importance throughout the country. The success of the Bangalore Mediation Centre, Karnataka is an indication of this. Since 2007, a group of 88 dedicated Advocate Mediators have worked on nearly 13,000 cases¹. All kinds of cases - contractual, commercial, family, matrimonial, labour have been referred for mediation from different Courts including the Supreme Court. 62% of these cases have been settled, the majority within 60 days.

A recent Judgment of the Supreme Court has held that ADR reference is mandatory. The question that needs to be answered is whether a voluntary process like mediation can be mandatory.

The division bench of the Supreme Court (R.V. Raveendran & J.M. Panchal, JJ) in *Afcons Infrastructure Ltd., V/s. Cherian Varkey Constructions Co. (P) Ltd* in Civil Appeal No.6000 of 2010 (Arising out of SLP(C) No. 760 of 2007) - Decided on 26-07-2010, held that parties in a suit may be **ordered** to participate in Mediation under Sec 89 and Order 10 Rule 1A of the Civil Procedure Code. By being ordered to participate in mediation there is an apparent contradiction to the inherently voluntary nature of the process and this has raised a debate. In this article I will show that on deeper analysis there is, in fact, no contradiction in this order. On the contrary, it better implements the objective of Section 89 and gives a much needed impetus to mediation, which is a very efficient dispute resolution mechanism.

After summarizing the salient points of the *Afcons* judgment, I will explain why mandatory referral does not contradict the voluntary nature of mediation. In addition, I will enumerate several reasons why a reference order is necessary to ensure that litigants have access to all the benefits of the mediation process.

¹ As of October, 2010

Salient Points in the Afcons judgment:

1. Unless a case falls under a recognized excluded category of cases, for example, cases involving criminal offences, serious allegations of fraud, fabrication of documents, representative suits under Order 1 Rule 8 CPC etc., “*reference to ADR process is a must*”².
2. As per paras 20 – 26 of the judgment, the five types of ADR processes in Sec 89 are arbitration, conciliation, mediation, lok adalat and judicial settlement. Arbitration is the only adjudicatory process among them. However both Arbitration and conciliation are governed by the Arbitration and Conciliation Act (the Act) and require mutual consent of the parties for reference. If the parties are unable to reach consensus for reference to ADR, the Court is bound to refer the case to any one of the remaining three options namely mediation, judicial settlement or lok adalat settlement.
3. Judicial settlement, as described in para 8 and 14, is a non-binding dispute resolution process with the help of a Judge who is not assigned to the case and who assists the parties with suggestions and guidance and helps them to arrive at a settlement.
4. Lok adalat is conducive “*if the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles*”³.

Taking the above into consideration, when there is no consensus between the parties on the choice of the ADR option, the Court shall refer the case for mediation unless a) it is possible to request another Judge to help the parties to settle the case through a judicial settlement or b) it is an uncomplicated case which could be settled by applying clear cut principles, in which case it can be referred to lok adalat. However, most cases are complicated and since Judges are already overburdened and may not be able to spare time for a judicial settlement, it can be surmised that the majority of the cases have to be mandatorily referred to mediation.

² Para 17 of *Afcons* judgment

³ Para 26 of *Afcons* judgement

A Reference order for mediation does not affect its voluntary nature

The majority of cases in the USA are resolved through mediation. Some of their Courts refer cases on a voluntary basis and others insist that the parties go for mediation. When I asked a Judge of the Superior Court in Los Angeles how he convinces his parties to go for mediation he replied, with a smile, “I tell them that they are ordered to voluntarily participate in mediation”. It sounded oxymoronic but today after having done several mediations, I am beginning to see the wisdom in it.

A case referred for mediation under Sec 89 CPC goes through the following steps:

1. Reference by the Court
2. Participation of parties
3. Outcome (terms of settlement/non settlement)
4. Decree by court, in case of settlement

‘Reference by the Court’ is prior to the commencement of the mediation process. Mediation only begins with ‘Participation of parties’ in which the mediator makes the opening statement and subsequently takes the voluntary parties through the process. Mediation ends when an ‘Outcome’ is reached or at any stage prior if parties choose to terminate it. ‘Decree by the Court’ is the enforceability of the previously concluded mediation process.

The reference by a Court to mediation and the mediation process are distinct. A mandatory reference to mediation will not affect the inherent voluntary nature of the process. The voluntary nature of the process is intact as long as the parties retain the right to decide whether and how to settle a dispute. ‘You can take the horse to water but you cannot make it drink’.

The Need for a Mandatory Reference Order

In order to ensure that parties as well as the justice system fully benefit from mediation, it is important to ensure that parties have a minimum level of exposure to the mediation process. However, to do this, it is not enough to merely rely on parties to seek this exposure themselves. For various reasons mentioned below, it is critical for the justice system to proactively ensure that parties receive the minimum level of exposure to mediation.

Failed communication between parties: Parties often choose litigation when negotiation between them has failed and communication is no more possible. They have lost trust in each other and need a third person to adjudicate and render justice. Consensus between the parties on any issue would be a remote possibility at this stage. When a mediator first meets the parties in the court annexed Mediation Center, parties are often unable to talk to each other or even make eye contact. They have come only because they have been told to go to the Mediation Center by the Judge, a higher authority in whom they have placed their trust.

Mediation is a new concept to the litigants: ‘Mediation’ under Sec 89 CPC is a recent addition to the system of justice delivery in India (through an amendment to the CPC effected in 2002). Parties rarely have any previous exposure to mediation. Often the word ‘mediation’ is confused with ‘meditation’! Their limited understanding, if at all, makes them view mediation as a ‘compromise’. Any hint of compromise is construed to be an admission of weakness in their case. The overburdened courts rarely have the time to elaborately explain the essential features of mediation. Amidst the load of cases and adamant litigants, it is hard for the Judge to explain the finer aspects of mediation, such as the control they would have over their case, voluntary nature of the process, the informal and comfortable approach in mediation, confidentiality, possibility of creative outcomes and the skills that the mediator uses that could help them resolve their case. The skill, patience and perseverance of the mediator may be required to help the parties get a better understanding of what mediation is and to steer them to make an informed choice. Participation in mediation may be the best exposure to the concept. Reluctant parties at the end of a successful mediation are often heard saying, “Why can’t we resolve all our cases this way?”

Trained mediators are best suited to introduce the concept of mediation and win the confidence of parties: In a court annexed mediation program the parties are referred to the Mediation Centre and a mediator is allotted to the case. The mediator commences the process with an ‘opening statement’. The opening statement is a very crucial part of a mediation process. Mediators are trained to make opening statements which can inspire and motivate parties, gain trust and establish neutrality. Through the opening statement, the parties are made to understand that the process is voluntary and their non participation would not prejudice the case in any manner. They have the freedom to craft mutually acceptable terms of settlement, which if found, becomes a final non appealable decree of the Court. It is the training and experience of the mediator that enables him during this short period to convince the parties to participate. Thus the reference to mediation is prior to the commencement of the process, and

will not have any effect on the essential voluntary nature of the mediation process.

A referral order for mediation enhances the justice in the system

Mediation is a private, structured, party-centered negotiation process where a mediator uses specialized communication and negotiation techniques to assist the parties in resolving their dispute. Among the three negotiation processes that do not require the consent of parties for reference under the *Afcons* judgment (mediation, lok adalat and judicial settlement), mediation is the only process that gives absolute control to the parties to find the terms that are mutually acceptable to them. The mediator therefore is required to ensure that the parties have an in-depth understanding of their case. There is ample time for analyzing facts and law, identifying underlying interests, exploring options and negotiating extensively. The mediator is a facilitator and does not exercise authority. If the case settles, the terms are what the parties have found. It is their chosen action. However if the parties decide not to settle and return to court they are doing so after having understood their case, its strengths and weaknesses and the consequences of failing to settle and going back to Court. This is again an informed choice and litigation becomes a chosen action and not a spontaneous reaction to conflict.

Chosen action results in ‘Nyaya’

Nobel Laureate Amartya Sen in his book “The Idea Of Justice” has emphasized the need for the coexistence of ‘Nithi’ and ‘Nyaya’ for enhanced justice in society. In the justice delivery system, ‘Nithi’ is justice by the strict application of law as delivered by litigation, and ‘Nyaya’ is justice with reference to human suffering ,as delivered by Mediation. Through mediation, litigants overcome their hurdles to effective communication, identify the unmet underlying interests that resulted in conflict, and realize those interests. The judicial system addresses the unique needs and suffering of each participant and justice transcends into practical applications. ‘Nyaya’ coexists with ‘Nithi’.

The enlarged role of Judges under Sec 89

The traditional role of the Judge was to deliver justice by strict application of law. Sec 89 has entrusted the Judge with greater responsibility. When hearing a case he needs to pause for a moment to examine and reflect on the ‘elements of settlement’, screen for the best Alternative Dispute Resolution mechanism and then persuade the parties to go and resolve their dispute. This is an opportunity for Judges to work with the litigants to help them recognize that negotiating a mutually

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acceptable settlement through mediation is a better choice than fighting bitterly for their rights. In the hands of a wise Judge, even a mandatory provision can be administered with gentle persuasion.

Conclusion

I am optimistic about the developments that could emerge through the *Afcons* case. The reference order is mandatory and majority of the cases have to go for mediation. If each Court has a strong mediation program with enthusiastic, committed and well trained mediators, most cases can be settled. This has been the experience of all the countries that embraced mediation as an integral part of their Justice Delivery System. When mediation is well entrenched into the System, Judges are freed to take on their additional noble role as peace makers and agents of change.

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