

INAUGURAL ADDRESS FOR THE FIRST ANNIVERSARY
CELEBRATIONS OF THE BANGALORE MEDIATION CENTER

JANUARY 19, 2008

At the very outset, I would like to convey my heartfelt greetings to Shri. H.R. Bharadwaj, the Minister for Law and Justice, my Brother Judges, the Chief Justice and other Judges of the High Court of Karnataka and all dignitaries present.

I congratulate the Bar and Bench of Karnataka for their commendable effort in creating the Bangalore Mediation Centre, that serves as a telling example for all other High Courts of the country to emulate. It also serves as an inspiration for the legal system at large to promote the rule of law through efficient use of alternate dispute resolution mechanisms, in a manner that the doors of the court are open to one and all, and justice does not remain a “teasing illusion”. Efforts such as these are thus an effective means for the common man to reach the court and get their disputes resolved amicably and swiftly. I hope

that the legal fraternity of Karnataka will continue in this noble endeavor.

Mediation, in varying forms, existed in India since time immemorial. In ancient times, village headmen or elders assisted in resolving disputes arising in their villages by providing their wise counsel. Often, people also went to the Maharaja to resolve their dispute. The decision of the Maharaja, or the village elder, as the case may be, was usually final. In many parts of India as well as the rest of the world, such informal systems still exist. However, in present times, judicial systems require legal authority and sanction, and it is thus incumbent on the courts to promote mediation enthusiastically. Lawyering and mediation are not diverging concepts, but two sides of a coin. The coin, in this case, is a representation of the lawyer's knowledge and skill on dispute resolution to the benefit of his client. Moving from legal representation in courts to representation in mediation proceedings requires an enhanced assessment of what their clients are willing to forego and that they are not. A balance between the interests of the client and the goal of resolving the dispute amicably has to be made.

In order to encourage mediation, a committed role is required to be played both by the Bench and the Bar, in order to create awareness and faith in the system, which has evolved in the present form only recently, and improvisations continue. The enactment of the Arbitration & Conciliation Act, 1996, a welcome change from the old legislations that pertained mainly to arbitration, gave statutory recognition to other alternate dispute resolution mechanisms as well. Further, by inserting Section 89 in the Civil Procedure Code, such mechanisms gained greater appreciation. The efforts of the Supreme Court, through the 2005 case of *Salem Advocates Bar Association, Tamil Nadu v. Union of India* are also laudable and greatly furthered the cause of promoting dispute resolution strategies such as mediation.

Mediation and other ADR systems are also gaining pace in other nations as well. In the UK, Lord Irvine, the then Lord Chancellor, announced in 2001 the government's pledge to use ADR mechanisms in all disputes, wherever feasible. Subsequent reports by the Department of Constitutional Affairs show that ADR has

flourished in the UK and led to speedy disposal of cases. As elucidated by Lord Woolf in the case of *R. (on the application of Cowl) v. Plymouth CC* [2001] 1 W.L.R. 803, Mediation and other forms of ADR can counteract increasing judicialisation and, for a number of judges, it is akin to case management. Lord Woolf made a number of judicial decisions that promoted the use of ADR mechanisms in public law cases and today, there exists a legislative framework, case law as well as government policy that are very favorable for the promotion of Mediation and other forms of ADR. However, judges themselves cannot participate in the mediation process, which has to be handled by professional mediators. On the other hand, countries like France and Germany have been relatively slow to respond, and mediations are resorted to very sporadically. In France, in 1993, the *Conseil d'Etat* drafted a special report titled "*Solving Disputes Differently: conciliation, mediation and arbitration in administrative law*". While dealing with the issue of Mediation in particular, the report deals with fundamental issues relating to procedure, such as timing of mediation, identification of mediators and the like. A working group, set up in 1998, was entrusted with the task of fine-tuning court-based mediation in France and drafting

guidelines for incorporating mediation in the system. In Germany, Article 87 of the German Administrative Code empowers Judges to encourage the parties to solve their dispute in an informal manner, and if they do so successfully, he can accept the agreement. However, it is to be noted that both these nations follow an inquisitorial procedure that is fundamentally different from our own, where the judge can play a more active role in directly helping the parties to settle their disputes.

In the US, mediation acquired a professionalized color by the 1980s, by the progressive development of mediator training standards, by providing lawyers adequate training in mediation practice and by prescribing ethical standards for lawyers acting as mediators. Consequently, mediation formed a substantial part of the practice of many lawyers. Thus, by responding favorably to the technique of mediation, the legal community incorporated it into the American legal system. Thus, lawyers have successfully enhanced their practice, rather than reduce it, through use of mediation. Though they did feel threatened at the start, they soon realized that mediation was yet

another useful tool that augmented the profession, and encouraged speedy and amicable dispute resolution.

The advent of globalization and the growth of science and technology in our everyday lives has given rise to new causes of action, which call for a corresponding change in the way we see disputes today. Moreover, Mediation may be a useful mechanism to reduce the large backlog of cases that congest our legal system.

The availability of organized and well regulated mediation empowers lawyers to provide better service to litigants. It reduces costs, time and stress as compared to court based litigation. Moreover, the latter option is always available as a last recourse to parties who are unable to come to a solution to their dispute. In this manner, lawyers can greatly improve their practice and efficiency. Mediation thus makes good professional sense.

Of all the factors that lawyers as well as clients need to take notice of, while in their role as mediators, preparation and patience are the most fundamental. Clients too need to have a different mindset while

participating in mediation. Mentally, they should also be prepared to often encounter proposals that are wholly unacceptable to them, without exasperation, since such proposals and counter-proposals are common in the parties' search for a compromise acceptable to both.

The mediator must be in a position to be able to evaluate the case in an intelligent manner, by assessing the parties' desire to settle. The desire to reduce costs and time also play their part in this evaluative process.

The goal of the mediator and the parties must be to reach at a fair and mutually acceptable resolution of the dispute. It is critical to bear in mind that the mediator is not a defender of the clients' cause only, in a manner that he rides forth like a knight in shining armour, to defend his client at all costs. He must instead develop a strategy that suits the convenience of both parties and signals confidence, rather than being offensive or intimidating. Overly strident behavior usually leads to a reciprocal response by the other party, thereby pushing the mediation process into the crevice of failure. Once this adjusted

approach is understood, the mediator should exercise flexibility to reach a compromise that both parties agree to.

Another important aspect of successful mediation is client counseling. Most clients expect their lawyers to be assertive and forceful in their arguments so as to increase their chances of a successful court decision. This approach is usually an antithesis to mediation. It is therefore necessary for both the client and the mediator to understand the nature of mediation and how it is fundamentally different from the court process.

The courts, while promoting court-assisted mediation should also promote after-dispute discussion and critical analysis. This kind of scrutiny augments raises a mediator's abilities and encourages him to explore other refreshingly creative ideas to make the mediation successful.

The optimum manner to conduct mediation is when the lawyer and his client are able to successfully identify their core interests and needs and those they are willing to forego for the interest of the

opposite party. The key to this is to understand how the parties can complement each others' interests by exchanging concessions and arriving at mutually beneficial agreements. The lawyer-mediator thus helps the parties to overcome exchange these concessions and overcome strategic obstacles. They can also present alternate routes.

However, each of these fundamental characteristics depends on the specifics of the situation, the available information, the approach of the parties and their willingness to explore various options. In some kinds of cases, mediation may even be inappropriate.

Mahatma Gandhi, in his autobiography, "The Story of My Experiments With Truth", while writing about his experiences in South Africa, said:

"My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul".