

WOULD CONCILIATION & MEDIATION SUCCEED IN OUR COURTS?

By Justice M. Jagannadha Rao

Would Conciliation and Mediation succeed in our Courts? Is it something outside the Indian culture and ethos? If it has succeeded in other countries, is it because of something different in those countries? These are some of the questions that fall for discussion.

Abraham Lincoln advocated settlement through conciliation and mediation. I may also refer to a famous statement by John F. Kennedy, former US President – he said:

“Let us not negotiate with fear but let us not fear to negotiate.”

None can deny that our cultural heritage is no different. Mahatma Gandhi advocated conciliation and mediation as a practicing lawyer in South Africa and said that it was the duty of lawyers to make efforts to settle disputes and that by doing so, lawyers would not be losers. He said that he, in fact, built up a reputation that he would always appear for the party whose case was invariably the just one. Therefore, the systems of conciliation and mediation are as much part of our cultural heritage as they are in any other country.

But what is that has stood in the way? Where was the need to usher in, by force of statute, something which was part of our culture? It is not

difficult to answer this question. Over the years, more cases have accumulated in our courts than our courts can decide within reasonable time. The litigant whose case is not worth a contest has developed a mind-set that there is nothing wrong in delaying justice, either by compelling the other party to go to a court of law or by himself moving the Court and keeping the issue subjudice. The litigant is today fairly sure that justice to his opponent, even if it cannot be denied ultimately, can be delayed as long as possible, may be for years. Unfortunately, successive Governments have neglected the judiciary. The number of Courts have not increased at least upto a basic minimum requirement and everybody finds it easy to blame the judiciary for the backlog. The judiciary is no doubt accountable, but there are other players who control the purse. It has been rightly said that the judiciary has neither the purse nor the sword.

In India, we do not have a separate system of federal courts and State courts. The Courts established by the State Governments in India administer both Central and State laws. In particular they administer laws relating mostly to the Concurrent List (List III) (such as the Contract Act, the Sale of Goods Act, Transfer of Property Act, the Negotiable Instruments Act, the Indian Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure) and to the Union List (List I) in the VII Schedule of the Constitution. This creates an obligation on the Central Government, in my view, to meet at least more than fifty percent of the expense of the State Courts. Added to this, whenever a Bill is introduced in Parliament or the State Legislatures, there is no ‘Judicial impact assessment’ made, as done in other countries like the USA setting out in the Financial Memorandum

attached to the Bill, how many civil and criminal cases will be generated out of the new rights and offences created by the Bill if it becomes law.

The Constitution Review Committee has made a recommendation that the Central Government must bear a substantial part of the expenditure on Courts and that sufficient allocation must be made by the Finance Commission and the Planning Commission in this behalf.

It is obvious however that the Government of India will not be able to establish all the needed Courts in a short time. Alternative methods must therefore be necessarily found, even otherwise.

The problem of overcrowding of dockets is not peculiar to our country nor is peculiar to our times. Such problems have been and are faced by almost every country in the world. Necessity became the mother of invention in several countries. Alternative Dispute Mechanisms were evolved and adopted. The United States of America is a more litigious country than ours. It has introduced Federal and State Legislations/Rules of Court to enable parties to resort to mediation voluntarily or by compulsion (by what is called Court-annexed mediation). So have Australia, New Zealand, Canada and the United Kingdom. There are various Reports of the Law Commissions or Reports of Royal Commissions or other committees on the ADR, mediation and conciliation. In every country, initially, there has been some resistance from the Bar. Judges, known for their conservatism, as usual, were also somewhat lukewarm in their approach to ADRs in the beginning. But, gradually, once the systems were implemented, the Bar and the Bench found that litigants did benefit enormously in terms of time and

money. Conciliation or mediation became very popular. In USA, in twenty years, surprisingly the settlement rate rose upto 94%. There are similar success stories in other countries.

Let us take the case of Lok Adalats. When the institution of Lok Adalats was started over fifteen to twenty years ago, there was tremendous skepticism and opposition both at the Bar and in the Judiciary. Soon, it was discovered that certain special types of cases – particularly those relating to claims for damages in motor accidents and compensation in land acquisition cases and others and also some criminal cases where the offences were compoundable, were best suited for settlement through Lok Adalats. These settlement centers were presided by retired Judicial Officers or those in office but not attached to the cases. As of today, millions of cases have been dealt with in Lok Adalats and millions of rupees have been distributed through Lok Adalats in these types of cases. Ultimately, Lok Adalats have today come to stay and have been accepted.

Lok Adalats can, however, deal only with cases where the settlement process is not long. But cases involving commercial disputes, property disputes, partition disputes, matrimonial disputes and the like, it is obvious, cannot be listed in a Lok Adalat and disposed of the same day by applying a multiplier formula as in accident cases. These are more serious cases where parties have to be brought to the negotiating table and the conciliator/mediator has to have separate as well as joint sessions with the parties in a good number of sittings. These may extend to six, or even ten such sessions. Lot of facts may have to be ascertained, documents may have to be called for, matters of equity may have to be taken into account and

what is more, a lot of effort is to be made to make the rival parties cool down their tempers. In a Lok Adalat, in motor accident cases, the rivals are either the State or the Insurance companies and there is absent the emotional part that is invariably involved during negotiation in other types of cases. This is because there is no such long standing rivalry or enmity in Lok Adalat cases. It is, therefore, essential that in more serious cases, parties must be cajoled, nay, even be persuasively compelled, to talk to each other through a conciliation/mediation process so that they may first cool down, come to reason and start thinking of settling their disputes. Once that is done, then conciliation or mediation is held, and settlement reached, they can still remain friends. There is no longer any acrimony. In addition, both sides would have saved time and money.

We have been a lawyers/Judges, in all, for decades. We all did settle a few cases. But now, Parliament, which saw that conciliation and mediation processes have led to a new revolution in judicial administration in other countries, has, in its wisdom, given us all a mandate that conciliation/mediation should be a regular process in every case which comes to Court. Even if parties do not agree for conciliation or mediation, the Court may, if it thinks the case to be a fit case, make a reference to conciliation or mediation. Courts and lawyers have therefore a paramount obligation to enforce the legislative mandate. We, therefore, have necessarily to make an effort to see how, by peaceful means, rather than by the adversarial process,- we can wipe out the tears of those suffering prolonged agony caused by delay and expense. If Lok Adalats, regarding which there was initial opposition, have come to stay and have become acceptable because of the spectacular results achieved, there is no reason

why the conciliation/mediation processes should not be given a fair trial in civil litigation, where a mediator/conciliator brings down the tensions, make parties see reason, and helps in settling their disputes. Unlike other systems of ADR like ‘compulsory or court-annexed non-binding arbitration’, there is here no compulsion. There is only persuasion so far as the terms of settlement are concerned. Compulsion is only to the extent of compelling parties to go to the negotiating table, discuss through the medium of an experienced conciliator/mediator. Such a process was always part of our Indian culture, even long before any system of Courts was established.

This Conference is intended to impress upon the Bar and the Judiciary to treat the Court not only as a seat for regular adjudication but also as a Centre for settlement, established by Parliament. In every High Court and in every District Court, to start with, separate accommodation must be provided for a conciliation/mediation centre to function. The Courts have a dual function – one as an adjudicator and the other as a facilitator for settlement. As done in the Gujarat High Court, every High Court and District Court must straightaway set apart specific accommodation for a “Conciliation and Mediation Centre”. After Court hours every day, and during week ends and holidays, the Centre must function regularly. Such Centers are sure to attract a lot of response.

Apart from the direct advantages to the litigants in each of such cases which is settled, there are other indirect advantages to the judicial administration as a whole on account of this new effort? This new process of settlement through conciliation and mediation will reduce the civil dispute dockets and bring the pendency to a tolerable level. The greater advantage,

in fact, is the one that will indirectly accrue to the criminal justice system. If civil cases are reduced substantially or to some extent, the time so saved can be utilized for disposal of a larger number of criminal cases. In that branch, there cannot be settlements except where they relate to compoundable offences. Plea bargaining has not yet become part of our system.

In our country, there is one great advantage, as compared to other countries, in that we are not burdened, both in terms of time and expense, by a jury system in civil cases. That would have delayed our trials more. With that advantage in our procedural system, there is need to go for conciliation/mediation in a big way as ordained by statute and take it seriously. The leadership qualities of our Chief Justices, Judges and lawyers must come to the fore. This Conference is intended to impress every one that the new concepts introduced in sec. 89 as regards conciliation and mediation are sure to result in bringing about a silent revolution in our judicial system.

I am not going into the various niceties in the procedure, or the various techniques to be employed by the conciliator/mediator in this paper. The amount of literature on conciliation/mediation and case management I have come across in recent months is mind boggling. There are number of books, articles, rules, statutes available on the subject. Lot of literature is available in the internet too. Every High Court/District Court/Bar must first build up a good library of books, or articles from journals or internet, on these subjects. In addition our judges and lawyers require to be trained. Workshops, seminars, conferences must therefore be held regularly in the Districts as well as in the Courts every month, for quite sometime. Bar

Councils should seriously think of ADRs as a compulsory subject. There can also be a separate examination on ADRs and a pass therein can be a condition for grant of licence to practice to highlight the importance of the ADR processes. If a revolution is to be brought about, it cannot be done by mere legislation, it must be done by motivating one's self as well as motivating others. But a word of caution – all settlements at mediation or conciliation must be voluntary, the procedure must be fair and none of the parties should go back with a feeling that the terms of settlement were the result of some compulsion. Settlements must be the result of reasonable persuasion.

Human beings, when it comes to disputes relating to money or property or status, are all the same, everywhere round the globe. Selfishness, strength of money-power for protracting litigation or ego are common features. If the conciliation/mediation solution have been successful in other countries, they must and will succeed here also. Where the problems are same, the solutions could be similar, though there may be differences in degree or the methodology adopted. The procedure for conciliation/mediation are today part of the systems of almost every judicial administration both in common law countries as well as in countries governed by civil law systems. The fact that we have woken up in 1999 and have started to enforce sec. 89 of the Code of Civil Procedure only from 1st July 2002, should not matter. Better late than never.

Let me reiterate my appeal to the Bench and Bar to implement the parliamentary mandate and make it a success. The purpose of this Conference, as stated earlier, is to request every Chief Justice, every Judge,

every Bar Council, every Bar Association and every lawyer to give conciliation/mediation higher priority than adjudication and give the litigant a reasonably good chance of settling the disputes so as to save time, money, - leaving more complicated and tougher cases and the criminal cases to pass through the adjudicatory process.

CONCEPTS OF CONCILIATION AND MEDIATION AND THEIR DIFFERENCES

by Justice M. Jagannadha Rao

One of the questions constantly asked by many is as to what is meant by conciliation and mediation, whether they are the same and, if not, whether there are any differences?

Conciliation and Mediation

Whether, in common parlance, there is some difference between conciliation and mediation or not, it is however clear that two statutes by Parliament treat them as different. (a) In the year 1996, the Arbitration and Conciliation Act, 1996 was passed and sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of 'mediation' or 'conciliation'. Sub-section (1) of sec. 30 permits the arbitral tribunal to

“use mediation, conciliation or other procedures”,
for the purpose of reaching settlement.

(b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of 'conciliation' and 'mediation' as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with sec. 89.

Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals

with ‘Conciliation’ there is no definition of ‘conciliation’. Nor is there any definition of ‘conciliation’ or ‘mediation’ in sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999).

Conciliation

In order to understand what Parliament meant by ‘Conciliation’, we have necessarily to refer to the functions of a ‘Conciliator’ as visualized by Part III of the 1996 Act. It is true, section 62 of the said Act deals with reference to ‘Conciliation’ by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This makes no difference as to the meaning of ‘conciliation’ under sec. 89 because, it says that once a reference is made to a ‘conciliator’, the 1996 Act would apply. Thus the meaning of ‘conciliation’ as can be gathered from the 1996 Act has to be read into sec. 89 of the Code of Civil Procedure. The 1996 Act is, it may be noted, based on the UNCITRAL Rules for conciliation.

Now under section 65 of the 1996 Act, the ‘conciliator’ may request each party to submit to him a brief written statement describing the “general nature of the dispute and the points at issue”. He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Subsection (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned

and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account “the circumstances of the case, the wishes the parties may express, including a request for oral statements”. Subsection (4) is important and permits the ‘conciliator’ to make proposals for a settlement. It states as follows:

“Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.”

I shall briefly refer to the other provisions before I come to sec. 73. Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels there exist elements of a settlement. He is also entitled to ‘reformulate the terms’ after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

“Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After

receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations.”

The above provisions in the 1996 Act, make it clear that the ‘Conciliator’ under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible settlement” or “reformulate the terms”. This is indeed the UNCITRAL concept.

Mediation:

If the role of the ‘conciliator’ in India is pro-active and interventionist as stated above, the role of the ‘mediator’ must necessarily be restricted to that of a ‘facilitator’.

In their celebrated book ‘ADR Principles and Practice’ by Henry J. Brown and Arthur L. Mariot (1997, 2nd Ed. Sweet & Maxwell, Lord on Chapter 7, p 127), the authors say that ‘mediation’ is a facilitative process in which “disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.”

In yet another leading book on ‘Dispute Resolution’ (Negotiation, Mediation and other processes’ by Stephen B. Goldberg, Frank E.A. Sander

and Nancy H. Rogers (1999, 3rd Ed. Aspine Law & Business, Gaithesburg and New York)(Ch. 3, p. 123), it is stated as follows:

“Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.

Despite the lack of ‘teeth’ in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others’ views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Prof. Robert Baruch Bush and Prof. Joseph Folgen (ibid, p 136) say:

“In a transformative approach to mediation, mediating persons consciously try to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. In stead, they encourage parties to define problems and find solutions for themselves and they endorse and support the parties’ own efforts to do so.”

The meaning of these words as understood in India appears to be similar to the way they are understood in UK. In the recent Discussion Paper by the Lord Chancellor's Department on Alternative Dispute Resolution (<http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm>) (Annexure A), where while defining 'Mediation' and 'Conciliation', it is stated that 'Mediation' is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Mediation can be 'evaluative' or 'facilitative'. 'Conciliation', it is said, is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. But it is also stated that the term 'conciliation' is gradually falling into disuse and a process which is pro-active is also being regarded as a form of mediation. (This has already happened in USA).

The above discussion shows that the 'mediator' is a facilitator and does not have a pro-active role. (But, as shown below, these words are differently understood in US).

The difference between conciliation and mediation:

Under our law and the UNCITRAL model, the role of the mediator is not pro-active and is somewhat less than the role of a 'conciliator'. We have seen that under Part III of the Arbitration and Conciliation Act, the 'Conciliator's powers are larger than those of a 'mediator' as he can suggest proposals for settlement. Hence the above meaning of the role of 'mediator'

in India is quite clear and can be accepted, in relation to sec. 89 of the Code of Civil Procedure also. The difference lies in the fact that the ‘conciliator’ can make proposals for settlement, ‘formulate’ or ‘reformulate’ the terms of a possible settlement while a ‘mediator’ would not do so but would merely facilitate a settlement between the parties.

Brown quotes (at p 127) the 1997 Handbook of the City Disputes Panel, UK which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative. It is there stated that conciliation “is a process in which the Conciliator plays a proactive role to bring about a settlement” and mediator is “a more passive process”.

This is the position in India, UK and under the UNCITRAL model. However, in the USA, the person having the pro-active role is called a ‘mediator’ rather than a ‘conciliator’. Brown says (p 272) that the term ‘Conciliation’ which was more widely used in the 1970s has, in the 1970s, in many other fields given way to the term ‘mediation’. These terms are elsewhere often used interchangeably.

Where both terms survived, some organizations use ‘conciliation’ to refer to a more proactive and evaluative form of process. However, reverse usage is sometimes employed; and even in UK, ‘Advisory, Conciliation and Arbitration Service’ (ACAS) (UK) applies a different meaning. In fact, the meanings are reversed. In relation to ‘employment’, the term ‘conciliation’ is used to refer to a mediatory process that is wholly facilitative and non-evaluative. The definition of ‘conciliation’ formulated by the ILO (1983) is as follows:

“the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator.”

However, according to the ACAS, ‘mediation’ in this context involves a process in which the neutral “mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject. (The ACAS role in Arbitration, Conciliation and Mediation, 1989). It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The National Alternative Dispute Resolution Advisory Council, (NADRAC), Barton Act 2600, Australia (see www.nadrac.gov.au) in its recent publication (ADR terminology, a discussion Paper, at p 15) states that the terms “conciliation” and “mediation” are used in diverse ways. (The ‘New’ Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001). It points out that the words ‘conciliation’ and ‘counselling’ have disappeared in USA. In USA, the word ‘conciliation’ has disappeared and ‘mediation’ is used for the neutral who takes a pro-active role. For example:

“Whereas the terms ‘conciliation’ and ‘conselling’ have long since disappeared from the literature in reference to dispute resolution

services in the United States and elsewhere, these terms have remained enshrined in Australian family laws, with ‘mediation’ grafted on as a separate dispute resolution service in 1991.”

Conversely, policy papers in countries such as Japan still use the term ‘conciliation’ rather than ‘mediation’ for this pro-active process (see www.kantei.go.jp/foreign/judiciary/2001/0612 report of Justice System Reform Council, 2001, Recommendations for a Justice System to support Japan in the 21st Century). NADRAC refers, on the other hand, to the view of the OECD Working Party on Information, Security and Privacy and the Committee on Consumer Policy where ‘conciliation’ is treated as being at the less formal end of the spectrum while ‘mediation’ is at the more formal end. Mediation is described there as more or less active guidance by the neutrals. This definition is just contrary to the UNCITRAL Conciliation Rules which in Art 7(4) states

“Art 7(4). The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute....”

In an article from US entitled “Can you explain the difference between conciliation and mediation” (<http://www.colorado.edu/conflict/civil-rights/topics/1950.html>), a number of conciliators Mr. Wally Warfield, Mr. Manuel Salivas and others treat ‘conciliation’ as less formal and ‘mediation’ as pro-active where there is an agenda and there are ground rules. In US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a ‘conciliator’. The above article shows that in US the word ‘mediator’

reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. In fact, in West Virginia, 'Conciliation' is an early stage of the process where parties are just brought together and thereafter, if conciliation has not resulted in a solution, the Mediation programme is applied which permits a more active role (see <http://www.state.wv.us/wvhic/Pre-Determination/20comc.htm>) The position in USA, in terms of definitions, is therefore just the otherway than what it is in the UNCITRAL Conciliation Rules or our Arbitration and Conciliation Act, 1996 where, the conciliator has a greater role on the same lines as the 'mediator' in US.

I have thus attempted to clear some of the doubts raised as to the meaning of the words 'conciliation' and 'mediation'. Under our law, in the context of sec. 30 and sec. 64(1) and sec. 73(1) of the 1996 Act, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a 'conciliator' is a mere 'facilitator' whereas a 'mediator' has a greater pro-active role. While examining the rules made in US in regard to 'mediation', if we substitute the word 'conciliation' wherever the word 'mediation' is used and use the word 'conciliator' wherever the word 'mediator' is used, we shall be understanding the said rules as we understand them in connection with 'conciliation' in India.
