STUDY OF THE AMERICAN LEGAL SYSTEM FOR PROCEDURAL REFORMS IN CIVIL COURTS IN INDIA

Justice Mohit S. Shah
Judge, High Court of Gujarat

1.0 INTRODUCTION

1.1 The problem of inordinate delay, huge arrears & backlog of civil cases is recognized to be the most serious problem of the Indian Judiciary. Number of studies have been made by different committees, the Law Commission and other agencies and various suggestions have been offered. However, the results have not been very significant so far. Delay of decades in civil cases in India runs into tens of millions of cases. For evolving solutions to this complex problem, looking around for solutions evolved by other legal systems in the world should be considered a welcome sign.

1.2 A decade ago, the USA had a similar problem, though not of the Indian magnitude. But Delay of 5 years in civil cases and a huge number of pending cases was causing a lot of concern in the USA. Judicial conferences, legislatures and their committees made various suggestions and reports. However, within a short span of 15 years the US Courts have achieved very significant results. For example, in California, known to have Courts with high volume of litigation, the delay has been reduced very significantly and most of

the cases are disposed of within one year and almost all within two years and today there are no arrears of cases older than two years.

1.3 Considerable reduction in delay in disposal of civil cases in the USA has become possible due to various measures which have been implemented with the cooperation, dedication and efforts of judges, lawyers and their associations. Most important of these measures are two:

(i) Mediation (Alternative Dispute Resolution) and

(ii) Case management.

2.0 MEDIATION

2.1 The concept of "Mediation" has become immensely popular, highly effective and most satisfactory to all parties. From a mere concept, it developed as a tool, then as an ADR mechanism and it has now ripened into a culture. In San Diego (California) having the third largest number of trial Courts in the USA, 97% of the civil cases get settled through mediation.

Mediation is a voluntary process and the mediator acts in a friendly manner without any power to decide. His only role is to facilitate the parties in coming closer and to make each party understand the case of the other party. The Mediator does not decide, he has no authority to decide, yet he successfully brings the parties together

and helps them in finding out a mutually, acceptable resolution of the dispute.

Mediators may be lawyers or retired Judges or technical experts – all of whom have undergone practical training for mediation skills. Mediation has the advantages of –

→ time and expertize of mediators,

→ privacy, confidentiality and continuity of mediation process,

→ participation by the parties in finding out the solution,

→ appealing to underlying interests of the parties rather than just demanding sacrifices from them.

2.2 Mediation has been developed as a highly specialized subject. The law schools have courses in mediation and it is offered as a subject for specialization at the postgraduate level. There are thousands of lawyers who practice exclusively as mediators. Retired Judges also act as Mediators. Every mediator is required to undergo intensive training. There are super specialist - Mediators who specialize in various branches such as Intellectual property, realty, bankruptcy, torts, accidents, medical negligence, construction, commercial causes, etc. Mediators have been successful in settling all kinds of civil disputes including highly contested cases, cases having important legal issues, and involving stakes of millions of dollars. It

is in very rare cases (that is only 3% of the cases) that parties go to trial. Mediation is an incredible success in the California State and elsewhere. More than 90% of the cases do not go to trial ! Heavy and highly contested cases with huge stakes go through mediation process within 4 to 6 months from the date of institution of the suit.

2.3 In the USA, the initiative for establishing mediation centres came from lawyers. Mediations are both private mediations (without reference by the Court) as well as the mediations referred by the Court. There are private mediation firms like JAMS having 45 full time mediators and with all infrastructure facilities to hold a large number of mediations. More people attend such places rather than wait in Courts ! The Government as well as the Judiciary have also realized the importance of mediation and how it can take a substantial load off the judicial system and thus prove both economical and satisfactory as a short term measure as well as in the long run. Hence, there are Court Annexed Mediation Centres run with funds readily made available by the Government. The mediator's fees for first four hours of mediation are borne by the State through the Court and for further period, if at all necessary, the hourly fees of the mediators are borne by the parties. Most of the cases get settled in less than four hours.

3.0 CASE MANAGEMENT

3.1 Case Management means the proceedings of a case are managed effectively by the Judge presiding over the Court and not controlled by the lawyers. In the USA, it has been realized that alternative dispute resolution mechanisms like mediation or any other mechanism will not achieve desired results, unless the parties know that in case the dispute is not settled, they will have to go to trial after a few months with all its attendant uncertainties, and that too on a date already fixed in advance. It has further been realized that at the earliest stage of the case, the Judge should take the initiative to persuade the parties sitting in a multi door hall to select the door to the appropriate room for dispute resolution. In short, mediation and case management are considered as complementary to and indispensable for each other.

3.2.0 CHIEF JUDGE

3.2.1 The Chief Judge (elected by colleagues for a fixed term) of San Diego Courts (comprising of 128 Judges & 40 Commissioners, referees and a staff of 1600) devotes his time exclusively to Court management & administration (judicial work is undertaken hardly once or twice in a month) and he monitors the working of each court, its needs and problems and gives solutions and support. He has to see that all his courts (128 + 40) work optimally & efficiently. He is assisted by a

number of professional management persons & consultants who are very highly paid, often even more than the Chief Judge.

3.2.2 As the Chief Judge of such a large establishment, he has enormous task of implementing reforms, policies, monitoring the work of judges, supervising, guiding & instructing them, looking after the entire administration and staff of 1600 & budget of $ 140 million. **If the administration is not done efficiently and effectively, the work of all 128 judges would suffer.** Thus, the priority of the Presiding Judge is to oversee the whole judicial administration and ensure that the judges' time and energy are utilized to their optimum capacity. He rarely sits in the courtroom for judicial work. For doing judicial work, he has 128 judges, but for over all administrative leadership and for ensuring good administrative support to those 128 judges, he is the only driving force. In other words, the other Judges will be able to look after **Case Management** more effectively, when the Chief Judge looks after the **Court Management**.

3.2.3 The authority of the Chief Judge, however, does not merely stem from his status and position. He also considers suggestions from a Joint committee of Judges and lawyers who meet once in a couple of months to discuss problems being faced by litigants, lawyers and

judges in the course of judicial administration – whether before or during trial and find solutions.

3.2.4 Judge Henderson, a senior Judge of the Federal District Court, San Francisco who was also the Chief Judge of that Court by rotation, indicated that circulation of disposal figures amongst the Judges also helps in motivating the Judges in deciding more number of cases and is useful as a peer pressure tool. Judge Peterson, the Chief Judge of San Diego Courts had also interesting things to say about the manner in which cases are distributed amongst the Judges of his Court and the manner in which he could motivate the Judges to decide more number of cases.

3.2.5 Some of the problems of delays and arrears in **India** can be attributed to the **lack of time** made available for effective management to the judicial leadership. Judicial Leadership is expected to attend to judicial work in the same manner and in equal proportion to that of a sitting Judge of the Court. Thus, the time available for administrative work is quite limited.

3.3 EARLY ASSIGNMENT OF THE CASE TO A PARTICULAR JUDGE

Case Management is placed on a very highly professional level and made effective in a very scientific and rational (and also ruthless) manner. Sick notes and strikes are unheard of. There are no

unattached ("Orphan") cases – discharged, sine die, unlisted, unready, no date – no judge matters. For every case, there is an involved & accountable trial judge right from the beginning – early assignment of each case to a trial judge till final disposal. Scheduling of the cases is thorough and time limit is adhered to. Right from filing the plaint and the appearance of the defendant, the judge is very actively involved & applies his mind at every stage more particularly at three appropriate stages before the trial. There are early settlements of agreed facts and also of disagreements, issues are narrowed and focused and tacked.

3.4 SCHEDULING

Right from the beginning the trial Judge is directly involved with the case and as soon as the plaint is filed the plaintiff is given a small brochure about mediation. Along with the summons and the plaint such brochure of mediation is also sent to the defendant. A schedule is fixed for the service of summons, appearance of the defendant and for a conference of the lawyers for reference to mediation. Within five months from the date of filing of the plaint, the dispute is referred to mediation (expected to be completed within 2 months) and the date for trial of the suit is also fixed so that the trial begins by the 11th month from the date of filing the plaint, just in case the suit is not settled in the meantime. In between this

period i.e. between the 8th and the 10th months, the stage for production, discovery, admission of the documents, witness list etc. is completed, in case the mediation does not succeed. A joint statement of agreed facts and of disagreed facts is filed and controversy is narrowed down. One month before the trial a pre-trial conference takes place to see that everything is complied with and the matter is made ready for trial on the fixed date with the estimate of time required. Full preparation is ensured.

3.5 PRE-TRIAL JUDICIAL SETTLEMENT CONFERENCE

Before the trial is to begin, the matter is placed before a Settlement Judge who is other than the trial Judge for that particular case. Many cases are settled at this stage. One or two Judges specially suited for the purpose are assigned the work of the settlement Judge. It is found that the cases which would have taken a week at the trial are settled within an hour. A good settlement Judge on an average settles about half a dozen cases in a day, thus saving trial time of about six weeks of other Judges.

3.6 CUT OFF DATE FOR IMPLEMENTING REFORMS

Unless it is seen working, working well & successfully and satisfactorily, the progress made by the American Judicial system in civil litigations may seem unattainable at the first blush. But even there, it has taken more than a decade to reach this level. During

discussions with the Chief Judge and former Chief Judges of the trial Courts in California, each of them agreed that it is never possible to introduce such reforms in any judicial system at one go and that they also introduced the reforms in new cases filed after a cut off date, adopting other measures for disposal of old civil cases including classification of cases and the circulation of disposal figures amongst Judges (to act as peer pressure).

4.0 CONCILIATION / MEDIATION IN INDIA

4.1 The Indian Parliament has also realized the need for resorting to alternative dispute resolution for expeditious disposal of civil cases. Section 89 of the Civil Procedure Code as inserted by the Civil Procedure Code (Amendment) Act, 1999 bears ample testimony to this concern and requires the trial Courts to refer disputes for settlement through arbitration, conciliation, mediation, Lok Adalats, etc.

4.2 The provisions of Sections 61 to 81 of the Arbitration and Conciliation Act, 1996 contain the detailed scheme of conciliation which is the same as mediation. The provisions of Section 64(2) and Section 68 of the said Act also indicate that the Indian Parliament also has contemplated the establishment of suitable private institutions for assisting the parties for the appointment of conciliators. Section 67 of the said Act also contemplates that the

role of the conciliator is the same as the role of the mediator in the American legal system. Conciliation and mediation are generally interchangeable. (Brayan A. Garner – A Dictionary of Modern Legal Usages Pg. 5554 – 2nd Ed. 1995).

4.3 In the Indian scenario, trained mediators can very competently take up contested and even heavily contested cases, which may be numerically small, but which take up a lot of quality time of the Court.

4.4 In July 2002, the Ahmedabad Mediation Centre was inaugurated by the then Chief Justice of India Mr Justice BN Kirpal. A strong case has been made out for establishing Court annexed mediation centres in India by Mr Niranjan Bhatt, Senior Advocate and Convenor of the Ahmedabad Mediation Centre, in his Article "Court Annexed Mediation" in the following words :-

> "In COURT ANNEXED MEDIATION the mediation services are provided by the Court as a part and parcel of the same judicial system as against COURT REFERRED MEDIATION, wherein the court merely refers the matter to mediator. The advantage of court annexed mediation is that the judges, lawyers and litigants become participants therein, thereby giving to them a feeling that negotiated settlement is achieved by all the three actors in justice delivery system. When a judge refers a case to the court annexed mediation service, keeping overall

supervision on the process, no one would fee that the system parts with the case. The Judge would feel that he refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same set-up. The litigants feel that they are given an opportunity to play their own participatory role in the resolution of disputes. This will also give a larger public acceptance for the process as the same time tested court system, which has acquired public confidence because of integrity and impartiality, retains its control and provides an additional service. The court is the parental institution for resolution of disputes and if ADR models are directed under court's supervision, at least in those cases which are referred through courts, the effort of dispensing justice can become more coordinated. ADR services under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complimentary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as n integral part of the system. If reference to mediation is made by the judge to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the movement of the case between the court and the mediator faster and purposeful. Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases. Court annexed mediation will give a feeling that court's own interest in reducing its caseload to manageable level is furthered by mediation and therefore reference to mediation will be a willing reference. Court annexed mediation will thus

provide additional tool by the same system providing continuity to the process, and above all, court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that Court works hand-in-hand with mediation facility will produce satisfactory and faster settlements."

5.0 INDO – US STUDY

5.1 In 1996, a Joint INDO US Study team had undertaken a study of the judicial system in India under the guidance of the then Hon'ble Chief Justice Mr A.M. Ahmadi. The study team included, inter alia, Mr Justice Saikia, Mr Justice R.C. Mankad, Mr Dipanker Gupta, Additional Solicitor General and Mr Abhishek Singvi, Additional Solicitor General, Mr Niranjan J. Bhatt, Advocate, Ahmedabad and Mr Steve Mayo, Executive Director of the Institute for Study and Development of Legal Systems (ISDLS). The Joint Study Team had visited some courts in India. It visited the Bombay High Court when Hon'ble Mr Justice M.B. Shah was its Chief Justice and also the Bombay City Civil Court. The study team also submitted a report. Recommendations made in the report have been implemented in other countries like Bangladesh and Pakistan.

5.2 The Alternative Dispute Resolution Programme (ADR) and more particularly Mediation can be extended and adapted to suit the typical needs of other legal systems. Mr Stephen Mayo, the

Executive Director of the ISDLS and other members visited Indian Courts. They found that the trial courts of the Ahmedabad City could be an ideal point of beginning. They held many meetings and conferences, workshops and seminars in Ahmedabad, in association with the Ahmedabad Bar Association. These were also attended by the Chief Justice, High Court Judges and the City Civil Judges. In 1998, Ahmedabad Bar Association and Gujarat Law Society and the ISDLS organized a conference in Ahmedabad on "Delays in Civil Litigation - Causes and Solutions". It was attended by about 500 delegates. The initiative had come from the lawyers and the Bar Association, and gave birth to AMLEAD (the Institute for Arbitration, Mediation Legal Education and Development). It is a public charitable trust registered under the Bombay Public Trust Act. Its trustees are some of the leading members of the Ahmedabad Bar Association.

5.3 Justice Wallace of the US Court of Appeal, 9th Circuit and Mr Stephen Mayo of the ISDLS visited Ahmedabad and had meetings with the then Chief Justice Hon'ble Mr Justice DM Dharmadhikari and other Judges of our High Court and the Gujarat State Judicial Academy in December, 2000. A delegation of four mediation trainers from the USA sponsored by ISDLS visited Ahmedabad and under aegis of the Gujarat State Judicial Academy, they held a two

day workshop in February, 2001 for trial court Judges – City Civil Judges, Small Cause Court Judges and other judicial officers.

5.4 Under the INDO-US Exchange Programme, Ms Justice Sandro O' and Mr Justice Breyar of the US Supreme Court, Mr Justice Wallace of the US Court of Appeal, 9th Circuit and Ms Fern Smith, Director of the Federal Judicial Centre visited Indian and particularly Ahmedabad on 13th September, 2001, and held deliberations on Court Management, Case Manager, ADRs, Mediations and Judicial training with the Indian delegates including the then Chief Justice Hon'ble Mr Justice DM Dharmadhikari and Judges of the Gujarat High Court, Hon'ble Mr Justice Arun Kumar, the then Judge of the Delhi High Court, Senior Advocates Mr Dipanker Gupta and Mr Abhishek Singvi, a few trial Court Judges and lawyers from the High Court and the Ahmedabad City Civil Court.

5.5 In October, 2002, the Indian team led by the then Chief Justice of India Hon'ble Mr Justice BN Kirpal visited the Amercian Courts and mediation centres and the observations in the Salem Advocates' Association case (2003) 1 SCC 49 bear ample testimony to the impressive performance of the mediation and case management concepts in the USA.

6.0 **CONCLUSION**

Mediation alongwith the traditional forms of ADR mechanisms can take away a substantial load from the heavy backlog of cases on the Courts, provided the lawyers and Judges take up the reforms in case management as well as support ADR mechanisms in right earnest and as a part of one and the same project. This may be done by selecting a few courts for the pilot project of implementing the reforms in the first instance.

****