

1. What is Mediation?

Mediation is a negotiation process in which a neutral third party assists the disputing parties in resolving their dispute. A Mediator uses special negotiation and communication techniques to help the parties to come to a settlement. The parties can appoint a Mediator with their mutual consent (or) a mediator can be appointed by the Court in a pending litigation. Mediation always leaves the decision making power with the parties. A Mediator does not decide what is fair or right, does not apportion blame, nor renders any opinion on the merits or chances of success if the case is litigated. Rather, a mediator acts as a catalyst to bring the two disputing parties together by defining issues and limiting obstacles to communication and settlement.

2. What are the ADR procedures contemplated under Sec.89 CPC?

Section 89 refers to five types of ADR procedures, made up of one; Adjudicatory process (Arbitration) and four negotiatory processes (Non Adjudicatory) i.e. Conciliation, Mediation, judicial settlement and Lok Adalat. Section 89 of CPC makes it clear that two of the ADR processes i.e. Arbitration and Conciliation will be governed by the provisions of Arbitration and Conciliation Act and two other ADR processes i.e. Lok Adalat settlement and Mediation will be governed by Legal Services Authorities Act. (See S.89 (2)(c) CPC as amended by Judicial interpretation in Afcon's Infra Judgment).

3. What are the types of Mediations?

THERE ARE TWO TYPES OF MEDIATION:

COURT- REFERRED MEDIATION- It applies to cases pending in Court and which the Court would refer for mediation under Sec. 89 of the Code of Civil Procedure, 1908.

2. **PRIVATE MEDIATION** - In private mediation, qualified mediators offer their services on a private, fee-for -service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

4.

5. What are the qualifications of a Mediator?

The following persons are eligible to be appointed as a Mediators:

- a. (i) Retired Judges of the Supreme Court of India
(ii) Retired Judges of the High Court:
(iii) Retired District and Sessions Judges or retired Judges of the Courts of equivalent status.
(iv) Judicial Officers of Higher Judicial Services.
- b. Legal practitioners with at least 10 years of standing at the bar the level of the Supreme Court or the High Court or the District Court or equivalent status:
- c. Experts or other professionals with at least fifteen years standing; or retired senior bureaucrats or retired senior executives;

6. What are the functions of a Mediator?

The functions of a mediator are to:

- (i) Facilitate the process of mediation; and
- (ii) Assist the parties to evaluate the case to arrive at a settlement.

7. Who is a trained mediator?

A trained mediator is one who underwent (40) hours of training imparted by Mediation and Conciliation Project Committee, New Delhi and a court must refer pending cases only to trained mediator.

8. Whether trained mediators are available in every District?

Yes. We have MCPC (40) hours trained mediators in every District including in High Court.

9. Whether Judges are also trained as mediators?

Yes. In our State we have Judge trained mediators also. The parties may also request Coordinator of Mediation Center to appoint a Judge trained mediator who will consider such request depending on their availability.

10. At what stage pending dispute can be referred for Mediation u/Sec. 89 CPC?

When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of the parties and the court should acquaint itself with the facts of case and nature of dispute between the parties and in cases which can be referred to ADR processes, the court should explain the choice of ADR processes

to the parties to enable them to exercise their option, if the parties are not agreeable for arbitration and conciliation, then the court may refer the matter for mediation in cases where complicated questions are involved or cases requires several rounds of negotiations.

11. Whether family and matrimonial disputes can also be referred after the pleadings are completed?

No. In family disputes or matrimonial cases, the position is slightly different. In these cases, the relations become hostile on account of various allegations in the petition against the spouse and the hostility will be further aggravated by the counter allegations made by the respondent in his/her written statement or counter. Therefore, as far as family disputes are concerned the ideal stage for mediation will be immediately after appearance of respondent and before the respondent files counter / written statement.

12. What is the procedure when a matter is referred for Arbitration u/Sec. 89 CPC?

The Arbitration and conciliation Act makes it clear that there can be a reference to the arbitration only if there is a pre-existing arbitration agreement between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reach the stage of Order X CPC the matter would have stood referred to Arbitration without taking recourse u/Sec. 89 CPC. Even if there is no pre-existing arbitration agreement the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court u/Sec. 89 CPC. Such agreement can be by means of joint memo (or) joint application (or) a joint affidavit before the Court (or) by record of agreement by the court in the order sheet signed by the parties. Once there is such agreement in writing signed by the parties the matter can be referred to arbitration

13. Whether in the absence of consent the matter could be referred to arbitration u/Sec. 89 CPC

No. If there is no consent between the parties for reference to arbitration the court cannot refer the matter to Arbitration u/Sec. 89 CPC. Reference to Arbitration u/Sec. 89 CPC could only be with the consent of both sides and not otherwise. Once referred to arbitration the case will go outside the stream of the Court permanently and will not come back to the court.

14. Whether consent is essential to refer a matter for conciliation u/Sec. 89 CPC

Yes. If both parties do not agree for conciliation, the court cannot refer them to conciliation u/Sec. 89 CPC. Unlike arbitration when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the Court for framing of issues and proceeds with the trial.

15. Whether consent is required to refer the matter u/Sec. 89 CPC for Lok Adalat, Mediation and Judicial Settlement?

No. The three ADR processes i.e., Lok Adalat, Mediation and Judicial Settlement do not require the consent of the parties for reference. The court has to use its discretion in choosing the ADR process judiciously, keeping in view the nature of the dispute, interest of the parties and expeditions in dispute resolution.

16. What is the procedure while referring the pending matter u/Sec. 89 CPC?

If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need to be stated in the order sheet. If the reference is to any other ADR processes, the court should briefly record that having regard to the nature of the dispute, the case deserves to be referred to Lok Adalat or mediation or judicial settlement as the case may be. There is no need for elaborate order for making the reference.

17. Whether the settlement by ADR process is binding in itself?

When court refers to Arbitration u/Sec. 89 CPC, the case goes out of the stream of the court and becomes an independent proceeding before the Arbitration tribunal. Arbitration being an adjudicatory process it always ends in a decision and there is no question of failure of ADR process or the matter is being returned to the Court with a failure report. The award of arbitrator is binding on the parties and executable as if decree of the Court.

When a matter is settled through conciliation, the agreement is enforceable as if a decree of the court having regard to Sec. 74 r/w. 30 of Arbitration and Conciliation Act.

Similarly when a settlement takes place before the Lok Adalat, the Award is is deemed to be a decree of the Civil Court and executable as per Sec. 21 of Legal Services Authorities Act.

Where the matter is referred to another judge for settlement and settled before him, such agreement will also be placed before the Court who referred the matter and that the court will make a decree in terms of it.

When the matter is settled through mediation u/s 89(2)(C) of CPC as amended by Afcon's Infra Judgment the terms of settlement shall be reduced into writing and the same will be placed before the referral judge and the referral judge shall examine and pass a decree subject to legality and enforceability of the terms of settlement and the said decree is binding on the parties as it has the status of Lok Adalat award.

18. What is the role of referral Judges in Mediation?

Judges who refer the cases, for settlement through any of the ADR Methods u/Sec. 89 CPC are known as referral Judges. All cases are suitable for mediation. Success of mediation will depend mostly on proper selection and reference of only suitable cases by referral judges. In the light of Afcon Judgment of the Hon'ble Supreme Court, a referral judge is not required to formulate the terms of reference or to make them available to the parties for their observation. He is only expected to make an objective assessment to the suitability of the case for reference to the ADR.

19. Whether a referral judge can persuade and motivate the parties for mediation?

Referral judges play a crucial role in motivating the parties to resolve their dispute through mediation. If the parties are not inclined to agree for mediation the referral judges may ascertain for disinclination in order to persuade and motivate them for mediation. He should explain the concept of mediation advantages and how the settlement through mediation can satisfy the underlying interests of the parties.

20. What is the role of the referral judge after completion of mediation?

The referral judges play a crucial role even after conclusion of mediation and he retains the control and jurisdiction over the matter, the result of the mediation has to be placed before the Court for passing appropriate orders.

If there is settlement through mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable, if the contents are not enforceable it shall be brought to the notice of the parties and the referral judges should desist from acting upon such agreement. If the agreement is found to be lawful and enforceable the referral judge should act upon the terms and conditions of the agreement and pass order. In view of judicial amendment of S.89(2)(c) in Afcon's Infra

Judgment such decree is equal to Lok Adalat award, final, and the provisions of Legal Services Authorities Act will apply for such settlement.

If there is no settlement between the parties, the court proceedings shall continue in accordance with law. In order to ensure that the confidentiality of mediation process is not breached by the referral judge, he/she should not ask for reasons for failure of the parties to arrive at a settlement. To protect the confidentiality of the mediation process there should not be any communication between the referral judge and the mediator regarding the mediation during or after the process of mediation

21. How to comply the requirements of section 89 (1) of CPC to formulate or reformulate the terms of the settlement before referring the matter?

The requirements of Section 89(1) CPC is that the Court should formulate or reformulate the terms of settlement would only mean that the court has to briefly refer to the nature of the dispute and decide upon the appropriate ADR process (Afcons Judgment). It is sufficient if the court refers the nature of dispute (in a sentence or two) and makes reference.

22. Whether the Judge assisted the parties in judicial settlement when referred u/Sec. 89 CPC. Can try the suit if the settlement is not arrived?

No. If the judge in-charge of the case assists the parties, and if settlement negotiations fails, he should not deal with the adjudication of the matter, to avoid apprehension of bias and prejudices. It is therefore advisable to refer the cases proposed for judicial settlement to another judge.

23. What is the time limit normally allotted for ADR process?

If the court refers the matter to an ADR process (other than Arbitration) it should keep the track of the matter by fixing a hearing date for the ADR report. The period allotted for the ADR process can normally vary from a week to two months.. (Which may be extended in exceptional cases depending upon the availability of the alternative forum, the nature of the case etc). As per Rule 18 of MCPC Rules, 2015 it is (90) days from the date fixed for first appearance of parties before the mediator.

24. Whether the original record has to be sent at the time of referring the matter u/Sec. 89 CPC?

Normally, the court should not sent the original record of the case, when referring the matter for an ADR forum (other than Arbitration). It should make available only copies

of relevant papers to the ADR forum. (For this purpose when the pleadings are filed, the court may insist upon filing of an extra copy) However, if the case is referred to a court annexed mediation center, which is under the exclusive control and supervision of a judicial officer, the original file may be made available where ever necessary.

25. What category of cases are normally considered as unsuitable for ADR process?

- (i) Representative suits u/O I Rule 8 CPC involving public interest or interest of numerous persons who are not parties before the court.
- (ii) Disputes relating to election to public offices
- (iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- (iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.
- (v) Cases requiring protection of courts, as for example, claims against minors, Deities and mentally challenged and suits for declaration of title against the Government.
- (vi) Cases involving prosecution for criminal offences.

All other cases of civil nature whether pending in civil courts or other special tribunals or normally suitable for ADR process.

26. Whether reference to ADR process is mandatory?

Where the case falls under the above mentioned excluded category of cases there need not be reference to ADR process but in all other cases reference to ADR process is mandatory

27. Briefly explain the process and the stages of the Mediation?

Mediation is a dynamic process in which mediator assists the parties to negotiate a settlement for resolving the dispute. In doing so, the mediator uses the four functional stages of mediation, namely,

1. Introduction and opening statement
2. Joint Sessions
3. Separate Session (s)
4. Closing

28. What are the advantages of Mediation?

ADVANTAGES OF MEDIATION

- a) The parties have CONTROL over the mediation in terms of
 - i) its scope; and
 - ii) its outcome (i.e., they have a right to decide whether to settle or not and the terms of settlement.)
- b) Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and directly participate in the negotiation.
- c) The process is VOLUNTARY and any party can drop it at any stage if he feels that it is not helping him. Mediators can't force the parties for any settlement against the consent of parties.
- d) The procedure is SPEEDY, EFFICIENT and ECONOMICAL.
- e) The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case.
- f) The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.
- g) Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent.
- h) The process is CONFIDENTIAL.
- i) The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.
- j) Mediation helps to maintain/ improve/ restore relationship between the parties.
- k) Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process
- l) In mediation, the focus is on resolving the dispute in a MUTUALLY BENEFICIAL WAY.
- m) A mediation settlement often leads to SETTLING OF RELATED/ CONNECTED CASES between parties.
- n) Mediation allows CREATIVITY in dispute resolution.
- o) When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.
- p) Mediation PROMOTES FINALITY.

q) REFUND OF COURT FEES is permitted as per S.66 (A) of APCF & SV Act in cases of settlement in a court referred mediation.

29. What is the role of Lawyers in Mediation?

Though the role of the lawyer in mediation is functionally different from his role in litigation, the service rendered by the lawyer to the party during the mediation process is a professional service, they have a pro-active role to play in the mediation process, they should know the concept and process of mediation and the positive role to be played by them in assisting the parties in mediation. Infact the role of lawyer commence even before the case comes to the court and it continues throughout the mediation process and even thereafter, whether the dispute has been settled or not.

30. What is the role of the parties in mediation?

As far as the parties are concerned the whole process of mediation is voluntary, they have a direct, active and decisive role in arriving at amicable settlement of the dispute. Neither the mediator or the lawyers take a decision for the parties. They must recognize and respect the right of self-determination of the parties however, the parties are free to avail the services of their lawyers in connection with mediation.

31. Whether the parties are entitled for refund of court fee in a settlement through mediation?

Yes. As per section 16 of Court Fee Act, or u/Sec. 66(A) AP Court Fee and Suit Valuation Act, whenever the pending dispute is referred u/Sec. 89 of CPC to any one of the modes of settlement, the plaintiff is entitled for a certificate from the court authorizing to receive back from the collector the full amount of court fee paid in respect of such suit.

32. 31. Whether a mediator can be summoned to testify in any proceeding or to disclose as to what transpired during the mediation?

No. The mediator cannot be called upon to testify in any proceedings or to disclose to the court as to what transpired during the mediation process.

33. What shall be report of the Mediator in case of failure to settle the dispute?

In the event of failure to settle the dispute, the mediator does not mention the reason for the failure. The report will only say "Not Settled".