

MEDIATION CHALLENGES



- Roshan Dalvi

MAHATMA GANDHI said:

“I realized that the true function of a lawyer was to unite parties 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.”

Is there anyone in this room

who would rather

not have the disputes settled?

ADR

- Arbitration – affordable by a few
- Conciliation – used in few kinds of disputes
- Lok Nyayalayas – are intermittent
- Mediation – by far the most preferred mode
- Judicial Settlement – Amongst Judges

OUR HISTORY

Pre CPC amendments -

Beginnings in Maharashtra:

- Peshwa – Nyayadhish – Mamlatdar – Panchayat
- Mediation was used as an art; the scientific techniques were unknown
- Compulsion to convene a Panchayat – Required submission of bonds to ensure participation
- If revoked, fine, imprisonment or forfeiture of bond
- Not 5, but 6 members – 2 of the Plaintiff, 2 of the Defendant and 2 of the Peshwa
- No power to administer oath and compel attendance
- Slow to assemble; many persons did not want to serve as arbitrators or mediators

“All my life through, the very insistence on truth has taught me to appreciate the beauty of compromise.” - Mahatma Gandhi

OUR HISTORY

Post CPC amendments

- Legislative mandate
 - Under the stewardship of Lord Justice A. P. Shah, a mass movement commenced
 - A second line of profession emerged
 - A new era dawned
 - Judges played a pro-active role
 - Matters are referred to mediation at the correct stage
- State Practice - Bengaluru

A *lean* compromise is better than a **FAT** lawsuit !

Grassroot level

- Gram Panchayat in India – adjudicating and settling disputes under trees
- Barefoot Doctors in China – Farmers in paddy fields trained in basic medicine to help spread healthcare and reduce infections

Justice Krishna Iyer's Vision

- ❑ People's Justicing
- ❑ Conciliation Organs
- ❑ Settlement Bodies
- ❑ Mobile Tribunals
- ❑ Community Representatives adjudicating disputes
- ❑ Positive Pre-Trial Settlement Processes

-In Constitutional Miscellany Pg. 225 Chapter XI

BEGINNINGS ABROAD

- AUSTRIA
 - Juvenile delinquents
- AUSTRALIA
 - Labour legislations
 - *Now even amongst school children*
- USA
 - Appeals
 - Property cases
 - Bankruptcy courts
 - *Now taught in US colleges*

TYPES OF ADR IN THE USA

- Negotiation
- Mediation
- Arbitration
- Neutral Evaluation
- Settlement Conference
- Med - Arb

THE US PRACTICE

- Forms to disclose facts on which the Judge decides to refer the matter to mediation or not
- Form of ADR option to be sent along with notice summons
- Life of suits determined under statute – if the suit is not ended within the statutory period, it is dismissed

THE CANADIAN / UK / AUSTRALIAN PROCEDURE

- “Automatic / Compulsory Mediation” – after framing of issues the computer shows the ADR INTERVAL
- The Court issues notice
- The parties have to meet

A face saving device for parties who hesitate to make the first move

No breach of human rights – no harm

The art of dividing the cake in such a way that everybody believes that he got the biggest piece

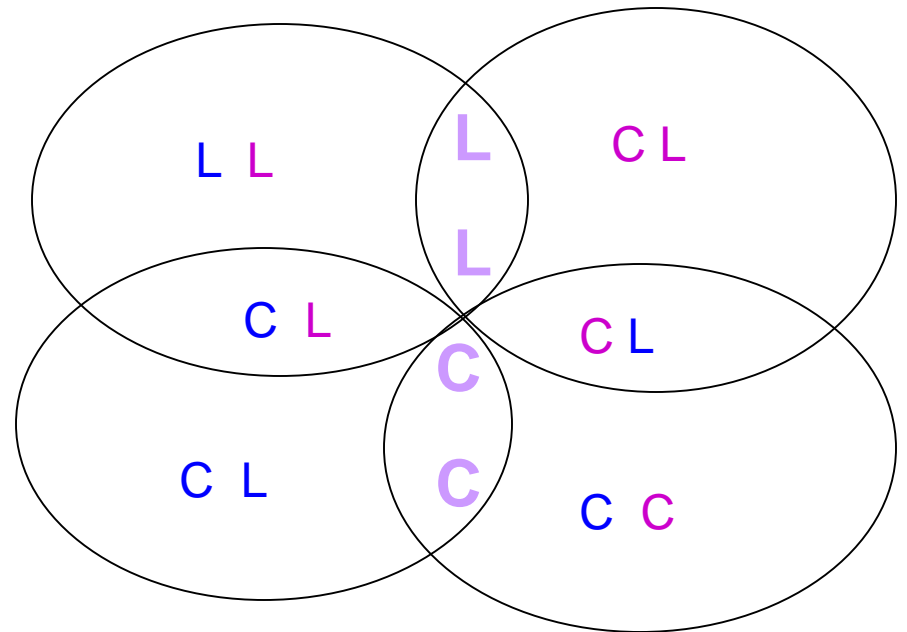
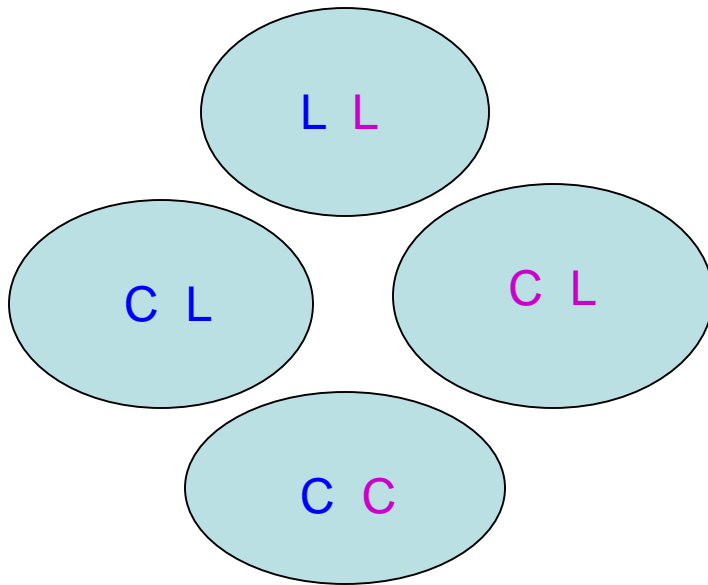


TYPES OF SUITS TO BE REFERRED TO LOK NYAYALAYA

- Motor accidents' claims
- Land references
- Bank suits
- Summary suits
- Family disputes
- S.498A cases
- S.138 cases
- Any other matters by consent of parties

SUBSTANCE OF MEDIATION

Connecting People



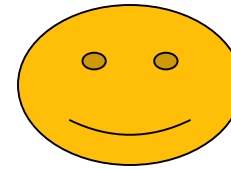
MEDIATION STRATEGY

P – Identifying **P**roblems



O – Generating ptions

S – Reaching **S**olution



Genius is the ability to reduce
the complicated into the simple !

KINDS OF CIVIL SUITS

- Possession suits
 - Recovery of possession
 - Protection of possession
- Specific Performance suits
- Commercial Disputes
 - Money Matters
 - Trade Disputes
 - Suits for Damages
- Corporate Litigation

Kinds of Civil Suits (Contd..)

- Family Disputes
 - Petitions for Custody / Access
 - Criminal applications for maintenance
 - Petitions for Divorce by mutual consent
- Partition suits
- Administration suits
- Partnership disputes
 - Suits for accounts
 - Suits for Dissolution
- Bank Suits

OTHER DISPUTES

- Community disputes
- Neighbourhood disputes
- Society disputes
- Inter-religious disputes
- Environmental disputes

*Mediation - Making Minds
Meet*

COMMERCIAL MEDIATION – IN WHICH DISPUTES

- Trade
- Project
- Energy
- Tariffs
- Export – Import
- Banking
- Insolvency
- IPR
- Shareholder
- Employer-Employee
- Real Estate
- Mining
- E- Commerce
- Transport
- Logistics
- Admiralty
- Healthcare

MEDIATION - FOR WHOM?

- NGOs
- Lawyers
- Corporates
- Bank Managers
- Union Leaders
- Bureaucracy
- Government / Public
- PSUs
- Police Officers

MEDIATION – NOT FOR WHOM

- Probate
- Divorce
- Winding up of Companies
- Mergers / Amalgamations
- Declaration of Tenancy
- Crimes – It belittles injury – No plea bargaining except in specified petty crimes

CAUTION

✕ Matters which cannot be referred to Mediation:

- ✕ Involving point of law
- ✕ Involving interpretation of documents
- ✕ Involving alleged fraud
- ✕ Acts against society / human rights

There can be no give and take on fundamentals; That would be surrender. I is all give, no take. - Mahatma Gandhi

TIME FOR REFERENCE



🕒 Pending Matters

- ✧ Any time is good time
- ✧ At the time of hearing of interim application
- ✧ After Issues are framed and before evidence is recorded
- ✧ Even after part trial

🕒 New Matters

- ✧ At the time of the filing itself (in case of all referable matters)
- ✧ After the first hearing (as deemed fit by the Judge)

RIGHT TIME

- The sooner, the better – NOW?
- Early Stage Mediation (ESM)
- After witness statements are exchanged
- After the cross examination is recorded
- At the time of the Judgment / Award

*I am not here to convince you;
I am here to understand you.*

MEDIATION STRATEGIES

- **Case of contracts**

- Create options for novation by Negotiation

- **Case where the bottom line is money**

- Arrive at the right figure

(from: *“How to win any argument”* by Robert Mayer)

MED-ARB / MID-ARB

- Med-Arb in the UK, USA, Canada
 - In case of an impasse, the Mediator becomes the Arbitrator.
- Mid-Arb in India
 - In case of an impasse, the parties may leave the final solution to the Mediator. But, they must sign the settlement agreement / consent terms as per the last suggestion of the Mediator. The Mediator does not give an award.

Change your Attitude and gain some Altitude
Donald Trump

ARB-MED

HYBRID 2 STAGE PROCESS

– same person knowing the value of both

○ Arb - Med

Arbitration is completed with Award.

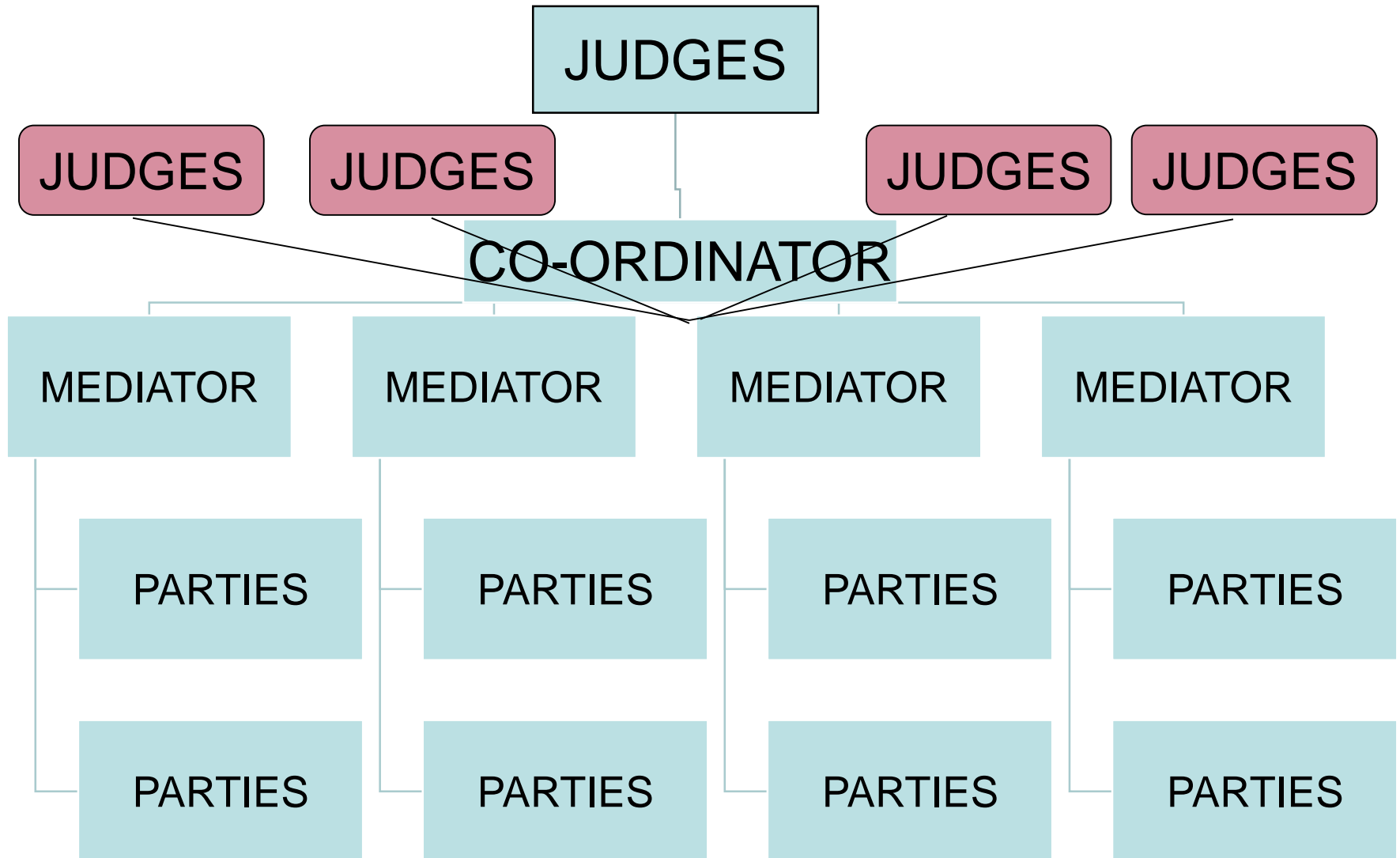
Parties are given option to negotiate/settle.

If successful, the Award would be torn/deleted.

If not, the Award would be served – No issue of double hatting

Mediation as a part of Arbitration needs a change of ethos

THE 4 ARMS OF MEDIATION



PROCEDURE FOR REFERENCE TO MEDIATION

- The **Judges** shall:
 - Identify matters for Mediation
 - Show them separately on Board
 - Notify on Board for Reference to Mediation
 - Take them up in the beginning of the day for reference
 - Fix date and time for appearance before Co-ordinator
 - Adjourn them for a specified period to give settlement a chance

PROCEDURE FOR REFERENCE TO MEDIATION (Contd..)

- The **Co-ordinator** shall:
 - Obtain list of referred matters from the Sheristedars daily
 - Assign matters to Mediators, preferably of the choice of the parties
 - Maintain a register of the matters referred to Mediation

PROCEDURE FOR REFERENCE TO MEDIATION (Contd..)

- The **Mediators** shall:
 - Fix date and time for Mediation
 - Complete within time-frame
 - File Report in Court and inform co-ordinator

*Those who bring Sunshine to the lives of others
Cannot keep it from themselves !*

PROCEDURE FOR REFERENCE TO MEDIATION (Contd..)

- The **parties** shall:
 - Contact the Mediator and fix up time and venue for Mediation
 - Provide a set of R & P to the Mediator, as required
 - Report to Court about the conclusion of the Mediation on the date to which the suit was adjourned for Directions

Provisions which are rigid in theory

are frigid in practice

RESULT OF REFERENCE

✓ “Successful” Mediation

- Consent Terms to be drawn up by the parties
- Matter disposed of

✗ “Failed” Mediation

- Matter to be taken up by the Judge expeditiously
 - Take Affidavit of Evidence
 - Consider admissibility of documents
 - Refer matters to Commissioners for cross-examination
 - Fix date for arguments
 - Deliver Judgment

THE JOURNEY
OF
A THOUSAND MILES
BEGINS WITH
A SINGLE STEP

