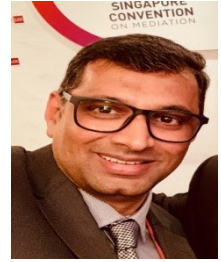


## MEDIATOR'S OPENING STATEMENT



.....By Mr.A.J.Jawad

V. Sivagami (name changed), an experienced mediator working with the Tamil Nadu Mediation and Conciliation Centre (TNMCC for short), rushed into the office of our Assistant Registrar Mr. Vijayakumar.

*“Sir, the parties are fighting with each other. They are almost coming to blows. I cannot control them. Please do something”* she said breathlessly.

It was obvious that she was at her wits' end. Mr. Vijayakumar looked at me. I was sitting there having a cup of the usual afternoon free coffee given to mediators.

*“Can you look into this?”* he asked me.

With a certain amount of trepidation, not knowing what had actually happened, I said “yes”.

I walked into room no. 6 and there was complete pandemonium. In fact, the fight had spilled into the sitting area. The contesting parties and their advocates were, however, still in the room yelling at each other and the scene looked straight out of the Santhome fish market.

I controlled my own fears (fear that I may become the target of their ire) and went and sat down as calmly as I could on the mediator's seat. For a few minutes I allowed the hollering to continue and sat there calmly with a half smile on my lips. The presence of the new element in the room suddenly dawned on the parties and they and their advocates turned to look at me with sufficient fire in their eyes to make hell look like a hill station.

I smiled at them and said, *"can we all sit down for a few minutes? There is something that I wish to tell you. If you don't like what I say, you are free to walk out of this room"*.

The advocates looked at each other and at their respective clients. One of the advocates gestured to his client to sit down and this prompted the other learned gentleman to follow suit.

The first question thrown at me was *" Why have we been sent here? There is nothing for us to discuss with the other side. So what are we doing sitting here?"*

I replied saying *"Friends, how long has this case been going on?"*

One of them said 3 months. I asked him *"How long do you think it will take for this case to get over, including the appeals and so on?"*

The reply was *"no idea"*.

I prompted *"May be 5 years on a more optimistic estimate?"*

Both the advocates nodded in agreement. I said “*Out of these five years, I only want you to spare 10 minutes to hear what I have to say and after that the decision is yours*”. Apparently this sounded very reasonable as both, the advocates and the parties, indicated their consent simultaneously.

I then started making the “Mediator’s Opening Statement”. I explained to them that:

- mediation is a voluntary process;
- that though they have been referred to mediation by the court, the option of either going through the process or not is in their hands;
- that they can opt out of the process at any stage and no fingers would be pointed at anyone for withdrawing from the process;
- that the entire proceedings would be highly confidential and no information or part information can be used in the court by one against the other;
- that there are two aspects of the confidentiality viz. (a) the parties, their advocates and the mediators vis-a-vis the outside world in so far as information disclosed in the joint sessions is concerned and (b) the mediators and the individual parties in so far as information disclosed in the private sessions is concerned;
- that mediation is a “*without prejudice*” process and parties are free to explore various options, choose or reject any options without being bound to the proposals discussed by them;
- that finality occurs only when all options are exhaustively discussed and the final agreement is signed;

- that mediators are neither judges nor advisers and their job is only to facilitate the negotiations and discussions between the parties and the outcome of the mediation is entirely in the hands of the parties;
- that the process is not governed by any rules of pleadings or evidence and parties are free to discuss anything that is deemed to be of importance to them and they are the best judges of their needs;
- that there are only two ground rules that the parties are required to follow: (a) one should not interrupt while the other is speaking and (b) parties should not use any strong or abusive words against each other.

To their credit the parties listened to me very patiently and much to my relief, when I finished the opening statement and asked them whether they would like to continue with the mediation, they both agreed. The whole atmosphere underwent a transformation. Smiles were more freely forthcoming and everyone was relaxed and easy.

So what happened? What actually brought about this transformation? Why did the parties, who were seemingly at loggerheads, suddenly agreed to sit across the table and discuss with each other how to resolve their conflict? If you ask me, I would say it was the mediator's opening statement (and please forgive me for patting my own back).

Actually the credit does not go to me but to the technique called "Mediator's Opening Statement". What really happens is this:

- When you tell the parties that it is a voluntary process, they relax because they know that there is no compulsion or duress and they are in control;
- When you tell them that it is confidential, they are emboldened and feel comfortable as they know that they are in a safe environment;

- When you tell them that the outcome is in their hands, they feel empowered and responsible at the same time as they know that, (in all probability for the first time), their fate is in their own hands;
- When you say that it is a “without prejudice” process, they feel encouraged to come forward and explore different options and know that nothing they say will be held against them;
- When you lay down the ground rules, they realise that they have the responsibility of maintaining the decorum and they have to listen to the other person’s point of view respectfully.

Many mediators, even the experienced ones, do not feel it necessary to make the opening statement. They presume that the parties know what they are there for. What happens is that, the battle is lost even before it has begun. The opening statement actually helps the mediator to set the tone of the discussion. While making the opening statement, the mediator is relaxed, he/she is casual, smiling, polite. The mediator maintains eye contact with both the parties. It is a process in which the mediator conveys to the parties that he/she is there to help them, that they can trust him/her, that the mediator will ensure that the process would be fair to both of them.

It is an opportunity for the mediator to build rapport with the parties and to gain their trust and confidence. It is an opportunity that needs to be grabbed with both hands and if the mediator does it effectively, half the battle is won.