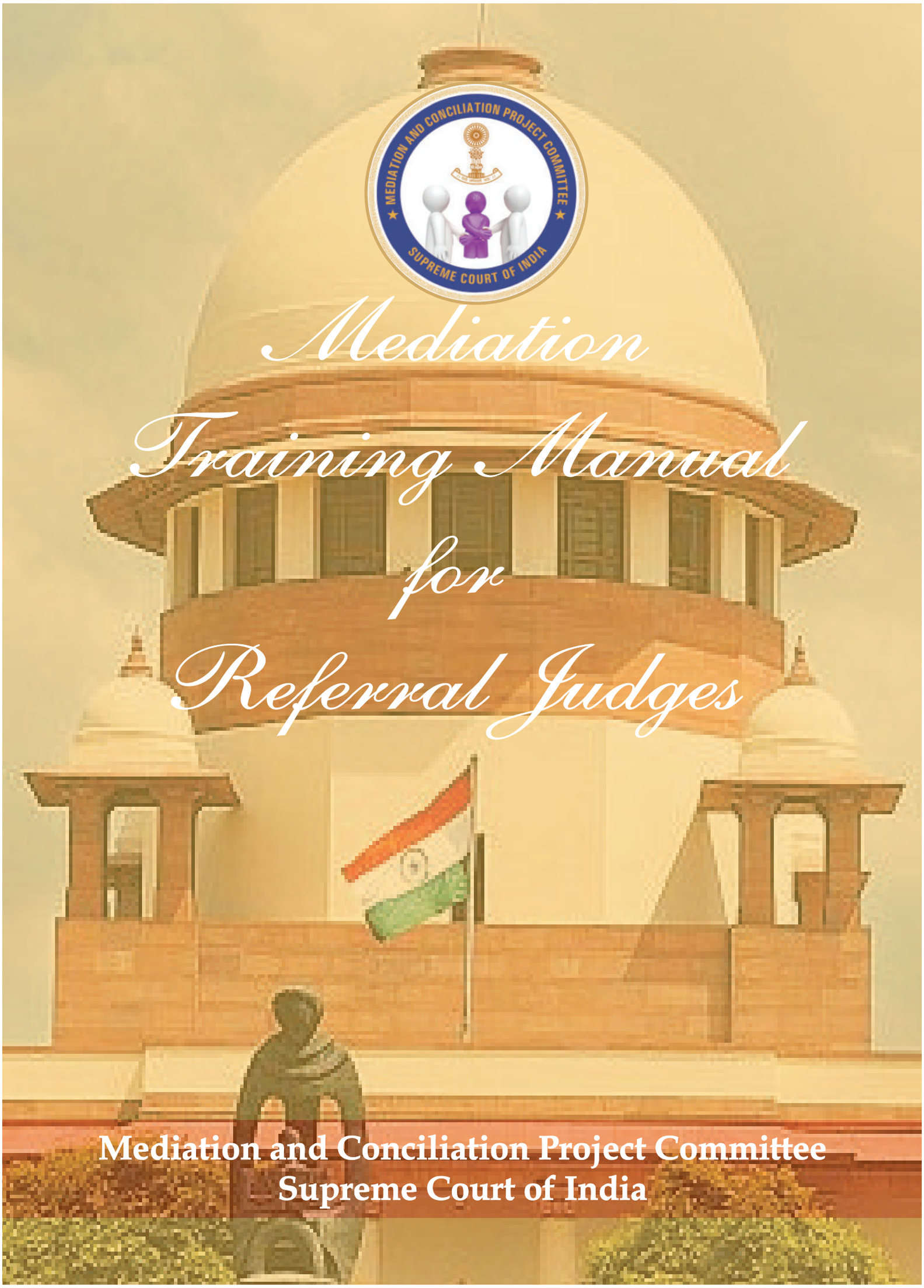

Mediation Training Manual for Referral Judges

Mediation and Conciliation Project Committee
Supreme Court of India



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CHAPTER - I
INTRODUCTION

Justice Delivery System in India is described by technical procedures with characteristics of the adversarial system with accompanying delays, arrears and taxing cost. Justice Delivery System reliance on win - lose situation leads to repeated use of the legal process. The unwarranted delays in dispensation of justice undermine the credibility of entire justice delivery system of the country. It leads to instances where people are settling disputes on their own, resulting in emergence of criminal syndicates and mob justice indicative of loss of confidence of the people in the rule of law and constitutional mechanisms. The adversarial system may be the appropriate method where authoritative interpretation or establishment of rights is required. To make rule of law a reality, assurance of speedy justice should be extended to citizens. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays. Justice Delivery System in India is under stress mainly because of the huge pendency of cases in courts. It emphasizes the desirability to take advantage of alternative dispute resolution which provided procedural flexibility, saved valuable time and money and avoided the stress of conventional trial. In a developing country like India with major economic reforms, Alternative Dispute Resolution Mechanism could be one of the best strategies for quicker resolution of disputes to lessen the burden on the courts and to provide suitable mechanism for expeditious resolution of disputes.

In Indian Legal System, appropriate methods of disputes resolution are available, such as arbitration, conciliation, mediation and Lok adalat etc. These methods are less formal, encourage disputants to communicate and participate in the search for solutions, focus better on the root causes of the conflict, salvage relationships, and have significant savings in time and cost.

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. The conciliators appointed under Section 4 of the Act are “charged with the duty of mediating in and promoting the settlement of Industrial disputes." Arbitration, as a dispute resolution process was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908. When the Arbitration Act was enacted in 1940 the provision for arbitration originally contained in Section 89 of the Civil Procedure Code was repealed. The Legislature also enacting The Legal Services Authorities Act, 1987 which provides constitution of the National Legal Services Authority as a Central Authority which is also vested with duties to encourage the settlement of disputes by way of negotiations, arbitration and conciliation.

The Parliament also enacted the Arbitration and Conciliation Act in 1996, making elaborate provisions for conciliation of disputes arising out of legal relationship, whether contractual or not, and to all proceedings relating thereto. The Act provided for the commencement of conciliation proceedings, appointment of conciliators and assistance of suitable institution for the purpose of recommending the names of the conciliators or even appointment of the conciliators by such institution, submission of statements to the conciliator and the role of conciliator in assisting the parties in negotiating settlement of disputes between the parties. In 1999, the Parliament passed the CPC Amendment Act of 1999 inserting Sec.89 in the Code of Civil Procedure 1908, providing for reference of cases pending in the Courts to ADR which included mediation. The Amendment was brought into force with effect from 1st July, 2002.

The Supreme Court upheld the Constitutional validity of newly inserted Section 89 in CPC in **Salem Advocate Bar Association, T. N. V Union Of India, (2003) 1Supreme Court Cases 49. (Relevant Para: 9, 10 & 11)** A Committee was also constituted to devise case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The Supreme Court also directed respective High Courts to take appropriate steps for making rules which have been finalized by the Committee in exercise of rule making power subject to modifications, if any, which may be considered relevant and prior to finalization, the same should be circulated to the High Courts, subordinate courts, the Bar Council of India, State Bar Councils and the Bar Associations, seeking their responses.

The Supreme Court in **Salem Advocate Bar Association, T. N. V Union Of India, (2005) 6 Supreme Court Cases 344** also clarified possible conflict between Section 89 and Order 10 Rule 1-A and observed that Section 89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. **(Relevant Para: 54 & 55)** The Supreme Court also held that the court is not involved in the actual mediation/conciliation and Clause (d) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. There is no question of the Court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at**.** It was also observed that the parties need not to incur extra expenditure for resorting ADR modes as it is likely to act as a deterrent for adopting these methods.

The Supreme Court of India in **Afcons Infrastructure Limited And Another V CherianVarkey Construction Co. (P) Ltd., (2010) 8 Supreme Court Cases 24**also clarified anomalies in Section 89 and interchanged the definitions of "Mediation" and "Judicial Settlement" as given in Section 89. **(Relevant Para: 11 to 13)** It was also clarified that there is no requirement to formulate the terms of settlement as per mandate of Section 89. **(Relevant Para: 14 to 19)**

The Supreme Court of India has constituted Mediation and Conciliation Project Committee (MCPC) on 09.04.2005 which in its meeting held on 11.07.2005 had decided to initiate a pilot project on Judicial Mediation in Tis Hazari Courts in Delhi. 30 Judicial Officers were imparted 40 hours training on "Techniques of Mediation" by the experts invited from ISDLS. In Delhi District Courts, formal Judicial Mediation was started w.e.f. 13.09.2005 with six judicial officers functioning as trained mediators. MCPC is implementing mediation at national level.

CHAPTER - II
MEDIATION: DEFINITION AND CONCEPT

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. In mediation, the parties retain the right to decide for themselves whether to settle a dispute and the terms of any settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

- **Mediation is voluntary.** The parties retain the right to decide for themselves whether to settle a dispute and the terms of settlement of the dispute. Even if the court has referred the case for the mediation or if mediation is required under a contract or a statute, the decision to settle and the terms of settlement always rest with the parties. This right of self-determination is an essential element of the mediation process. It results in a settlement created by the parties themselves and is therefore acceptable to them. The parties have ultimate control over the outcome of mediation. Any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

- **Mediation is a party-centred negotiation process.** The parties and not the neutral mediator are the focal point of the mediation process. Mediation encourages the active and direct participation of the parties in the resolution of their dispute. The parties play the key role in the mediation process. They are actively encouraged to explain the factual background of the dispute, identify issues and underlying interests, generate options for agreement and make a final decision regarding settlement.

- Though the mediation process is informal, which means that it is not governed by the rules of evidence and formal rules of procedure it is not an extemporaneous or casual process. The mediation process is structured and formalized with a degree of flexibility.

- Mediation in essence is an assisted negotiation process. Mediation addresses both the factual/legal issues and the underlying causes of a dispute. Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests.

- Mediation provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.
- Mediation is conducted by a neutral third party- the mediator. The mediator remains impartial, independent, detached and objective throughout the mediation process. In mediation, the mediator assists the parties in resolving their dispute.
- In Mediation the mediator works together with parties to facilitate the dispute resolution process and does not adjudicate a dispute by imposing a decision upon the parties. A mediator's role is both facilitative and evaluative. A mediator *facilitates* when he manages the interaction between the parties, encourages and promotes communication between them and manages interruptions and outbursts by them and motivates them to arrive at an amicable settlement. A mediator *evaluates* when he assists each party to analyze the merits of a claim/defence, and to assess the possible outcome at trial.
- The mediator employs certain specialized communication skills and negotiation techniques to facilitate a productive interaction between the parties so that they are able to overcome negotiation impasses and find mutually acceptable solutions.
- Mediation is a private process, which is not open to the public. Mediation is also confidential in nature, which means that statements made during mediation cannot be disclosed in civil proceedings or elsewhere without the written consent of all parties.
- Any settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".
- The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.
- Parties to the mediation proceedings are free to agree for an amicable settlement, even ignoring their legal entitlement or liabilities.
- Mediation in a particular case need not be confined to the dispute referred, but can go beyond and proceed to resolve all other connected or related disputes also.

CHAPTER - III
ADVANTAGES OF MEDIATION

1) The parties have CONTROL over the mediation in terms of 1) its *scope* (i.e., the terms of reference or issues can be limited or expanded during the course of the proceedings) and 2) its *outcome* (i.e., the right to decide whether to settle or not and the terms of settlement.)

2) Mediation is PARTICIPATIVE. Parties get an opportunity to present their case in their own words and to directly participate in the negotiation.

3) The process is VOLUNTARY and any party can opt out of it at any stage if he feels that it is not helping him. The self-determining nature of mediation ensures compliance with the settlement reached.

4) The procedure is SPEEDY, EFFICIENT and ECONOMICAL.

5) The procedure is SIMPLE and FLEXIBLE. It can be modified to suit the demands of each case. Flexible scheduling allows parties to carry on with their day-to-day activities.

6) The process is conducted in an INFORMAL, CORDIAL and CONDUCIVE environment.

7) Mediation is a FAIR PROCESS. The mediator is impartial, neutral and independent. The mediator ensures that pre-existing unequal relationships, if any, between the parties, do not affect the negotiation.

8) The process is CONFIDENTIAL.

9) The process facilitates better and effective COMMUNICATION between the parties which is crucial for a creative and meaningful negotiation.

10) Mediation helps to maintain/ improve/ restore relationships between the parties.

11) Mediation always takes into account the LONG TERM AND UNDERLYING INTERESTS OF THE PARTIES at each stage of the dispute resolution process – in examining alternatives, in generating and evaluating options and finally, in settling the dispute with focus on the present and the future and not on the past. This provides an opportunity to the parties to comprehensively resolve all their differences.

12) In mediation the focus is on resolving the dispute in a MUTUALLY BENEFICIALSETTLEMENT.

13 A mediation settlement often leads to the SETTLING OF RELATED/CONNECTED CASES between the parties.

14) Mediation allows CREATIVITY in dispute resolution. Parties can accept creative and nonconventional remedies which satisfy their underlying and long term interests, even ignoring their legal entitlements or liabilities.

15) When the parties themselves sign the terms of settlement, satisfying their underlying needs and interests, there will be compliance.

16) Mediation PROMOTES FINALITY. The disputes are put to rest fully and finally, as there is no scope for any appeal or revision and further litigation.

17) REFUND OF COURT FEES is permitted as per rules in the case of settlement in court referred mediation.

CHAPTER - IV
COMPARISON BETWEEN JUDICIAL PROCESS, ARBITRATION AND MEDIATION

	JUDICIAL PROCESS	ARBITRATION	MEDIATION
1.	Judicial process is an adjudicatory process where a third party (judge/ other authority) decides other authority) decides	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
2.	Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
3.	The decision is binding on the parties.	The award in arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
4.	Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
5.	Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.

6.	A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
7.	Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.
8.	No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
9.	Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

COMPARISON BETWEEN MEDIATION, CONCILIATION AND LOK ADALAT

	MEDIATION	CONCILIATION	LOK ADALAT
1.	Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	LokAdalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. LokAdalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.

2.	Voluntary process.	Voluntary process.	Voluntary process.
3.	Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
4.	Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
5.	Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In LokAdalat, the scope of negotiation is limited.
6.	The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.
7.	The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to LokAdalat.
8.	The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of LokAdalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
9.	Not appealable.	Decree/order not appealable.	Award not appealable.
10.	The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in LokAdalat is on the past and the present.
11.	Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of LokAdalat involves only discussion and persuasion.
12.	In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In LokAdalat, parties are not actively and directly involved so much.
13.	Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in LokAdalat.

CHAPTER - V
MEDIATION: FUNCTIONAL STAGES

Mediation is a dynamic process in which the mediator assists the parties to negotiate a settlement for resolving their dispute. In doing so, the mediator uses the four functional stages of mediation, namely, (i) Introduction and Opening Statement (ii) Joint Session (iii) Separate Session and (iv) Closing. These functional stages are used in an informal and flexible manner.

STAGE 1: INTRODUCTION AND OPENING STATEMENT

OBJECTIVES

- Establish neutrality
- Create an awareness and understanding of the process
- Develop rapport with the parties
- Gain confidence and trust of the parties
- Establish an environment that is conducive to constructive negotiations
- Motivate the parties for an amicable settlement of the dispute
- Establish control over the process

INTRODUCTION

- To begin with, the mediator introduces himself by giving information such as his name, areas of specialization if any, and number of years of professional experience.
- Then he furnishes information about his appointment as mediator, the assignment of the caseto him for mediation and his experience if any in successfully mediating similar cases in the past.
- Then the mediator declares that he has no connection with either of the parties and he has no interest in the dispute.
- He also expresses hope that the dispute would be amicably resolved. This will create confidence in the parties about the mediator's competence and impartiality.
- Thereafter, the mediator requests each party to introduce himself. He may elicit more information about the parties' and may freely interact with them to put them at ease.
- The mediator will then request the counsel to introduce themselves.

- The mediator will then confirm that the necessary parties are present with authority to negotiate and make settlement decisions
- The mediator will discuss with the parties and their counsel any time constraints or scheduling issues
- If any junior counsel is present, the mediator will elicit information about the senior advocate he is working for and ensure that he is authorized to represent the client.

OPENING STATEMENT

The opening statement is an important phase of the mediation process. The mediator explains in a language and manner understood by the parties and their counsel, the following:

- Concept and process of mediation
- Stages of mediation
- Role of the mediator
- Role of advocates
- Role of parties
- Advantages of mediation
- Ground rules of mediation

The mediator shall highlight the following important aspects of mediation:

- Voluntary
- Self-determinative
- Non-adjudicatory
- Confidential
- Good-faith participation
- Time-bound
- Informal and flexible
- Direct and active participation of parties
- Party-centred
- Neutrality and impartiality of mediator
- Finality
- Possibility of settling related disputes
- Need and relevance of separate sessions

The mediator shall explain the following ground rules of mediation:

- Ordinarily, the parties/counsel may address only the mediator
- While one person is speaking, others may refrain from interrupting

- Language used may always be polite and respectful
- Mutual respect and respect for the process may be maintained
- Mobile phones may be switched off
- Adequate opportunity may be given to all parties to present their views

Finally, the mediator shall confirm that the parties have understood the mediation process and the ground rules and shall give them an opportunity to get their doubts if any, clarified.

STAGE 2: JOINT SESSION

OBJECTIVES

- Gather information
- Provide opportunity to the parties to hear the perspectives of the other parties
- Understand perspectives, relationships and feelings
- Understand facts and the issues
- Understand obstacles and possibilities
- Ensure that each participant feels heard

PROCEDURE

- The mediator should invite parties to narrate their case, explain perspectives, vent emotions and express feelings without interruption or challenge. First, the plaintiff/petitioner should be permitted to explain or state his/her case/claim in his/her own words. Second, counsel would thereafter present the case and state the legal issues involved in the case. Third, defendant/respondent would thereafter explain his/her case/claim in his/ her own words. Fourth, counsel for defendant/respondent would present the case and state the legal issues involved in the case.
- The mediator should encourage and promote communication, and effectively manage interruptions and outbursts by parties.
- The mediator may ask questions to elicit additional information when he finds that facts of the case and perspectives have not been clearly identified and understood by all present.
- The mediator would then summarize the facts, as understood by him, to each of the parties to demonstrate that the mediator has understood the case of both parties by having actively listened to them.
- Parties may respond to points/positions conveyed by other parties and may, with permission, ask brief questions to the other parties.

- The mediator shall identify the areas of agreement and disagreement between the parties and the issues to be resolved.
- The mediator should be in control of the proceedings and must ensure that parties do not 'takeover' the session by aggressive behaviour, interruptions or any other similar conduct.
- During or on completion of the joint session, the mediator may separately meet each party with his counsel, usually starting with the plaintiff/petitioner. The timing of holding the separate session may be decided by the mediator at his discretion having regard to the productivity of the on-going joint session, silence of the parties, loss of control, parties becoming repetitive or request by any of the parties. There can be several separate sessions. The mediator could revert back to a joint session at any stage of the process if he feels the need to do so.

STAGE 3: SEPARATE SESSION

OBJECTIVES

- Understand the dispute at a deeper level
- Provide a forum for parties to further vent their emotions
- Provide a forum for parties to disclose confidential information which they do not wish to share with other parties
- Understand the underlying interests of the parties
- Help parties to realistically understand the case
- Shift parties to a solution-finding mood
- Encourage parties to generate options and find terms that are mutually acceptable

PROCEDURE

- During the separate session each of the parties and his counsel talk to the mediator in confidence. The mediator should begin by re-affirming the confidential nature of the process.
- The separate session provides an opportunity for the mediator to gather more specific information and to follow-up the issues which were raised by the parties during the joint session. In this stage of the process:-
    - Parties vent personal feelings of pain, hurt, anger etc.
    - The mediator identifies emotional factors and acknowledges them;
    - The mediator explores sensitive and embarrassing issues;

- The mediator distinguishes between positions taken by parties and the interests they seek to protect;
- The mediator identifies why these positions are being taken (need, concern, what the parties hope to achieve);
- The mediator identifies areas of dispute between parties and what they have previously agreed upon;
- Common interests are identified;
- The mediator identifies each party's differential priorities on the different aspects of the dispute (priorities and goals) and the possibility of any trade off is ascertained.
- The mediator formulates issues for resolution.

STAGE 4: CLOSING

(A) WHERE THERE IS A SETTLEMENT

Once the parties have agreed upon the terms of settlement, the parties and their advocates re-assemble and the mediator ensures that the following steps are taken:

1. Mediator orally confirms the terms of settlement;
2. Such terms of settlement are reduced to writing;
3. The agreement is signed by all parties to the agreement and the counsel if any representingthe parties;
4. Mediator also may affix his signature on the signed agreement, certifying that the agreement was signed in his/her presence;
5. A copy of the signed agreement is furnished to the parties;
6. The original signed agreement sent to the referral Court for passing appropriate order in accordance with the agreement;
7. As far as practicable the parties agree upon a date for appearance in court and such date is intimated to the court by the mediator;
8. The mediator thanks the parties for their participation in the mediation and, congratulate sall parties for reaching a settlement.

THE WRITTEN AGREEMENT SHOULD :

- clearly specify all material terms agreed to;
- be drafted in plain, precise and unambiguous language;
- be concise;
- use active voice, as far as possible. Should state clearly WHO WILL DO, WHAT, WHEN,

- WHERE and HOW (passive voice does not clearly identify who has an obligation to perform
- a task pursuant to the agreement);
- use language and expression which ensure that neither of the parties feels that he or she has
- 'lost';
- ensure that the terms of the agreement are executable in accordance with law;
- be complete in its recitation of the terms;
- avoid legal jargon, as far as possible use the words and expressions used by the parties;
- as far as possible state in positive language what each parties agrees to do;
- as far as possible, avoid ambiguous words like reasonable, soon, co-operative, frequent etc;

(B) WHERE THERE IS NO SETTLEMENT

If a settlement between the parties could not be reached, the case would be returned to the referral Court merely reporting "not settled". The report will not assign any reason for non settlement or fix responsibility on any one for the non-settlement. The statements made during the mediation will remain confidential and should not be disclosed by any party or advocate or mediator to the Court or to anybody else.

The mediator should, in a closing statement, thank the parties and their counsel for their participation and efforts for settlement.

CHAPTER - VI
ROLE OF MEDIATORS

Mediation is a process in which an impartial and neutral third person, the mediator, facilitates the resolution of a dispute without suggesting what should be the solution. It is an informal and non-adversarial process intended to help disputing parties to reach a mutually acceptable solution. The role of the mediator is to remove obstacles in communication, assist in the identification of issues and the exploration of options and facilitate mutually acceptable agreements to resolve the dispute. However, the ultimate decision rests solely with the parties. A mediator cannot force or compel a party to make a particular decision or in any other way impair or interfere with the party's right of self-determination.

(A) 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

(i) FACILITATIVE ROLE

- A mediator facilitates the process of mediation by-
- creating a conducive environment for the mediation process.
- explaining the process and its ground rules.
- facilitating communication between the parties using the various communication techniques.
- identifying the obstacles to communication between the parties and removing them.
- gathering information about the dispute.
- identifying the underlying interests.
- maintaining control over the process and guiding focused discussion.
- managing the interaction between parties.
- assisting the parties to generate options.
- motivating the parties to agree on mutually acceptable settlement.
- assisting parties to reduce the agreement into writing.

(ii) EVALUATIVE ROLE

- A mediator performs an evaluative role by-
- helping and guiding the parties to evaluate their case through reality - testing.
- assisting the parties to evaluate the options for settlement.

(B) MEDIATOR AS DISTINGUISHED FROM CONCILIATOR AND ADJUDICATOR

(i) MEDIATOR AND CONCILIATOR

The facilitative and evaluative roles of the mediator have been already explained. The evaluative role of mediator is limited to the function of helping and guiding the parties to evaluate their case through reality testing and assisting the parties to evaluate the options for settlement. Butin the process of conciliation, the conciliator himself can evaluate the cases of the parties andthe options for settlement for the purpose of suggesting the terms of settlement.The role of a mediator is not to give judgment on the merits of the case or to give advice to theparties or to suggest solutions to the parties.

(ii) MEDIATOR AND ADJUDICATOR

A mediator is not an adjudicator. Adjudicators like judges, arbitrators and presiding officers of tribunals make the decision on the basis of pleadings and evidence. The adjudicator follows the formal and strict rules of substantive and procedural laws. The decision of the adjudicator is binding on the parties subject to appeal or revision. In adjudication, the decision is taken by the adjudicator alone and the parties have no role in it.

In mediation the mediator is only a facilitator and he does not suggest or make any decision. The decision is taken by the parties themselves. The settlement agreement reached in mediation is binding on the parties. In court referred mediation there cannot be any appeal, or revision against the decree passed on the basis of such settlement agreement. In private mediation, the parties can agree to treat such settlement agreement as a conciliation agreement which then will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

CHAPTER - VII
ROLE OF REFERRAL JUDGES

Judges who refer the cases for settlement through any of the ADR methods are known as Referral Judges. The role of a Referral Judge is of great significance in court-referred mediation. All cases are not suitable for mediation. Only appropriate cases which are suitable for mediation should be referred for mediation. Success of mediation will depend on the proper selection and reference of only suitable cases by referral judges.

A) REFERENCE TO ADR AND STATUTORY REQUIREMENT

Section 89 and Order X Rule 1A of Code of Civil Procedure, 1908 require the court to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case for Arbitration, Conciliation, Judicial Settlement, Lok Adalat or mediation. While making such reference the court shall take into account the option if any exercised by the parties and the suitability of the case for the particular ADR method. In the light of judicial pronouncements a referral judge is not required to formulate the terms of settlement or to make them available to the parties for their observations. The referral judge is required to acquaint himself with the facts of the case and the nature of the dispute between the parties and to make an objective assessment to the suitability of the case for reference to ADR.

The cases which are not suitable for ADR process should not be referred for ADR process including mediation. The court has to form an opinion regarding suitability of a case for being referred to ADR process. Having regard to the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, the Court may choose not to refer to an ADR process. If the case is unsuited for reference to any of the ADR process, the court shall briefly record the reasons for not referring the case to any of the settlement procedures prescribed under section 89 of the Code. It is mandatory for the Courts to consider recourse to ADR process under section 89 of the Code but actual reference to an ADR process in all cases is not mandatory. If the case falls under an excluded category then it should not be refer to ADR process but in all other case reference to ADR process is mandatory. **(Relevant Para of Afcons: 24 & 26)**

B) STAGE OF REFERRAL

The appropriate stage for considering reference to ADR processes in civil suits is after the completion of pleadings and before framing the issues. If for any reason, the court did not refer the

case to ADR process before framing issues, nothing prevents the court from considering reference even at a later stage. However, considering the possibility of allegations and counter allegations vitiating the atmosphere and causing further strain on the relationship of the parties, in family disputes and matrimonial cases the ideal stage for mediation is immediately after service of notice on the respondent and before the filing of objections/written statements by the respondent. An order referring the dispute to ADR processes may be passed only in the presence of the parties and/or their authorized representatives. **(Relevant Para of Afcons: 24, 41 & 42)**

C) CONSENT

Under section 89 CPC, consent of all the parties to the suit is necessary for referring the suit for arbitration where there is no pre-existing arbitration agreement between the parties. Similarly the court can refer the case for conciliation under section 89 CPC only with the consent of all theparties. However, in terms of Section 89 CPC and the judicial pronouncements, consent of the parties is not mandatory for referring a case for Mediation, Lok Adalat or Judicial Settlement. The absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation. **(Relevant Para of Afcons: 36)**

D) AVOIDING DELAY OF TRIAL

In order to prevent any misuse of the provision for mediation by causing delay in the trial of the case, the referral judge, while referring the case for mediation, shall post the case for further proceedings on a specific date, granting time to complete the mediation process as provided under the Rules or such reasonable time as found necessary.

E) CASES SUITABLE FOR REFERENCE

As held by the Supreme Court of India in **Afcons** case, having regard to their nature, the following categories of cases are normally considered unsuitable for ADR process.

a) Representative suits under Order I Rule 8 CPC which involves public interest or interest of numerous persons who are not parties before the court.

b) Disputes relating to election to public offices.

c) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

d) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

e) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special tribunals/forums) are normally suitable for ADR processes:

a) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts(including all money suits)
- disputes relating to specific performance
- disputes between suppliers and customers
- disputes between bankers and customers
- disputes between developers/builders and customers
- disputes between landlords and tenants/licensor and licensees
- disputes between insurer and insured

b) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children
- disputes relating to partition/division among family members/coparceners/co-owners
- disputes relating to partnership among partners

c) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance, etc.)
- disputes between employers and employees
- disputes among members of societies/associations/apartment owners' associations

d) All cases relating to tortious liability, including

e) claims for compensation in motor accidents/other accidents

f) All consumer disputes, including disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity

The above enumeration of “suitable” and “unsuitable” categorization of cases is not exhaustive or rigid and is illustrative. The types of cases including criminal cases which can be referred to ADR processes are subjected to just exceptions or addition by the courts/ tribunals

exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

In spite of the categorization mentioned above, a referral judge must independently consider the suitability of each case with reference to its facts and circumstances.

(Relevant Para of Afcons: 27, & 28)

F) MOTIVATING AND PREPARING THE LAWYERSS AND PARTIES FOR MEDIATION

The referral judge plays the most crucial role in motivating the lawyers and parties to resolve their disputes through mediation. Even if the parties are not inclined to agree for mediation, the referral judge may try to ascertain the reason for such disinclination in order to persuade and motivate them for mediation. The referral judge should explain the concept and process of mediation and its advantages and how settlement to mediation can satisfy underlying interest of the parties. Even when the case in its entirety is not suitable for mediation a Referral Judge may consider whether any of the issues involved in the dispute can be referred for mediation.

ROLE OF LAWYERS IN MEDIATION

Mediation as a mode of ADR is the process where parties are encouraged to communicate, negotiate and settle their disputes with the assistance of a neutral facilitator i.e., mediator. The role of the lawyer in mediation is functionally different from his role in litigation. The Lawyers have a proactive role to play in the mediation process and they should know the concept and process of mediation and the positive role to be played by them while assisting the parties in mediation. The role of the lawyer commences 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.

The role of lawyers in mediation can be divided into three phases:

(I) Pre-mediation;

(ii) During mediation; and

(iii) Post-mediation.

(I) PRE - MEDIATION

A party in case of having legal dispute first contacts a lawyer. The lawyer must first consider whether there is scope for resorting to any of the ADR mechanisms. Where mediation is considered

the appropriate mode of ADR, the lawyer should educate the party about the concept, process and advantages of mediation. The lawyer helps the party to understand that the purpose of mediation is not merely to settle the dispute and dispose of the litigation, but also to address the needs of the parties and to explore creative solutions to satisfy their underlying interests. The lawyer can help the parties to change their attitude from adversarial to collaborative.

(II) DURING MEDIATION

The role of lawyers is very important during mediation also. The participation of lawyers in mediation is often constructive but sometimes it may be non-cooperative and discouraging. The attitude and conduct of the lawyer influence the attitude and conduct of his client. Hence, in order to ensure meaningful dialogue between the parties and the success of mediation, lawyers must have a positive attitude and must demonstrate faith in the mediation process, trust in the mediator and respect for the mediator as well as the other party and his counsel. The lawyer must be prepared on the facts, the law and the precedents.

III) POST-MEDIATION

After conclusion of mediation also, the lawyer plays a significant role. If no settlement has been arrived at, he has to assist and guide the party either to continue with the litigation or to consider opting for another ADR mechanism. If a settlement between the parties has been reached before the mediator, the lawyer has to maintain and uphold the spirit of the settlement and must cooperate with the court in the execution of the order/decree passed in terms of the settlement.

ROLE OF PARTIES IN MEDIATION

Mediation is a process in which the parties have a direct, active and decisive role in arriving at an amicable settlement of their dispute. Though the parties get the assistance of their advocate and the neutral mediator, the final decision is of the parties. Though consent of the parties is not mandatory for referring a case to mediation and though the parties are required to participate in the mediation, mediation is voluntary as the parties retain their authority to decide whether the dispute should be amicably settled or not and what should be the terms of the settlement. The parties are free to avail of the services of lawyers in connection with mediation.

G) REFERRAL ORDER

The mediation process is initiated through a referral order. The referral judge should understand the importance of a referral order in the mediation process and should not have a casual approach in passing the order. The referral order is the foundation of a court-referred mediation. An ideal referral order should contain among other things details like name of the referral judge, case number, name of the parties, date and year of institution of the case, stage of trial, nature of the dispute, the statutory provision under which the reference is made, next date of

hearing before the referral court, whether the parties have consented for mediation, name of /mediator to whom the case is referred for mediation, the date and time for the parties to report before the institution/mediator, the time limit for completing the mediation, quantum of fee/remuneration if payable and contact address and telephone numbers of the parties and their advocates.

H) ROLE AFTER CONCLUSION OF MEDIATION

The referral judge plays a crucial role even after the conclusion of mediation. Even though the dispute was referred for mediation, the court retains its control and jurisdiction over the matter and the result of mediation will have to be placed before the court for passing consequential orders. Before considering the report of the mediator the referral judge shall ensure the presence of the parties or their authorized representative in the court.

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 the mediation process is not breached, the referral judge should not ask for the reasons for failure of the parties to arrive at a settlement. Nor should the referral judge allow the parties or their counsel to disclose such reasons to the court. However, it is open to the referral judge to explore the possibility of a settlement between the parties. To protect 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.

If the dispute has been settled in mediation, the referral judge should examine whether the agreement between the parties is lawful and enforceable. If the agreement is found to be unlawful or unenforceable, it shall be brought to the notice of the parties and the referral judge 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 consequential orders. The court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective. **(Relevant Para of Afcons: 37 to 40)**

To overcome any technical or procedural difficulty in implementing the settlement between the parties, it is open to the referral judge to modify or amend the terms of settlement with the consent of the parties.

CHAPTER - VIII
IMPORTANT GUIDELINES FOR REFERRAL JUDGES

1) As per Section 89 and Rule 1-A of Order 10, the court should explore the possibility of referral to ADR processes after the pleadings are complete and before framing the issues when the case is taken up for preliminary hearing for examination of parties under Order 10 of the Code. If for any reason, the court could not considered and referred the matter to ADR processes before framing issues, the case can be refer even after framing of the issues.

In family disputes or matrimonial cases, the ideal stage for mediation would be immediately after service of respondent and before filing of objections/written statements. In such cases, the relationship between concerned parties becomes hostile on account of the various allegations in the petition. The hostility would be further aggravated by the counter-allegations madein written statement or objections.

2) After completion of the pleadings and before framing of the issues, the court shall fix a preliminary hearing for appearance of parties to acquaint itself with the facts of the case and the nature of the dispute between the parties.

3) The court should first consider whether the case is not fit to be referred to any ADR processes. If the case is not suitable for any ADR process then court should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. If case can be referred to ADR processes, the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

4) The court should first ascertain regarding choice of parties for arbitration and should inform the parties that arbitration is an adjudicatory process and reference to arbitration will permanently take the suit outside the ambit of the court.

5) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

6) If parties are not agreeable for arbitration and conciliation, the court after taking into consideration the preferences/options of parties, refer the matter to any one of the other three other ADR processes:

(a) Lok Adalat;

(b) Mediation by a neutral third party facilitator or mediator; and

(c) A judicial settlement, where a Judge assists the parties to arrive at a settlement.

7) If the case is simple or relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties, the court may refer the matter to LokAdalat.

8) If the case is complicated and requires negotiations, the court should refer the case to mediation. If the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the case can be refer to another Judge for attempting settlement.

9) If ADR process is not successful, then court shall proceed with hearing of the case. If case is settled, then court shall examine the settlement and shall make a decree in terms of itkeeping in view the legal principles of Order 23 Rule 3 of the Code.

10) If the settlement includes terms and conditions which are not the subject matter of the suit, the settlement shall be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a LokAdalat or by mediation which is a deemed Lok Adalat).

11) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

12) The court shall record the mutual consent of the parties if the case is referred to arbitration or conciliation.

If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. The Referral Order should not be an elaborate order.

13) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

14) If the Presiding Judge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is, therefore, advisable to refer cases proposed for Judicial Settlement to another Judge.

15) If the court refers the case to an ADR process (other than Arbitration), it should keep track of the case by fixing a hearing date for the ADR Report. The period allotted for the ADR process should not exceed from the period as permitted under applicable Mediation Rules.

The Court should take precaution that under no circumstances the ADR process shall be used as a tool in the hands of an unscrupulous litigant to delay the trial of the case.

16) The court should not send the original judicial record of the case at the time of referring the case for an ADR forum, however only copies of relevant papers of the judicial record should be annexed with referral order. If the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

CHAPTER - IX
CHECK LIST FOR REFERRAL JUDGES

DO'S

- Ensure presence of the parties or authorized representatives at the time of referral
- Assess relevant facts of the case
- Interact and motivate the parties
- Ascertain willingness of the parties
- Explain Role of Mediator
- Explain Right to Self Determination and Confidentiality
- Select appropriate cases.
- Encourage Advocates and Litigants to choose Mediation
- Ensure Authority of Government Officials
- Obtain free consent of the parties for referral
- Find reasons if parties are not ready for Mediation
- Explain benefits of Mediation
- Pass appropriate Referral Order
- Obtain signatures of parties on Referral Order
- Fix date and time for appearance before Mediator
- Fix Schedule of Trial

DON'T

- Do not refer Ex-parte case
- Do not refer cases involving complex legal issues, multiple parties, Constitutional matters, Public Policies

- No delay of Trial
- No reference for sake of reference
- No reference without objective assessment
- Do not refer a case barred by Statutory Provisions
- No communication with Mediator

PROPOSED REFERRAL ORDER

NEXT DATE OF PROCEEDINGS IN THE

REFERRAL COURT: _____

Court Case ID: _____

Name of the referral Judge: _____

SUIT NO./CASE NO. : _____

NAME OF THE PARTIES: _____

V.

_____

(Annexed memo of parties)

DATE OF INSTITUTION OF THE CASE: _____

NATURE OF SUIT : _____

STAGE OF THE CASE AT THE TIME OF REFERRAL: _____

NO. OF HEARING(S) AT THE TIME OF REFERRAL: _____

REFERRAL ORDER

This court after conferring with the parties to the suit and ascertaining that there exists the element of settlement, and in pursuant to Section 89 of CPC refers the case to Mediation.

The concerned parties are directed to report to the **Judge In-Charge, Mediation Centre,** _____ on _____ at _____ am/pm. The concerned parties alongwith their respective advocates, if any, are also directed to participate in the mediation proceedings. Participation in Mediation is in Good Faith.

No fee shall be payable by the parties for mediation.

Mediation settlement arrived at between the parties in writing (in case of settlement), after recording the terms and conditions of the settlement, the Mediation shall report the settlement through Judge Incharge, Mediation Centre to this court for further directions and proceedings.

The Mediation proceedings are confidential. The parties and their respective advocates or any other person with parties, who is allowed to attend the mediation proceedings, shall not disclose any deliberations of mediation proceedings to any court/forum etc.

Mediator is directed to report the final outcome of the mediation on _____

Signature of the Referral Judge with date:_____

_____ _____

Signature of Plaintiff/Complainant/Petitioner/ AppellantSignature of Defendant/Respondent/ Accused

Mobile/Phone no._____ Mobile/Phone no._____

Name of the Advocate_____ Name of the Advocate _____

Mobile/Phone no._____ Mobile/Phone no._____

CURRICULUM FOR REFERRAL JUDGES SENSITIZATION PROGRAMME

Suggested Reading : Mediation Training Manual for Referral Judges

Duration – One day

10.00 am – 11.00 am	11.00-11.15 am	11.15 am - 01.15 pm	01.15-02.00 p.m	02.00 pm – 4.00 pm	4.00-4.15 p.m	4.15 pm – 05.30 pm
Session – I **ADR:** Relevance with special reference to Section 89, Code of Civil Procedure, 1908 **(INTRODUCTION)** **[Chapter – I]**	TEA BREAK	**Session – II** **Mediation :** 1. Definition and Concept 2. Advantages of Mediation 3. Comparison between Judicial Process, Arbitration and Mediation 4. Comparison between Mediation, Conciliation and Lok Adalat 5. Mediation : Functional Stages 6. Role of Mediators **[Chapter II to VI]**	LUNCH BREAK	**Session – III** **Role of Referral Judges** **1.** Reference to ADR **2.** Stage of referral **3.** Consent **4.** Avoiding delay of trial **5.** Cases suitable for reference **6.** Motivating and preparing the lawyers and parties for mediation **7.** Referral Order **8.** Role after conclusion of mediation proceedings **[Chapter VII]**	TEA BREAK	**Session – IV** **1.** Guidelines for referral Judges and Check List **INTERACTIVE SESSION** **[Chapter VIII & IX]**

