

PAPER.25

MEDIATION - A PROCESS OF EDUCATION

By

D.K.Sampath

Mediation is one of the conflict resolution processes. It is an educating process too. A brief note about the role of the mediator in the process of mediation is presented in what follows. It is largely based on the experience gathered as a result of my exposure to these processes at various mediation centres where I work. They are located in villages in the state of Tamil Nadu, South India. The Tamil Nadu State Legal Aid and Advice Board, Madras (India) has organised this programme in 50 centres in the state. It is conceived as legal aid outside the court system. It has to be appreciated in the context of the problem of access to courts for the rural poor. These villages are about 25 to 30 Km from the nearest court centres. In some centres a lone lawyer works as the mediator. In some centres a team works. For instance, 3 or 4 lawyers from the bar at Chengalpattu (T.N) and one or two local village elders help the disputants settle their disputes at Tiruporur. The service is offered free for three hours every Sunday at the Block Development Office premises. The intake averages two per session, a hundred a year. The centre completes its fifth year in October, 1988. As of now in (August 1988) the intake stands at 485. About 60 to 70 percent of the intakes reach the stage of negotiations. In the rest there is no response to the request to the other party to the dispute to attend the centre for negotiating a settlement. On an average about 40 percent of the intake are settled. A recent evaluation shows that about 70 percent of the settlements are durable. With this background in mind, let us look at the mediator's role in the following paragraphs.

Each dispute is an expression of the personality of the disputants involved in it. The solution may also bear the impress of the mediator. But, he should guard against thrusting his values on the disputants. There are class values, caste values. There are group values, regional values. Values marking age, sex or position are also often seen.

This is a difficult task. Values are an integral part of our personality. It is impossible to divorce our perceptions from our values. We can use them to promote the ultimate goals of the programme. Spell out the right beliefs about what mediation is and how one sets about it. These beliefs have tremendous power. They motivate and sustain the efforts of the mediator. An unfailing devotion to these beliefs is required of the mediator. These beliefs constitute the basic philosophy of mediation. They should not be tampered with, however informal and flexible the process of mediation may be. For instance an element of compulsion or punishment should never flaw a settlement arrived at by negotiations through a mediator. If this happens the focus on future amicable relationships is lost. A belief that human dignity should never be a casualty in any settlement, a belief that even failures build up the programme will avoid needless frustration. The centrality of harmony in human relationship is a core belief. Tact, impartiality, patience, understanding, fair play and a faith in human nature, all contribute to the success of the mediator's efforts. The value commitment has to be generated and nourished by creation of a sense of mission. People must talk about the way the disputants are treated by one mediator, the ease with which another mediator gets the hostile parties negotiating, the patience of a third mediator and the innovative skill of another in shaping solutions. Each mediator does it a little different, and that is his own contribution. The programme is the richer for it. People talk about it. The programme of

mediation grows. A system of values helps in building up an image of the programme. The image infuses confidence in the mediator. Most of the disputants perhaps make enquiries about the mediator, his competency and failings before they allow him to intrude into their life. That is where mediator's reputation, carefully built up by small day to day acts of concern for the poor helps. If the disputant is satisfied about the bona fides and sincerity of the mediator, it goes a long way in bringing forth spontaneous response from him at the stage when waivers and concessions are called for.

Sometimes the mediator may have to educate a party on her rights and clarify how she is entitled to much more than what she is asking for. At once, the other party to the dispute suspects the mediator of being partisan or even lacking in integrity. His well established image would prevent such a suspicion from developing. Legal competence can be generated in the poor only if they have confidence in him. A barber died leaving behind a son and a daughter. Each lived in a portion of the house. The brother asked the sister to vacate the house. She did not know that she was a heir to her father. Creating an awareness of the right is the threshold task. Legal literacy. Then the aim is assertiveness, without closing the door. The woman came to the mediator asking for time to vacate, but went back with a share of the house. The brother never questioned the bona fides of the mediator when he explained about a daughter's share in Hindu law. Indeed, he declined to do so when he was asked to take some time to verify from any source of his choice if the daughter was also a heir to her father's estate. That speaks for the image. That speaks for the faith the poor would invest once they are satisfied about the bona fides. It is a great help to the mediator. The consensus of the disputants does not limit the scope of the mediator's task. He is to see that a negotiated settlement approximates to any decree that the parties would get in a court of law if they litigate for their rights. That affords a test for the measure of their rights. They are not to be the losers for having opted for mediation. This approach would reduce arbitrariness and ensure fair play.

It is the mediator's responsibility to ensure that no party feels done out of equity or fairness or justice as a result of the negotiated settlement. Fair play in the sense of straight forward justice has to inform the negotiations and conclusion of a settlement. The crafting of the compromise is essentially in the hands of the mediator as the parties, often poor and ignorant, do not know the significance of shades of meaning of the words used. Simple, straightforward language known to both parties is a safeguard against a settlement creating fresh problems. Settlement is only the beginning of the rapprochement; it is the implementation that tests the change in the relationship. In a mediation, nobody wins, nobody loses. That makes implementation easier. The compromise has to be so worded that no success is spelt out by either party. Concessions have to appear to be balanced. Vagueness has to be avoided. Clean, simple words have to spell out the obligation of each party under the settlement. A situation where one party has performed while the other party defaults may, if possible, be avoided.

A woman came to the mediator seeking his help in recovering a half share in a home in Madras. Her husband died possessed of it, intestate. Long years ago he asked her consent to take on a second wife. By then they had a daughter. He wanted a son and hence a second wife. She refused. He went ahead with the choice of the bride though he knew that law prohibited a second marriage without a divorce. She left the home and went to live with her aged mother. He had two children by his "second wife" by the time he died. After his death, the "second wife" and her two children sold away the house in Madras, ignoring the first wife and her daughter. When the parties negotiated through the mediator a sum of Rs.35000.00 was agreed to be paid by the "second wife" to the first wife and her daughter. That was based on the price paid by the purchaser and the fact that the so-called "second wife" had no

share, her marriage being void. Her children through him were heirs at law. The first wife was very particular about immediate payment to her. This was seen to be reasonable as the other party had already collected the entire price from the buyer. A short time limit and a default clause to treat the compromise as at an end were fixed by consent after negotiations. No money was paid in time. The defaulting party was informed that the offer to accept the stipulated sum in full quit was terminated. She appeared and pressed the mediator for extension of time. The reason for default was not totally unconvincing. Legal norms would not countenance the best of reasons as the contract was clear and self contained. It was explained by the mediator how a negotiated settlement can be reopened only by negotiation and not by the mediator on his own. Parties were invited to negotiate afresh on the question of further time. The first wife was generous enough to agree to a short extension. Money was paid as per the revised time limit. A registered sale deed was executed to the vendee by the first wife. She did not insist on her pound of flesh. If she had treated the settlement as at an end as a result of the default of the other party, she would have gone to court for partition and might have gained in terms of the value of her half share in the house. But her spirit of give and take survived the negotiations and settlement and salvaged it too.

There is no finality in mediation, it is said in detraction of the programme. But then persuasion aims at change of mind. Where is the finality in it ? There are many external realities like comments by others, approval or disapproval swaying the mind after the settlement. The mediator should be prepared to take them on when the consensus is threatened. Is anything final in human effort ? It is not and cannot be a one shot activity. Mediation is a continuing process. The significance lies in the fact that they come to the mediator again to renegotiate.

The source of power of the mediator is the initial consent of the parties to avail themselves of his assistance for their negotiating a settlement. Somewhere on the way the mediator cannot augment it to the authority of an arbitrator or tribunal to unilaterally call for compliance outside or opposed to the settlement. Even if there had been no clause stipulating for time being the essence of the contract (in the dispute discussed above) a mediator would not have had the authority to call for the acceptance of the money tendered beyond the date agreed upon. In mediation words mean what they say. Words reflect what the parties negotiated for and so legalistic technicalities are not to be imported into them. The mediator at Sriperumbudur where the dispute was settled patiently helped the parties to forge a fresh consensus even after a breach by one of them. Mediator took the trouble of discussing the terms of the settlement, what they mean and what they do not before the parties signed the settlement.

It is a difficult role, the mediator's task. He has no powers. Yet he has to win over the disputing parties to the concept of conciliation, get them started on negotiations, clinch an agreement and see to the implementation. All without threat, intimidation or compulsion. Does it sound impossible ? Well it is being done all the time.