

PAPER.24

INFORMALISM & FINALITY

By

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The element of choice is not merely procedural in mediation. It goes to the very root of the concept. Nobody can be compelled to allow a third party intervention in his or her dispute with another. This choice is there even when parties go to court. But there is a difference. Once plaintiff sets the ball rolling in court he cannot exercise the option of walking out, save at the peril of jeopardising her claim. The risks are greater for a defendant. Once he is called to court, he has no option but to respond. Otherwise *ex parte* decision would bar his claim on a future date. Even in course of the trial, it is a structured transaction and the parties have to strictly conform to the procedure. Similar inhibitions inform the arbitration proceedings also.

But in mediation, both parties have unfettered choice to initiate and respond, participate, negotiate and conclude a settlement and implement it. Thus the choice factor survives till the end. It is characterised by discrimination and a careful weighing of the reasons before a choice is made. It is an act of will exercised in making a decision. Sometimes, the choice of the party may puzzle the mediator. But there may be valid reasons for it.

The initiator brought a sale deed evidencing his late father's purchase of 1 acre of land in his village about 25 years ago. It was lying uncultivated for long. On the purchaser's death, his son was out of the village for some years. On his return he found the owner of the next plot asserting his claim to this land also. The neighbour is influential in the village. The protests were in vain.

When neighbour responded to the request to attend the Uttiramerur mediation centre, he started on a belligerent note. He opened the talks with a challenge as to how the mediator had satisfied himself about the title of the initiator to the land in dispute. The mediator explained how it was not his function to certify title. It was up to the parties to discuss the problem of conflicting claims, strength and weakness of their rival versions and negotiate a settlement if possible. He was assured, the mediator would facilitate it.

The basis of the initiator's claim was read out from the notes. The respondent asserted that he had not ever heard of any purchase by the initiator's father as claimed. With a view to set the ball rolling, the mediator read out the registered sale deed in favour of the initiator's father in detail. Mistaking this as a partisan representation, the responding party questioned the procedure adopted at the centre. It was clear that he had come for a show down. The field worker reminded the mediator how this neighbour had come to the mediation centre last year for another dispute. So he knew about how it was done and yet he shouted that what was going on was not mediation at all. The mediator assured him that there was no rigid procedure and that he could explain his version out of turn if he wanted. If he had come with any prejudice, this should have reassured him.

He said he himself had a patta for this land under the updating scheme. It was explained to him how any patta or document earlier to the updating record would be useful. The updating was only a few

years back and it was public knowledge that many errors had crept in to it, inadvertently or designedly. He lost his temper and shouted at the initiator, the mediator and the field worker who attempted to pacify him. Finding him in no mood to negotiate, the mediator suggested that he withdrew from the place. This enraged him further and louder shouting from him stalled the work at the centre. About 5 or 6 persons were waiting for 2 other disputes. Mediator suggested to the angry party that he could search for earlier records at home. It was expected that he would cool down and be better prepared for rational negotiations next week.

The initiator attended the next session, but not the other party; why? Was it because he had no faith in a negotiated settlement? Was he disillusioned with the mediator's ways? He had come earlier. Why did he come again? Did he come deliberately to show his contempt for informality? Perhaps he hoped that a formal approach would project the initiator's claim as comparatively weaker of the two. Did he reject informality as unsuitable for his interests?

Whatever be his reasons he was free to reject mediation. In case his disappointment was about the mediator only, he should have an opportunity to use the facility of another centre. He was contacted by a letter suggesting his visit to Wallajabad centre where another mediator functioned. No response. A party can change his mind at any stage. The choice factor is kept alive till the end. That is the hallmark of voluntarism. Informalism ensures it.