

Role of Alternative Dispute Resolution as a Mechanism for Administration of Justice

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“Discourage litigation. Persuade your neighbors’ to compromise wherever you can. Point out to them how the nominal winner is often a loser – in fee, expenses and waste of time.”

-Abraham Lincoln

Abstract: *Desire for quick and affordable justice is universal. Right to speedy trial is a right to life and personal liberty of every citizen guaranteed under Article 21 of the Constitution, which ensures just, fair and reasonable procedure. Alternative Dispute Resolution mechanisms have become more crucial for businesses operating in India as well as those doing businesses with Indian firms. There are various reasons for which ADR is preferred over the conventional way of resolving the disputes. India being a developing country, going through major economic reforms within the framework of the rule of law, for expeditious resolution of disputes and lessening the burden on the courts, alternative mechanisms for resolution (ADR) are the only alternative through arbitration, conciliation, mediation and negotiation.*

Keywords: ADR, Role of Alternative Dispute Resolution, Benefits of ADR

1. Introduction

It is impossible to eliminate contradictions, conflicts and disputes in any society, and the human society develops in contradictions. It is these contradictions and conflicts which tell us the importance of peace. Trust of the people in the system that they will get justice, if and when required, keeps the system peaceful, smooth and comfortable. There are many stake-holders of justice delivery system. The most important is the consumer of justice who is a litigant. The seekers of justice come to the courts with pain and anguish in their hearts because they have faced legal problems and suffered physically and psychologically. They have a trust in the courts and believe that they would get justice from the courts, so they do not take the law into their own hands.

Desire for quick and affordable justice is universal. Right to speedy trial is a right to life and personal liberty of every citizen guaranteed under Article 21 of the Constitution, which ensures just, fair and reasonable procedure. “Any conflict is like cancer. The sooner it is resolved the better for all the parties concerned in particular and society in general. If it is not resolved at the earliest possible opportunity, it grows at a very fast pace and with time and the effort required to resolve it increases exponentially as new issues emerge and conflicting situations galore. One dispute leads to another. Thus, it has become very difficult for the poor and marginalized people to have access to justice. In these circumstances, it becomes significantly necessary for all the stake-holders of the judicial system to find out some mechanism where such grey areas can be effectively and adequately taken care of [1].

The truth is that an effective judicial system requires not only that just results be reached but they be reached swiftly. However, the reality is that it takes a very long time to get justice through the established court system. In spite of the continuous efforts, sometimes the litigation continues for the life time of the litigant and sometimes it carries on even to the next generation. In this state of uncertainty and unending long process, the disputant or litigant may exhaust his resources besides physical and mental sufferings. Thus,

there is a chain reaction of litigation process and, at times, civil cases may even give rise to criminal cases.

2. Meaning of Alternative Dispute Resolution System

ADR is not a recent phenomenon as the concept of parties settling their disputes themselves or with the help of third party, is very well-known to ancient India. Disputes were peacefully decided by the intervention of Kulas (family assemblies), Srenis (guilds of men of similar occupation), Parishad, etc.

However, Carrow defined “Alternative Dispute Resolution as including binding arbitration in the minds of some since it qualifies as an alternative to court litigation. The better view is that the distinguishing feature of ADR is that the parties with few exceptions, determine their own destiny rather than having the decision of another imposed upon them” [2]

According to Akinsaya. “ADR is the abbreviation of Alternative Dispute Resolution and is generally used to describe the methods and procedures used to resolve disputes either as an alternative to the traditional disputes resolution mechanism of the court or in some cases as supplementary to such mechanism”. In other words, these processes are designed to aid parties in resolving their disputes without the need for a formal judicial proceeding [3].

Constitutional provisions

Article 39-A of the Constitution of India provides that the State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity and shall in particular, provide free legal aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 14 also makes it obligatory for the State to ensure equality before law and a legal system which promotes justice on the basis of equal opportunity to all. Thus, access to justice, provision of legal aid for poor and needy and dissemination of equal and

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speedy justice are the cherished goals of our Constitutional Republic.

Provisions Regarding ADR under Indian Law

As regards the Industrial Disputes Act, the Supreme Court observed, "the policy of law emerging from Industrial Disputes Act, 1947 and its sister enactments is to provide an Alternative Dispute Resolution mechanisms to the workmen, a mechanism which is speedy, inexpensive, informal and unencumbered by the plethora of procedural laws and appeals upon appeals and revisions applicable to civil court. [4]

Section 89, CPC and other provisions – Prior to the existence of S. 89, CPC there were various provisions that gave the power to the Courts to refer disputes to mediation. Such provisions are in the Industrial Disputes Act, 1947, Section 23(2) of the Hindu Marriage Act, 1955 and Section 9 of the Family Courts Act, 1984. We can also find and infer such provisions in Section 80, Order XXIII, Rule 3, Order XXVII, Rule 5-B, Order XXXII-A & Order XXXVI of the Code of Civil Procedure, 1908. Order 23, Rule 3, Code of Civil Procedure mandates the courts to record a full adjustment or compromise and pass a decree in terms of such compromise or adjustment. But the compromise decree has to be recorded as a whole so as to gather the intention of the parties [5].

S. 9 of the Family Courts Act, 1984 mandates the family court to assist and persuade the parties at the first instance, to arrive at a settlement.

The court must apply its judicial mind while examining the terms of settlement. The compromise shall not be recorded in a casual manner. The court is under the responsibility to satisfy itself about the lawfulness and genuineness of the compromise [6].

Government of India and State Governments are the largest litigants in India. The government or statutory authorities are defendants in a large number of suits pending in various courts in the country. Section 80, CPC and some other statutes require service of notice as a condition precedent for filing of a suit or other proceedings against the government or authority. It is observed that in a large number of cases where government is a defendant either the required notice is not replied or in a few cases where a reply is sent, it is generally vague and evasive. Thus, the object of S. 80, CPC and similar provisions get defeated. It not only gives rise to avoidable litigation but also results in heavy expenses and costs to the government exchequer.

Reasons to Promote ADR or Advantage of ADR

The concept of ADR is not new for India. Since the ancient time arbitration, conciliation, mediation were the means of settlement of dispute, different from the formal legal system. These means of dispute resolution recognized not only in India but also in so many countries of the world.

The popularity of alternative dispute resolution mechanism has been increasing dramatically from the last two decade mainly. ADR has greatly expanded over the last several years to include many areas in addition to the traditional

commercial dispute in the form of Arbitration, Mediation has become an important first step in dispute resolution process.

Alternative dispute resolution mechanism, are in addition to courts and compliment them. Our old traditional system of dispute resolution is affected with inordinate delays. By the reason of this there are backlog in court cases in India. ADR mechanism play an important role in doing away with delays and congestions in court proceedings the concept of the "administration of justice" and the judicial dispute resolution is one and the same and are synonymous.

As be discussed earlier that a man is fighting animal. Since "Stone Age" to upto now, he is habitually fighting. In the beginning, he was fighting with animals and men for his struggle for existence, and for food. Later he began to speak. He created money. In the initial stage of human race, there were dual fights and vengeance between men. Gradually it developed to group fighting, and later to wars. And the remedies provided for this in our Judicial system is through statutes. The remedies provided in the statutes are simply called „legal remedies“.

These legal remedies are embedded in statutes themselves and their substantives and objective laws, i.e., The Constitution of India 1950, The Transfer of property Act 1872, The Civil procedure code 1908, The Specific Relief Act, 1963 The India Contract Act, 1872 etc. The procedural law direct the court how to proceed and conduct the judicial dispute proceedings and these procedures are purely related to Bar and Bench. They can only be understood by Bar and Bench. And ordinary person cannot understand the implications of substantives and procedural law, which very often to change.

Due to all these several reasons the judicial system of India has come under the great stress. One of them was huge pendency of cases in court. And there was a need of a technique like alternative dispute resolution in India. To keep all these problem in their mind the government of India constitute a committee, on the advice of the chief Justice of India, under the chairmanship of justice Malimath, Chief Justice of Kerla High Court, to suggest the way and means by which the arrears and work load of High Court and subordinate court can be reduced and control.

Hence, there is a need of alternative to adversarial court method. In other words, an alternative dispute resolution movement has taken birth the supplementary objects of these alternative movements are:

- 1) To lessen the court overloading as well as excessive cost and delay ;
- 2) To boost up the public participation in the dispute resolution process ;
- 3) To facilitate access to justice ;
- 4) To reflect seriously on the negotiation process with the aim to increase mediation and settlement conference with confidence and effectiveness.
- 5) To learn the language of negotiation, mediation and settlement conferences so that all these process can be

- placed on a practical, concept that provide the framework.
- 6) To know the newest empirical studies in business communication, psychology and law and their application in negotiation medication and settlement conferences.
 - 7) To build up more efficient personal negotiations, mediations and settlements conference dynamics through practical exercise and case studies.
 - 8) To categorize strategies in dispute resolution and apply them to actual case.

Therefore, this explains the need of ADR which aims to protect the socio-economic and cultural rights of citizen. The huge backlog of cases cannot be handled by the court alone, it is extremely important to dispose of these cases quickly. The alternative resolution effectively achieved the goal. This is reason behind the introduction of ADR in India. The Main purpose of alternative resolution is to encourage the peaceful and satisfactory resolution of dispute through voluntary settlement procedure for example if the Allopathic system of medicine is unsuitable.

The patient's is sensitive/allergic to those drugs, or the strain of organism is resistant to known medicine, one must look to the Ayurvedic or Homeopathic form of medicine, or even plain Nature Cure. However, if the main Allopathic system is suitable but the queue outside the public dispensary or the wait for the medication is so long that a person is not likely to survive the wait a look at the alternative system becomes imperative.

3. Advantages of Alternative Dispute Resolution Mechanism

The ADR mechanism is much advantageous and compliment to traditional legal system. The frame work of ADR mechanism has emerged comprehensive but its success depends much on the will of the people to work it up in the right spirit and with good faith. The parties have to be made aware and educated about the advantage of adopting ADR mechanism. [7]

Alternative dispute resolution is based on direct participation by the disputants rather than being run by lawyer and judges. The involvement of peoples in the dispute settlement proceedings, believe that it is most satisfactory with the outcome. Most of the ADR processes are based on integrative approach. They are most corporative and less competitive than the method of litigation of course. That is the main reason that ADR tends to generate less escalation and ill-will between the parties. This is the key advantage in situation where the parties must continued to interact after settlement is reached, such as in matrimonial cases and labour management cases. [8] *Following are the advantageous of ADR*

- 1) The Alternative dispute resolution are solved the dispute quickly.
- 2) The Alternative dispute resolution provides a more flexible, alternative solution for a wide verity of dispute whether small or large.
- 3) It can be used at any time, even when a case is pending before a court of law.

- 4) The Alternative Dispute Resolution are very cheaper when compared with the judicial dispute resolution means it can provide better solution the dispute more expeditiously and at less cost than regular litigation.
- 5) The Alternative Dispute Resolution is concerned mainly with the facts and facts only. They not need to go in the depth of the legal provisions.
- 6) One of the foremost advantage of the Alternative Dispute Resolution process is that dispute remains under the control of the parties themselves and any settlement entered into is their own and does not represent a dictate from a outsider.
- 7) It can be used to reduce the number of contentious issues between the parties and it can be terminated at any stage by any of the disputing parties.
- 8) The parties themselves come to an agreement for the appointment of an officer or arbitrator in the Alternative dispute resolution. It is most advantageous point in the Alternative dispute resolution.
- 9) The results can be kept confidential the parties can agree that information disclosed during negotiations or arbitration hearing cannot be used later even if litigation ensures. The final outcome can also be made private if the parties so stipulate and agree on the other hand, most trials and related proceedings are open to the public and the press.
- 10) ADR is often less stressful then expensive and lengthy litigation most people have reported high degree of satisfaction with ADR.

Various Forms of ADR

- (1) Arbitration
- (2) Conciliation
- (3) Mediation
- (4) Judicial Settlement, and
- (5) Lok Adalat

The advantages of arbitration can be summarized as follow –

- 1) In comparing with ordinary litigation, arbitral proceedings are very cheap.
- 2) It is often than litigation in court
- 3) The parties mutually agree to appoint the arbitrator, who is related with the same field and technical qualities therefore, the parties have personally acquaintance with such arbitrator.
- 4) Arbitral proceedings are generally non public, and can be made confidential.
- 5) Arbitral proceedings are more flexible for business.
- 6) There is no involvement of legal practitioners in arbitral proceedings.
- 7) In arbitral proceedings, the language of arbitration may be chosen by the parties which are acquainted to them.
- 8) There are very limited avenues for appeal of an arbitral award.

However, there are some disadvantages of the arbitration, which may be summarized as follow –

- 1) Arbitrator may be subject to pressures from the powerful parties.
- 2) Arbitration waives the right of parties to access the court because the arbitration is mandatory and binding.

- 3) Some time in arbitration proceedings the parties are required to pay an additional at cost for arbitrator, especially in small consumer dispute.
- 4) Undoubtedly the arbitration proceeding is speedy but where there are multiple arbitrator on the penal, juggling their schedules for hearing dated in long cases can lead to delays.
- 5) There are very limited opportunity of appeal to the parties which means that an erroneous decision can be easily overturned.
- 6) Arbitration awards themselves are not directly enforceable. A party seeking to enforce arbitration award must resort to judicial remedies.

Judicial Approach towards ADR

Supreme Court started issuing various directions as so as to see that the public sector undertakings of the Central Govt. and their counterparts in the States should not fight their litigation in court by spending money on fees on counsel, court fees, procedural expenses and waiting public time. [9]

In Chief Conservator of Forests v. Collector [10] were relied on and it was said that state/union govt. must evolve a mechanism for resolving interdepartmental controversies-disputes between department of Government cannot be contested in court.

In Punjab & Sind Bank v. Allahabad Bank [11], it was held that the direction of the Supreme Court in ONGC III [12] to the government to setup committee to monitor disputes between government departments and public sector undertakings make it clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee.

In the judgment of the Supreme Court of India in **Salem Bar Association vs. Union of India [13]**, the Supreme Court has requested prepare model rules for Alternative Dispute Resolution and also draft rules of mediation under section 89(2)(d) of Code of Civil Procedure, 1908.

In Sundaram Finance Ltd. v. NEPC India Ltd. [14], the Supreme Court explicitly made it clear that the 1996 Act is very much different from that of Act, 1940. The provisions made in Act of 1940 lead to some misconstruction and so the Act of 1996 was enacted or rather repealed. In order to get help in construing these provisions made in Act of 1996, it is more relevant to refer to the UNCITRAL Model Law besides the Act of 1996 rather than following the provisions of the Act of 1940.

In Grid Corp. of Orissa Ltd. v. Indian Charge Chrome Ltd. [15], Section-37(1) of the Indian Electricity Act, 1910 provides for arbitration by the Commission or its nominee any dispute arising between the licensees or in respect of matters provided under Section-33. The Orissa High Court held that Section-7 of the Arbitration Act, 1996 would apply to the present case in view of the fact that the scope of the Arbitration Act, is very wide and it not only contains arbitration agreement in writing but also other agreements as mentioned in sub-section (4). It also held that if there is any arbitration agreement in any other enactment for the time

being in force i.e., statutory agreement, provisions of Arbitration Act, 1996 shall apply except sub-section (1) of Section-40 and Sections 41 and 43.

In Baba Ali, Petitioner v. Union of India and Others [16], the validity of the Act was challenged on the ground that under the Act of 1996 the question of jurisdiction of the arbitrator can only be considered by the appropriate court after the award is passed and not any penultimate stage. The Delhi High Court rejected the plea. Against this decision a Special Leave Petition was filed in the Supreme Court. The Supreme Court of India dismissed the Special Leave Petition and held that there is no question of the Arbitration and Conciliation Act, 1996 being unconstitutional or in any way offending the basic structure of the Constitution of India, as the High Court has rightly observed that judicial review is available for challenging the award in accordance with the procedure laid down therein. The time and manner of judicial scrutiny can legitimately be laid down by the Act passed by the Parliament.

In Sri Venkateshwara Construction Co. v. Union of India [17], Andhra Pradesh High Court, in an application filed under Section 11, referred to the provisions of Section 10, sub-section (1) and (2) and held that after a close reading of the aforesaid provision it clearly shows that the parties are free to determine the number of Arbitrators, but such number shall not be an even number. Sub-section (2) further provides that if the parties fail to provide for an odd number of arbitrators, the arbitral tribunal shall be constituted by a sole arbitrator.

In Ashalata S. Lahoti v. Hiralal Lilladhar [18], the Bombay High Court has taken a stand in a few matters, wherein the number of arbitrators was even. It was held that under Section 14 of the Act of 1996 the mandate of Arbitrator should terminate, if he becomes *de facto* or *de jure* to perform his functions. It was held that if the Tribunal is constituted contrary to Section-10 of the Act of 1996, the Arbitrators *de jure* will not be able to perform those functions. In that case, the parties can move the Court for decision to decide whether the mandate has been terminated or not. And thus this matter is to be dealt by the Court having a jurisdiction under Section-14(2). So, once it is so treated it will be so held that the Arbitrators *de jure* cannot proceed with the Arbitration.

In Guru Nanak Foundation v. M/s Rattan Singh & Sons [19], the Supreme Court held "Interminable, time-consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by chosen by the parties for expeditious disposal of their disputes has, by the decisions of

the Courts been clothed with „legalese“ of unforeseeable complexity.”

4. Conclusion and Suggestion

ADR is quicker, cheaper, and more user-friendly than courts. It gives people an involvement in the process of resolving their disputes that is not possible in public, formal and adversarial justice system perceived to be dominated by the abstruse procedure and recondite language of law. It offers choice: choice of method, of procedure, of cost, of representation, of location. Because often it is quicker than judicial proceedings, it can ease burdens on the Courts. Because it is cheaper, it can help to curb the upward spiral of legal costs and legal aid expenditure too, which would benefit the parties and the taxpayers.

In this juncture, few things are most required to be done for furtherance of smooth ADR mechanisms. Few of them are:

Creation of awareness and popularizing the methods is the first thing to be done. NGOs and Medias have prominent role to play in this regard.

For Court- annexed mediation and conciliation, necessary personnel and infrastructure shall be needed for which government funding is necessary.

Training programmes on the ADR mechanism are of vital importance. State level Judicial academies can assume the role of facilitator or active doer for that purpose.

While the Courts have never tired of providing access to justice for the teeming millions of this country, it would not be incorrect to state that the objective would be impossible to achieve without reform of the justice dispensation mechanism. There are two ways in which such reform can be achieved- through changes at the structural level, and through changes at the operational level. A change at the structural level challenges the very framework itself and requires an examination of the viability of the alternative frameworks for dispensing justice. It might require an amendment to the Constitution itself or various statutes. On the other hand, a change at the operational level requires one to work within the framework trying to indentify various ways of improving the effectiveness of the legal system.

Needless to say, this will considerably reduce the load on the courts apart from providing instant justice at the door-step, without substantial cost being involved. This is also avoid procedural technicalities and delays and justice will hopefully be based on truth and morality, as per acknowledged considerations of delivering social justice.

References

- [1] Prof. Anurag K. Agrawal, Strengthening ‘Lok Adalat’ Movement in India, AIR JL. Section, Vol. I, March 2006, p. 33
- [2] Jangkama D.N. “Alternative Dispute Resolution At A Glance”, p.1041 viewed at www.duhaime.org
- [3] Ibid.
- [4] Rajasthan State Road Transport Corporation v. Krishna Kant, AIR 1995 SC 1715

- [5] Manjulata Sharma v. Vinay Kumar Dubey, AIR 2004 All 92 (94) DB
- [6] Banwarilal v. Chano Devi, AIR 1993 SC 1139
- [7] Sabharwal, Y.K.J.: “Alternative Dispute Resolution”, NYAYA DEEP. Vo.6 January 2005 page 56.
- [8] Sinha, S.N.P. and Mishra, Dr. P.N. ; “ A Dire Need of Alternative Dispute Resolution System In A Developing Country Like India”, INDIAN BAR REVIEW, Vol. XXXI (3&4) 2004, p.300
- [9] see Oil and Natural Gas Commission v. Collector of Central Excise, 1992 Supp2 SCC 432, Oil and Natural Gas Commission v. Collector of Central Excise, 1995 Supp4 SCC 541 and Chief Conservator of Forests v. Collector, (2003) 3 SCC 472
- [10] (2003) 3 SCC 472 ONGC I AND II
- [11] (2006) (3) SCALE 557
- [12] (2004) 6 SCC 437
- [13] (2005) 6 SCC 344
- [14] AIR 1999 SC 565; 1999 (1) Arb. LR 305 (SC)
- [15] 1998 (2) Arb. LR 128 (Orissa)
- [16] 1999 (Suppl.) Arb. LR 433 (SC)
- [17] 2001 (2) Arb. LR 619 (AP)
- [18] 1993 (3) Arb. LR.462 (Bombay)
- [19] AIR 1981 SC. 2075