

ALTERNATIVE DISPUTE RESOLUTION: A BOON TO JUSTICE DELIVERY SYSTEM IN INDIA

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Introduction

The courts are over burdened with the cases. Remedy in the form of ADR was considered as an alternative to the courts to resolve the disputes between the parties. The adjudicatory system has become costly, expensive and time consuming. The attention of the business community is drawn to the informal dispute resolution, which is in fact tradition in many of the world societies like China, England, America⁴⁷. Even in India resolution of disputes outside court was in vogue in the form of the resolution of the disputes between members of a particular clan or occupation or between members of a particular locality, by *Kulas* (assembly of the members of a clan), *Srenis* (guild of a particular occupation) and *Pugas* (neighborhood assemblies).⁴⁸

Before expansion of commercialization and industrialization the justice delivery system was in sound condition. As the time passes, the consciousness of fundamental and individual right, government participation in growth of the nation's business; commerce and industry, establishment of the parliament and state legislatures, government corporations, financial institution's fast growing international commerce and public sector participation in business, tremendous employment opportunities were created. Multiparty complex civil litigation, the expansion of business opportunities beyond local limits, increasing popular reliance on the only judicial forum of courts brought an unmanageable expansion of litigation. The clogged courthouses have become an unpleasant compulsive forum instead of temples of speedy justice. Instead of waiting in queues for years and passing on litigation by inheritance, people are inclined either to avoid litigation or to start resorting to extra judicial remedies.⁴⁹

ADR System: Nature and Scope

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⁴⁷ K. Jayachandra Reddy, Alternate Dispute Resolution, 'Alternative Dispute Resolution', Reprint 2007, Universal law Publishing Co. Pvt.Ltd.79.

⁴⁸Sarvesh Chandra, ADR : IS CONCILIATION THE BEST METHOD, 'Alternative Dispute Resolution', Reprint 2007, Universal law Publishing Co. Pvt. Ltd, 82

⁴⁹ Mediation and Case Management- Their co-existence and correlation- A paper presented during Indo-US Judicial exchange at U.S. Supreme court by Niranjana Bhatt on 15/12/2002.

There is change of wind all over the world and shift is towards resolution of the disputes not through adjudication but through amicable settlement. Modern Alternative Disputes Resolution Techniques (ADR) is a voluntary system, according to which the parties enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution.⁵⁰ There are various forms and techniques of ADR like mediation, conciliation, early neutral evaluation etc. ADR is a form of facilitated settlement, which is confidential and without prejudice.⁵¹

ADR, like litigation and arbitration, will often involve an independent third party but his function is fundamentally different from that of a judge or arbitrator and is best described as a neutral facilitator. He cannot impose a decision on the parties⁵² but, on the contrary, his role is to assist the parties to resolve the dispute themselves. The conciliator does not have the authority to impose upon the parties a solution to the dispute.⁵³ He may give opinions on issues in dispute but his primary function is to assist in achieving a negotiated solution.⁵⁴ Thus the ADR is considered as purely consensual procedure. The parties to the dispute have total control over the process. The parties themselves may choose the form or prepare their own procedure for settlement of dispute. The party may withdraw from the process at any stage of the proceeding.⁵⁵ It is a process where disputes are settled with the assistance of a neutral third person generally of parties own choice; where the neutral is generally familiar with the nature of the dispute and the context in which such disputes normally arise; where the proceedings are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses; where the confidentiality of the subject-matter of the dispute is maintained to a great extent; where decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities⁵⁶. In substance the ADR process aims at rendering justice in the form

⁵⁰ Dr. Loukas A. Mistelis, ADR in England and Wales, 12 Am. Rev. Int'l Arb.167, 170

⁵¹ Simon Davis, ADR and Commercial Disputes, Russell Caller (ed), Sweet & Maxwell, London, 2002

⁵² Haresh Dayaram Thakur v State of Maharashtra, 2000 DGLS (Soft.) 925

⁵³ Sub article 3 of Article 1 of the UNCITRAL Model Law

⁵⁴ O.P. Malhotra, and Indu Malhotra, 'The Law and Practice of Arbitration and Conciliation', Lexis nexis Butterworths, 2nd ed, New Delhi, 2006, p.1477

⁵⁵ Section 76 Arbitration and Conciliation Act, 1996.

⁵⁶ Sarvesh Chandra, ADR : IS CONCILIATION THE BEST METHOD, 'Alternative Dispute Resolution', Reprint 2007, Universal law Publishing Co. Pvt. Ltd, 83

and content which not only resolves the dispute but tends to resolve the conflict in the relationship of the parties which has given rise to that dispute⁵⁷.

Need for ADR System :

As per statistics available in India, it is unable to clear the backlog of cases. Take a look upon the pendency figures.[Source: www.supremecourtfindia.nic.in, Bar& Bench News Network Jul 15, 2010 Google search]

Pending cases

Courts		2008	2009	2010
Supreme court*	Admission	26,863	30,834	33,352
	Regular	19,024	19,329	21,512
	Total	45,887	50,163	54,864
High Courts *		3,743,060	3,874,090	4,060,709
Lower Courts**		25,418,165	26,409,011	27,275,953
Total(All Courts)		29,207,112	30,333,264	31,391,526

*Statistics as of march 31, 2010

** Statistics as of December 31, 2009.

The backlog has been increasing at an average rate of 34 percent annually. This huge backlog of unsolved cases, experts claim, is directly proportional to a lack of judges. Statistics released by the Supreme Court although shows a drop in vacancies of judges in the courts of the country, the number is still very high. Here are the statistics for past three years and vacancies that continue to exist

Vacancies in the Courts :

Courts		2008	2009	2010
Supreme Court*	Sanctioned	26	31	31
	Vacancies	1	7	2
High Courts**	Sanctioned	876	886	895

⁵⁷ibid

	Vacancies	282	251	267
Lower Courts**	Sanctioned	15,917	16,685	16,880
	Vacancies	3,393	3,129	2,785

*Statistics as of march 31, 2010

** Statistics as of December 31, 2009.

The vacancies in the Supreme Court have been reduced by new appointments this year and last year. The High Court's statistics however, show some concerns. There have been nearly 30 percent vacancies in High Courts as well as lower courts

In Maharashtra state, total pending cases as of 31 December, 2009 in Lower Courts is 4,158,458, i.e. 15 percent of total pendency and 338,183 in High courts i.e. 8 percent of total pendency

Ratio of Judges to Population *

Country	Ratio of judges to population (per 10 Lac population)
USA	107 Judges
Canada	75 Judges
Australia	57.7 Judges
England	50.9 Judges
India	10.5 Judges

*As per the Law Commission of India Report, 1987

The United Nations Development Programme reveals that approximately 20 million legal cases are pending in India. India is a country of 1.1 billion people. Presently it has approximately 12.5 judges for every million people compared with roughly 107 per million in the United States and Great Britain have around 150 judges for million of it's population. In its 120th Report in 1988, the Law Commission of India had recommended that "the state should

immediately increase the ratio from 10.5 judges per million of Indian population to at least 50 judges per million within the period of next five years.”⁵⁸

Our justice delivery system is bursting at the seams and may collapse unless immediate remedial measures are adopted not only by the judiciary but also by the legislature and executive.

Government as a largest litigator: According to rough estimate, 70% of all cases are either agitated by the State or appealed by it. The State fights cases against citizens at the cost of citizens.

Legislative Recognition to ADR in India:

The Arbitration and Conciliation Act, 1996 enacted in India is based on the recommendations of UNCITRAL. Part III of the Arbitration and Conciliation Act, 1996 provides for the procedure of 'Conciliation'.⁵⁹ The provisions of Code of Civil procedure⁶⁰, Section 23 of Hindu Marriage Act, 1955, Industrial Disputes Act, Family Courts Act, Lok Adalats are based on the concept of ADR. The specific procedure of conciliation is also introduced in India for the first time by Arbitration and Conciliation Act, 1996⁶¹. The Legal Services Authorities Act, 1987 is amended by addition of chapter VI-A and concept of Permanent Lok Adalat was introduced.⁶² Under the Legal services Authorities Act, 1987, a party may before the dispute is brought before any court, regarding public utility service,⁶³ make an application to the Permanent Lok Adalat for settlement of the dispute. It further provides that where the parties fail to reach at an agreement the Permanent Lok Adalat shall decide the dispute.⁶⁴

The Indian legislature also realised importance of ADR and added section 89 to the Code of Civil Procedure 1908 with a purpose : to prevent suits from proceeding further except when

⁵⁸ 120th Report of the Law Commission of India on Manpower Planning in the Judiciary: A Blueprint, Ministry of Law, Justice and Company Affairs, Government of India (1987) 39.

⁵⁹ Sections 61 to 81 of Arbitration and Conciliation Act, 1996.

⁶⁰ Section 89, O.XXXII-A

⁶¹ Part III of Arbitration and Conciliation Act, 1996.

⁶² Sections 22-A to 22-E of Legal Services Authorities Act, 1987

⁶³ Public utility service is defined in s. 22-A (b) of Legal Services Authorities Act, 1987 to mean any "(i) transport service for the carriage of passengers or goods by air, road or water; or (ii) postal, telegraph or telephone service; or (iii) supply of power, light or water to the public by any establishment or (iv) system of public conservancy or sanitation; or (v) service in hospital or dispensary; or (v) insurance service.

⁶⁴ Sub section (8) of section 22 C of Legal Services Authorities Act, 1987.

parties could not get their disputes settled through any of the methods of Alternate Dispute Resolution mentioned therein. Section 89 of Code of Civil Procedure provides for court annexed ADR. Section 89 reads as " **Settlement of dispute outside the court.**—

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may formulate the terms of a possible settlement and refer the same for—

- (a) arbitration;
- (b) conciliation
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) Mediation.

(2) Where a dispute has been referred—

(a) for arbitration or conciliation ,the provisions of the Arbitration and Conciliation Act,1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub section (1) of section 20 of the Legal services Authority Act,1987(39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal services Authority Act,1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d)For mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed”.

Indian Judicial Attitude towards ADR:

The Supreme Court in, **Salem Advocate Bar Association v Union of India**⁶⁵ (I), has held "It is quite obvious that the reason why section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in

⁶⁵ 2003(1) SCC 49

mind the laws delays and the limited number of judges which are available. It has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date." Also in Salem Advocate Bar Association v Union of India⁶⁶ (II) the Apex Court held, "The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or other of the said modes."

In a landmark case of Supreme Court, **Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd & Ors**⁶⁷, the issue before Supreme Court was the general scope of Section 89 of the Code of Civil Procedure (Code for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties? In this case trial court had heard the application under section 89 by one of the parties. The trial court recorded that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application under section 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. The revision application filed before High Court Kerala against the said decision was dismissed. The High Court held that in appropriate cases the even unwilling party can be referred to arbitration and the condition of pre-existing arbitration agreement is not necessary to apply section 89. The Supreme Court set aside both the orders passed by the trial court and High Court. The Supreme Court held that unwilling parties cannot be referred to arbitration or conciliation. It will be appropriate to quote here, J. Raveendran in Afcons Infrastructure Ltd & Anr Vs Cherian Varkey Construction Co (p) Ltd and Ors.

“Sec. 89 appears to be non- starter with many courts, Though the process u/s 89 appears to be lengthy and complicated, in practice, the process is simple – know the dispute, exclude unfit cases, ascertain consent for arbitration and conciliation, if there is no consent select Lok Adalat

⁶⁶ 2005(6) SCC 344

⁶⁷ 2010(8) SCC 24

for simple cases and mediation for all other cases, reserving reference to judge assistance settlement only in exceptional or special cases”.

Basically section 89 was enacted with object that every dispute before court should be first referred to the alternate dispute resolution and only when the parties fail to get their disputes settled through any of the alternate dispute resolution methods that the suit could proceed further⁶⁸. The opening words of section 89 “where it appears to the Court that there exists elements of a settlement which may be acceptable to the parties” has left the initial satisfaction about ‘elements of a settlement’, to the court, not to the parties. The decisions of the Supreme Court in earlier cases⁶⁹were supportive of ADR.⁷⁰ The decision of the Apex Court in Afcon’s case is set back to the movement of ADR through assistance of the courts. A strained construction has been placed on a most important and salutary provision in the code.⁷¹

Fali S. Nariman has stated "I am afraid that after the decision of the highest court in Afkons there is not much help to be expected on ADR in the future from the courts. Mediation must stand on its own record , un-assisted by Judges"⁷²

In my humble opinion all these cases needs rethinking by the apex court as they hamper the progress of the ADR movement.

Conclusion and Recommendations:

The Supreme Court and High Court are endeavoring for growth and adoption of ADR system. However, the said growth needs to still get momentum at grassroots. The action plan floated by Bombay High Court in this behalf aims at holding workshops and spreading awareness of ADR Mechanism at the grassroots. Hence, it is only if the community of Lawyers and the Litigants accept the concept as being beneficial to them. If some parties show reluctance to bear the fees of Mediator. In such cases the first need is to explain to the parties the benefits of mediation and saving of loss from a long turn point of view.

⁶⁸ Clause 7 of the objects and reasons (section 89) of the Code of Civil procedure Amendment Bill,1999

⁶⁹ Salem Advocates Bar association v Union of India (I) ,2003 (1) SCC 144, Salem Advocates Bar association v Union of India (II) ,2005 (6) SCC 344

⁷⁰ Forward by Fali S. Nariman, Mediation , Practice and Law the Path to Successful Dispute Resolution, Sriram Panchu, Lexis Nexis Butterworths Wadhwa, Nagpur,2011 pg xxvii

⁷¹ *ibid*

⁷² *ibid*

Analyzing the present pendency of cases in courts and required time for the resolution of dispute and execution of the decision in coming years there will be rise of private mediation centers in this country. At present we have recognized and reputed Lawyers, Senior counsels in litigation. Time will come when we will also have a group of well recognized and reputed mediators who can then specialize in one or more areas of dispute resolution.

Practicing advocates may make a simple beginning by drafting a clause in their notices or replies as “without prejudice to the contentions raised and claims made in this notice, my client is willing to resort to any of the modes of arbitration, mediation, conciliation and pre-litigation cells⁷³ in court to avoid actual litigation”.



⁷³ The Legal Services Authorities Act, 1987 S. 20(2) provides for pre-litigation as under :-
S. 20(2) Notwithstanding anything contained in any other law for the time being in force, the District Authority may, on receipt of an application from any person that any dispute or matter pending for a compromise or settlement needs to be determined by a Lok Adalat, refer such dispute or matter to the Lok Adalat for determination.

The National Legal Services Authority (Lok Adalat) Regulations, 2009, Rule 12 is as under :-

[12] Pre-litigation matters – (1) In a pre-litigation matter it may be ensured that the court for which a Lok Adalat is organized has territorial jurisdiction to adjudicate in the matter.

(2) Before referring a pre-litigation matter to Lok Adalat the Authority concerned or Committee, as the case may be, shall give a reasonable hearing to the parties concerned:

(3) An award based on settlement between the parties can be challenged only on violation of procedure prescribed in section 20 of the Act filing a petition under articles 226 and 227 of the Constitution of India.