An analysis of Alternative dispute resolution in India with special reference to Afcons Infrastructure Limited and Another v. Cherian Varkey Construction Company Pvt. Ltd. and others 2010 – Glimpse

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"*I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realized that the true function of a lawyer was to unite parties given as under. The lesson was so indelibly burnt unto me that the large part of my time, during the twenty years of my practice as a lawyer, was occupied in bringing about private compromises of hundreds of cases. I lost nothing, thereby not even money, certainly not my soul*".

----------Mahatma Gandhiji

Abstract

Alternative dispute resolution (ADR) refers to the different ways people can resolve disputes without a trial. In common ADR process includes mediation, arbitration, and neutral evaluation. These processes are generally confidential, less formal, and less stressful than traditional court proceedings. The object behind this provision is to avoid multiplicity of litigation, save valuable time, money and permit parties to amicably come to a settlement which is lawful, is in writing and is a voluntary act on the part of the parties. Further, to reduce burden of the court. The general principle is that all matters, which can be settled in a suit, can also be settled by means of compromise. The Act of 1999 has introduced by way of power rendered under Section 89 of the Code of Civil Procedure 1908. On which, the court may by itself, proactively refer a dispute for ADR methods such as Arbitration, Mediation, Conciliation and judicial settlement through Lok Adalat if it appears that elements of settlement, which may be acceptable to the parties to the dispute. This paper is intended to give an overview of procedural aspects as contained in Civil Procedure Code as well as of the different methods of Alternative Dispute Resolution with special reference to the judgement of the Hon'ble Supreme Court in the case of Afcons Infrastructure Limited and Another v. Cherian Varkey Construction Company Pvt. Ltd. And others[1] 2010 along with other statutes of India.

INTRODUCTION

ADR is a mechanism of dispute resolution that is non adversarial, i.e. working together unite to reach the best resolution for everyone. ADR can be instrumental in reducing the burden of litigation on courts, while delivering a well-rounded and satisfying experience for the parties involved. It provides the opportunity to "expand the pie" through creative, collaborative bargaining, and fulfill the interests driving their demands. Alternative dispute resolution, or external dispute resolution, typically denotes a wide range of dispute resolution processes and techniques that parties can use to settle disputes with the help of a third party. They are used for disagreeing parties who cannot come to an agreement short of litigation. For instance, the parties may stipulate in their contracts that in the event of a dispute they will first submit to an attempt at amicable settlement (conciliation/mediation) and only in the event of failure will they resort to a judicial method of settlement, which may be arbitration or recourse to the State justice system. ADRs therefore come into play at different levels and have a complementary character. It is pertinent to mention that the mechanisms of Alternative Dispute Resolution are extra-judicial in nature and are applicable to various matters of civil, commercial, partnership, intellectual property, personal injury, family, insurance, industrial, and

1(2010)8 SCC 24.

product liability including other commercial disputes[2]. Thus, to overcome the complexities of the modern legal system, the civil litigants resorted to adopting the less challenging technique, namely, Alternative Dispute Resolution.

OVERVIEW OF SECTION 89 CPC

The objective of Section 89 CPC is to ensure that the court makes an endeavour to facilitate out-of-court settlements through one of the ADR processes before the trial commences. The related provisions which were incorporated by the same amendment Act are those contained in Rules 1A, 1B and 1C of Order X, CPC. With the introduction of these provisions, a mandatory duty has been cast on the civil courts to endeavour for settlement of disputes by relegating the parties to an ADR process. Five ADR methods are referred to in section 89. They are: (a) Arbitration[3], (b) Conciliation, (c) Judicial settlement, (d) Settlement through Lok Adalat, and (e) Mediation[4]. The reason behind for the amendment of Section 89 of the Code of Civil Procedure was to provide an amicable, congenial, peaceful, and mutual settlement between the disputing parties without the intervention of the court. Section 89, CPC was initiated in Salem Advocate Bar Association v. Union of India[5]. The constitutional validity of the section 89 of CPC was upheld and the intent behind its inclusion was lauded. Criticism was muted as Section 89 was a recent insertion at the time. It was opined that the section had not been very effective as its modalities or qualities were yet to be determined. For that there was a committee was set up to draft model rules, and the apex court recommended the adoption of these rules by the various High Courts so as to give effect to section 89(2)(d), CPC.

ADR MEANING

The term "alternative dispute resolution "or 'ADR' is often used to describe a wide variety of dispute resolution mechanisms that are short of, or alternative to, full-scale court processes. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini-trials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of alternative dispute resolution. Such systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems. It is important to distinguish between mandatory processes and voluntary processes. Some judicial systems require litigants to negotiate, conciliate, mediate or arbitrate prior to court action. ADR processes may also be required as part of a prior contractual agreement between parties[6]. Involuntary processes, submission of a dispute to an ADR process depends entirely on the will of the parties.

BACKGROUND OF ARBITRATION AND CONCILIATION ACT

Arbitration as well as Conciliation are governed by the Arbitration and Conciliation Act, 1996 ("AC" Act, for short) which superseded the previous Arbitration Act of 1940. Arbitration, unlike conciliation is an

2S.R. Myneni, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," 1st ed. 2004, Asia Law House, Hyderabad.

3Arbitration is used when disputing parties agree to have someone else decide the outcome. A neutral person called an arbitrator listens to arguments from both sides, considers evidence, and then issues their decision. There are two kinds of arbitration. In *binding* arbitration, the arbitrator's decision is final. In *nonbinding* arbitration, the parties can pursue a court trial if they do not agree with the arbitrator's decision.

4In mediation, the parties still work to settle the dispute themselves, but an impartial person called a mediator hears both parties out, helps them discuss the dispute, and then helps them decide what to do. The mediator does not control the outcome. Mediation is often recommended when there is a relationship that both parties want to preserve, such as between family members or business partners.

5AIR 2003 SC 189.

6S.R. Myneni, "Arbitration, Conciliation and Alternative Dispute Resolution Systems," 1st ed. 2004, Asia Law House, Hyderabad.

adjudicatory process[7]. Once a civil dispute is referred to arbitration, the case will go outside the stream of the court permanently and will not come back to the court. However, in contrast, a dispute referred to conciliation which is a non- adjudicatory process, does not go out of the domain of the court- process permanently. In the event of failure to reach a settlement, the disputing parties appear before the court. In the case of civil matters, the conflicting parties possess the option of choosing negotiation[8] to resolve their dispute. The parties opting for negotiation can settle their conflicts themselves without the intervention of the court. However, in the case when the disputants approach the court to settle their disputes, they are mandated under Section 89 of the Code of Civil Procedure to refer to the mechanisms of ADR. Section 89 of the Code of Civil Procedure provides an alternative method to the official judicial procedures in resolution of the disputes.

ADVANTAGES OF ADR

The resolution of disputes takes place usually in private-helping to maintain confidentiality. It is more viable, economic, and efficient. Procedural flexibility saves valuable time and money and absence of stress of a conventional trial. This often results in creative solutions, sustainable outcomes, greater satisfaction, and improved relationships. The possibility of ensuring that specialized expertise is available on the tribunal in the person of the arbitrator, mediator, conciliator or neutral adviser. Further, it offers greater direct control over the outcome. The system of dispensing justice in India has come under great stress mainly because of the huge pendency of cases in courts9. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for ADR methods.

Statutories related to ADR methods in India

The Legal Services Authorities Act was passed in 1987 to encourage out-of-court settlements, and the new Arbitration and Conciliation Act was enacted in 1996. Inclusion of Plea Bargaining and Procedure for Plea-bargaining was included in the Code of Criminal Procedure by way of amendment in 2005. Plea-bargaining is best described as a ″pre-trial negotiation between the accused and the prosecution *during which the accused agrees to plead guilty in exchange for certain concessions by the prosecution."* Lok Adalats: Lok Adalat or "people's court" comprises an informal setting which facilitates negotiations in the presence of a judicial officer wherein cases are dispensed without undue emphasis on legal technicalities. The order of the Lok-Adalat is final and binding on the parties, and is not appealable in a court of law.

OTHER RELATED LEGAL PROVISIONS

In 2021, the Lok Sabha passed the Arbitration and Conciliation (Amendment) Bill, 2021 to check misuse by “fly-by-night operators” who take advantage of the law to get favourable awards by fraud. The Bill intends to replace the Arbitration and Conciliation (Amendment) ordinance issued in November, 2020. More recently in July 2022, the Parliamentary Standing Committee on Law and Justice recommended_substantial changes to the Mediation Bill, 2021 and Online Dispute Resolution (ODR), on which, the NITI Aayog in its recently released report - The Future of Dispute Resolution discusses the concept of Online Dispute Resolution (ODR) - its evolution, significance and present status in India. ODR refers to the usage of ICT tools to enable parties to resolve their disputes. In its first phase, ODR shares its fundamentals with ADR Mechanisms of negotiation, mediation and arbitration.

ACHIEVEMENTS ON ADR

By way of following ADR techniques it has proven successful in clearing the backlog of cases in various levels of the judiciary – Lok Adalats alone have

7S.R. Myneni, “Arbitration, Conciliation and Alternative Dispute Resolution Systems,” 1st ed. 2004, Asia Law House, Hyderabad.

8Negotiation is perhaps the simplest and most straightforward type of alternative dispute resolution. The disputing parties meet with one another to identify concerns, explore options, and seek a solution they can agree on. No one else acts as a neutral third party to help them negotiate.

9P.C. Rao and William Sheffield, “Alternative dispute resolution,” Ed., 1st ed. 1997, Universal Law Publishing Co. Pvt. Ltd., Delhi

disposed more than 50 lakh cases every year on average in the last three years. But there seems to be a lack of awareness about the availability of these mechanisms. The National and State Legal Services Authorities should disseminate more information regarding these, so they become the first option explored by potential litigants[10]. The future of dispute resolution revolves around ICT innovations and new ideas to make dispute resolution efficient and accessible for every section of the society. ODR has the potential to decentralise dispute resolution in India and empower innovators across communities to create targeted ODR processes to resolve disputes efficiently.

CONCLUSION

Concluding with the words of, Chief Justice *Bhagwati* said in his speech on Law Day, "*I am pained to observe that the judicial system in the country is on the verge of collapse. These are strong words I am using but it is with considerable anguish that I say so. Our judicial system is creeking under the weight of errors*".

ADR programs cannot be a substitute for a formal judicial system. ADR programs are instruments for the application of equity, rather than the rule of law, and as such cannot be expected to establish legal precedent or implement changes in legal and social norms. However, ADR programs can complement and support judicial reforms. In ADR programs can increase access to justice for social groups that are not adequately or fairly served by the judicial system and they can also reduce cost and time to resolve disputes andincrease disputants satisfaction with outcomes. ADR programs can support not only rule of law objectives, but also other development objectives, such as economic development, development of a civil society, and support for disadvantaged groups, by facilitating there solution of disputes that are impeding progress toward these objectives. If ADR is appropriate in principle, program designers must assess background conditions to ensure that ADR will be feasible in practice. These include political support, institutional and cultural fit, human and financial resources, and power parity among potential users.

SUGGESTIONS

The disputants want a decision, and that too as quickly as possible. As the problem of overburdened Courts has been faced all over the world, new solutions were searched. Various Tribunals were the answer to the search. In India, we have a number of Tribunals. However, the fact of the matter is that even after the formation of so many Tribunals, the administration of justice has not become speedy. Thus, it can be safely said that the solution lies somewhere else. All over the globe the recent trend is to shift from litigation towards Alternative Dispute Resolution. It is a very practical suggestion, which if implemented, can reduce the workload of Civil Courts by half. Thus, it becomes the bounden duty of the Bar to take this onerous task of implementing ADR on itself so as to get matters settled without going into the labyrinth of judicial procedures and technicalities. The Bar should be supported by the Bench in this herculean task so that no one is denied justice because of delay.

It is important here to mention the statement made by John F. Kennedy in this respect: "*Let us never negotiate out of fear but let us never fear to negotiate*".

10P.C. Rao and William Sheffield, "Alternative dispute resolution," Ed., 1st ed. 1997, Universal Law Publishing Co. Pvt. Ltd., Delhi