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ALTERNATIVE DISPUTE RESOLUTION-"A GARLAND OF DIVERSE MECHANISMS"

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ABSTRACT

"Justice Delayed is Justice Denied"

[1] Indian judiciary is one of the Oldest Judicial System. Many developments are being done in our system to make access to justice much efficient. But still, the courts are logged with number of pending cases. To deal with such a situation, **Alternative Dispute Resolution** can be helpful mechanism; it resolves conflict between the transacting parties in a peaceful manner by arriving at an amendable settlement which is accepted by both the parties.

It resolves disputes of all types including civil, commercial, family, etc. ADR procedures are often collaborative and allow the parties to understand each other's position. It aims to maintain peace and cooperation between parties and prevents hostility among them. The purpose of solving dispute through ADR is to lower the burden upon the courts and provide cost effective, early access and speedy trial to the cases. In India, ADR is established based on Article 14 and Article 21 of the Constitution of India.

This article tries to give a good and detailed overview of the Alternative dispute mechanism (hereinafter referred to as ADR) Systems of India in particular and the world over in general. This article zeros in on the important aspects of the ADR methods, like the usefulness of these methods for the resolution of various legal matters, the efficiency of methods, pros and cons of each of these methods etc. It also covers a comparative analysis of various ADR mechanisms. I hope, this article shall enlighten the layman and all other stakeholders concerned in a big way thereby enabling them to unfold new paradigms of ADR methods and resolutions techniques.

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INTRODUCTION

Human Conflicts are inexorable because society is a multifarious web of social relations. Disputes in the same way are inescapable. We cannot avoid disputes but an attempt must be made to resolve them speedily and inexpensively, so that the precious time of courts is public is not wasted. Therefore, Dispute resolution is an indispensable process for making social life peaceful. It is the sin qua non of social life and security of social order, without which it may be difficult for the individuals to carry on the life together.

Alternate Dispute Resolution is one of the most efficacious mechanisms to resolve legal disputes in confidential way using different modes. It is free from technicalities of courts; here informal ways are applied in resolving dispute. People is free to express themselves without any fear of court of law. They can reveal the true facts without disclosing it to any court.

ADR is a bouquet that consists of various techniques being utilized to determine disputes involving a structural process with a third party intrusion. It is an attempt to devise feasible and fair alternative to our conventional judicial system. It can be categorized into three categories namely: informal techniques, advance techniques and hybrid techniques.

Informal methods consist of the following: Forceful private enforcement, escaping, belief in God's justice, decision by society's representative body etc.

Advance methods can be classified as: Negotiation, mediation and conciliation and arbitration.

A hybrid dispute resolution method combines elements of two or more traditionally separate processes into one like Mediation-Arbitration, Mini trial, Neutral Listener Agreement, Rent a judge etc.

In India, laws relating to resolution of disputes have been amended from time to time to facilitate speedy dispute resolution in sync with the changing times. The Judiciary has also encouraged out-of-court settlements to alleviate the increasing backlog of cases pending in the courts. Adding to it, the *Arbitration Act*, 1940 was also repealed and a new and effective arbitration system was introduced by the enactment of *The Arbitration and Conciliation Act, 1996*.

Likewise, to make the ADR mechanism more effective and in coherence with the demanding social scenario, the *Legal Services Authorities Act, 1987* has also been amended from time to time to endorse the use of ADR methods. Section 89 of the Civil Procedure Code, 1908 provides that opportunity to the people, if it appears to court there exist elements of settlement outside the court then court formulate the terms of the possible settlement and refer the same for: Arbitration, Conciliation, Mediation or Lok Adalat. ADR also strive to achieve equal justice and free legal aid provided under Article 39-A relating to Directive Principle of State Policy (DPS)

With the development ADR, their methods, and in order to improve access to justice, ADR is an absolute necessity in the present scenario.

Sir Francis Bacon also explained the concept of ADR stating that **"It is generally better to deal by speech than by letter and by mediation of a third man than by man's self"**

Therefore, Legal recognition should be given to all ADR methods as they are viable and convenient and help to ease the burden of the courts.

This Article will discuss in detail the "Art and Heart" of ADR which is the wide range of techniques which are present and are used in an effective way.

[2] As per the economic times' report, there are 58.94 lakh cases pending in High Courts and more 4.10 crore cases pending in the district and subordinate courts across the country, as on 21st March, 2022. As per the website of Supreme Court of India there are 70,632 cases pending, as on 01st April 2022.

HISTORICAL BACKGROUND OF ADR

[3] In the ancient period dispute between parties were settled by assemblies of learned men in a locality who knew law. The practise is still prevalent in this contemporary society but its scope has widened... Earlier it was only the work of judiciary to solve dispute between parties. The delay in delivery of Justice was the biggest challenge before the Indian Judicial system. But after the evolution of ADR methods, the amicable settlement of disputes became possible without the intervention of Court. It enabled speedy justice to the society. It also helped the Judiciary by reducing its burden.

ADR is not a new concept for the society. ADR has been a spoke in the wheel of the larger formal legal system in India since time immemorial. The earliest evolution of the concept of arbitration can be traced back to the time when King Solomon settled the dispute between two mothers where each one was claiming the right on the baby boy and the issue was who the true mother of a baby boy was. In the ancient and medieval periods disputes were resolved in an informal manner by a neutral third person who was either an elderly person or village chief.

ADR DURING BRITISH PERIOD

The British East India Company opened their first trading Centre at Surat, Gujarat in 1612. This was as per the deed of right Mughal Emperor Jehangir granted to them. Their first major interference with the internal politics of India was when they supported Mir Kasim, a minister of Bengal, militarily to sabotage Siraj-ud-Daula, the Nawab. On 23rd June, 1757, the Nawab was defeated by a joint military action of Robert Clive's troops and those of Mir Kasim in a battle at Plassey.

And this was the turning point where the British formally entered the political arena of India and began to play a direct role in the administrative supremacy. They managed to bring under their administrative control most of the princely states of India either by direct annexation using force or by giving military support. They brought Punjab also under their control in 1849.

[3] Supakar, Dr. Shraddhakara. (1986). Law of Procedure and Justice in Ancient India. New Delhi: Deep & Deep Publication.

Along with Punjab, the North West Frontier Province, which is now under Pakistan, was also brought under them. And in those states where a legitimate heir apparent to the crown was not available, they were brought under the British rule.

Judicial administration was changed during British period. The current judicial system of India is very close to the judicial administration as prevailed during British period.

The system of alternate dispute redressal was found not only as a convenient procedure but was also seen as a politically safe and significant in the days of British Raj.

[4]However, with the advent of the British Raj these traditional institutions of dispute resolution somehow started withering and the formal legal system introduced by the British began to rule. ADR in the present form picked up pace in the country, with the coming of the East India Company. Modern arbitration law in India was created by the Bengal Regulations. The Bengal Regulations of 1772, 1780 and 1781 were designed to encourage arbitration.

Bengal Resolution Act, 1772 and Bengal Regulation Act, 1781 provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties. Hence, there were several Regulations and legislation that were brought in resulting considerable changes from 1772.

[5]After some other provisions from time-to-time Indian Arbitration Act,1899 was passed, based on the English Arbitration Act of 1889. It was the first substantive law on the subject of arbitration but its application was limited to the Presidency - towns of Calcutta, Bombay and Madras. Act, however suffered from many defects and was subjected to severe judicial criticisms.

The Arbitration Act of 1940 was enacted replacing the Indian Arbitration Act of 1899 and section 89 and clauses (a) to (f) of section 104(1) and the Second Schedule of the Code of Civil Procedure, 1908. It amended and consolidated the law relating to arbitration in British

[4] Nripendra Nath Sircar, Law of Arbitration in British India (1942), p. 6 cited in 76'th Report of Law Commission of India, 1978, p. 6, para 1.14

[5]Alternate Dispute Resolution, in Rao, P.C. and Sheffield, William. (1997) Alternative DisputeResolution: What it is and How it Works, New Delhi: Universal Law Publishing Co., p. 79.

India and remained a comprehensive law on Arbitration even in the Republican India until 1996.

ADR POST-INDEPENDENCE

Bodies such as the panchayat, a group of elders and influential persons in a village deciding the dispute between villagers are very common even today. The panchayat has, in the recent past, also been involved in caste disputes. In 1982 settlement of disputes out of courts started through Lok Adalat's. The first Lok Adalat was held on March 14, 1982 at Junagarh in Gujarat and now it has been extended throughout the country.
By the enactment of the Legal Services Authorities Act, 1987, which came into force from November 9, 1995, the institution of Lok Adalat's received statutory status. To keep pace with the globalization of commerce the old Arbitration Act of 1940 is replaced by the new Arbitration and Conciliation Act, 1996.

[6] "Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."- Abraham Lincoln [37]

[7]'ADR A GARLAND OF DIVERSE MECHANISMS'

ADR can be broadly classified into two categories: court-annexed options (Mediation, Conciliation) and community-based dispute resolution mechanism (Lok-Adalat).

The following are the modes of ADR practiced in India:

1. Arbitration
2. Conciliation
3. Meditation
4. Negotiation
5. Lok Adalat

ARBITARION:

The dictionary meaning of 'arbitration' is the process of solving an argument between people by helping them to agree to an acceptable solution Arbitration is a part of the Alternative Dispute Resolution mechanism that benefits parties who want to avoid the normal lengthy recourse to the local courts for settlement of disputes. It is in fact a legal technique for the resolution of dispute outside the courts, wherein the parties to a dispute refer it to one or more persons namely arbitrator(s) by whose decision (the "award") they agree to be bound.

Many disputes like consumer complaints, family disputes, construction disputes, business disputes can be effectively resolved through ADR. It can be used in almost every kind of dispute which can be filed in a court as a civil dispute.

[7] "I realized that the true fiction of a lawyer was to unite parties… A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing out private compromise of hundreds of cases. I lost nothing thereby- not even money, certainly not my soul."
– Mahatma Gandhi

ADVANTAGES OF ARBITRATION:

Arbitration is preferred over traditional litigation because Arbitration is generally less expensive than litigation. It provides for faster resolution of dispute through flexible time schedule and simpler rules.

A Court is burdened with a number of cases taken up for hearing every day. An arbitrator conducts only the proceedings referred to him by the parties which allows the arbitrator to pass sound judgments.

The arbitration legal process is more confidential than a trial.

There is a level of finality to the arbitration process. Because it cannot be appealed, both parties can move on following the outcome.

DISADVANTAGES OF ARBITRATION:

Just like how a coin as two sides Arbitration also has its own disadvantages. Some advantages itself become disadvantages in some situations.

As we already discussed that arbitral award cannot be appealed by either of the parties. This is an advantage as well as disadvantage in Arbitration. Since there is no appeal, even if one party feels that the outcome was unfair, unjust, or biased, they cannot question it.

Since Arbitration itself is cost-efficient it won't be helpful if minimal money is involved.

Unlike a typical court here in arbitration there is no scope for cross-examination. Arbitrators rely on documents provided by the parties.

In litigation court there are certain rules of evidence laid down for accepting evidence which is not the case in Arbitration. [8]

[8] https://www.upcounsel.com/what-are-the-advantages-and-disadvantages-of-arbitration

AN OVERVIEW OF THE ARBITRATION AND CONCILLIATION ACT, 1996:

The Arbitration and Conciliation Act, 1996 contains the law relating to arbitration. This Act came into force on January 25th 1996. This act gives the provisions for International Commercial arbitration, domestic arbitration and also enforcement of foreign Arbitral awards. It is based on the UN model law so as to equate with the law adopted by the United Nations Commission on International Trade Law (UNCITRAL).

The main object of Arbitration Act is to regulate law relating to-

- Domestic Arbitration
- International Commercial Arbitration
- Enforcement of Foreign Arbitral Award

TYPES OF ARBITRATION IN INDIA:

DOMESTIC ARBITRATION: Domestic Arbitration as the name suggests is that type of Arbitration, which takes place in India, wherein both the parties belong to India and the conflict has to be decided in accordance the substantive law of India. The term 'domestic arbitration' has not been defined in the Arbitration and Conciliation Act, 1996. However, when reading Section 2 (2) (7) of the Act 1996 together, it is implied that domestic arbitration means an arbitration in which the arbitral proceedings must necessarily be held in India, and according to Indian substantive and procedural law, and the cause of action for the dispute has completely arisen in India, or in the event that the parties are subject to Indian jurisdiction.

INTERNATIONAL ARBITRATION: The arbitration that takes place within the territory of India or outside India or it has any element which has foreign origin is termed as International Arbitration. The facts and circumstances of the disputes between the parties decide that of which origin the law should apply to the dispute.

Generally, in India the Arbitration processes are classified into three:[9]

- Institutional arbitration
- Ad hoc arbitration
- Fast track arbitration

[9] S K Chowdary & K H Saharay- Arbitration Law- Eastern Law House, 32nd Edition 199

INSTITUTIONAL ARBITRATION refers to the arbitration process which is carried out by an arbitration institution. These institutions have their own set of rules and give a framework for the arbitration to settle the dispute between the parties. The parties have the choice of specifying, in the arbitration agreement, to refer the differences to be determined by an elected arbitral institution.

AD HOC ARBITRATION refers to the process in which the parties mutually arrange the arbitration for the settlement of the dispute. The parties are free to submit their own set of rules and procedures as they don't have to follow any set guidelines of any arbitration institution. The essence of the ad hoc arbitration is the geographical jurisdiction.

FAST TRACK arbitration is the remedy to the lengthy and tedious process of arbitration. The time is the main essence of fast-tracks arbitration. In this process, all the methods which consume time in an arbitration process have been removed and the process is made much simpler. The arbitration process is also called private process as it is not similar to the court proceedings it takes place privately.

PROCESS OF ARBITRATION IN INDIA:

Arbitration arises due to dispute between parties. So, to start arbitration there must be an arbitration clause in the agreement entered into by the parties.

The following steps are involved in an Arbitration:

- The parties must have entered into an agreement containing arbitration clause. Arbitration clause in simple words states that in case any dispute arises between the parties, it must be resolved through the process of arbitration.
- Section 21 of the 1996 Act states that a notice is to be given by the aggrieved party to the opposite party invoking the arbitration proceedings. It is in line with the principles of natural justice.
- After the respondent receives notice from the aggrieved party about the commencement of arbitration, both the parties will appoint an arbitrator according to section 11 of the 1996 Act.[10]

[10] Ashwini K Bansal – Arbitration Procedure and Practise – Lexis Nexis, 1st Edition 2009

- According to section 23 of the 1996 Act both the parties draft their statement of claims which contains all the documents which they think are relevant to the case and also all the evidences proving their statements.
- Thereafter, the arbitral tribunal will hear both the parties and examine evidences. The tribunal will decide whether documents produced are admissible or not.
- After hearing both the parties and examining all the issues a final award will be given by the arbitrator. This award shall be made in writing and shall be signed by all the members of the Tribunal. This award shall be final and binding on both the parties.

  Neither of the parties can appeal the award before arbitral tribunal however, they can challenge it in the court.
- After the award is passed it has to be executed according to sections 35 and 36 of the Act.

[11] The Arbitration and Conciliation Act, 1996, No. 26 Acts of Parliament, 1996 (India).

LANDMARK JUDGMENT ON ARBITRATION:

BHATIA INTERNATIONAL VS BULK TRADING S. A. & ANR ((2002) 4 SCC 105)

This case is of momentous significance in the field of arbitration as it empowers the Indian courts to intervene in international commercial arbitrations held outside India irrespective of the proper law governing the arbitration agreement. The extent of intervention extends from the grant of interim measures and the appointment of arbitrators to the vacatur of an award resulting from such arbitrations.

BRIEF FACTS OF THE CASE:

Bhatia International (appellant) (Indian party) and Bulk Trading SA (respondent) (Foreign party) entered into a contract with an arbitration clause providing for arbitration as per the rules of the International Chamber of Commerce (ICC). A sole arbitrator was appointed by the ICC on request of the respondent and the parties agreed for arbitration to be held in Paris. Thereafter, the respondent filed an application under Section 9 of the Act in the District Court, Indore, for obtaining an order of injunction restraining the appellant from transferring its business assets and properties located in India. The appellant (Indian party) contended that Part 1 of the Act containing Section 9 applies only to arbitrations conducted in India. Hence, an appeal was made to the Supreme Court for deciding whether an Indian court can provide interim relief under Section 9 in cases where an international commercial arbitration is held outside India.

ISSUE: Whether Indian Courts have power to grant interim relief under section 9 of the Arbitration and Conciliation Act 1996?

JUDGMENT:[12]

In this case the Supreme Court found that Part 1 applied to International Arbitrations, despite the fact that it seemed to apply to only domestic arbitrations. Nevertheless, the court held that Part 1 applied to international arbitrations unless the parties expressly or impliedly excluded the provision. This case has given Indian courts the opportunity to intervene in a foreign

[12] See Bhatia International, 4 S.C.C. 105, at 32; see also The Arbitration and Conciliation Act, No.26 of 1996, (Aug. 16, 1996), available at http://keralamediation.gov.in/AC%20Act.pdf. (Part 1- Arbitration- Chapter 1: 2. Definitions. - (1) In this Part, unless the context otherwise requires, . . .f) "International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is- (i) An individual who is a national of, or habitually resident in, any country other than India; or (ii) A body corporate which is in corporate in any on n try other than India;

award as it were an Indian award. Essentially, Bhatia International case granted courts the authority to claim jurisdiction over international arbitration agreements and set aside arbitral awards from foreign-seated panels when such a dispute involved an Indian party.[13]

CONCILIATION

In simple words conciliation is a process of settlement of disputes outside the court. In this process a third party called the 'conciliator' is involved to assist the parties to a dispute in reaching a mutually agreed solution. The conciliator is appointed by the consent of both the parties. The conciliator may express his opinion about the merits of the dispute to help the parties reach a settlement. The conciliator does not take any decision in this matter. Conciliation is one of the non-binding procedures i.e., the outcome is not binding on the parties.

The part 3 of the Arbitration and Conciliation Act, 1996, pertains to provisions with respect to Conciliation from section 61 to Section 81.

DIFFERENCE BETWEEN ARBITRATION AND CONCILIATION

1. Arbitration is a method used to resolve disputes where both the parties present their case to an arbitrator who pronounces a decision and enforces such decision. Whereas, conciliation involves a neutral third party who assists the parties to arrive at a mutual agreement.
2. The decision of the arbitrator is similar to a judgment given by the court. A conciliator, however, does have the right to enforce the decision.
3. In order to settle the dispute through arbitration prior agreement is required whereas to settle the dispute through conciliation prior agreement is not required.
4. An arbitrator is a neutral party and is not allowed to suggest parties regarding the alternatives. Whereas, conciliator can give suggestions, consider alternatives to resolve the dispute.

ADVANTAGES AND DISADVANTAGES OF CONCILIATION:

ADVANTAGES:

- Conciliation is an informal process with simple procedures and can be availed by layman too.
- The selection of the conciliators depends upon the parties. The parties can choose conciliator on the basis of their availability, experience in particular field, previous track records of the cases, knowledge in subject area.
- Conciliation is cost effective and affordable compared to court litigation.
- The process of conciliation is private in nature hence the documents, evidences submitted are highly confidential.

DISADVANTAGES:

- Conciliator is not a legally qualified person for resolving disputes. His decision is not binding upon the parties.
- As the procedure is informal and non-binding there is high possibility of delivering injustice.
- Since the decision is at the discretion of the parties, there is a possibility that a settlement between the parties may not arise.

[14] Bhatia International v. Bulk Trading [2002] 4 SCC 105 [Supreme Court of India]. 13 Art. 1 (2) UNCITRAL Model Law 1985. 14 9: "A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced... apply to a court for an interim measure of protection

PROCESS OF CONCILIATION:

- **COMMENCEMENT OF CONCILIATION PROCEEDINGS:**

  Section 62 of the Arbitration and Conciliation Act (Hereinafter, referred to as Act) talks about commencement of the conciliation proceedings. In order to begin the proceedings either of the parties must send a written invitation to the other party. The proceedings will start only if the other party accepts such invitation. If the other party does not give reply within 30 days it shall be assumed that invitation is not accepted.

- **APPOINTMENT OF CONCILIATORS:**

  Section 64 of the Act talks about appointment of conciliators. After the parties have agreed to go for conciliation the next step is to appoint the conciliators. If the parties agree they can appoint a sole conciliator. If the parties agree upon appointing two conciliators, each party shall appoint one conciliator each.

- **SUBMISSION OF WRITTEN STATEMENT TO THE CONCILIATOR:**

  It is necessary that both the parties must file a written statement each to the conciliator, Narrating their set of facts.

- **CONDUCT OF THE CONCILIATION PROCEEDINGS;**

  Sections 67(3) and 69(1) of the Act talks about the conduct of conciliation proceedings. The conciliator may talk to the parties separately or together as a round table proceeding. Finding an amicable solution is important at the end.

- **ADMINISTRATION ASSISTANCE:**

  Section 68 of the act talks about the administrative assistance. The parties may seek administrative assistance from any recognized institution if necessary. For such assistance consent of the parties is required.

[15] Avtar Singh, Law of Arbitration and Conciliation, (Lucknow: Eastern Book Company) 2007 Pg. 436

NEGOTIATION:

The word "negotiation" is from the Latin expression, "negotiatus", which means "to carry on business". "Negotium" means literally "not leisure". Negotiation is the simplest means for redressal of disputes. It is a non-binding, Equalization process which involves direct interaction of the disputing parties wherein a party offers a negotiated settlement drawn on an objective evaluation of both parties The parties engage in the dispute with each other until they reach a desirable outcome for all involved. The aim of negotiation is the settlement of disputes by exchange of views and issues concerning the parties. A well-conducted negotiation may allow both sides to win by making the sum for both sides greater than either could possess alone. In the language of academics this is called “synergy Negotiation can be used either to resolve any existing problem or a future relationship.

In this mode, the parties begin their talk without the interference of a third person. If there is understanding, Good communication, Objectivity, Willingness and element of patience between the parties, this mode of redressal of dispute is most suitable. In India, Still Negotiation doesn’t have any statutory recognition i.e. through way of legislation

ADVANTAGES OF NEGOTIATION:

- It can open wide new areas of interests to both parties by and helps them maintain a healthy relationship.
- It is swift , economical, uncomplicated and private
- It improves communication maximizing the odds of a positive outcome
- In court proceedings the judge decides. In negotiation the decision is in the hands of the parties.
- It allows parties to tailor the decision to their own needs. They have greater control over procedure and final outcome.
- It is Voluntary and non-binding based technique[16]

[16]“Negotiation-Mode Of Alternative Dispute Resolution (ADR)” Article by Ranganath
“Comparative analysis of ADR methods” by STA law firm

DISADVANTAGES OF NEGOTIATION

- The parties to the dispute may not come to a settlement.
- Lack of legal protection of the parties to the conflict.
- Imbalance of power between the parties is possible in negotiation.

STAGES OF NEGOTIATION

The process includes following stages:

1. **PREPARATION:** The process of negotiation begins with the signal of communication from one party to the other showing a willingness to bargain. This stage involves ensuring the important facts of the dispute and its situation in order to clarify the position of both the parties.
2. **DISCUSSION:** Once it has been established that negotiation is the appropriate course of action the further arrangement shall be made in that course with the other party included. The arrangement includes:

- outlining the scope of negotiation
- forming a time table as to whether or not that will be a fixed duration of negotiation
- ensuring that all the interested parties are identified and have been consulted
- Choosing a location which is feasible to both the parties.

3. **CLARIFICATION OF GOALS**: Clarification is one of the crucial parts of negotiation process as without it, the misunderstanding and disagreements are likely to continue which main result to cause problems and barrier in reaching a beneficial outcome.
4. **NEGOTIATE TOWARDS A WIN-WIN OUTCOME:**
   This stage focuses on which can be termed as Win-Win outcome wherein both the parties may have the satisfaction that they have gained something positive through the process and both the parties may feel that their point has been considered**.**

AGREEMENT:

A proper agreement can be achieved only when both the parties understand each other's point of view and interest are considered simultaneously.[17]

5. **IMPLEMENTATION OF COURSE OF ACTION:** Once agreement is reached a proper course of action has to be implemented so that the decision can be carried out.

QUALITIES AND STRATEGIES OF AN NEGOTIATOR:

- A good negotiator must know his subject thoroughly. He should remain faithful to the facts and collect data. He should attack the problem after identifying the issues. Successful negotiator should never be intimidated. He should be patient and should analyse every detail properly with great precaution. He should also have planning skill. A sense of humour and a positive attitude are necessary, as they make both the parties feel comfortable with each other. He should always emphasize on balance and should not make concessions until the end.
- The entire success of the negotiation depends on the strategies the negotiator uses. An effective communicator with skills of comprehending the problem must be there. Suitable location has to be picked for negotiation. . The best alternative to Negotiated settlement and the Worst alternative to Negotiated Settlement are considerable points a negotiator must detect and discuss at all stages.

[1717] "If two friends ask you to judge a dispute, don't accept, because you will lose one friend; on the other hand, if two strangers come with the same request, accept because you will gain one friend" - Saint Augustine

"Skills and Values: Alternative Dispute Resolution: Negotiation, Mediation, Collaborative Law, and Arbitration" – Arbitration Law review

[18]MEDIATION

[19]Mediation can be defined as a voluntary process of dispute resolution where a neutral third party (the mediator) with the use of effective and specialized communication and negotiation techniques aids the parties in arriving at an amicable settlement without recourse to the court of law. The mediator helps the parties find common ground and assists with drafting a settlement agreement. He interprets concerns, relay information between the parties, frame issues, and define the problems. He helps the parties to explore their choices and ultimately help control the outcome and results.

A mutual agreement taken via mediation is binding upon the parties.

In India, mediation is legitimised by Section 89 of the Civil Procedure Code, 1908 which states that the court can refer the parties to mediation or arbitration if there is existence of elements in a settlement which should be acceptable to the parties involved. Industrial Disputes Act, 1947 is the first legislation which gives legal recognition to the mediation. Section 4 of this Act speaks about "appointment of an independent and impartial mediator" for the process of mediation.

ADVANTAGES OF MEDIATION:

Mediation is a cost-effective, confidential and swift way of resolving a dispute. Mediations put dispute resolution into the hands of the disputing parties. Parties have their voluntary participation in the mediation process. The mediator has to act impartially and neutrally. The responsibility for defining the problem, setting the agenda and agreeing the solution rests with the people in the dispute. No court rules or legal precedents are involved in mediation. The relationships between the parties are also preserved in this process.

[19] *"Consilia omnia verbis prius experiri, quam armis sapientem decet"* which means that an intelligent manwould prefer negotiation before using arms

[20] PROCESS OF MEDIATION

1) COVENING THE MEDIATION PROCESS

[21] The convening of the mediation is often the most difficult and challenging part of the mediation process.

a) Reference to the ADR by the court : The court is required to direct the parties to opt for any of the five modes of alternative dispute resolution and to refer the case

2) INTIATIATION OF MEDIATION PROCESS

The mediator gives an introduction among him and also requests the parties to introduce themselves to gain rapport and trust.

a) OPENING STATEMENTS

The mediator's opening statement is intended to explain to the parties-

- The concepts, processes and stages of mediation,
- The role of the mediator, advocates and parties and
- The advantages and ground rules of mediation.

The doubts regarding these are also clarified.

3) SETTING THE AGENDA:

It involves setting down the order in which negotiation is to proceed and gives the parties a standard using which they can individually evaluate the progress of the negotiations.

4) FACILITATION OF NEGOTIATION AND GENERATION OF OPTIONS:

a) **JOINT SESSION**: The purpose of the joint session is to gather information.

[20] www.adrservices.com
www.lawshelf.com

[21]https://vakilsearch.wordpress.com/2011/01/15/procedure-to-be-followed-during-a-mediation/
http://mediationbhc.gov.in/PDF/concept_and_process.pdf

- The mediator provides an opportunity for the parties to hear and understand each other's perspectives, relationships and feelings.

- At the completion of the joint session, the mediator may also suggest meeting each party with their counsel separately.

b) **SEPARATE SESSION**:

- The separate sessions are meant for the mediator to understand the dispute at a deeper level.
- It helps the mediator to understand the underlying interests of the parties, identify areas of dispute, differential priorities and common interests, and to shift the parties to a mood of finding mutually-acceptable solutions.

- The mediator offers options which he feels bests satisfies the underlying interests of the parties.

REACHING A SETTLEMENT:

- By helping parties to understand the reality of their situation and give up rigid positions, the mediator creates creative options for settlement.
- In case negotiations fail, the case is sent back to the referral court.

CLOSING:

- Once the terms of the settlement have been agreed to, the parties are reassembled. The parties, with the mediator's aid, write down the terms of the settlement and sign the agreement. The settlement has the binding nature of a contract and is enforceable in a court of law. In case no settlement is reached between the parties, the case is returned to the referral court

- The proceedings of the mediation are kept confidential and cannot be revealed even to the court.[22]

[22] "An introduction to Alternative Dispute Resolution"- Anupam Kurlwal

LANDMARK JUDGEMENT RELATED TO MEDIATION

Salem Bar Association v. Union of India (2003) 1 SCC 49

BRIEF FACTS:

A committee was formed to ensure that the 1999 and 2002 Amendments to the Civil Procedure Code are effectively implemented and result in quicker dispense of justice. II. The report was submitted in three parts, (a) Consideration of various grievances (b) Draft Rules for ADR and mediation (c) Case management conferences III Writ Petitions were filed challenging the Amendments made to the Code of Civil Procedure by way of Amendment 46 of 1999 and Amendment 22 of 2002. . The validity of this report and the amendments was challenged before the Court, in the matter.

MAIN ISSUE: Whether the 1999 and 2002 Amendments to the Civil Procedure Code were constitutionally valid?

JUDGEMENT: The attention of the Hon'ble Supreme Court was drawn to Section 89 of the Code of Civil Procedure.

The Hon'ble Supreme Court observed that the provision of Section 89 of the Code of Civil Procedure has been inserted to ensure that all the cases which are filed in the courts need not necessarily be decided by the courts. The Hon'ble Supreme Court opined the need to promote Alternate Dispute Resolution. It therefore, considered Section 89 to be a welcome step. It was therefore suggested by the Hon'ble Supreme Court, that a Committee be constituted so as to ensure that the amendments made to the Code of Civil Procedure become effective and result in quicker dispensation of justice.

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[23] [23] 2019 SCC Online SC 315
(2010)8SCC24
(2003)1SCC49
Article on “India: Mediation : Current Jurisprudence And The Path Ahead” By Geetanjali sethi
Case analysis in Bharati Law review 2016

[24]LOK ADALAT

The Lok Adalat is a significant mode of alternative dispute resolution mechanism. It is an old form of adjudicating system prevailed in ancient India which is still relevant even today. It is interesting to note that the Lok Adalat system settles disputes by way of negotiation, persuasion, mediation and conciliation with the actively involvement of the advocates, judges, eminent social workers and concerned parties. So, it is worthy to say that Lok Adalat effectively works to implement the views of our nation's father Mahatma Gandhi as he said, *"I had learned the true practice of law. I had learnt to find out the better side of human nature and to enter hearts, I realized that the true function of the lawyer was to unite parties given as under. The lessen was so indelibly burnt into 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 also."*. As, it is a known fact that the Indian courts are over burdened with the backlog of cases and the regular courts are to decide the cases involve a lengthy, expensive and tedious procedure. In such situation, the emergence of Lok Adalat is a ray of hope for needy of justice. [25] The Lok Adalat system has got its statutory recognition under the **Legal Services Authorities Act, 1987** (for brevity 'the Act'). The preamble of the said Act emphasizes that the Lok Adalat's should be constituted to provide economical and competent legal services to the weaker sections of the society to perform Constitutional obligation on behalf of the State.

The meaning of the term 'Lok Adalat' in literally is 'People's Court' because the term comprises two words namely 'Lok' and 'Adalat', Lok stands for the people and Adalat means the court. So, it is meant people's court.[26]

[24] Article on "India: Mediation : Current Jurisprudence And The Path Ahead" By Geetanjali sethi

[25] Anurag K. Agarwal, "Strengthening Lok Adalat Movement in India," AIR 2006 Jour 33. 44. Abraham Lincoln – "Discourage litigation persuade your neighbours to compromise whenever you can. Point out to them the nominal winner is often a real loser; in fees, expenses and waste of time. As a pacemaker, the lawyer has a superior opportunity of being a good person", See Supra note 9, 34.

[26] N.C. Jain, "Legal Aid, Its Scope and Effectiveness of the Legal Aid Rules in This Regard," AIR 1996 Jour 185.

JURISDICTION OF LOK ADALAT:

Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of-

i. Any case pending before any court.

ii. Any matter which is not brought before, any Court and still at a Pre – litigative stage.

iii. It can compromise and settle even criminal cases, which are compoundable under the relevant laws. Lok Adalat's do not have the statutory power to entertain any case or matter relating to an offence not compoundable by law.

ORGANIZATION OF LOK ADALAT:

AT THE STATE AUTHORITY LEVEL –

The Member Secretary of the State Legal Services Authority organizing the Lok Adalat would constitute benches of the Lok Adalat, each bench comprising of a sitting or retired judge of the High Court or a sitting or retired judicial officer and any one or both of- a member from the legal profession; a social worker engaged in the upliftment of the weaker sections and interested in the implementation of legal services schemes or programmes.

AT HIGH COURT LEVEL -

The Secretary of the High Court Legal Services Committee would constitute benches of the Lok Adalat, each bench comprising of a sitting or retired judge of the High Court and any one or both of- a member from the legal profession; a social worker engaged in the upliftment of the weaker sections and interested in the implementation of legal services schemes or programmes.

AT DISTRICT LEVEL -

The Secretary of the District Legal Services Authority organizing the Lok Adalat would constitute benches of the Lok Adalat, each bench comprising of a sitting or retired judicial officer and any one or both of either a member from the legal profession; and/or a social worker engaged in the upliftment of the weaker sections and interested in the implementation of legal services schemes or programmes or a person engaged in para-legal activities of the area, preferably a woman.

AT TALUK LEVEL -

The Secretary of the Taluk Legal Services Committee organizing the Lok Adalat would constitute benches of the Lok Adalat, each bench comprising of a sitting or retired judicial officer and any one or both of either a member from the legal profession; and/or a social worker engaged in the upliftment of the weaker sections and interested in the implementation of legal services schemes or programmes or a person engaged in para-legal activities of the area, preferably a woman.

NATIONAL LOK ADALAT

National Level Lok Adalats are held for at regular intervals where on a single day Lok Adalats are held throughout the country, in all the courts right from the Supreme Court till the Taluk Levels wherein cases are disposed of in huge numbers. From February 2015, National Lok Adalats are being held on a specific subject matter every month.

PERMANENT LOK ADALAT

The other type of Lok Adalat is the Permanent Lok Adalat, organized under Section 22-B of The Legal Services Authorities Act, 1987. Permanent Lok Adalats have been set up as permanent bodies with a chairman and two members for providing compulsory pre-litigative mechanism for conciliation and settlement of cases relating to Public Utility Services like transport, postal, telegraph etc. [27]

PROCEDURE AT LOK ADALAT:

- Here, the application can be filed by the both the parties to dispute or they can verbally express their willingness to the court to refer the matter to Lok Adalat.
- Any party can also file an application for referring the dispute to Lok Adalat after the court hearing all the parties, if there are chances for settlement.
- Lok Adalat while deciding the matter under the Legal Services Authority Act, 1987 shall deal the matter with utmost care, expedition to arrive at a compromise between the parties and shall be guided by the principles of natural justice.

[27] "To the poor the courts are a maze, if he pleads there all his life, Law is so lordly, And loath to end his case, Without money paid in the presents, Law listeneth to few." Pier's Plowman

- When no compromise or settlement is accomplished, the matter shall be referred back to the court. Then the case will proceed in the Court from the stage immediately before the reference.

Further no Court Fee is required to be paid by the parties. The parties can be represented by a legal counsel hired by them but in case, due to some reasons if they cannot afford a legal counsel themselves then, a counsel can be provided by the Legal Aid Committee.

AWARD PASSED BY LOK ADALAT:

Every award of the Lok Adalat shall be deemed to be a Decree of a Civil Court and shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

AN OVERVIEW OF THE NATIONAL LEGAL SERVICES AUTHORITY ACT, 1987:

[28] The National Legal Services Authority (NALSA) has been constituted under the Legal Services Authorities Act, 1987 to provide free Legal Services to the weaker sections of the society. The Chief Justice of India is the Patron-in-Chief and the Senior most Hon'ble Judge, Supreme Court of India is the Executive Chairman of the Authority.

Public awareness, equal opportunity and deliverable justice are the cornerstones on which the NALSA is based. The principal objective of NALSA is to provide free and competent legal services to the weaker sections of the society and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats for amicable settlement of disputes. Apart from the abovementioned, functions of NALSA include spreading legal literacy and awareness, undertaking social justice litigations etc.

[28] https://nalsa.gov.in/lok-adalat

LANDMARK JUDGMENT:

Citation:

AIR 2014 SC 1863

Court:

SUPREME COURT OF INDIA

Judges:

K S RADHAKRISHNAN & A K SIKRI

BRIEF FACTS:

This case was filed by the National Legal Services Authority of India (NALSA) to legally recognize persons who fall outside the male/female gender binary, including persons who identify as "third gender".

DECISION:

Here, the court had to decide whether persons falling outside the male/female gender can be legally recognized as "third gender".

The court referred to an "Expert Committee on Issues Relating to Transgender" constituted under the Ministry of Social Justice and Empowerment to develop its judgement. This was a landmark decision where the apex court had legally recognized "third gender" for the first time and discussed the matter at length. The court held that the persons belonging to "third gender" are equally entitled to fundamental rights and citizenship under the constitution. Further, it directed state governments to develop mechanisms to realise the rights of "third gender" persons.

[29] https://translaw.clpr.org.in/wp-content/uploads/2018/09/Nalsa.pdf

CONCLUSION:

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalat quickly has acquired good popularity among the public and this has really given rise to a new force to ADR and this will no doubt reduce the pendency in law Courts. There is an urgent need for justice dispensation through ADR mechanisms. More people should settle their disputes through ADR mechanisms which in turn will reduce burden on courts and ensure sound administration of justice.

The ADR movement needs to be carried forward with greater speed. This will considerably reduce the load on the courts apart from providing instant justice at the door-step, without substantial cost being involved. If they are successfully given effect then it will really achieve the goal of rendering social justice to the parties to the dispute.

SUGGESTIONS:

- The courts are authorized to give certain directives for the ADR adoption by the parties and for that purpose court has to play an important role by way of giving guidance.

  The institutional framework must be brought about at three stages, which are:
- Awareness can be brought about by holding seminars, workshops, etc. ADR literacy program has to be done for mass awareness and awareness camp should be to change the mindset of all concerned disputants, the lawyers and judges.
- In this regard training of the ADR practitioners should be made by some University together with other institutions. Extensive training would also be necessary to be imparted to those who intend to act as a facilitator, mediators, and conciliators.
- The inflow of cases cannot be stopped because the doors of justice cannot be closed. But there is an urgent need to increase the outflow either by strengthening the capacity of the existing system or by way of finding some alternative mechanism such as ADR.
- The major lacuna in ADR is that it is not binding. One could still appeal against the award or delay the implementation of the award. “Justice delayed is justice denied.” The very essence of ADR is lost if it is not implemented in the true spirit. The award

should be made binding on the parties and no appeal to the court should be allowed unless it is arrived at fraudulently or if it against public policy.

[30] K. Gupteshwar, "The Statutory Lok Adalat: Its Structure and Role," 30 JILI, 174 at 177-178 (1988). 48. Shiraj Sidhva, “Quick, Informal, Nyaya,” LEXET JURIS, 39 (1988)