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Understanding Importance of ADR in the Context of Adversarial System

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Abstract—*With the pace of human progression, humans were able to create a system that dealt with resolution of disputes that would disrupt the functioning of daily activities. A system of remedial forums was created for them to approach and get their disputes resolved. Slowly with growing population and huge pile up of cases, time became an important factor. India was just an independent nation emerging from the shackles of colonial era policies which included an adversarial system of deciding disputes in courts of law. Therefore, there was search for an alternative form of dispute resolution that could lead to a 'win-win' outcome for parties. This lead to the emergence of different kinds of dispute resolution like Arbitration, Mediation and Conciliation. Apart from being meritoriously cost-effective, these methods reduce the existing burden on Indian Courts.*

This paper makes an attempt to assess the importance of mediation by giving a description about the drawbacks of adversarial system, mandates of the Code of Civil Procedure and the Arbitration and Conciliation Act, 1996.

Introduction

In simple terms, an ADR is a group of methods used for settling disputes outside the court. It is conceived as a mechanism that is non-adversarial. ADR tries to facilitate quick resolution of disputes in a cost-effective manner. The kinds of ADR mechanisms are:

1. Arbitration
2. Mediation
3. Conciliation

In arbitration, the parties submit their disputes to neutral third parties for adjudication and the final outcome would result in a binding decree and can be enforced. Mediation might be defined as a voluntary process of resolving disputes by a neutral third party (the mediator) with the use of effective and specialized communication and negotiation techniques that aids the parties in arriving at an amicable settlement. The word mediation is derived from the latin word 'mediare' which means 'to be in the middle. Therefore mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party who helps them to try to arrive at an agreed resolution of their dispute. The mode is aimed at finding a middle path for the dispute between the parties so that they can work out a mutually acceptable solution. Mediating disputes is not new in our country. Village Panchayats and Nyaya Panchayats have also been using mediation.

Conciliation is a technique in which a neutral third party meets the parties separately and together to resolve their differences.

Causes of shifting from adversarial to alternative ways of dispute resolution

With passing of time the courts were overcrowded with litigation. Shortage of Judges, lack of judicial infrastructure and increase in population had led to piling of litigations. Because of these reasons, a system of by-passing this was conceived in the mode of alternative dispute resolution. Such form of resolution was cost-saving. This allows the parties to adopt a problem solving approach to achieve a win-win outcome of their situation.

Another reason is the adversarial system, one of the greatest legacies of British India which worked for centuries but the docket expansion has eroded its confidence. Its functioning has invited questions from different quarters regarding procedural wrangles, enormous costs and inordinate delays.

The sordid functioning of the system is because of numerous reasons. **Firstly,** there has been qualitative and quantitative change in the nature of litigation. **Secondly,** the growth of litigation against state and state-like entities had been substantial and prompt compliance of orders by the state of orders by writs is necessary for bringing down litigation and **thirdly,** the increase in the number of tribunals and courts had not been that much effective and didn't provide any solution for quick resolution.

Because of these reasons there was a search for looking at different modes of dispute resolution that would serve as an alternative to traditional method of resolving disputes.

Analysis

The code of civil procedure contains provisions pertaining to mediation of disputes. Section 89 of CPC states: "**89. Settlement of disputes 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 reformulate 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 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 Authorities Act, 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 Authorities Act, 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."

Rules 1A, 1B and 1C of Order X, CPC, state as follows: "1A. Direction of the Court to opt for any one mode of alternative dispute resolution.—After recording the admissions and denials, the court shall direct the parties to suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties."

"1B. Appearance before the conciliatory forum or authority– where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit."

"1C. Appearance before the Court consequent to the failure of efforts of conciliation.- Where a suit is referred under rule 1A and the forum or authority to whom the matter has been referred is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it."

These provisions conceive three important alternative modes of dispute resolution i.e. Arbitration, Mediation, Conciliation and Lok Adalat. The terms mediation and conciliation are different. Though they might seem to be the same, there is a fair distinction in terms of enforcement and recognition that separates them. In conciliation the parties arriving at a settlement agreement through conciliation can enforce the same as if it were a decree of the court. Whereas a settlement reached through mediation must be placed before the court which will make it a decree. This point has been affirmed by the Supreme Court in the *Afcons* Judgment.

Thus, a mandatory duty is cast upon the court to refer disputes for settlement through these alternative modes. Both Arbitration and Conciliation are governed by the Arbitration and Conciliation Act, 1996. The difference between them lies in the fact that arbitration is an adjudicatory process unlike conciliation. Another point of difference is that once a dispute is referred to arbitration it permanently goes outside the domain of court system which is not so with conciliation.

In conclusion, courts are mandated to refer *sub judice* disputes mediation.

The pre-condition for referring a matter for ADR is that the court is satisfied about elements which exist for reference. Once these preconditions are satisfied, the court should refer the matter to any of the modes by obtaining consent of parties. That is, the parties would be given a choice to opt for a particular mode alternative resolution. If they fail to make any choice, then the court itself would refer the matter to any of the aforesaid modes it considers suitable.

Conclusion

ADR can turn out to be an effective mechanism to resolve disputes. It can potentially minimize costs that would have to be incurred in case the parties pursued litigation. That is why section 89 was introduced as a mandatory provision so that the judiciary with an already-occurring problem of infrastructure, shortage of judges would not be faced with the burden of adjudicating disputes which would not only cost it of its own time but would be the cause of harassment to the parties. The Code of Civil Procedure and the Arbitration and Conciliation Act are two prime instruments that can mitigate this burden.

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