Alternative Dispute Resolution

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"It is the spirit, not the form of law, that keeps the justice alive".

L.J. Earl Warren

Introduction

The preamble of the Constitution of India declares, to secure to all its citizens, justice, social, economic and political; and equality of status and of opportunity. Art.39A provides that State shall secure that operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes or in any other way to ensure that opportunity for securing justice are not denied to any citizen by reason of economic or other disabilities.

We have the laws to secure constitutional goals and a strong and effective judicial system based on common law principles. The legal system including Courts, Tribunals and Commissions seeks to

administer the laws, to secure justice. The public has great faith in our judicial system.

The complexities of our multicultural society, with ever increasing population, and the limited resources within the justice delivery system, has resulted into inordinate delays and expenses in securing justice. In order to secure speedy and inexpensive justice, both to the privileged and under privileged classes, it was found necessary to sidetrack those cases, which are not suited for adjudication, to the processes of Alternative Dispute Resolution (ADR). It may be called appropriate dispute resolution, as it offers options suited to the different categories of cases.

We have at present in civil laws under Section 89 and Order X Rule 1A, 1B and 1C of the Code of Civil Procedure (the Code), a mandatory requirement for the judges to consider at the appropriate stage, whether the dispute brought before it can be referred to any one of the five ADR processes, namely:-

(1) Arbitration

(2) Conciliation

(3) Lok Adalat

(4) Mediation; or

(5) Judicial Settlement.

Advantages of ADR

The advantages of ADR are:

(1) to facilitate access to justice to the poor and disadvantaged;

(2) to provide for informal, quick and inexpensive resolution of disputes;

(3) to take away cases inappropriate for adjudicatory process;

(4) remove petty cases, which do not require any adjudication by courts;

(5) to reduce the burden of statistical load of cases on the courts;

(6) to help promoting in trade and commerce, "fair practice, good commerce and equality";

(7) to maintain peace and harmony in society, by reducing hostility and promoting resolution of disputes in a peaceful manner;

(8) enhancing faith and confidence in the judicial system; and

(9) to provide for dispute resolution by morals and not coercion.

In Afcons Infrastructures Ltd. Vs. Cherian Varkey Construction Company Pvt. Ltd. & Ors.[1] the Supreme Court has after noticing the errors in drafting of Section 89 of the Code, provided the procedure for referring the cases to any one of the ADRs prescribed in Section 89 CPC.

Cases not suited for ADR

S.89 of the Code provides for settlement of disputes outside the Court. The cases, which are not suited for ADR process should not be referred under Section 89. These cases may be broadly categorised as;

(1) representative suits under Order 1 Rule 8 of the Code, involving public interest or interest of persons, who are not parties before the Court;

(2) disputes relating to election to public office, except those, where two groups in case of dispute of management of societies, clubs, associations are clearly identifiable and are represented;

(3) cases involving granting relief in rem, such as grant of probate or letters of administration;

(4) cases involving serious allegations of fraud, fabrication, forgery, impersonation, coercion etc.;

(5) cases involving protection of courts for minors, deities, mentally challenged persons and suits for declaration of title against government;

(6) cases involving prosecution of criminal offences etc.

Cases suited for ADR

All other suits and cases of civil nature normally suited for ADR processes, are:

(1) all cases relating to trade, commerce and contracts including money claims, consumer disputes, banking disputes, tenancy matters, insurance matters etc.;

(2) all cases arising out of strained or soured relationship (social issues) including matrimonial, maintenance, custody matters; family disputes such as partition/ division, and disputes amongst partners;

(3) all cases in which there is need for continuation of pre-existing relationship inspite of disputes such as easementary rights, encroachments, nuisance, employer and employee matters, landlord and tenant, and disputes involving members of societies, associations, apartment owners;

(4) all cases relating to tortious liability such as motor accident and other accident claims;

(5) all consumer disputes including disputes with traders, suppliers, service providers, who are keen to maintain their reputation, credibility or product popularity.

Reference To ADR Process

S.89 of the Code starts with the words "where it appears to the Court that there exist elements to a settlement". The Court has to form an opinion that the case is one that is capable of being referred to a settlement through any of the ADR processes. In the category of cases suited for ADR the civil court should invariably make reference to ADR process. In other cases, which fall in the excluded category, reference is not necessary. The upshot is, that it is mandatory for the Court, if in its opinion there exists element of settlement, to consider to refer the case to ADR process. The actual reference, however, depends upon the discretion of the judge, guided by the nature of dispute and the process of ADR.

After hearing and completing of pleadings, to consider recourse to ADR process under Section 89 is mandatory, the actual reference is not mandatory.

Order 10 Rule 1A of the Code requires the Court to give an option to the parties, after admissions and denials, to choose any of the ADR processes. This, however, does not mean an individual action but to join action or consensus about the choice of ADR process. Rules 1A to 1C of Order X has laid down manner in which such jurisdiction is to be exercised. The Court has to explain the choice available regarding ADR processes to the parties, and permit them to opt for a process by consensus. If there is no consensus, the Court can proceed to choose the process. S.89 of the Code refers to arbitration as adjudicatory process, and negotiatory (non-adjudicatory) processes namely conciliation, mediation, judicial settlement and Lok Adalat.

The adjudicatory process of arbitration and the non-adjudicatory procedure of conciliation, are referred to in the Arbitration and Conciliation Act, 1996 (AC Act), to a private forum, the awards of which are binding on the parties under S.36 in case of arbitration and S.74 in case of conciliation, can be resorted to only if both the parties agree to refer the dispute. In the other three types of ADR procedures namely mediation, judicial settlement and Lok Adalat, the agreement between the parties is not necessary to refer to these processes.

Arbitration

Arbitration is an adjudicatory dispute resolution process by a private forum governed by the AC Act. If there is pre-existing arbitration agreement, the matter has to be referred to arbitration invoking Section 8 or Section 11 of the Act. S.89 CPC pre-supposes that there is no pre-existing arbitration agreement.

The Court can looking to the nature of the dispute and the possibility of settlement, in the category of cases mentioned above such as the disputes relating to trade, commerce and contracts, cases relating

to tortious liability or consumer disputes, may gently persuade the parties, to refer the matter to arbitration with the consent of both the sides and not otherwise.

If the parties agree to arbitration then the provisions of AC Act will apply and the case will go outside the stream of the Court. The Court will in such case, where parties agree to refer the dispute to arbitration, make a short order referring to the nature of the dispute, the agreement between the parties, the name of the arbitrator/ arbitrators; take their consent on record or allow the parties to sign the order and refer the case to arbitrator, closing the file.

Conciliation

Conciliation is a non-adjudicatory ADR process, also governed by the provisions of the AC Act (Ss.61 to 81). Where the Court, looking to the nature of dispute arrives at a satisfaction that there are elements of settlement, it can make a reference to Conciliation, if both the parties to the dispute agree to have negotiations with the help of third party, or third parties, either by an agreement or by the process of invitation and acceptance provided under Section 62 of the Act followed by appointment of Conciliator(s) as provided in Section 64.

Conciliation may include an advisory aspect. The settlement with the help of the conciliator under S.74 of the AC Act has same status and effect as if it is arbitral award on substance of dispute given by arbitral tribunal under S.30. Where the dispute settled with the help of Conciliator is not subject matter of suit/ proceedings, the Court will have to direct that the settlements shall be governed by S.74 of the AC Act (in respect of conciliation proceedings), or S.21 of the Legal Services Authority Act, 1987, (in respect of settlement by a Lok Adalat or a mediator) to make the settlement effective.

On a reference of conciliation, the matter does not go out of the stream of the Court process permanently. If there is no settlement, the matter returns to the Court for framing of issues and trial.

Lok Adalat

The reference to Lok Adalat does not require consent of the parties. The satisfaction of the Court to the nature of the dispute, and the elements of settlement, where the issues are not complicated and do not require determination or adjudication of any dispute, may be referred to the Lok Adalat. The Court should make a short order preferably in a few lines recording its satisfaction that the nature of dispute is not complicated, the disputes are easily sortable and may be settled by applying clearcut legal principles.

Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat under S.20 of Legal Service Authority Act, 1987 determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law from the stage, which was reached before reference. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of

the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat. [2]

To provide compulsory pre-litigation mechanism for settlement and conciliation relating to public utility services, the parliament has amended Legal Services Authority Act, 1987 in the year 2002, providing for Permanent Lok Adalats in every district, exercising jurisdiction in public utility services, such as transport, postal, communications, water supply, hospitals and insurance. The party can make an application under S.22C of the Act to the Permanent Lok Adalat for assistance to conciliate under Sub-Section (4) to settle the dispute in an independent and impartial manner. If the parties fail to reach an agreement under sub-section (7), the Permanent Lok Adalat shall under sub-section (8), if the dispute does not relate to any offence, decide the dispute. The award will be final and binding on all the parties under S.22E, and will be deemed to be a decree of Civil Court and shall not be called in question in any suit, application or execution proceedings.

Mediation

Mediation is a structured process of dispute resolution in which a mediator, a neutral person trained in the process of mediation, works with the parties to a dispute, to bring them to a mutually acceptable agreement. The mediator does not decide the dispute or give an award. He is only a facilitator and incharge of the process of mediation. Mediation rules of each State under Chapter X CPC, as recommended in Salem Advocate Bar Association (I)[3] and (II)[4] by the Supreme Court provide for a detailed procedure for mediation.

The mediation is a purely voluntary process in which parties continue out of their free will. They can opt out at any time. Once an agreement is reached and signed, and is accepted by the Court, it is enforceable in law by the Court. The mediation avoids adversarial approach and instead adopts cooperative methods. The parties focus on mutual agreement with long term gains, which improve their

relationship. It offers win win situation putting to end to the dispute in an amicable manner. The mediation looks forward and offers long time acceptable solution to the parties.

In B.S. Joshi Vs. State of Haryana[5], the Supreme Court held that in cases such as Section 498A IPC and Section 125 CrPC, where after a settlement no evidence may be led, the High Court can quash the first information report or the proceedings.

The mediation is recommended in all such matters in which the relations between the parties have to survive beyond litigation. The Court should refer all such matters to mediation in which disputes relating to properties, partition, marriage and custody of children, commercial and business are involved. The mediation also succeeds in consumer disputes, suppliers, contractors, banking, insurance, labour matters, doctor and patients, landlord and tenant and in cases relating to intellectual property rights.

Mediation is not recommended, where questions of law are involved to be adjudicated by the Court, or in which offences of moral turpitude and fraud are involved. Mediation is also not recommended, when there is serious imbalance between the position of the parties, in which fair negotiation is not possible.

The court annexed and court referred Mediation Centres have been established in almost all the High Courts and District Courts. In High Court, the Mediation Centres are run by the Mediation Centres under the Supervisory Committees or Director/ Coordinator. In District Courts, Mediation Centres are run by State Legal Services Authorities with a Judicial Officer appointed as Coordinator in each district. There are five essential requirements for any Mediation Centre namely awareness, infrastructure, training of mediators and referral judges, reference by judges under Section 89 and Order X CPC and funds. The 13th Finance Commission has given grants to set up one Mediation Centre in each of the 600 districts in the country with outlay of 750 courts including one court for ADR centres in each district and

remaining amount for training out of which 10% may be spent for awareness.

The mediators receive training from the trainers of MCPC and those mediators, who have gained sufficient experience in Mediation Centres in the High court.

In the process of mediation after receiving brief summary of the case from the parties, the mediator gives an opening statement, explaining the entire structure including voluntariness of the mediation process. He commits parties to good behaviour and allows them to sign a form to abide by the terms of the mediation process. He actively listens without showing any sympathy, holds joint and separate sessions, to identify the issues of conflict. He, thereafter, proceeds to discuss the strength and weaknesses of the case with the parties and sets up the agenda. He, thereafter, open channels of communication, brain storming the options, which the parties generate among themselves, while controlling the process. He allow the parties to focus on their long term interests, takes them out of impasse, if any such situation arise, and brings out underlying issues. The mediator uses dynamic process of negotiation and bargaining explaining the parties to the Best Alternative to Negotiated Settled Agreement (BATNA) and Worst Alternative to Negotiated Settled Agreement (WATNA).

Parties may agree to resolve the dispute, which may also involve the issues, which are not involved in the case, and may arrive at an agreement, which is mutually beneficial and acceptable. The mediator, thereafter, holds, if the parties reach to a settlement in drafting realistic, legal, valid and effective settlement, which resolves all the issues between them and does not leave anything for any further dispute in future. The agreement then comes to the Court and may be accepted with or without modifications, which the Court may suggest and to which the parties may agree. On the acceptance of the agreement, it becomes binding on the parties under Order 23 Rule 1 CPC against which no appeal lies. The agreement may be vitiated only

in case of mis-representation or fraud. The process is entirely confidential in which the mediator binds himself to the confidentiality and cannot be required to appear in court as a witness to the proceedings. The person incharge of Mediation Centre maintains the confidentiality and ethics amongst mediators and in the process of mediation.

Judicial Settlement

The Court may at the stage of Section 89 or Order X Rule 1A, 1B, 1C, looking to the nature of dispute and on being satisfied that there are elements of settlement, refer the dispute for judicial settlement. If the Court feels that a suggestion or guidance by a judge would be appropriate, it may refer the dispute to another judge for dispute resolution. The Judicial Officer to whom the case is referred shall make efforts for settlement between the parties and follow such procedures as may be prescribed. Where the settlement is arrived at before such other judge, the settlement agreement will have to be placed before the court, which referred the matter, and that Court will make a decree in terms of it. The case may not be tried by the same judge to whom the matter is referred for judicial settlement but the parties did not agree to settle the matter.

In case of arbitration and conciliation, it is essential that the parties shall agree to refer the matter to the Arbitrator or Conciliator. In the case of other three ADR processes namely Lok Adalat, mediation and judicial settlement, the consent of the parties is not essential to refer the matter. The Court may on a satisfaction arrived at, on its own discretion even exparte refer the matter to these ADR processes. In Family Courts it is recommended that the ideal stage for mediation is before the respondent files objections/ written statements, as in such case, the pleadings written with the help of lawyers very often leads to allegations, which aggravates the hostility between the parties.

Summary of procedure

The procedure to be adopted by the Court for reference to any of the processes of ADR may be summed up as follows:-

- When the pleadings are complete before framing issues, the Court has to fix date for preliminary hearing to find out nature of dispute with the help of the parties.
- The Court should first exclude the cases, which are not fit for ADR process and record brief order, as to why the case is not fit for reference to ADR process.
- In other case the Court should explain the choice of the five ADR processes to the parties, to allow them to exercise their option.
- If the parties are willing for arbitration, or conciliation, the Court should record their agreement, and explain to the parties the procedure and the cost involved. If they agree, the matter should be referred to arbitration or conciliation. In case of arbitration, the matter goes out of court proceedings. In case of conciliation the Court has to wait until the conclusion of the proceedings, if the parties agree, the conciliation awarded can be enforced independently and the file is closed, failing which the Court proceeds with the trial.
- If the case is simple, where legal principles are settled and there is no personal animosity, the case may be referred to Lok Adalat. If there is settlement in Lok Adalat and award is declared, it become decree of the Court and the case goes out of proceedings. Where the parties do not arrive at the settlement, the Court proceeds with the trial.
- In case of judicial settlement, the Court attempts to settle the matter or refers it to some other judge. If the parties arrive at a settlement, such settlement is recorded, and the case is decided in terms thereof, failing which the case is tried by judge, who did not participate in the judicial settlement proceedings.

- If dispute is fit for mediation, the Court records that the dispute is fit for mediation, and refers it to the Mediation Centre, fixing a date by which Mediation Centre may submit its report. If the matter is settled, the agreement signed by parties and verified by the pleaders is recorded as a compromise agreement under Order 23 Rule 3 CPC, failing which the Court proceeds with the trial.
- In all cases of settlement brought before the Court namely in case of judicial settlement and settlement with the help of mediation, the Court examines to find out whether it is valid, effective and enforceable and draws attention of the parties to avoid any further litigation and about executability of the settlement.

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(1) Afcons Infrastructures Ltd. Vs. Cherian Varkey Construction Company Pvt. Ltd. & Ors., (2010) 8 SCC 24.
(2) State of Punjab & Anr. Vs. Jalour Singh & Ors., (2008) 2 SCC 660;
(3) Salem Advocate Bar Association (i) Vs. Union of India, (2003) 1 SCC 49;
(4) Salem Advocate Bar Association (ii) Vs. Union of India, (2005) 6 SCC 344;
(5) B.S. Joshi Vs. State of Haryana, AIR 2003 SC 1386;