ADR Mechanism

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ADR- Alternate Dispute Resolution

Whether it is really alternate,

Or

additional,

Or

appropriate

Scheme for Resolution of Disputes ?

Why the need for ADR ?

➔ Mind boggling pendency – Regular Courts proved to be insufficient to deal with the ever rising number of the cases,

Resulting in unending delay.

➔Affecting public confidence.

➔Litigation becoming costlier.

➔In the era of fast growing industrialization and international commercial trade – imminent need for expedious disposal of disputes.

➔Decisions of Courts based solely upon capacity of parties to bring or to prevent evidence being brought before the Court.

➔Formal judicial system based, on justice in accordance with substantive and procedural law, – no place for equity.

➔Nominal winner is often a real looser in terms of fees, expenses and waste of time.

➔No place for reunion, reconciliation, bridging the gap between the warring parties and putting an end to / giving finality to the disputes.

What are the benefits of ADR ?

It is an informal system of conflict resolution.

Parties can play active role in resolution of disputes.

It resolves the disputes finally.

It is quick, cheap, flexible and secures privacy.

Avoids delay, tedious and complicated procedures.

Better tailored to parties' unique needs.

Solution is problem specific.

Not only addresses the dispute, but also the emotions underlying the disputes.

Participatory.

Leading to win-win situation.

Which are the Statutory provisions relating to ADR ?

Statutory recognition to ADR

Art.51(d) of Constitution - emphasizes on settlement of international disputes by Arbitration.

Section 89 and Order X Rule 1A of CPC, which require the Court to refer the disputes for settlement by way of Arbitration, Conciliation, Lok Adalat and Mediation.

Order XXVII, Rule 5B CPC – in suits or proceedings by or against the Govt. or Public Officer - duty of the Court to assist the parties in arriving at a settlement.

Order XXXII A Rule 3 CPC - in suit or proceeding relating to family, duty of the Court to assist the parties in arriving at a settlement.

Section 9 of Family Courts Act, 1984 – making conciliation compulsory, with the help of the counselors, before proceeding with the trial.

Industrial Disputes Act, 1947- which advises the parties to resolve the disputes peacefully through ADR modes.

ADR having roots in India in Panchayat System,

which is also recognized by Constitution as a

best

way of managing the governance of the villages.

Section 89 and Order X Rule 1A of CPC

Inserted by Amendment Act 1999 w.e.f. 1-7-2002
It's validity upheld by the Supreme Court in Salem Advocate Bar Association -Vs.- Union of India 2003 A.I.R. (S.C.) 189

Order X Rule 1A makes it mandatory on the part of the Court to direct the parties to opt for any of the mode of settlement outside the Court as specified in Section 89 (1)

Section 89 CPC

Where it appears to the Court that there exist

elements of settlement, which may be acceptable to the parties,

the Court shall formulate the terms of settlement.

Give them to the parties for observations.

After receiving the observations, re-formulate those terms.

The Court shall then refer the said terms for

a) arbitration;
b) conciliation;
(as contemplated under the provisions of Arbitration and Conciliation Act, 1996)

c) judicial settlement, including settlement through Lok Adalat, in accordance with the provisions of Sec.20(1) of Legal Services Authority Act

d) for mediation – the Court shall effect a compromise between the parties as per the Mediation Rules, 2006.

Salem Adv. Bar Association v. Union of India
JT 2002(9) SC 175
Salem Adv. Bar Association v. Union of India
JT 2005(6) SC 486

In the first case, the validity of Section 89 was upheld in view of its laudable object.

In the second case it was held that instead of the Court formulating and reformulating the terms of settlement, the Court should only briefly state about the dispute between the parties, which is called as 'Summary of dispute' and not 'the terms of settlement'

Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. JT 2010(7) SC 616

In Section 89(2) the two words appearing in Clause C and D are required to be interchanged and then it should read as follows :

C – for mediation to a suitable institution of person.....

D – for judicial settlement to effect compromise between the parties as per the procedure to be prescribed by appropriate rules.

Arbitration

Arbitration revolves around the agreement between the parties to get their disputes settled from a third person.

And

Such settlement has executable legal recognition.

Arbitration and Conciliation Act 1996 gives wide ranging powers to the Arbitrators.

Interference of the Court in the Arbitration proceedings is reduced.

Award given by Arbitrator is having the force of the decree.

It is final and cannot be challenged, except as

provided in Sec. 34 of the Act.

Jog Engineering Limited & anr. - Vs.- State of Maharashtra 2005 (6) LJSOFT (URC) 15 Bom. H.C.

Section 89 of CPC contemplates a consensual approach that is in those cases where parties agree to settle the dispute, then only the matter can be referred to Arbitration. In the absence of an agreement there is no right to any of the party to seek a direction to the Court or by way of a Writ in the nature of mandamus directing Respondents to refer the matter to arbitration .

Conciliation

Arbitration and Conciliation Act 1996 gives statutory recognition to the process of reconciliation.

It is a non-binding procedure in which a neutral inter-mediatory – the conciliator assists the parties to arrive at an amicable settlement,

which can be enforced as a decree by virtue of Sec. 36 of the Act. In conciliation a decision is not forced on the parties. Hence emotional harmony between the parties remains.

Mediation

Mediation is one of the methods by which conciliation is arrived at.
Arbitrator gives decision.

Conciliators induces the parties themselves to come to a settlement. He acts merely as facilitator.

Arbitrator is expected to give hearing to the parties which is not necessary for conciliator.

Mediator is merely a facilitator who persuades the parties to arrive at an agreement.

He is not an adjudicator.

It is a process formed by interaction between the parties and mediator.

Even if dispute is not resolved, mediation narrows down the dispute/differences.

In view of Sec.30, 64(1) and 73(1) of Arbitration and Conciliation Act 1996,

the conciliator has a greater power in making proposals for a settlement or formulating and reformulating the terms of settlement

Lok Adalats

It provides supplementary forum to the parties for conciliatory settlement.

Compromises/Settlement arrived at Lok Adalat has a force of decree.

It attains finality and binds the parties

.

By this process disputes get resolved for once and all, ensuring mental peace to the parties.

ADR Rules 2006

After formulating the terms of settlement, the Court has to give them to parties for their observations and the parties have to submit their observations within 30 days.

The Court has to obtain written consent of the parties before referring the dispute to Arbitration or to judicial settlement through Lok Adalat.

It is the duty of the Court to give guidance to the parties in selection of the modes of settlement.

Guidelines for the Court – When there is no relationship between the parties which requires to be preserved, then to refer them to Arbitration.

When there is a relationship between the parties, which requires to be preserved, then to conciliation or mediation.

Disputes in matrimonial, maintenance and child custody matters are to be considered as cases where relationship between the parties has to be preserved.

Where parties are interested in final settlement

which may lead to a compromise –

then refer them to Lok Adalat.

When parties agree for settlement by any of the mode, then they have to apply to the Court within 30 days to refer the matter to Arbitration, Conciliation, Mediation, or Lok Adalat, as the case may be.
Then the Court has to refer the matter accordingly.

. In case all the parties do not agree, but where it appears to the Court that there exist elements of settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, then the Court shall refer the matter to conciliation or mediation.

Rule 5A

Nothing in these Rules shall affect the powers of the Court to refer the parties to ADR by consent of the parties at any stage of the proceedings.

If the matter is not resolved by any of the mode, then the Court has to proceed with the matter according to law.

Mediation Rules, 2006

It is for the parties to agree upon or decide the name of Mediator. The Mediator need not necessarily be from the panel of mediators and need not have the qualifications referred in Rule 4, but he should not be a person who suffers from disqualifications referred in Rule 5.

Each set of parties can nominate a mediator and such nominees can select the sole mediator and failing unanimity, the Court shall appoint a Sole Mediator.

Rule 11 -Procedure of Mediation

It is for the parties to agree on the procedure to be followed.

The mediator is not bound by the provisions of CPC or Evidence Act,

but shall be guided by principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

Rule 17

Parties alone are responsible for taking decision.

The mediator cannot impose any decision on the parties. He only facilitates in arriving at a decision.
His role is to assist them in identifying issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute.

Rule 18

Time limit for completion of mediation – 60 days from the date fixed for first appearance.

The Court can extend the further period of 30 days,
upon request by the Mediator or any of the parties and upon hearing all the parties,

if it is necessary or may be useful.

Rule 25

On receipt of settlement agreement,

within 7 days, the Court has to issue Notice to the

parties and

record the settlement and

pass a decree in accordance with the settlement.

Rule 26

The Court shall fix the fee of the mediator, as far as possible a consolidated sum,

after consulting mediator and parties,

which is to be shared equally by both the parties.

Afcons Infrastructure Ltd. v. Cherian Varker Construction Co. JT 2010(7) SC 616

Having regard to the tenor of the provisions of Order X Rule 1A, the Civil Court should **invariably** refer cases to ADR process, except in certain excluded categories of cases.

If the case is unsuited for reference to any of the ADR processes, the court has to briefly record the reasons for not resorting to any of the settlement procedure prescribed u/s. 89.

What is mandatory is to consider recourse to ADR, though actual recourse to ADR is not mandatory.

Afcons Infrastructure Ltd. v. Cherian Varker Construction Co. JT 2010(7) SC 616

Categories of the cases which are excluded from consideration for reference to ADR are laid down in this authority.

They are like representative suit, election dispute, cases involving serious allegations of fraud,fabrication of documents, etc.

Afcons Infrastructure Ltd. v. Cherian Varker Construction Co. JT 2010(7) SC 616

Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both 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 in section 62 of AC Act followed by appointment of conciliator/s as provided in Section 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation'.

Conciliation contd...

As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.

Guidelines laid down in Afcons Infrastructure Ltd.

a. When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

b. The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

c. In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

d. The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court.

The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

e. If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with Section 64 of the AC Act.

f. If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three ADR processes : (a) Lok Adalat, (b) Mediation by a neutral third party facilitator or mediator, and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

g. If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat.

In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation.

Where the facility of mediation is not available or where the parties opt for the guidance of a judge to arrive at a settlement, the court may refer the matter to another court for attempting settlement.

h. If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23, Rule 3 of the Code in mind.

i. If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject mater of the suit or proceedings in which the reference is made, but also other disputes which are not the subject matter of the suit.

j. If any term of the settlement is *ex facie* illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation, or judicial settlement, as the case may be. There is no need for any elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is, therefore, advisable to refer cases proposed for Judicial Settlement to another Judge.

v. If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternate forum, the nature of case, etc.) Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

vi. Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However, if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

Difference between various processes

Arbitration and Conciliation – Consent of both the parties mandatory. Without consent no reference can be made.

Once the matter is sent to Arbitration, the Court's role is over.

Whereas in Conciliation, the matter again comes back to the Court for final Order.

Arbitration is an adjudication process by Private Forum.

Conciliation is a settlement process.

Difference between various processes

For reference to Mediation, Lok Adalat and Judicial Settlement – Consent of the parties is not required. It is the discretion of the Court to make reference to any of these three processes.

The control of the Court remains over the file even if reference is made and the file ultimately comes to the Court for Order in case of mediation and Judicial Settlement.

Difference between various processes

Arbitration and Conciliation – governed by

AC Act, 1996.

Reference to Lok Adalat – governed by Legal Services Authorities Act, 1987.

Reference to Mediation – governed by Mediation Rules, 2002.

Judicial Settlement – not governed by any enactment and the Court is to follow such procedure as may be prescribed by appropriate Rules.

Active case management includes,

Encouraging parties to use of ADR procedure

and facilitating the use of such procedure.

Disputant has a right of self determination of Forum to get conflict resolved by different resources.

The approach is
not –
whether this case is suitable for ADR,

but
approach should be

why this case is not suitable ?

Matter divides - ADR unites.

Through meditation you bring peace to yourself.

Through mediation you bring peace to others.

Coming years would be years of mediation and conciliation.

And

Not of litigation.

Time has come to consider whether we have failed the formal system of justice or whether the system has failed us.

The litigant is, however, not interested in these things. He wants justice, that too fair, quicker and cheaper.

Only ADR Mechanism can guarantee that justice to the litigant.


Thank you