

Alternative Dispute Resolution
(Challenges in Implementation of ADR System in Subordinate Courts)

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Introduction

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 for both to the privileged and under privileged classes, it was found necessary to sidetrack those cases, from mainstream litigation 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 threshold, or at any stage of the case 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

- 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.* (2010) 8 SCC 24¹ 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

- 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

- 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 to continue even after its resolution, such as easement 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 claims, railway accident claims and other accident claims;
- 5) all consumer disputes including disputes with traders, suppliers, service providers, who are eager to maintain their reputation, credibility or product popularity.

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.

On making reference to the process of arbitration with the consent and express agreement of the parties, the dispute goes out of the Court, the case stands decided for the court referring it, and does not require monitoring by the court. It may come back to court after adjudication, if the Award is challenged under S. 34 of AC Act on grounds of misconduct, or for enforcement. The amendments to AC Act in 2015 have given extensive powers to the Arbitrator to rule on his jurisdiction, to make interim orders and impose costs. There is no need to make the Award rule of court now for its enforcement. The challenge to the Award is on limited grounds and there is no automatic stay in the challenge to the Award under section 34 of the Act. The Act now provides strict timelines to make the Award.

Conciliation

Conciliation is a non-adjudicatory ADR process, also governed by the provisions of the AC Act 1996 (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 the 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.

The process of conciliation is somewhat like arbitration except that the Conciliator, a person of confidence to the parties, may counsel the parties in persuading them to enter settlement which comes to the court for its scrutiny and acceptance, and has same attributes as an Award given by the Arbitral Tribunal.

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, is sufficient to refer may to the Lok Adalat. A brief discussion with the parties to the advantages of the process is recommended. 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 clear cut legal principles. There are several types of Lok Adalats organized periodically by LSA under the Legal Services Authorities Act 1987, including pre-litigation Lok Adalats, Case Type Specific Lok Adalats and Mega Lok Adalats by NALSA, SALSAs and TLSAs. The program is of great success in India with disposal of thousands of cases in Institutionalized Lok Adalats.

Permanent Lok Adalats in every district, exercises jurisdiction in public utility services, such as transport, postal services, communications, water supply, hospitals and insurance. The party can make an application under S.22-C 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. The order of Permanent Lok Adalat need not be brought to the court for its approval and may be enforced as decree of court. It cannot be challenged except in the case of fraud.

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 (settlement). The settlement must be lawful and satisfy the requirements of a valid contract. The mediator does not adjudicate the case or give an award. He is a facilitator and is in-charge of the process of mediation.

The reference to mediation is to be made in the nature of cases recommended in the Afcon International Ltd (Supra) , after a brief discussion with the parties, to the mediation center with trained and accredited mediators . The case remains in the control of the court until it is settled for acceptance of settlement by the Court. Where the parties could not reach to settlement; the case proceeds from the stage it was referred.

Almost all the High Courts have framed rules for mediation, there is a long felt need of an appropriate legislation on mediation which is now approved by the Union Cabinet and is awaited.

Judicial Settlement

The Court may at the stage of Section 89 or Order X Rule 1A, 1B, 1C of CPC 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 sitting judge of the same court would be appropriate, it may refer the dispute to such judge for dispute resolution who will not adjudicate it thereafter, if it is not settled.

This process is not very common and still requires time and persuasion to gain acceptance. It has a great potential to be used as an efficient ADR tool by the courts to resolve disputes.

Summary of procedure

- 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. In matrimonial matters, the Court may fix the date even before the filing of objections / written statements.
- 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 system. 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.
- The Court may even after recording settlement on some of the issues refer the matter with consent of parties to a substitute arbitrator under the terms of the clauses of agreement . In *Shailash Dharyawan vs Mohan Balkrishna Lulla* (2016) 3 SCC 619 the approach was justified by purposive interpretation of Section 15(2) of AC Act.

- 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 settlement is valid, effective and enforceable and draws attention of the parties to avoid any further litigation and about executability of the settlement.
- The Court may in the facts of the case innovate in ADR processes with med-adjudication, med –arbitration, and med- judicial settlement to encourage parties to settle the matter , keeping control of the proceedings.

References

- 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;
- 6) Gian Singh Vs. State of Punjab & Anr., (2012) 10 SCC 303.
- 7) K. Srinivas Rao Vs. D.A. Deepa, (2013) 5 SCC 226.

THE CHALLENGES TO ADR PROCESS

- The understanding of the ADR process.
- The hesitation of the Court to make reference.
- The over confidence in adjudicatory process .
- The absence of legislation for Mediation and Judicial settlement.
- The lack of infrastructure, trained Mediators and staff.
- Lack of motivation.