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Impediments in India's Advancement of ADP (Alternative Dispute Resolution)

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Abstract:

Arbitration dispute resolution has shown itself to be a useful instrument in the Indian judicial system for alleviating the undue strain on it. It was beneficial in a number of ways, including cost-effectiveness, parties presenting their own terms and conditions, and speedier decision-making. The 1996-introduced Arbitration and Conciliation Act was modified in 2015. Despite its progress toward modernization, arbitration has not developed appropriately or gained widespread acceptance in India for a variety of reasons. Lack of knowledge, manner of working, meddling by the government, and court involvement. Appropriate institutional ADR dealing does not exist. The development of ADR procedures in India has been impeded by a number of factors.

Keywords: Arbitration, conciliation, mediation, institutional, mechanisms, Hindrances, awareness

INTRODUCTION

Hindrances in development of Adr in India:

1) Inefficient proper laws:

   Law makers in India need to do effective study considering arbitration to find out for easy resolutions. There is need for more comprehensive and procedural law apart from arbitration and conciliation act 2019.

2) Court intervention in arbitration proceedings

   Courts interference must be reduced while arbitration proceedings are going on and after concluding. Section 34 of arbitration and conciliation act 1996 (1)covers the right to challenge the arbitral award, which should be limited . Courts should not unnecessarily interfere in thefair trial process of such proceedings.

3) Availability of skilful knowledgeable and globally recognised arbitrators:

   With the development of foreign industrialisation and marketing there is a need for creative minds,

excellent and skillful arbitration dealing.

There are very few institutional arbitration platforms in India that are globally recognised. So they need upliftment in this area.

4) Cost effective and timely completion of proceedings: The arbitration process requires many months to dealwith the arbitration disputes and sometimes they seemto be expensive , so it is not possible for each party toafford such dealings.

5) Ignorant Indians:

Indians are still ignorant and there is a lack of interest in Alternative dispute resolution. They still believe in court proceedings for effective resolution .With the increase of modernization there is a need to make them aware about ADR benefits so that they can have access to justice.

6) The rules and practices followed are often outdated and ineffective:

Many Institutions like ICC, SIAC , LCIA are government controlled. New Delhi International arbitration centre and Arbitration Council of India have members from the government. So all the practices followed by them till date seem to be ineffective and traditional. So there is a need for new legislation and Reforms in this field.

7) Judicial attitude towards arbitration in general:

If arbitration matters entangled in court then it gets delayed. For example section 34 of Arbitration and Conciliation act, 1996 deals with a challenge to an arbitral award the same may take forever to decide. Even in the judgement of BCCI(2) sec. 87.of the act was introduced by legislation ,later on it was struck down by Hindustan Construction Corporation Limited versus Union of India(3). A lot of time was wasted in it.

8) Failure in working style:

There is a need to upgrade the Indian judicial systemand administrative background . There is a lack ofAdvanced Technologies like sound proof caucus rooms,audio video recordings, video conferencing etc.

9) Parties fault in delaying arbitration proceedings by initiating Court proceedings before or during such proceedings.

10) Lack of Legislative support for institutional arbitration in India.

11) Lack of Governments support for institutional arbitration and in providing solid platforms for the resolution of disputes.

12) Overlapping efforts of different laws.

To overcome such problems various recommendations areas follows:

a) Increasing Awareness-

Seminars and workshops should be organized and people should be encouraged to opt for arbitration for efficientlyresolving their disputes. Law Schools in India shouldorganize competitions , moot courts, seminars, briefing of law students related to alternative dispute resolution should be done. As well as law firms must build their own networks amongst future arbitration or ADR lawyers.

b) Courts encouragement in alternative dispute resolutions and less interferences -

In fact, we have regressive judgement by the Supreme Court for example in ONGC versus Saw pipes Limited (3).

c) Most of the arbitrators in India are adhoc which is a major reason why arbitration mechanisms in India are notefficient and robust l. Owing to a busy schedule of litigation lawyers in India it is unlikely for Indian lawyers to actively participate. So there is a need for proper infrastructure and good Institutions which are established on permanent ground.

d) Proper skillful training to lawyers, students andpractitioners is required and is a need of hour.

Historical background of ADR in India

In India, before the advent of the court, people used to amicably settle their disputes mutually through mediation. Person holding higher standing and reputation in the village usually led the mediation, and it was referred to as a "Panchayat" in the past [1] . The Pancha, also known as the Village Headman (sarpanch), is a person of integrity, quality, and character who is regarded as an unswayed person by the villagers and is aided by the people of same strata [2] . Panchayats' used to hear individual and family disputes, and the disputants used to accept the decisions of the Panchayats'. Similarly, if a dispute arises between two villages, it will be resolved through Mediation, both village residents will accept the decision of such mediation. Disputes in the past rarely reached the courts. They were even resolving intricate civil, criminal, and family conflicts. Even after their disputes were resolved, disputants who used this method of dispute resolution maintained a friendly relationship [3] . These traditional institutions of dispute settlement began to wither with the arrival of the British Raj, and the British introduced a formal legal system that began to govern [4] . With the introduction of the Bengal Regulations, The Bengal Regulations were created with the intention of encouraging arbitration. After various Regulations relating to arbitration, Act VIII of 1857 mentioned the procedure of Civil Courts, with the exception of those founded by Royal Charter, and included provisions dealing with arbitration in litigation as well as portions allowing

arbitration without the intervention of the court. Following that, the Indian Arbitration Act of 1899, which was modelled after the English act of the same name, was passed. Though it only pertained to the Presidency towns of Calcutta, Bombay, and Madras, it was the first substantive law on the subject of arbitration. In 1908, the Civil Procedure Code was re-enacted. In terms of arbitration law, the Code made no significant changes. The Indian Arbitration Act of 1899 and some sections of the Civil Procedure Code of 1908 were repealed, and the Arbitration Act of 1940 was passed. It changed and consolidated arbitration law in British India, and it continued in Republican India until 1996 as a comprehensive arbitration law. Lok Adalats were established in 1982 to settle disputes outside of the courts. On March 14, 1982, the first Lok Adalat was held in Junagarh, Gujarat, and it has since been expanded across the country. Lok Adalats were established as a voluntary and conciliatory body with no legal authority to make decisions. When the Legal Services Authorities Act of 1987 was passed, the Lok Adalats were given legal status. The previous Arbitration Act of 1940 has been superseded by the new Arbitration and Conciliation Act of 1996 to keep up with the globalization of commerce. The amendment of the Code of Civil Procedure in 1976 included provisions for the settlement of family disputes. The Special Marriage Act of 1954 and the Hindu Marriage Act of 1955 both include provisions for reconciliation initiatives. The Family Courts Act of 1984 requires the family court to make reasonable attempts to settle between the parties. The insertion of Section 89 to the Code of Civil Procedure, 1908, as part of the 1999 Amendment, is a significant step forward in the Indian Legislature's adoption of the “Court Referred Alternative Dispute Resolution” system. Meaning and scope of ADR Alternate Dispute Resolution, or ADR, is an initiative aimed at developing technology that can serve as a substitute for traditional dispute resolution methods. A choice between two options is referred to as an alternative. It does not imply the selection of an alternative court, but rather anything that can function as an alternative to court procedures or as a court announced method. ADR is not a substitute in the strict sense. ADR is essential to supplement and preserve the court's functions [5] . According to Black’s Law Dictionary Alternative dispute resolution or ADR refers to a “procedure for settling a dispute by means other than litigation, such as arbitration or mediation [6] .” ADR, according to Halsbury's Laws of England [7] , is a term for the procedures of settling disputes without resorting to litigation, and encompasses mediation, conciliation, expert determination, and early neutral assessment. As a result, the term ADR refers to a multitude of approaches for resolving conflicts without adjudication. It even covers the method of negotiation in which two parties resolve a problem amongst themselves without the help of a third party by communicating with one another. It may also include processes such as conciliation and mediation, in which a neutral third party is involved. As a result, it is a system for resolving conflicts and

disputes that relies on private, consensual resolutions between parties, with or without the intervention of a neutral third party. In Food Corporation of India v. Joginderpal Mohinderpal [8]

the Supreme Court observed – "We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done." The scope of ADR does not apply to all law cases. ADR is a process which may be used in addition to or along with or even independent of the judicial system. ADR is not intended to supplant of litigation [9] . It provides alternatives to traditional dispute settlement. There are still a handful of significant areas, such as constitutional law and criminal law, where court decisions remain the exclusive source of information [10] . Since the techniques used in ADR are not the ones applied in adjudication, ADR is extra-judicial in character [11] . The main objectives of ADR are resolution of disputes in a speedy manner and at lesser cost. Since it is an amicable way of settling disputes, building better relationship between parties is another objective [12] . The Law Commission of India has stated that the cause of judicial delays is not an absence of clear procedural laws, but rather their faulty execution, or even complete nonobservance [13] . The Law Commission of India stated explicitly in its 14th Report that the delay is due to the nonobservance of many of the legislation's critical provisions, particularly those intended to expedite the disposition of proceedings [14] . The key objective of the ADR movement is to eliminate vexation, expenditure, and delay while also promoting the notion of "equal access to justice" for all. The ADR system aims to deliver justice that is inexpensive, simple, fast, and accessible. ADR is not the same as the traditional judicial process. Disputes are resolved with the help of a third party, and the proceedings are kept simple and, for the most part, handled in the way agreed upon by the parties. ADR encourages the resolution of disputes quickly with minimal time, skill, and money spent on the decision-making process, while maintaining the secrecy of the subject matter. Various means and modes of justice delivery mechanism of ADR The five different methods of ADR can be summarized as Follows. 1. Arbitration. 2. Conciliation. 3. Mediation. 4. Negotiation. 5. Judicial Settlement. 6. Lok Adalat. 7. Ombudsman. Arbitration Arbitration one of the modes of alternative dispute resolution facilitates out of court settlement of disputes by referring their problems to the arbitrator or arbitrators, as being appointed by the concerned parties to the dispute [15] . Its nature can be that of a statutory, Institutional, Contractual or even ad-hoc [16] . It is a non-judicial, private, and mostly informal trial procedure for settling disputes. The notion of arbitration comprises four requisite namely an arbitration agreement between two or more parties, a subsequent dispute or disputes

among the parties, a referral to a third party for adjusting the dispute and an amicable way to resolve the issues raised as a cause of the dispute or disputes, concluded by a third party award [17] . In arbitration, a neutral third party assigned by the parties to the dispute or conflict settles the referred conflict between the said parties. It is similar to a court-based settlement, but it involves less formalities and the arbitrator is chosen by the parties. It exists with a well-established, less time-consuming procedure that is very effective in settling various types of disputes, including international business conflicts. Arbitration is presently the most potent legally binding and enforceable alternative to judicial proceedings [18] . The scope for appeal and review against an arbitration award is limited. Arbitration differs from both judicial proceedings and mediation. Conciliation Conciliation is a private, informal process in which a neutral third person helps disputing parties to reach an agreement [19] . Apart from arbitration, conciliation is also an alternative dispute resolution process aiming to resolve the dispute by assigning a conciliator. The role of conciliator is to meet both the parties separately in order to resolve their said dispute or disputes. Conciliation attempts target's on displaying both the parties the different aspects of dispute including the pros and cons of the dispute, effects of the dispute on both the parties so to resolve the dispute and bring the concerned parties together [20] . It is a procedure in which the parties, with the help of a neutral third person or persons, carefully identify the problems in dispute, explore possibilities, consider alternatives, and find a mutually agreeable settlement that fulfils their interests. Typically, the conciliator would conduct an independent investigation into the disagreement and write a report outlining the technique of dispute resolution. The parties are then free to negotiate by concluding a final settlement in accordance with the Conciliator's report and can be initiated with or without any alteration or alterations agreed upon by the concerned parties. As a result unlike arbitration, the report prepared by the conciliator in relation with the settlement of dispute would not be binding upon the parties. Mediation Mediation is the process of resolving conflicts amicably between parties with the assistance of a mediator. The primary aim of mediation is to provide the parties a solution by creating an opportunity to negotiate, discourse and explore different ideas by seeking the help of a third party in order to assess whether or not a resolution is feasible. A mediator is a neutral third party who has no authority to make binding decisions but who uses a variety of procedures, strategies, and skills to assist the parties in reaching an amicable settlement without going to court [21] . The primary goal of mediation is to give the parties an opportunity to negotiate, communicate, and explore ideas with the help of a neutral third party in order to assess whether or not a resolution is feasible [22] . The parties are free to analyse the law and the facts, including to err in what is law, fact, or important, and to walk away without making a choice if neither of them likes the settlement offered [23] . Between mediation and conciliation,

there is a minor difference. While the third party, neutral intermediary, referred to as the mediator, plays a more active role in meditation by offering independent compromise formulas after hearing both parties, the third neutral intermediary's role in conciliation is to bring the parties together in a frame of mind to forget their animosities and be prepared for an acceptable compromise on terms midway between the positions taken before the conciliation proceedings began. Negotiation Negotiation is the simplest form of ADR, where the participants normally start talking without the involvement of a third party. The primary goal of this mode is to resolve disputes through a discussion on the views and issues of the respective parties. It is one of the fundamental steps for settling disputes. The parties to a dispute can, on their own motion start a process of negotiations through correspondence or through one or two mediators aiming to seek a mutually acceptable solution for their concerned issues [24] . Negotiation has the advantage of allowing the parties to work out their differences through face-to-face discussion. Negotiations have another advantage of saving time, and hence time counts in favour of the negotiation process. Negotiation does not have any statutory status in India. In this process of Negotiation there are no set rules but a predictable pattern is followed. Judicial Settlement Judicial Settlement as mentioned under Section 89 of the Civil Procedure Code can also be utilized as a means of alternative dispute resolution. Indeed, no hard and fast rule has been established for such an alternative mode of settlement. The phrase Judicial Settlement, on the other hand, is defined under Section 89 of the Code. Of course, the Legal Services Authorities Act, 1987 will apply if there is a Judicial Settlement. In a Judicial Settlement, the concerned Judge seeks to reach an amicable settlement between the parties. If an amicable solution is sought and reached at the instance of the judiciary in a given case, the settlement is deemed to be decree under the Legal Services Authorities Act, 1987. Every Lok Adalat award is regarded to be a Civil Court decree, according to Section 21 of the Legal Services Authorities Act of 1987. Lok Adalat In India, the Lok Adalat system is a distinctive process. It means “people's court.” It is a framework in which the parties make a concerted attempt to reconcile their issues through conciliation and persuasion [25] . For settling problems between parties, it comprises tactics such as negotiation, mediation, and conciliation. 1908 Lok Adalats were given civil court powers under the Code of Civil Procedure. Lok Adalats were given legislative status by the Legal Services Authorities Act of 1987, and the Lok Adalat's award is regarded a civil court decree. The decision is final and binding on both parties. During the pre-litigation stage or while the dispute is pending in court, parties can bring any dispute to Lok Adalats for a peaceful resolution. An application may be referred to Lok Adalats by the State Legal Services Authority or the District Legal Services Authority.

Advantages of ADR The ADR method is a non-binding alternative to formal judicial procedures brought before the courts pursuant to statutory provisions. These methods provide a significant means for the common man to obtain speedy justice. The following are some of the many benefits of the ADR system. 1. Parties arguing their claims in the Courts must follow the procedural requirements provided in the statutory enactment, and judicial officers must follow the current statutory rules and regulations. However, there is no such obligation under the ADR system when settling the issue. 2. This ADR process is available at all times, both before and after the case is filed. Even though the case has been filed and is awaiting trial in a court, the parties have the option of using ADR to resolve the dispute. 3. These ADR mechanisms are always more effective and efficient in resolving conflicts and they cost less and take less time. Because the neutral person, whether arbitrator, conciliator, or mediator, always helps to construct the conclusion in the shortest possible time, these procedures are non-adversarial and produce faster results [30] . 4. For adjudicators, reliable information is a must-have tool. Due to the unwillingness of parties to share embarrassing information, judicial proceedings are stalled. ADR helps to overcome this flaw in the judicial system. The truth may be difficult to discover if a person is forced to stand in the witness box and is publicly chastised. An informal discussion across the table can be more efficient in gathering information. 5. The parties can choose neutrals who are specialists and have subject area expertise through ADR procedures, which is the finest and most crucial benefit of ADR in attracting parties. The only stipulation is that everyone involved in the settlement must adapt their roles to the ADR criteria Disadvantages of ADR However, the Arbitration has some drawbacks, which can be stated as follows. 1. The powerful parties may pressurize the arbitrator. 2. The parties may lose their interest to move to the court if arbitration becomes mandatory and binding. 3. Some arbitration agreements require the parties to pay the arbitrators, which increases the costs, especially in small consumer disputes. 4. An improper decision is unlikely to be reversed because there are few alternatives for appeal. 5. When a panel has a large number of arbitrators, organising their calendars for hearing dates in prolonged cases might cause delays, regardless of the fact that it is usually considered to be faster.

Conclusion

Regretfully, the lack of widespread interest prevented the Indian legal system from fully embracing ADR processes. The data indicates that the bar's strong initiative is responsible for ADR's success in the United States. Since there aren't many lawyers in India who don't litigate, there is a dearth of knowledge about ADR procedures because people aren't trained in these methods of resolving conflicts amicably. Large

sections of the population of India believe the dispensation of justice in regular court is very inefficient and inconvenient. So it is the need of the hour that the law of arbitration should be developed, promoted and applied to decrease the judicial pressure upon the regular courts as the regular courts are really overloaded with complexities and disputes. It enables people to participate in the course for deciding their conflicts which are impossible in the general, public and adversarial justice system The fact that India requires conferences like SIAC and ICC is the reason for the lack of awareness. In order to advance in this sector, we should urge all attorneys, practitioners, and other members to pursue full-time arbitration practice. We should also invite foreign attorneys to practice arbitration in India.

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