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AN OVERVIEW OF THE INDIAN JUDICIARY'S CONTRIBUTION TOWARDS ADR

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ABSTRACT

In this paper, the author dwells upon the importance of Alternative dispute resolution in India along with the requirement of its promotion in the Indian legal system. It tries to bring out the problems present in the Arbitration Act, 1940 and gives a comparison between both the 1940 and the 1996 amended Act. This paper also highlights the contribution of the Indian Judges towards the upliftment of the ADR through a plethora of positive judgments and brings out the voluntary role taken by the Judiciary to include the ADR in the system.

Keywords - *ADR, Alternative Dispute Resolution in India, Arbitration and Conciliation Act, 1996, The Arbitration Act, 1940, Benefits of ADR, Promotion of ADR*

INTRODUCTION

In the Preamble to the Constitution of India, it has been mentioned, "to secure all the citizens Justice"[1]. The purpose of the Judiciary was to deliver this Justice about which the preamble mentions to all its citizens. However, after so many years of independence, it is hard to say whether all the citizens are able to secure justice by the legal system of this country or not. Looking at the number of cases pending in the Courts an important question has arisen that How the legal system of our country will make sure that this justice is secured to all its citizens.

REASON TO PROMOTE ADR

The concept of Access to justice has been in danger due to a lack of judges in the courts, which has led to the pendency of a large number of cases. The object of securing justice to the citizens was to give relief to the aggrieved party. If they delay in initiating proceedings or provide justice at a later stage, which may sometimes occur even after the death of the petitioner or when the subject matter has already been exhausted, then the task of securing justice to the citizens become impractical or futile. It is a very famous saying by Willian Ewart Gladston, who was the former

[1] Constitution of India, 1950.

British Prime Minister, that "Justice delayed is Justice denied"[2]. The above-mentioned legal maxim was instrumental in laying down the very foundations of the legal system of almost every human society. It is observed that delay in providing administrative justice has proved to be one of the biggest obstacles of any legal system that may be found in any part of the world and the same requires the immediate attention of the judiciary. The abundance of pending cases is one of the prominent reasons why the judiciary should adopt or inculcate the very maxim in its functioning. In order to prevent the victimization of people due to delayed justice, the Indian judiciary thought that it was appropriate to bring alternative dispute resolution mechanisms within the existing legal framework, in order to function in an inexpensive, expeditious and effective manner.

BENEFITS OF ADR

The concept of Alternative Dispute Resolutions is not a recent phenomenon in India, and its history can be traced back to the ancient times were the same existed under various heads such as Arbitration, Mediation, Conciliation and Negotiation, as a mechanism of settlement of disputes, which was quite different from the conventional methods of resolving disputes. Alternative dispute resolution mechanisms have been designed to provide additional support to the courts in clearing the backlog in the court cases in India. Increasing the use of Alternative dispute resolution mechanisms has been stressed due to the following advantages that it provides over the conventional method of resolving disputes with the help of the judiciary. These are as follows: -

I. To alleviate the burden of the courts
II. To lessen the excessive cost and avoid delay in delivery of justice
III. To increase the involvement of the public in the process of dispute resolutions.
IV. To promote access to justice
V. To discover new empirical studies in the field of business communication, psychology and law.
VI. To safeguard the Socio-economic and cultural rights of the citizens

[2] Tania Sourdin & Naomi Burstyner, *Justice Delayed is Justice Denied*, SSRN Electronic Journal (2016).

VII. To promote a peaceful and satisfactory resolution of the dispute through voluntary settlement procedures.

VIII. ADR ensures that confidentiality of the dispute between the parties is maintained and the information that has been disclosed during the arbitration or mediation cannot be used later, even if the litigation demands the disclosure of the same.

IX. The parties are free to the walkway at any point in time during the tenure of the settlements.

X. ADR is fact-oriented and they do not go in-depth of the legal provisions.

STEPS TAKEN TO PROMOTE ADR

The Indian judiciary through the help of judgments in various cases highlighted the importance or need of an alternative dispute resolution mechanism which can be opted by all the citizens to access justice. In Salem Advocate Bar Association v. Union of India[3] it was mainly focused on the importance of the mediation as an alternative dispute resolution in the upcoming time. The Supreme Court requested the formulation of Model rules on Mediation which were implemented by the High Courts all over India. The aftermath of this judgment leads to the establishment of the Court-connected Mediation Centers. Section 89 of the Code of Civil Procedure sets an example of a step taken by the legislature to promote the empirical method of settling the disputes.[4] It broadened the power of the judge to decide when can the dispute be settled outside the Court. However, in Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.[5] the Supreme Court gave more clarity on the above-mentioned section as in at which stage a case can be referred for ADR by the parties or the Courts. Also, the difference between the term 'Mediation' and 'Judicial Settlement' was given by the Court in this case which was used earlier interchangeably. In ONGC v. Collector of Central Excise,[6] the Court held that the dispute present in this case will not come up to the Court to decide to waste a lot of public money and time. In ONGC v. Collector of Central Excise[7] also referred to as ONGC II, it was held that the issue contested in the Court

[3] (2005) 6 SCC 344.
[4] The Code of Civil Procedure, 1909, Section 89.
[5] (2010) 8 SCC 24.
[6] 1992 Supp (2) SCC 432.
[7] 1995 Supp (5) SCC 541.

should be resolved through arbitration or by mutual consultation avoiding unnecessary litigation. In Chief Conservator of Forests v. Collector[8] the Supreme Court held that all the interdepartmental issues of the government cannot be contested in the Court. Rather they should formulate a new mechanism to resolve these controversies. In Punjab & Sind Bank v. Allahabad Bank[9] it was held that the order passed in ONGC III[10] to the government is to ensure that every party is given a fair chance/opportunity of Conciliation before the case comes up for litigation. All the case laws mentioned above one thing common among them was that the Judiciary tried to promote alternative dispute resolution in the current legal system of India.

PROBLEMS IN 1940 ACT & INTRODUCTION OF 1996 ACT

The Current laws on arbitration are found in The Arbitration and Conciliation Act, 1996 which has been largely taken from the 1985 UNCITRAL Model Law on International Commercial Arbitration and UNCITRAL Arbitration Rules 1976.[11] Earlier, these laws had a place in three different acts, namely, The Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 covering different aspects.[12] Even though these acts were a big step towards the introduction of arbitration law in India yet there were a lot of shortcomings in them which urged the feeling towards the introduction of the new act. Some of the problems were: -

I. Conciliation was not considered as a mode of dispute resolution
II. Courts could interfere at any stage of the arbitration because of which parties never looked at it as an alternative dispute resolution mechanism.
III. In order to delay the arbitration proceedings parties used to refer to Court at any stage and point of time which increased their backlog of cases.
IV. Parties could question the validity of the arbitration agreement even after passing the award to which they never objected at that time.

[8] (2003) 3 SCC 472.
[9] (2006) (3) SCALE 557.
[10] (2004) 6 SCC 437.
[11] Sumeet Kachwaha, & Dharmendra Rautray, *Arbitration In India: An Overview*, IPBA Journal (2009).
[12] Ibid.

The landmark judgement given by Justice DA Desai in the case of Guru Nanak Foundation v. M/S Rattan Singh & Sons[13] highlighted the reality of the Arbitration Act, 1940. Though the above-mentioned judgment was overruled by the case of the State of Jharkhand v. Hindustan Construction Co. Ltd.[14], however, the obiter dicta given by Justice DA Desai cannot be disregarded just because of the aforesaid reason, and the same will continue to hold significance in the light of the need and urgency to strengthen the justice delivery mechanisms that are already existing in our country. The Court held "Interminable, time- consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has, by the decisions of the Courts been clothed with "legalese" of unforeseeable complexity."[15] The new Act i.e. The Arbitration and Conciliation Act, 1996 replaced all the three previous acts and was a consolidated, better, practical form of them. Even though it was largely based on the UNCITRAL Model law still there were differences in both of them in some legal provisions.

Earlier, alternative dispute resolution was considered to be a voluntary act on the part of parties, but later on, as there were gradual developments in the legal provisions involving the same, it was further backed by the legislature through a various statutory provision in terms of Code of Civil Procedure Amendment Act, 1999, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002. The main intention behind these legislative changes was to throw the ball in the court of the judiciary. On a superficial look at the Hindu Marriage Act, 1955 one can observe how Section 23(2) casts a duty on the court to take steps to have reconciliation between the parties to the dispute before they proceed to give any remedy in the concerned case.[16] The same can be inferred from the decisions in a number of

[13] AIR 1981 SC 2075.
[14] (2018) 2 SCC 602.
[15] Supra note at 8.
[16] Hindu Marriage Act, 1955, Section 23(2).

cases, one such case is that of K.A. Abdul Jalees v. T.A. Sahida[17] where the court held that "The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promoting conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith."[18] The object of Section 80 of CPC, 1909 was to provide sufficient warning to the government regarding the case which is going to be instituted against it and to provide them an opportunity to make amends or settle the claims out of the court without litigation or adopting any recourse to a court of laws.[19] This was further reiterated in the case of Ghanshyam Dass v. Domination of India[20]

CONCLUSION

From the above discussion, it becomes clear that ADR is significant in the contemporary era, and will continue to retain its salience in the times to come. Even though there were a lot of debates regarding the relevance and need of ADR within India's existing legal setup, but keeping in mind increasing globalization and the emergence of big companies having arbitration clauses in their contracts, one can safely conclude that the concept of ADR will not lose its shine and will continue to develop and expand.

[17] (2003) 4 SCC 166.
[18] Ibid.
[19] Raghunath Das v. Union of India AIR 1969 SC 674.
[20] (1984) 3 SCC 46.