VOLUME 2 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

THE MECHANISM OF ADRs- NEED OF THE HOUR

- Priyanshu Kumar Tripathy[1]

ABSTRACT

This paper mainly deals with the features of The Arbitration and Conciliation Act, 1996 in relation to the present need and the future aspects of the ADRs mechanism in India. The concept of ADR is not too new; it is in our society from time immemorial. Alternative dispute resolution (ADR) is a flexible method through which the conflicts can be resolved without interferences of the court proceedings. It is a mechanism parallel to the formal judicial system which tries to settle the conflicts between parties amicably with the consent of both parties. This paper also focuses on the historical background of ADR mechanism in India mainly in the ancient India, in Mughal Empire, In British period and after independence in India. Due to excess burden on the formal judicial system, the entire global system is not capable to give justice timely and as we all know that Justice delayed seems to be justice denied. So, in parallel to the formal judicial system, we can consider the mechanism of ADRs as an appropriate and flexible mechanism which works the base of the speedy and flexible dispute settlement of the parties in less time and safeguard the public interest. Now the ADR mechanism become a movement in India and plays a very important role in reducing the burden from the judicial systems.

INTRODUCTION

Alternative dispute resolution (ADR) is a flexible method through which the conflicts can be resolved without interferences of the court proceedings. The main objective of the ADR is to establish less costly, easy, speedy and reachable justice.[2] ADR techniques are mainly non-judicial body in nature which used to deals with most of the issues which can be settled by law

[1]8TH SEMESTER, CUSB UNIVERSITY, EMAIL:- priyanshu.ara970@gmail.com

[2]Jasime Joseph, "Alternate to Alternatives: A Critical review of claims of ADR" available at http://www.nujs.edu/ accessed on 19th Feb 22.

with conformity among the parties and this method is inspired by most approved faith which simply talks about justice delayed is justice denied.[3]ADR has a great significance to the corporate sectors and economically poor people who need speedy and transparent method to attain justice and try to resolve their problems in very flexible way. That is why it is alternative to the litigation and it should be considered as a most essential part of policy of the company. It has been shown that arbitration and mediation is very manageable as compared to litigation and it makes good business sense and that the addition of arbitration and mediation clause in the legal agreement will help to ensure that dispute will be resolved in a timely and flexible way.

MEANING OF ALTERNATIVE DISPUTE RESOLUTION:

The phenomena alternative dispute resolution has been defined as a dispute settlement method that is very effective and alternative to costly and time taking justice delivery system. The ADR refers to the whole thing which promotes settlement negotiation in which parties are agreed to discuss without deviation to each other. This method came into existence to tackle most of the problems and try to do possible societal development issues within the ambit of ADR as well as reduce the burden from our judicial system. [4]It is an alternative which shows that the parties have freedom to choose this method and accept it as an alternative to litigation at their own choice. Dispute should be settled at minimum possible expenses in the term of money so that the phenomena alternative dispute resolution has been defined as a dispute settlement method that are very effective and alternative to costly and time taking justice delivery system. The ADR refers to the whole thing which promotes settlement negotiation in which parties are agreed to discuss without deviation to each other. This method came into existence to tackle most of the problems and try to do possible societal development issues within the ambit of ADR as well as reduce the burden from our judicial system. [5]It is an alternative which shows that the parties have freedom to choose this method and accept it as an alternative to litigation at their own choice. Dispute should be settled at minimum possible expenses in the term of money so that the government can easily engage the more resources for some constructive and positive outcome for the development of society. There is a legal system in each and every society to settle the conflicts and whenever any person gets injured then he can go at the door of that legal

[3]Shaeyup Ahmad Shah, "Evolution of ADR in India- Law and Practices" accessed on 17th Feb 22.
[4]Arvind Agarwal, Knowing Alternate Dispute Resolution available at. https://www.russianlawjournal.org accessed on 20th Feb 22.
[5]Arvind Agarwal, Knowing Alternate Dispute Resolution available at. https://www.russianlawjournal.org accessed on 20th Jan 22.

system for justice. Almost all the legal systems are trying their best to execute the legal idea whenever there is wrong in that society because there must be a remedy of almost all the conflicts, so that no one shall have to take law into their hands. The Court has become overburdened with the large numbers of pending cases in the court which ultimately results in dissatisfaction in the society regarding the justice delivery system and its capability to dispense justice comes in question.[6] It is important that this dissatisfaction can be settled and at same time the alternative mechanism should be accepted which do not have less complexities but be as flexible, reasonable and binding on the people adopting it.

HISTORICAL BACKGROUND OF THE CONCEPT OF ADR IN INDIAN CONTEXT

The concept of ADR is not a new concept, it is a movement which is coming from a time immemorial. We can see the development of ADR in India in different passage of time.

• ADR in ancient India: In the ancient era, We see the concept of monarchy in the process of making and administrating rules and regulations in the society. In early times, disputes were flexibly settled by the intermediate actions of Kulas to that of king including the authorities like Srenis, Parishads and Nyaya Panchayat.[7] There was hierarchy of appeal from Kula to King. On the bottom, we see the authority like Kula which was the assembly of elders mainly look into the civil matters including slight criminal matters. Sreni was the authority of group of people who belong to same profession and they were examined to settle the dispute on the request of both parties. Parishad was the assembly of learned people who had the knowledge of law. At that time laws were mainly related to religion due to which we see the concept of legal justice with good conscience in the ancient times. Nyaya Panchayats also play a great role even after Independence. It is a constitutional body used to resolve certain matters in villages. Lastly the King was the superior authority to resolve disputes and maintained check and balance on other authorities.

• ADR in Mughal period: in Mughal empire, there were three independent judicial agencies which were working at the same time. The first was the Courts of religious law which were headed by the Quazis. The second was the Courts of secular law which were mainly administered by Governors, Faujdars, Kotwal and in the cases related to Hindus, they were

[6]Shaeyup Ahmad Shah, "Evolution of ADR in India- Law and Practices" accessed on 17th Feb 22.
[7] Jasime Joseph, "Alternate to Alternatives: A Critical review of claims of ADR" available at http://www.nujs.edu/ accessed on 19th Feb 22.

governed by Brahmins. And lastly there were political courts which were headed by Subahdars, Faujdars, Kotwal etc. But also at that time, most of the villagers settled their disputes in the village courts itself and may appeal to caste courts or panchayats. In this Mughal period also the emperor or the king was the final court of appeal.

• ADR in the British regime: As we all know that our current judicial system is very much similar to the judicial system of the British era. The ADR in India is mainly picked up the pace by the arrival of East India Company and The Bengal Regulation of 1772,1780 and 1781 laid down the foundation of the modern arbitration. After certain modifications and formulations of the provisions from time to time, The Indian Administration Act passed, 1899 was passed and it is based on the English Arbitration Act, 1889. This act was the formal initial attempt to provide flexibility in the process of arbitration but its application was very limited mainly seen in the Presidency towns of Calcutta, Bombay and Madras. Along with the flexibility in the process of arbitration, there were also many defects in this act but it gave a sign of positivity towards the acceptance of ADR in our society formally. After this in the year of 1940, The Arbitration Act of 1940 was enacted in the place of the Act of 1899.[8] It modified the law relating to arbitration in British India even in the independent India until 1996.

• ADR after Independence: These ADR methods are not very fresh as they were in action in different forms even before the modern justice delivery system was introduced by the British rulers. There were various types of arbitral authorities, which led to the outcome of the celebrated panhayati raj (people's rule) system of India, especially in the village areas. Thus, Lok Adalalat (the court of people) created under the panchayati raj was considered very efficient and used to play their role very flexibly. In 1980 the Government set up a Committee under the direction of, a former Chief Justice of the Supreme Court of India Mr. P.N. Bhagwati. After the recommendations of this Committee, the legislature enacted the Legal Services Authorities Act, 1987 in accordance with Article 39A of the Constitution of India. The Legal Services Authorities Act 1987 flexibly executed in its true spirit the usefulness of Lok Adalats for the speedy settlement of disputes. The advantage here after thus system is that justice delayed refers like justice denied, and speedy justice has now been welcomed or honored as a constitutional guaranteed.[9] Even though the international authorities paid attention towards this traditional

[8] Jasime Joseph, "Alternate to Alternatives: A Critical review of claims of ADR" available at http://www.nujs.edu/ accessed on 19th Feb 22.
[9]Shaeyup Ahmad Shah, "Evolution of ADR in India- Law and Practices" accessed on 17th Feb 22.

way of the settlement of disputes. Along with India we can also see the concept of ADR in China, England and United States of America etc

Alternative Dispute Resolution has been come reasonably in India with the commencement the Trade Dispute Act of 1929. The purpose of this Act of 1929 was to provide a conciliation process to do the settlements of disputes in industries through the establishment of the Board of Conciliation and through the Inquiry courts. On the other hand, the certain restrictions have been imposed to reduce the actions of strikes and lock outs. This was modified with Rule 81A of the Defense of India Rules which give powers to the central government to mention to disputes compulsorily to adjudication or voluntarily to conciliation and enforce the decree and gave awards. This rule came with the commencement of in the Industrial Disputes Act of 1947. In order to make arbitration more attractive and much flexible, the Parliament enacted the Arbitration & Conciliation Act of 1996 which says that the award can be opposed only on certain stricter grounds and in a reasonable manner as may be prescribed and ultimately, the Act provided a statutory structure for the resolution of disputes quickly. However, this act only regards matters which are of civil in nature and there is no any relevant act that pertains to the whole of ADR in India, thus also there is a need to improve the current situation because now a day ADR becomes a movement in India.

LAWS RELATED TO ADR IN INDIA:

In Civil Procedure Code 1908:
Section 89 and also rules 1-A to 1-C of Order 10:-

Settlement of dispute the provisions has been inserted by code of CPC (amendment) Act 1999. Section 89 of this code deals with the resolution of disputes outside the court. It is based on the recommendations made by the law commission of India and especially by Malimath committee. It was suggested by law commission of India that the court may demand attendance of any party to the suit or proceeding to appear in person with a thought to come at an cordial settlement of dispute between the parties and do take an attempt to resolve the conflict between parties flexibly. The Malimath Committee says about the obligation for the court to refer their disputes after issues having been made for the settlement by the means of ADR rather than litigation.

In India Arbitration Act, 1899:

The first India Arbitration Act was passed on 1st July 1899.which was mainly based on the British Arbitration Act of 1899 and at that time it was applicable only to the presidency towns

of Calcutta, Bombay, and Madras.[10]A peerless feature in the Act was that the name of the arbitrators were to be mentioned in the contract and the arbitrator can also be a setting judge as held in *Nusserwanjee and Ors V. Meermynooden Khan Wuleed Meer Sudrooden Khan Bahador. In case of Gojendra Singh V Burg*, it was held that the award given in arbitration is nothing but a sort of bargain between the parties. In *Binkurrai Lakshami Prasad V Gaswant Rai Prasad*, the honorable high court said that the Act of 1899 was very complicated, bulky in nature and demanded certain urgent reforms.

In The Arbitration Act of 1940:

At the time of colonial rule a more definite and reasonable Arbitration Act was passed on 14th March 1940 which came into force from 1st July 1940 popularly known as Arbitration Act 1940. This is only single act which was extended to the whole of India including Pakistan The Act implies that it does not legally setting aside and contemplates that an application for setting aside an award may be made under the section 30 and an application of the award is nullity under section 33. Also it was observed that the very act failed in admitting that the arbitration will fail in the case of non subsistence and debility of an arbitration agreement. The Act of 1940 was not covered the falling which was containing in personal or private legal agreement and the rules providing for awards also varied in different High Courts.[11] The shortcomings of the provision restricting an arbitrator from resigning at any time in the course of the proceeding. Because it resulted in heavy loses to the parties and especially where the arbitrator acted with mala fide intention. It was also observed that if an arbitrator was appointed by the court dies during the proceeding of arbitration, there were no other provisions in the said act for the appointment of a new arbitrator which was also a big drawback of the Act of 1940.

The Arbitration and Conciliation Act, 1996:

The Act of 1996 was based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and UNCITRAL Conciliation Rules, 1980.[12] The UN General Assembly had recommended that every state should take into consideration to that Model Law in view of in-consistency of the law of arbitration, their procedures and specially the need of the international

[10]Jasime Joseph, "Alternate to Alternatives: A Critical review of claims of ADR" available at http://www.nujs.edu/ accessed on 19th Feb 22.
[11]Jasime Joseph, "Alternate to Alternatives: A Critical review of claims of ADR" available at http://www.nujs.edu/ accessed on 19th Feb 22.
[12] Marc Jonas Block, "The Benefit of ADR for International Commerce and IP Disputes, Rutgers Law Record, Vol. 44, 2016-17 accessed on 17th Feb 22.

commercial practices. It also suggested the practice of the said rules and regulations in those matters where a conflict arises in the view of international commercial relations and the parties try to look out a friendliness settlement of dispute by taking the assistance of conciliation and by the means of arbitration. These rules play an essential role for the establishment of a combine legal structure for the just, fair, quick, flexible and effective resolution of conflict which arises in international commercial relations.

A report was made by the law commission of India on the basis of the Arbitration Act of 1996 and suggested several modifications. Arbitration and Conciliation (Amendment) Bill, 2003 was in the Parliament on the basis of the suggestions given by the commission. But the Standing Committee of Law Ministry is in opinion that the courts have much intervention in many provisions of the Bill. The Arbitration and Conciliation Act, 1996 mainly focuses on the domestic arbitration. The Act was amended in 2015 and further modifications have been done in 2019.

The Arbitration and Conciliation (Amendment) Bill, 2015 came in the Parliament by the Government of India to modify the Act of 1996 to do engage arbitration procedure in a suitable mode of settlement for the disputes related to commerce and to become India as a focus of international commercial arbitration.[13] The main objective is to amend the Act to design a clear cut distinguish between domestic and international commercial arbitration in context to the definition of the court. As far as domestic arbitration is concerned, the definition of "court" has similar meaning as the definition was in the Act of 1996. However, the term court with respect to international commercial arbitration which means only the High Court of a certain competent jurisdiction.[14] Therefore, the District Courts will have no legitimate power and accordingly the parties can demand their effective and quick settlement of any dispute directly through the High Court which is better to tackle the situations and conflicts in the context of the commercial dispute.

SAILENT FEATURES OF THE ARBITRATION AND CONCILIATION ACT 1996

The main objective of this act is related to the arbitration related to domestic issues, also in the

[13] Marc Jonas Block, "The Benefit of ADR for International Commerce and IP Disputes, Rutgers Law Record, Vol. 44, 2016-17 accessed on 17th Feb 22.

[14]Marc Jonas Block, "The Benefit of ADR for International Commerce and IP Disputes, Rutgers Law Record, Vol. 44, 2016-17 accessed on 17th Feb 22.

dispute of business and commercial disputes, in relation to enforcement of foreign awards and to regulate the laws related to arbitration and conciliation in India.

Salient features are as follows-

- Replacement of three old statutes- It is the consolidation of three acts ie The Arbitration Act 1940, The Arbitration (Protocol and Convention) Act 1937 and The Foreign Awards (Recognition and Enforcement) Act 1961.
- Necessity of Arbitration Agreement- The act emphasizes the need of the arbitration agreement, without which the proceedings related to arbitration cannot be instituted.
- Application to domestic and international arbitration- It is not only limited to domestic arbitration but also for the international arbitration.
- Parties centric approch- Without the consent of both the parties, we cannot initiate it.
- Minimal interference of the judiciary- It is very effective with less complexity in context of proceedings. Only in case of certain objections, rarely the judiciary comes in the picture.
- Clear difference between arbitration and conciliation- Part I delas with arbitration and Part III deals with conciliation.

In the case of *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*[15], the Court gave beneficial features of The Arbitration and Conciliation Act, 1996 as it is based on fair resolution of disputes by impartial tribunal without any delay and in less cost. The autonomous role of the parties is the paramount only as for the safeguard of the public interest.

In case of *FuerstDay Lawson Ltd. v. Zindal Exports Ltd.*[16], The Court held that the object of this act to provide speedy and alternative solution to the dispute and avoid unusual litigation.

CONCLUSION

The ADR refers to the whole thing which promotes settlement negotiation in which parties are agreed to discuss without deviation to each other. This method came into existence to tackle most of the problems and try to do possible societal development issues within the ambit of ADR as well as reduce the burden from our judicial system. [17] There is growing trend that ADR

[15] (2006) 11 SCC 245
[16] AIR 2001 SC2293
[17]Arvind Agarwal, Knowing Alternate Dispute Resolution available at. https://www.russianlawjournal.org accessed on 20th Feb 22.

is becoming more popular as it is less time consuming, more effective & efficient mechanism than the traditional or formal redressal mechanism. There is number of reasons that why people is opting for ADR for their peaceful dispute settlement *firstly*, it is more cost-effective mediators usually claim that mediation is cheaper than moving their issues through court. It can be reasonably much cheaper than taking legal action against anyone. But this is not always the case as when mediation ended in a settlement then people think that it is cheaper as compare to full court hearing but if mediation failed then people just thought that it was nothing but a waste of money.[18] It is important that this dissatisfaction can be settled and at same time the alternative mechanism should be accepted which do not have less complexities but be as flexible, reasonable and binding on the people adopting it. Hence, we can say that till today the alternative dispute redressal mechanism is not appropriate mechanism as one may have to face financial shortage to settle their dispute for which the government may have to come with an appropriate legislation.

REFERENCES-

BOOKS-

1. Alternate Dispute Resolution- The Indian Perspective, Shashank Garg, 1st Edn , 2018.
2. Alternate Dispute Resolution, Dr. SC Tripathi, Central Law Publication, 1st Edn, 2018.

[18] See Dispute Resolution Reference Guide, DEP'T OF JUST. OF CAN., http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprssprd/res/drrg-mrrc/03.html accessed on 19th Feb 22.

3. Arbitration and Conciliation- A Commentary, Saurabh Bindal and RV Prabhat, 1st Edn, 2021

WEBSITES AND RESEARCH PAPERS

1. Lessons from the Alternative Dispute Resolution Movement by Jethro K. Lieberman & James F. Henry.
2. The Benefit of ADR for International Commerce and IP Disputes by Marc Jonas Block.
3. Alternate to Alternatives: A Critical review of claims of ADR by Jasmine Joseph.
4. Evolution of ADR in India- Law and Practices by Shayup Ahmed Shah.
5. Knowing Alternate Dispute Resolution by Arvind Agarwal