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WHY ADR SHOULD BE BETTER INVOLVED IN THE LABORIOUS JUDICIAL SYSTEM: INDIAN SCENARIO

- TWINKLE SHAJI[1]

ABSTRACT

For as long as memory serves, delivery of justice has always been associated with courts, in whichever form they were present at any particular time. Thus, it is believed that our courts as *sentinel on the qui vive* and justice go hand in hand. That is true, but with courts being overburdened and the process of delivering justice taking (in some cases) almost three generations to be achieved, it has become necessary to find alternate solutions in achieving justice, at least in civil cases – an additional system to help the judiciary and the people. Though courts are trying their best to deliver speedy justice, due procedure needs to be followed which can be time consuming. The now booming solution to this has been found in Alternate Dispute Resolution mechanism or ADR for short. These are out of court settlement mechanisms that help realise the same goal outside of court within a shorter span of time.

There are many perks to adopting ADR mechanisms but the question is what role does the judiciary play now? In this paper, the researcher will look into the various provisions of the Code of Civil Procedure, 1908 and the Arbitration and Conciliation Act, 1996 to see how the judiciary has been directed to promote ADR in certain civil cases and how it is to stay out of certain cases respectively. The researcher will also delve into the judiciary's role to check to see if it is stretching into the realm of ADR mechanisms as well – both legislatively and on the basis of judicial decisions. The researcher will most importantly focus her work on what role the judiciary plays as respite to anyone unsatisfied with the ADR mechanism and the result yielded thereon. Relevant case laws and some burning questions vis-à-vis this topic will be searched for and answered in this paper.

[1] Student at GITAM School of Law

INTRODUCTION

Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for generations down the line.[2]

- Hon'ble Thiru Justice S.B.Sinha,
  Judge Supreme Court of India

Alternate Dispute Resolution, hereinafter to be referred to as ADR, is a dispute resolution mechanism. The aim is simple – dispute resolution. Courts are trying the best they can to ensure that every person's rights are upheld and that a fair and just trial or proceedings takes place without making haste. But with things the way they are, it becomes imperative to have another branch of not justice delivering mechanism, but dispute resolving one. The reasons for these will be discussed in detail in the third chapter of this paper.

The judiciary has portrayed a crucial role in endorsing and making India a State that can now be called arbitration friendly. The Apex Court of India and numerous High Courts have approved a "hands-off approach" to disputes that are resolved by the mode of arbitration a party has challenged such decisions. The Indian courts have steadily adopted an arbitration friendly approach in recent times. There are many scenarios when the courts have stood by the arbitration agreement(s) even when the courts have had to suffer some losses or errors, thereby respecting the choice of the parties to settle their disputes my means of arbitration. Further in the paper we will discuss how the Supreme Court in the case of *Enercon (India) Limited & Ors. v. Enercon GmBH & Anr.* has now taken a pro-arbitration stance all the while ignoring the little errors it had to face and keeping the intent of the parties as paramount to go into arbitration.[3]

[2] *ADR and Access to Justice: Issues and Perspectives*, Hon'ble Thiru Justice S.B. Sinha, Judge Supreme Court of India, available at: http://tnsja.tn.gov.in/article/ADR-%20SBSinha.pdf (last accessed on 26th March, 2022)
[3] Enercon (India) Limited & Ors. v. Enercon GmBH & Anr., (2014) 5 SCC 1

OVERBURDENED COURTS

"*The notion that most people want 'black-robed judges', well dressed lawyers and 'fine panelled courtrooms' as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible*."

- Chief Justice Warren E. Burger,

Our Vicious Legal Spiral, 16 JUDGES J. 23, 49 (Fall 1977).[4]

The birth of ADR can be attributed to the courts being overburdened with a lot of work. The sanctioned strength of the subordinate judiciary has seen a rise from 17,715 by the end of 2012 to 20,502 by the end of 2015. The strength allowed in High Courts has also seen significant rise from 906 in the month of March, 2014 to 1079 in 2016.[5] According to 1st May, 2021 reported by the Department of Justice, Ministry of Law and Justice, the Supreme Court has a vacancy of 7 with the sanctioned strength being 34. The situation in the High Courts is worse. With the highest number of vacancies stands the Allahabad High Court with 60 vacancies out of the 160 sanctioned and next comes the Calcutta High Court with 41 vacancies out of the 72 sanctioned.[6]

The judge to population ratio in the nation, keeping note of the sanctioned strength of the number of judges at every level is taking into account sanctioned strength of judges at all levels in 2016 stood at 18 judges for 10 lakhs of the Indian population.[7] There are many reasons for the lack of filling up of these vacancies, some completely agreeable while some still not out for public disclosure. Thus, it becomes vital that this lack of officers and judges does not affect the trials or proceedings by prolonging it more than it has to be. The requirement of an effective judicial system is not only to reach results but to reach them swiftly, said Chief Justice H.L. Dattu in 2015.[8]

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[4] *Some Reflections from the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, Elizabeth S. Stong, 17 Am. Bankr. Inst. L. Rev. 387 (2009)

[5] *Judicial Manpower*, available at: https://doj.gov.in/sites/default/files/Judicial-manpower_1.pdf (last accessed on 26th March, 2022

[6] Vacancy Positions, available at: https://doj.gov.in/appointment-of-judges/vacancy-positions (last accessed on 26th March, 2022)

[7] Ibid fn. 4

[8] Speech of Hon'ble Minister of Law and Justice at The Law Day Function Organised by the Supreme Court Bar Association on 26th November, 2015, Hon'ble Mr. Justice H.L. Dattu, Chief Justice of India, available at:

In the District and Taluka levels, out of the over 99 lakhs of civil cases, more than 50 lakh cases are still pending.[9] In the High Courts, of the 41.6 lakh civil cases, 11.3 lakh of the cases are still pending.[10] These statistics are based on the data as on 1st June, 2021. The statistics speak for themselves. This data proves that courts are overburdened, be it due to them being understaffed or because of the current pandemic situation or any other justifiable reason. This therefore, means that it would be better for the parties and the courts to be able to send suits off to be resolved by way of ADR as that may ensure swift resolution of the disputes all the while also letting the judiciary blow off some steam.

Relevant Provisions & Case Laws

The researcher in this paper will confine herself to the judiciary's role in ADR mechanisms under the Arbitration & Conciliation Act, 1996. Now, the judiciary has, under S. 89 of the Code of Civil Procedure of 1908, been directed to promote out-of-court-settlements in matters where it is visible to the court that there are present elements, that both the parties can agree to. In such a scenario, steps to be followed by the courts have been laid down while referring the matter to either arbitration or conciliation or mediation or judicial settlements or through lok adalats. But the implementation of this section seemed like a colossal task which did not seem to achieve what it was intended to do – reduce the burden on the courts and enforce effective and faster dispute resolution.

In the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd.*[11], the Supreme Court realised some glaringly anomalous errors in the drafting of this section. The court believed that this section made the trial court judges do all the work with nothing left for the conciliators, arbitrators etc. to do. This would need them to spend hours after hours on the negotiations and after all has been done, there seemed to be nothing left for the ADR mechanisms to do. Thus, some changes were introduced. It was stated to not be necessary for the court to reformulate or formulate all the terms for a possible settlement and the second change was that 'mediation' and 'judicial settlement' would be interchanged term wise. Now, S. 98(2)(c) would speak about mediation instead of judicial settlement ans S.

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https://lawmin.gov.in/sites/default/files/MLJ%20Speech%2026.11.2015_0.pdf (last accessed on 26th March, 2022)

[9] National Judicial Data Grid (District and Taluka Courts of India), available at: https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard (last accessed on 27th March, 2022)

[10] National Judicial Data Grid (High Courts of India), available at: https://njdg.ecourts.gov.in/hcnjdgnew/?p=main/pend_dashboard (last accessed on 27th March, 2022)

[11] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Company Pvt. Ltd., (2010) 8 SCC 24

89(2)(d) would speak about mediation in lieu of judicial settlement.[12] The court also held that this interpretation of the section shall remain in force till the errors in drafting the same have been corrected by the legislature. This is to ensure that S. 89 does not become "meaningless and infructuous".[13]

In a 2002 case[14], this section was challenged in court and after that some rules, that needed to be followed while referring to ADR u/S 89 were framed and each High Court also adopted the rules. But to the surprise of the courts, these draft errors had not been spotted by that committee.

Now coming to S. 5 of the Arbitration & Conciliation Act, 1996, hereinafter to be referred to as the Act. This section restricts any judicial authority from intervening in any part except where explicitly provided in Part I. In the case of *Kvaerner Commentation India Ltd. v. Bajranglal Aggarwal*[15] the Supreme Court held that when an arbitration clause is not present in the agreement, then no dispute can be referred to arbitration. This decision does not seem to be promoting arbitration when actually it could have. This would help bring down the number of cases pending in courts and would also ensure speedy resolution of disputes.

So now a question. Can the courts refer a matter to arbitration if the agreement is present and there is a clause to refer any dispute to any of the ADR mechanisms? The answer would be yes unless fraud is alleged or there involves a question of fact or of law.[16] S. 8 of the Act also allows the judicial authority (it includes more bodies than just the judiciary) to refer a dispute to arbitration if there a night clause of the same. The requirement of a 'dispute' u/S. 8 has been well explained in the case of *Maruti Udyog Ltd. v. Mahalaxmi Motors Ltd & Anr*.[17] The Delhi High Court said,

"*What is material for the purpose of Section 8 of the Arbitration Act is that there should be existence of 'difference or disputes' with regard to a particular liability 'arising out of the terms of the agreement'. If the liability is acknowledged and admitted it does not come within the meaning and ambit of disputes and differences.*"

[12] *Judicial Settlement under Section 89 C.P.C. A Neglected Aspect*, Justice S.U. Khan, available at: http://ijtr.nic.in/Article_chairman%20S.89.pdf (last accessed on 26th March, 2022)
[13] Ibid fn. 10
[14] Salem Advocate Bar Association, Tamil Nadu v. Union of India, (2003) AIR 189 SC
[15] Kvaerner Commentation India Ltd. v. Bajranglal Aggarwal, (2012) 5 SCC 214
[16] N. Radha Krishnan v. Maestro Engineers, (2010) 1 SCC 72
[17] Maruti Udyog Ltd. v. Mahalaxmi Motors Ltd & Anr., (2002) 1 Arb.LR 271 Del.

These provisions and the decisions of the courts have helped ADR mechanisms come a long way. They have opened doors to better opportunities that parties can opt for while ensuring that the principles of natural justice are at play.

Conclusion

One of the main objectives of The Arbitration & Conciliation Bill of 1995 was to curtail the supervisory role of courts in the process of arbitration. This objective has been placed u/S 5 of the Act which specifies the degree of judicial intervention and in no uncertain terms.[18] The judiciary does not have much of a role to play when it comes to ADR mechanisms unless otherwise expressly specified. An appeal can be made in a court of law against any orders specified u/S 37 of the Act and an application to set aside an arbitral award can also be made u/S 34.

In a plethora of judgments, Indian judiciary has reaffirmed its stance on this settled principle of law and has stated that the Act u/S 5 clearly intents to curb judicial intervention. But the Courts' stance has not been sufficient in promoting ADR mechanisms in India. Changing from ad-hoc methods to institutionalised arbitration might help foreign entities opt for arbitration in India. Judges dealing with cases referable to ADR need to increased to increase interest in the minds of the people. Frivolous petitions that challenge the arbitral tribunal awards in courts need to be fined heavily to prevent the same in the future all the while maintaining the stand of the judiciary.

In India, we see that criminal cases cannot be referred to ADR mechanisms. This is because, in criminal cases, the main objective is achieving justice because a crime is not just committed against a person, but against the society in whole. But for civil cases, the main objective of the parties is to resolve their disputes speedily, economically & finally and this is also the objective of ADR.[19] Because it is rightly said by William E. Gladstone that if justice is delayed then it is deemed to have been denied. And in this case, justice to the parties would be speedy dispute resolution.

[18] pg. 39, Law of Arbitration & Conciliation, Avtar Singh, EBC Publishing (11th ed. 2021)
[19] Ibid fn. 2 pg. 8

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