

SCOPE OF ALTERNATE DISPUTE RESOLUTION IN INDIA

*K.Ramakrishnan,
Addl.District Judge, Mavelikara.*

Time has come to think to provide a forum for the poor and needy people who approach the Law Courts to redress their grievance speedily. As we all know the delay in disposal of cases in Law Courts, for whatever reason it may be, has really defeated the purpose for which the people approach the Courts to their redressal. Justice delayed is justice denied and at the same time justice hurried will make the justice buried. So we will have to find out a via media between these two to render social justice to the poor and needy who wants to seek their grievance redressed through Law Court. Considering the delay in resolving the dispute Abraham Lincon has once said:

“Discourage litigation. Persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time”.

“In the same vein Judge Learned Hand commented, “I must say that as a litigant, I should dread a law suit beyond almost anything else short of sickness and of death”.

A committee was formed under Indira Gandhi Government, to recommend measures at national level to secure for the people a democracy of remedies and easy access to justice. In one of such committee meetings a dialectical diagnosis of the Pathology of Indo Anglican Judicial Process was presented by the committee as follows:

“Where the bulk of people are backward social and economic status but the national goal is social and economic justice, the rule of law, notwithstanding its mien of majestic equality but fail its mission in the absence of a scheme to bring the system of justice near to down-trodden. Therefore it becomes a democratic obligation to make the legal process a surer means to Social Justice”.

All the above has made us to think and find out a way to resolve the dispute between the parties otherwise than by going to law Court which is called the Alternate Dispute Resolution”.

Concept of Alternate Dispute Resolution in Olden days in India

Before formation of law Courts in India, people were settling the matters of dispute by themselves by mediation. The mediation was normally headed by a person of higher status and respect among the village people and such mediation was called in olden days “Panchayath”. The Panchayath will be headed by a person of higher statues, quality and character who will be deemed to be unbiased by people of the locality, called Village headman and he was assisted by some people of same character or cadre from several castes in the locality. The dispute between individuals and families will be heard by the Panchayath and decision given by the Panchayath will be accepted by the disputants. The main thing that will be considered in such Panchayath will be the welfare of the disputants as also to retain their relationship smooth. Similarly in the case of dispute between two villages, it will be settled by Mediation consists of person acceptable to both villages and people from both the villages and the decision of such mediation will be accepted by both village people. The disputes in olden days seldom reached law Courts. They will be even settling the complicated civil disputes, criminal matters, family disputes etc. Such type of dispute resolution maintained the friendly relationship between the disputants even after resolution of their disputes. But subsequently, this type of Panchayath has failed due to intervention of politics and communal feeling among the people.

Alternate Dispute Resolution in Modern India

(1) Labour law:-

The first avenue where the conciliation has been effectively introduced and recognized by law was in Labour law, namely Industrial Disputes Act, 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management. The provision in the I.D. Act makes it attractive for disputing parties to settle disputes

by negotiation and failing that through conciliation by an officer of the Government, before resorting to litigation. Several provisions in the Act get the scene for conciliation to be more successful.

(1) The conciliation is by an Officer of the Labour Department in the Government.

(2) The parties may not go on strike or declare a lock out during the period of conciliation.

(3) The conciliation officer shall make all effort to settle the dispute by conciliation (Section 12(2)).

(4) The agreement reached in the process of conciliation shall be certified by the Conciliation Officer as fair settlement (Section 12(3)).

(5) Such settlement shall bind all the other trade Union that are party to the dispute and are invited to participate in the conciliation but prefer to stay away from the conciliation process (Section 18(3)).

(6) The settlement is a self-executing document and breach of the settlement condition by the Management is a ground for recovery of the due under simplified summary procedure (Sec.33 C).

All parties to an industrial dispute who have had the misfortune of going through litigation knew that it is a tedious process and one which could go well beyond the life time of some of the beneficiaries. It is this factor that has contributed greatly to the success of conciliation in industrial relations.

Judicial approach to ADR in India

The only field where the Courts in India have recognized ADR is in the field of arbitration. The arbitration was originally governed by the provisions of the Indian Arbitration Act, 1940. The Courts were very much concerned over the supervision of Arbitral Tribunals and they were very keen to see whether the arbitrator has exceeded his jurisdiction while deciding the issue, which has been referred to him for arbitration. The scope of interference of the award passed by an arbitration was dealt with by the Apex Court in the decision reported in *Food Corporation of India Vs. Jogindarlal Mohindarpal* 1989(2) SCC 347 as follows:

“Arbitration as a mode for settlement of disputes between the parties has a tradition in India. It has a social purpose to fulfill today. It has a great urgency today when there has been an explosion of litigation in the Courts of law established by the sovereign power. However in proceedings of arbitration, there must be adherence to justice, equality of law and fair play in action. The proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure, which will lead to a proper resolution of the dispute and create confidence of the people, for whose benefit these procedures are resorted to. It is therefore, the function of the Court of law to oversee that the arbitrator acts within the norms of Justice. Once they do so and the award is clear, just and fair, the Court should as far as possible give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator. It is in this perspective that one should view the scope and limit of corrections by the Court of an award made by the arbitrator. The law of arbitration must be made simple, less technical and more responsible to the actual realities of the situation but must be responsible to the canon of justice and fair play. The arbitrator should be made to adhere to such process and norms which will create confidence not only doing justice between parties but by creating a sense that justice appears to have been done”.

The Courts were anxious to see whether there was any jurisdiction to the arbitrator to decide such dispute or not while interpreting the arbitration clause in the agreement. The power to decide the jurisdiction of the arbitrator to decide a particular issue or not was vested with the Law Courts (See 1996(3) SCC 568 (*Union of India Vs.G.S.Alwal & Co.*) and 1996(2) SCC 216 (*State of Orissa and another Vs.Damodar Das*)).

There was much delay in settlement of disputes between the parties in law Courts which prevented investment of money in India by other countries. Further there was no provision in the Indian Arbitration Act 1940 to resolve a dispute between an Indian and a non-Indian as the law-relating contract between the parties were different which caused difficulties to refer such matter for arbitration. In order to avoid such a difficulty, India has undertaken major reforms in its arbitration law in the recent year as part of economic reforms initially in 1991. Simultaneously many steps have been taken to bring judicial reforms in the

country, the thrust being on the minimization of Courts intervention in the arbitration process by adoption of the United Nations Commission on International Trade Law (UNCITRAL). With this in mind, the Government has given birth to a new legislation called "The Arbitration and Conciliation Act 1996". There are distinctive feature in this Act compared to 1940 Act.

(1) When there is an arbitration agreement, the Court is required to direct the parties to resort to arbitration as per the agreement (Sec.8).

(2) The ground on which the award can be challenged now minimized on the basis of invalidity of agreement, want of jurisdiction on the part of arbitrator or want of proper notice to a party of the appointment of arbitrator or of arbitral proceedings or a party being unable to present his case. At the same time an award can be set aside if it is in conflict with "the public policy in India, a ground which covers inter alia fraud and corruption".

(3) The power of the arbitrator himself have been amplified by inserting specific provision on several matters such as law to be applied by him, power to determine the venue of arbitration, failing agreement, power to appoint experts, power to act on the report of a party, power to apply to the Court for assistance in taking evidence, power to award interest and so on.

(4) Provision to adopt obstructive method by parties to agreement are thwarted by providing express provision to that regard.

(5) Role of arbitral institution in promoting arbitration has been recognized for the first time in law.

(6) Provision has been made for appointment of arbitrator by Chief Justice Scheme which takes the act of selecting arbitrator by Court outside the litigation process and makes it an administrative act. Parties are given the liberty to select the arbitrator and only in cases when the parties failed to nominate their arbitrator, the Court's intervention need be sought.

(7) Time limit for conducting the arbitration proceedings has been deleted which is a drastic change in the new Act compared to old Act where the time will have to be extended only by Court when there is time limit is provided.

(8) Formal written agreement to arbitration as provided under the old Act has been now relaxed.

(9) Though the parties to the agreement held the arbitration in India, the parties to the contract are free to designate the law applicable to the substance of the disputes.

(10) The Arbitrator has been clothed with power to grant interim relief.

(11) Arbitrator has been given the power to decide his own jurisdiction to decide the dispute.

(12) The Act provides for various other saving measures such as requiring an arbitrator to disclose any possible bias at the threshold itself (Sec.12)

(13) Even if an arbitrator is replaced, the proceedings conducted by him are saved. This reduces the delay.

(14) The arbitrators are directed to give reason for their conclusion unless it has otherwise provided in the agreement. Further there is no necessity for the party to arbitration to get the award made a rule of Court as required under the old Act and the award passed by the arbitrator will have the force of a decree.

Further provision has been made to deal with international arbitration, which was not provided, in the old Act.

Further matters disclosed to arbitrator has been protected from disclosure unless otherwise required by law to do so. This gives the parties to the arbitration to disclose their views freely.

Family Law:

The other area where Alternate Dispute Resolution recognized in India is in family law.

Section 5 of the Family Court Act provides provision for the Government to require the association of Social Welfare Organisation to hold the family Court to arrive at a settlement. Section 6 of the Act provides for appointment of permanent counsellors to effect settlement in the family matters. Further Section 9 of the Act imposes an obligation on the Court to make effort for settlement before taking evidence in the case. In fact the practice in family Court shows that

most of the cases are filed on sudden impulse between the members of the family, spouse and they are being settled in the conciliation itself. To this extent the alternate dispute resolution has got much recognition in the matter of settlement of family disputes. Similar provision has been made in Order XXXII A of C.P.C. which deals with family matters.

Code of Civil Procedure.

By amendment of the Code of Civil Procedure in the year 2002, Sec.89 has been included in the code, which gives importance to mediation, conciliation and arbitration. This section casts an obligation on the part of the Court to refer the matter for settlement either before the Lok Adalath or other methods enumerated in that section itself.

Legal Services Authority Act:

The other legislation, which has given more emphasis on the alternate dispute resolution, is the Legal Services Authority Act 1985. Though settlements were effected by conducting Lok Nyayalayas prior to this Act, the same has not been given any statutory recognition. Matters settled in the Nyayalayas earlier were made decree by the Court in which the case was filed on the basis of settlement arrived at between the parties. But under the new Act, a settlement arrived at in the Lok Adalaths has been given the force of a decree which can be executed through Court as if it is a decree passed by a Competent Court.

Further provision has been made in the Act for settling pre-litigation cases through such adalaths. Power has been given to the Lok Adalaths constituted under the Act, to decide the dispute referred to them, to effect settlement by mediation and if settlement is arrived at between parties to draw a decree on the basis of compromise and the same will be signed by the members of the Adalath which consist of a judicial Officer working or retired, a lawyer and a person of social welfare association preferably women and a copy of the same will be given to the parties free of costs. This has really reduced delay in getting copy of the decree by the parties. Lok Adalaths have acquired wide acceptance among the

public as the results are quick, less expensive and no appeal will lie against the award passed in a Lok Adalath.

Advantage of Alternate Dispute Resolution:

- 1) It is less expensive.
- 2) It is less time consuming.
- 3) It is free from technicalities as in the case of conducting cases in law Courts.
- 4) The parties are free to discuss their difference of opinion without any fear of disclosure of this fact before any law Courts.
- 5) The last but not the least is the fact that parties are having the feeling that there is no losing or winning feeling among the parties by at the same time they are having the feeling that their grievance is redressed and the relationship between the parties is restored.

Conclusion:

With the advent of the alternate dispute resolution, there is new avenue for the people to settle their disputes. The settlement of disputes in Lok Adalath quickly has acquired good popularity among the public and this has really given raise to a new force to alternate dispute resolution and this will no doubt reduce the pendency in law Courts. The scope of alternate dispute resolution system (ADR) has been highlighted by the Hon'ble Chief Justice of India in his speech in the joint conference of the Chief Ministers of the State and Chief Justice of High Courts, held at Vigyan Bhavan, New Delhi on September 18, 2004 and insisted the Courts to try settlement of cases more effectively by using alternate dispute resolution system so as to bring down the large pendency of cases in law Courts. I conclude the article by saying that alternate dispute resolution will really achieve the goal of rendering social justice to the parties to the dispute, which is really the goal of the successful judicial system.
