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NEED OF RESOLUTION AWARD OF ARBITRATION / MEDIATION/ CONCILIATION BEFORE PROCESSING FOR COURT

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ABSTRACT

Since the introduction of the "multi-door courthouse" concept at the Pound Conference, court-annexed mediation programs have been established in increasing number. The courts' increasing association with mediation programs begs the question of whether they should compel disputing parties to attempt mediation, especially in jurisdictions where mediation has not been widely utilized.

The origin of 'Arbitration' may be traced back to the age old system of village panchayats prevalent in India. The decisions of the 'panchas' were adhered with reverence by the members of the society with a popular belief that they were the embodiment of voice of God. This mode of divine dispensation of justice underwent radical changes with the changing pattern of society and growth of human knowledge and civilization.The complexities of modern commercial transactions in the wake of globalisation of economy have necessitated effective redress mechanism for speedy settlement of domestic as well as international commercial disputes with a view to ensure uninterrupted flow of trade and commerce. This has been possible through measures such as arbitration, conciliation and

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mediation which are considered as relatively less expensive and speedy as compared with the traditional court proceedings which are expensive, dilatory and involve a complex and cumbersome procedure. Though these are the alternative methods of dispute resolution but they are the formal setups with legal recognition. There are other more informal setups like the caste-panchayats, gram-panchayats etc prevalent in India. This paper attempts to study the various alternative dispute redresal avenues available and the is there any conflict amongst such formal and informal setups.

KEYWORDS : mandatory mediation, court-annexed mediation

INTRODUCTION

As per the NJDG data, as on 6/6/2019, there are 31111546 Cases pending across the country. Out of which 8827748 Civil Cases and 22283798 Criminal Cases. 71.67% (6326458) cases and 72.91% (16248097) criminal cases are pending for more than one year.1 NJDG has given data on the pendency of cases ranging from 2 to 10 years also. For reducing the number of pending cases in courts, government along with judiciary have taken various initiatives such as, speed up the process, the establishment of newcourts and increase the number of judges, etc. Apart from those initiatives, the government has amended Section 89 of Civil Procedure Code 1908 and mandated the courts to try out the possibilities of resolving the pending civil disputes through arbitration or mediation or Lok Adalat. Though this amendment has been passed by the parliament in the year 1999 still, it has been enforced in the year 2002.

Arbitration is an ADR (alternative dispute resolution) method where the disputing parties involved present their disagreement to one arbitrator or a panel of private, independent and qualified third party "arbitrators." The arbitrator(s) determine the outcome of the case.

Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. Mediation is a "peaceful" dispute resolution tool that is complementary to the existing court system and the practice of arbitration.

Conciliation is another dispute resolution process that involves building a positive relationship between the parties of dispute, however, it is fundamentally different than mediation and arbitration in several respects. Conciliation is a method employed in civil law countries, like Italy, and is a more common concept there than is mediation. While conciliation is typically employed in labour and consumer disputes, Italian judges encourage conciliation in every type of dispute . The "conciliator" is an impartial person that assists the parties by driving their negotiations and directing them towards a satisfactory agreement.

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CONSTITUTIONAL VALIDITY OF SECTION 89 OF CPC

Under Section 89, CPC, consent of the parties is mandatory. The justification for the mandatory nature of reference is that the absence of consent for reference does not affect the voluntary nature of the mediation process as the parties still retain the freedom to agree or not to agree for settlement during mediation.The referral court should apply its judicial mind objectively to ascertain the factors facilitating a successful mediation by using his judicial experience.Generally, the reluctance for mediation by the parties at the initial stage of the litigation is due to the reason that they do not want to settle the dispute with his rival who dragged him to the litigation. Another reason is an apprehension that the other party might consider his readiness for mediation as a weakness of his case. However, mandatory mediation provides a platform to the parties to think about an alternative option for settlement of their disputes.

Section 89 of CPC states that "where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for –

a) Arbitration

b) Conciliation

c) Judicial Settlement including Settlement through LokAdalat or

d) Mediation

The constitutional validity of Section 89 of CPC was challenged before the Supreme Court of India in Salem Advocate Bar Association v. Union of India which is popularly known as Salem Advocate Bar AssociationIand the Apex Court has upheld the constitutional validity of this section.4 For overcoming some procedural aspects.

The Apex Court has constituted a committee to frame suitable rules for smooth implementation of section 89 of CPC. The committee has submitted its report along with model rules on the implementation of section 89 of CPC in 2005 to the Apexcourt. The Supreme Court has accepted that model rules in Salem Advocate Bar Association II and it has asked all High Courts to frame similar rules for their respective jurisdictions for the better implementation of section 89 of CPC.5

In Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) LTD,6 the apex court has further laid down some detailed guidelines especially, on the referral of the dispute to each ADR mechanisms and which kind of civil dispute can be referred under Section 89. In this case, the court held that if the dispute is going to be referred to arbitration or conciliation then, both parties must give their consent; whereas, if the dispute is going to be referred to mediation or Lok Adalat then, there is no requirement of the parties consent. In this case, the apex court also lists out the disputes which are capable and non-capable of settlement through ADR mechanisms.

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EXECUTION UNDER THE ARBITRATION AND CONCILIATION ACT , 1996

Section 2(1)(e) of the Act defines 'Court' and Section 42 which provides for jurisdiction determines the Court to which all applications under Part I of the Act are made before, during or after arbitral proceedings. The Hon'ble Supreme Court34 while interpreting these provisions held that the expression 'with respect to an arbitration agreement' widens the scope of Section 42 to include all matters which directly or indirectly pertain to an arbitration agreement.

Section 36 of the Act likens an Arbitral Award to a Decree of the Civil Court and therefore provides for it to straightaway be executed to realize the decretal amount. However, there is no provision in the Act which likens the Arbitral Tribunal to a Court which passed the Decree. There is also no provision for an Arbitral Tribunal to execute its own Award. Inevitably, the Decree has to be brought for execution before an executing Court. As per the Code, a decree can be executed by the Court which passes the decree or where the Judgment Debtor is residing or carrying on business or having immovable property. However, the Act of 1996 is special law which prevails over the general provisions of the Code35.

In view of this, a doubt is raised as to whether an Award can be executed under Section 36 of the Act in any jurisdiction different to the place where the Award has been passed, without requiring such award to be transferred to the executing Court by the competent Court as per Section 42.

CASES WHICH CAN'T BE REFERRED TO ADR

1. Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).
2. Disputes relating to election to public offices (as contrasted from disputesbetween two groups trying to get control over the management of societies,clubs, association, etc.).
3. Cases involving the grant of authority by the court after inquiry, as for example, suits for grant of probate or letters of administration.
4. Cases involving serious and specific allegations of fraud, fabrication ofdocuments, forgery, impersonation, coercion, etc.
5. Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the government.
6. Cases involving prosecution for criminal offences.

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CASES WHICH CAN BE REFERRED TO ADR

1. All cases relating to trade, commerce, and contracts, including – disputesarising out of contracts (including all money claims);
   a. Disputes relating to specific performance;
   b. Disputes between suppliers and customers;
   c. Disputes between bankers and customers;
   d. Disputes between developers/builders and customers disputes between landlords and tenants/licensor and licensees;
   e. Disputes between the insurer and insured;
2. All cases arising from strained or soured relationships, including
   a. Disputes relating to matrimonial causes, maintenance, custody ofchildren;
   b. Disputes relating to partition/division among family members/coparceners/co-owners; andDisputes relating to a partnership among partners.
3. All cases where there is a need for continuation of the pre-existing relationshipin spite of the disputes, including
   a. Disputes between neighbors (relating to elementary rights,encroachments, nuisance, etc.);
   b. disputes between employers and employees;
   c. disputes among members of societies/associations/Apartment ownersAssociations;
4. All cases relating to tortious liability including - claims for compensation inmotor accidents/other accidents; and
5. All consumer disputes including disputes where atrader/supplier/manufacturer/service provider is very keen on maintaining hisbusiness/professional reputation and credibility or 'product popularity'.

In this case, the Supreme Court further highlighted that there is a typographical errorin section 89 of CPC and which must be rectified. It also stated that while referring the disputes, the judge must careful which ADR he is suggesting or the parties arepreferring and the nature of the dispute which he is referring.

DELAYS IN THE COURT PROCESS AND THE DEVELOPMENT OF ADR.

In addition to the recognition by the legal profession and the courts that some disputes can be better resolved by agreement rather than court decision, the emergence in Ireland (and internationally) of alternative dispute resolution processes has also been associated with real problems of delays in the

court system. An undoubted advantage of mediation and conciliation is the ability to get speedy access to a process that may produce a satisfactory outcome for the parties in a short space of time. The Commission accepts that any long delays in the court process involve clear barriers to justice: justice delayed is, indeed, justice denied. While some ADR processes may have emerged in response to delays in the court process, the Commission also considers it is important to note that the court process has not stood still or ignored the problem of delay.

THE COURT PROCESS AND ADR

The court process in Ireland has responded to the problem of delay - and the connected development of ADR processes - with important initiatives. For example, the Commercial Court list in the High Court, which was established in 2004 to deal with large commercial disputes, uses active judicial case management to improve the efficiency of the litigation process itself and also encourages the use of mediation and conciliation. Similarly, the Smalls Claims Court in the District Court is a mediation process for certain consumer disputes (which can be filed on-line and is available for a small handling fee), under which the first step is to seek informal resolution of the dispute using a document-only approach. In a wider setting, the Family Mediation Service6 provides an important alternative resolution facility in the context of family conflicts. The Commission also notes in this respect that, in its Report on Consolidation and Reform of the Courts Acts, 7 it has recommended that the existing Courts Acts, which comprise over 240 Acts (146 of which precede the foundation of the State in 1922) should be consolidated and reformed into a single Courts (Consolidation and Reform) Act. The Commission's draft Courts (Consolidation and Reform) Bill attached to that Report proposes a number of detailed reforms aimed at enhancing the effectiveness of the administration of justice in the courts. This would include enhancing the efficiency of civil proceedings, and would build on the important initiatives, such as those connected with the Commercial Court, which have been developed in Ireland in recent years. That Report includes proposals concerning judicial case management and the obligation on parties in civil proceedings to conduct their proceedings efficiently; as well as supporting current arrangements to inform parties, where appropriate, of alternative dispute processes, including mediation and conciliation.

EFFICIENCY, INCLUDING COST EFFICIENCY

Research on the efficiency of ADR processes (some based on Irish experience) indicates that mediation and conciliation processes often provide a speedy resolution to a specific dispute.9 That research also indicates that there is – to put it simply – no such thing as a free conflict resolution process, alternative or otherwise. Where the resolution process is provided through, for example, the courts or the Family Mediation Service, most or all of the financial cost is carried by the State. Where the resolution process involves private mediation, the cost is often shared by the parties involved. The Commission accepts, of course, that the additional financial costs involved in an individual case that

goes through an unsuccessful mediation and must then be resolved in litigation has to be balanced against the possible savings where a complex case is successfully mediated. The Commission nonetheless considers it is important not to regard ADR as a patently cheaper alternative to litigation costs; in some instances, it may be, but where a mediation or conciliation is not successful it obviously involves additional expense. On the whole, the Commission accepts that careful and appropriate use of ADR processes is likely to reduce the overall financial costs of resolving disputes.

ROLE OF COURT-ANNEXED MEDIATION IN SECTION 89 REFERRAL

The mediation manual of India highlighted the advantages of referring the disputes to court-annexed mediation centers in the following words-

"The judges, lawyers, and litigants become participants therein, thereby giving them a feeling that negotiated settlement is achieved by all the three actors in the justice delivery system. When a judge refers a case to the court-annexed mediation service, keeping overall supervision on the process, no one feels that the system abandons the case. The Judge refers the case to a mediator within the system. The same lawyers who appear in a case retain their briefs and continue to represent their clients before the mediators within the same setup. Where ADR procedures are overseen by the court, at least

in those cases which are referred through courts, the effort of dispensing justice can become well-coordinated.

Supreme Court has explained the confidentiality of the mediation proceedings and content of the mediation report by the mediator to the referred court in the following words-

"Mediation proceedings are totally confidential proceeding. This is unlike proceedings in Court which are conducted openly in the public gaze. If the mediation succeeds, by both the parties to the Court without mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the 'Mediation has been unsuccessful'. Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counteroffers, and proposals are made by the parties butuntil and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process."

PROPOSED AMENDMENT IN SECTION 89 OF CPC

Our research team would like to suggest the following amendment under section 89 of CPC ADR referral-

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1. Where it appears to the court, having regard to the nature of the dispute involved inthe suit or another proceeding that the dispute is fit to be settled by one of the ADRmechanism then, the court shall, preferably before framing the issues, record itsopinion and direct the parties to attempt the resolution of dispute through one of thesaid ADR processes which the parties prefer or the court determines.
2. If the court decides or the parties prefer the reference of dispute to any non-adjudicatoryalternative dispute resolution processes, including conciliation,mediation, judicial settlement, settlement through Lok Adalat, DRB, Early NeutralEvaluation, mini-trial and ODR then, the court shall refer the same to such ADRmechanisms with the consent of the parties or its own motion. However, the courtcannot refer the dispute to Conciliation, mini-trial, Early Neutral Evaluation, DRBwithout the written consent of the parties.

THE NECESSITY OF COURT-MANDATED MEDIATION

As the title of this paper suggests, mandatory mediation appears to be a glaring contradiction. Formality is eschewed within mediation because this mode of dispute resolution emphasizes self-determination, collaboration and creative ways of resolving a dispute as well as addressing each party's underlying concerns.Any attempts to impose a formal and involuntary process on a party may potentially undermine the raison d'^ etreof mediation. In view of this danger, there must be compelling reasons to introducemandatory mediation.

A. Empirical Studies on the Benefits of Mediation

The issue of whether to introduce mandatory mediation presupposes that mediation yields benefits that are both verifiable and well-accepted. However, some writers opine that these benefits are over-stated and have not been subject to rigorous empiricalscrutiny.Some studies have also revealed that the parties who attempted mediation did not necessarily view the mediation process more favorably than the litigation process. Furthermore,other studies have found that mediated agreements did not increase the level of compliance or reduce subsequent disputing.

B. Mandated Mediation: A Temporary Expedient

Despite its documented advantages, mediation may well be under-utilized in certain jurisdictions. Parties and their attorneys are still accustomed to treating litigation as the default mode of dispute resolution; initiating mediation may also be perceived as a sign of weakness. In many jurisdictions, the rates of voluntaryusage of mediation have been low. For instance, in England's Central London County Court system in which mediation occurred only with the parties' consent, only 160 mediations took place out of the 4,500 cases in which mediation was offered.20 In contrast,

after England introduced the Civil Procedure Rules, which empowered the courts to encourage the use of ADR (with cost sanctions), the number of commercial disputes referred for mediation

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increased by 141 percent. Hence, the full benefits of mediation are not reaped when parties are left to participate in it voluntarily.

AWARD OF COSTS OF MEDIATION AND CONCILIATION WHERE CONNECTED TO PROCEEDINGS

(1) Where a court has invited parties to consider using mediation or conciliation in accordance with section 16, the court, in awarding costs in the proceedings connected with that invitation (or, as the case may be, any appeal in those proceedings) may, where it considers it 219 just, have regard to any unreasonable refusal of any party to consider using mediation or conciliation where such a process had, in the Court's opinion, a reasonable prospect of success.

(2) Where a court has invited parties to consider using mediation or conciliation in accordance with section 16, the court may, in the absence of an agreement by the parties as to financial cost made in accordance with section 10, make such order for costs incurred by either party in connection with the mediation or conciliation process as it considers just, including an order that both parties bear the costs equally.

CONCLUSION

Effective implementation of the rules regarding mandatory mediation is essential to tackle proliferation of litigation and its resultant pendency. Reluctance of Referral Judges and lawyers to promote mandatory mediation at the initial stages of introduction of mediation due to the reason of unawareness of the object of mediation, apprehensions about losing out judicial powers and the lawyers' apprehension of reduction of briefs and income is changing gradually. Effective sensitization programs to Referral Judges, mediators, lawyers and clients is necessary to inspire the stakeholders of mediation to promote mandatory mediation in cases where there is a higher probability of settlement through mediation. Mandatory mediation can be effectively implemented in all civil cases in the same way as that of the implementation of mandatory mediation in matrimonial disputes. To ensure it instead of relying on the Mediation Rules framed by the High Courts, introduction of appropriate legal provision is necessary in the existing laws.

Abraham Lincoln puts the philosophy of Alternate Dispute Resolution systems by declaring "discourage litigation; persuade your neighbours to compromise whenever you can. Pointout to them how the normal winner is often a loser in fees, expenses, cost and time." Further, the Constitution of India has defined and declared the common goal for all of us as — "to secure to all the citizens of India Justice social, economic and political; Liberty; Equality and Fraternity". ADR is a vehicle to achieve these principles and objectives. Increased awareness of ADR is the need of the hour. Despite many advantages of using Alternative dispute resolution mechanisms, our society has been reluctant to give it its due recognition .The predominant reason being that a litigation ridden society is generally unable to explore consensual dialogue or arrive at an amicable solution. The ADR practitioner

therefore acts like a healer of conflicts rather than a combatant. It is similar to the Panchayats system we have in our villages. The resolution of disputes is so effective and widely accepted that Courts have more often recognised them. Sir John Wallis observed that the reference to a village Panchayat is the time-honoured method of deciding disputes. It avoids protracted litigation and is based on the ground realities verified in person by the adjudicators and the award is fair and honest settlement of doubtful claims based on legal and moral grounds.

RECOMMENDATIONS

Our research team would like to recommend that there must be a regular audit of court annexed mediation with regards to a number of cases filed and resolved in a particular centre. Based on this information dispute centric mediation process can be developed. Further, there must be concrete information about the number of mediation conducted by the MCPC mediation trainees.

Our research team would like to suggest that adequate training must be given to the advocates and judges about various conventional and new form of ADR mechanisms and the importance and features of these mechanisms. Awareness program must be planned specifically for the litigants and the common public who will be the future litigants on the availability of ADR mechanisms for the resolution of their disputes.

NJDG must maintain a separate data on the section 89 referral and do the regular audit on the success and failure of referred cases and thereby, the government could able tobring suitable special dispute resolution policy for each dispute on regular basis.

Awareness of ADR through seminars, workshops and other means and its supervised and systematic implementation should be encouraged so that its effectiveness is proved and the message reaches a large section of population. Also, apart from a good law that provides for resolution of disputes, it is rudimentary to extend or create facilities, services, and infrastructure that shall enable the implementation of such rules and lead to effective ADR practice. Effective coordination both at operational and structural level is a prerequisite of any successful ADR mechanism. Pre-trial conciliation and fixing the targets for dispensation of justice are imperative for successful implementation of any ADR mechanism. Proper training of the Mediators, Negotiators, and Conciliators should be a mandatory requirement for the understanding of the disputes/ cases and its efficient handling. The specialized firms or organizations are certainly more promising and reliable in this sphere and people choose to consult them and engage their services for dispute resolution.