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A Socio-Legal Study of Challenges in Resolving Disputes through ADR and Future of Alternative Dispute Resolution in Contemporary World with Special Reference to India

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ABSTRACT

Speedy trial and prompt delivery of Justice are the most important aims of all legal systems in the World. Due to pendency of cases in traditional judicial system, Alternative Dispute Resolution has been emerged. Other factors such as expensive legal procedures, delay in Court proceedings and high technicality involved in the Court room are responsible for the growth of Alternative Dispute Resolution. For example In India, the Arbitration and Conciliation Act 1996 has been introduced in order to reduce burden on the judiciary. For the purpose of approaching arbitration, many people are adding arbitration clause and seat of the proceedings in their agreements. Simple process of Alternative Dispute Resolution, less expenditure, flexibility, speedy process, confidentiality of the matters, presence of experts etc. are some of the benefits of this method. Besides advantages of Alternative Dispute Resolution, some critical challenges are blocking the path of its success. Factors such as Lack of awareness, inapplicability in criminal cases, lack of skilled advocates, absence of execution proceedings, lack of government support, lack of precedents and poor infrastructure are working as hindrances in proper implementation of Alternative Dispute Resolution. Moreover, Alternative Dispute Resolution is not applicable to all types of cases. In case of international arbitration, the field is dynamic because of diversity, technology, environmental factors, cyber security. Though Alternative Dispute Resolution is suffering from so many defects, it will be more efficient in near future internationally. The Parliament of India is trying to make proper amendments to the Arbitration and Conciliation Act 1996 in order to cope up with the new situations and problems. The perfect example is the Arbitration and Conciliation (Amendment) Act, 2021 and the Arbitration and Conciliation (Amendment) Act, 2015. Indian Judiciary and Government should take responsibility and initiatives for smooth running of effective Alternative Dispute Resolution mechanism. Since all the official systems have been turned into online mode, Alternative Dispute Resolution

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can be done through virtual mode or hybrid mode. In this area, more professional trained arbitrators and practitioners are required.

Keywords: Arbitration, Arbitrators, Conciliation, Mediation, Negotiation.

I. INTRODUCTION

Alternative Dispute Resolution (ADR) is an alternative process by which disputes can be solved outside Court. It consists of various methods of process which intends to solve various cases without any procedural delay unlike Court of Law. In order to save time and avoid delayed procedure, Alternative Dispute Resolution (ADR) has been evolved almost in every country. Through Alternative Dispute Resolution, both national and international disputed can be resolved. In contemporary time, all the developed nations have adopted this method because of over-burdened Courts of their Country. In India also, the relevant Act, i.e. the Arbitration and Conciliation Act, 1996 deals with both the national and international commercial disputes. The popular line “Justice delayed is justice denied” carries itself the importance of emergence of Alternative Dispute Resolution (ADR) in recent times.

Alternative Dispute Resolution works as a substitution of Court’s lengthy time consuming process. Alternative Dispute Resolution (ADR) consists of various modes of dispute solving methods such as arbitration, conciliation, mediation and Lok Adalat which predominantly operates in India. These various kinds of dispute solving methods give options to parties seeking Alternative Dispute Resolution to choose any method at their own convenience and according to their terms and conditions. According to the agreement signed between parties, they can refer their dispute to a particular and suitable method of ADR.

(A) Meaning of Alternative Dispute Resolution

Alternative Dispute Resolution means different methods or ways by which legal problem or dispute between parties can be solved without going to traditional courts. Generally, Alternative Dispute Resolution involves less legal formality which is more convenient for common people rather than going to traditional judicial system. It operates as a substitution to the conventional court system which takes more time, cost and delay. In this process, neutral third party is appointed to discuss the dispute, solve them amicably and come to a settlement by mutual will and consent. Importance of Alternative Dispute Resolution has been increasing day by day. In 21st century, alternative process in place of conventional traditional justice system should be encouraged, so that court can be less burdened and will be in a position to handle carefully serious issues of the society.

(B) Reasons behind Introduction of Alternative Dispute Resolution

There are many factors present in our traditional judicial system which is responsible for the growth of Alternative Dispute Resolution in the Contemporary World. Alternative Dispute Resolution aims to promote peaceful settlement procedure efficiently. Lots of pending cases in the court have created itself an alternative method in order to dispose of cases with fewer costs of litigation. Therefore, cheaper cost of litigation in Alternative Dispute Resolution is another reason for its development. Some other factors are also responsible for its acceptance by the people such as maintaining confidentiality and selection of deciding authority or persons. Apart from this, faster procedure is also an important reason for this alternative method.

(C) Various Kinds of Alternative Dispute Resolutions Mechanism

Over the time, various kinds of Alternative Dispute Resolution has been evolved in all over the world. Some of the important trending methods are mentioned below:

- **Arbitration**

Arbitration is one kind of outside dispute settlement mechanism which comes under the scope of Alternative Dispute Resolution. In this process, Arbitrator is appointed mainly who will preside and decide over the case. Now, arbitration arises in various forms such as ad hoc arbitration, institutional arbitration, domestic arbitration, international arbitration and lastly emergency arbitration.

In case of ad hoc arbitration, the parties give their consent to opt for arbitration and willingly choose their arbitrator mutually without any institution. In case of institutional arbitration, institution has to be created for the purpose of solving dispute through a panel of arbitrators maintained by that particular institution only. In domestic arbitration, the parties to the dispute must belong to same nation and the seat of arbitration should be in that country also. If one of party is body corporate, such body corporate must be instituted in the same nation or jurisdiction and the seat should be same.

In case of International Arbitration, one of the parties to the dispute has to be foreign nationals or habitual residents of a foreign country or body corporate must be Instituted and incorporated in a foreign country if such body corporate is one of the parties in a dispute. Lastly, emergency arbitration is one kind of arbitration where temporary relief is given to the party in case of emergency just like interim injunctions mentioned in the Code of Civil Procedure.

- **Conciliation**

Conciliation is one kind of Alternative Dispute Resolution process which is more flexible than

Arbitration because here the Conciliator is not bound the rules of Code of Civil Procedure and Indian Evidence Act. But during the settlement procedure, they have to follow the principles of natural justice and come to an amicable settlement in an impartial manner.

- **Mediation**

Mediation comes under the purview of alternative dispute resolution where impartial and neutral person is appointed to bring the parties together, bring communication between them and assist them to negotiate their problems through active participation and constructive direction by the mediator.

- **Judicial Settlements inclusive of Lok Adalats**

Also lok adalats come under the scope of alternative dispute resolution where cases pending before court can be solved without following strict legal procedures. In India, Legal Services Authorities Act, 1987 has given statutory authority and power to lok adalats.

- **Negotiations**

Negotiation is one of the informal processes where parties by their free will come to the process in order to reach an agreement mutually to solve their dispute.

(D) Advantages of Alternative Dispute Resolution

Advantages of Alternative Dispute Resolution Make it more acceptable for the common people. Some of the advantages of these processes have been mentioned below:

- **Less Formality**

Normally Alternative Dispute Resolution process such as arbitration, mediation, conciliation and negotiation involves less legal formality unlike conventional traditional court system where the judge has to follow strictly adherence to Code of Civil Procedure or Code of Criminal Procedure as the case may be.

- **Cheaper Cost**

Normally these processes involve less amount and cost rather than traditional court system because it takes less time.

- **Suitable Venue**

In these processes, parties can choose their suitable venue where they want to settle the dispute by their own free will.

- **Flexibility**

Alternative Dispute Resolution processes are comparatively flexible than regular court processes.

- **Confidentiality**

Confidentiality of ADR processes is another advantage for which parties in this contemporary era choose to opt for this method.

- **Safe and Supportive Environment**

Safe and supportive environment is another reason for opting for this method. Supportive nature of arbitrator in arbitration is one of the best advantages of this method.

- **Informal**

Since arbitrator, conciliator and mediator don't have to follow strict legal procedures, common lay man is more favorable for opting this method.

- **Convenient**

Opting for alternative dispute process and getting justice through this method are much more convenient than traditional court system.

- **Agreed Solutions**

For example, mediators or conciliators try to settle down the dispute where both the parties after discussion can come to agreed solutions.

- **Participation of Parties**

Arbitration, Mediation and conciliation process involves active participation by the parties.

- **Cooperation between Parties**

Through cooperation, parties reach to an amicable solution in alternative dispute resolution process.

(E) Challenges in Resolving Disputes through Alternative Dispute Resolution in Contemporary Era

There are certain administrative and legal challenges in proper implementation of Alternative Dispute Resolution process and also resolving disputes through this method. Lack of specific statutory procedures creates confusion in the Alternative Dispute Resolution process. Moreover, government's reluctant behavior towards Alternative method of litigation is another challenge towards the proper implementation of this process. Limited support makes it difficult for the

growth of this process. Lack of infrastructure, lack of funding from the Government and lack of Arbitration center in both cities and urban areas are major hindrances in this method. Sometimes over interference by the Courts demotivates the faith in Alternative Dispute Resolution process. In fact, in order to execute the order of arbitrator, the concerned party has to go before the Court.

In India, our law education system doesn't provide enough education relating to arbitration or other alternative method's matters. The main focus of law education is to provide information related to traditional court systems.

(F) The Future of International Commerce Arbitration

Most of the developed nations such as United States, Germany, and Japan are opting for international commercial arbitration because of absence of international court. In this area, administrative agencies which will be impartial and professional through the entire process will be available in big businesses. Uniform rules would be preferable to guide the parties to choose their forum and incorporate such venue in their arbitration agreement clause. Impartial and independent arbitrators who would have knowledge of Arbitration laws should be subject to ethical guidelines.

(G) History of Arbitration in India

Dispute resolution system similar to arbitration was prevalent in ancient India where elder member of a village used to solve all the problems. In those days, there was no such concept of strictly maintaining any such procedure. But later on, proper law courts have been established and continued by the britishers. Besides this court of law, Villagers in rural area didn't go for long hectic court procedure. They choosed old alternative method of dispute resolution process where Village members those who are expert in solving dispute amicably used to settle down dispute. Later on, when panchayat system has developed, most of the problems used to be solved the members of panchayat.

The first formal concept of arbitration came in the year of 1899 when the Indian Arbitration Act, 1899 came into force which was the first arbitration Act in the history of India. Since it was applicable to only the three presidency towns such as Bombay, Calcutta and Madras, this Act had become useless in the other part of the Country. Due to complexity in the provisions of the Indian Arbitration act of 1899 and many criticisms faced after its implementation, new Arbitration Act of 1940 came into force to remedy the situation created by and to remove the lacuna of the former Act.

But this Act had suffered from so many drawbacks in its time. After the independence of India,

Arbitration and Conciliation Act of 1966 came into force which was based on model concept of United Nations Commission on International Trade Law in order to achieve globalization and to solve international legal problems which can be solved by arbitration.

(H) Constitutional Provisional relating to Alternative Dispute Resolution

Brief concept of Alternative Dispute Resolution can be inferred from the Preamble and certain constitutional provisions of Constitution of India. We all know that social justice and legal justice take very important place in every democratic country. Our Preamble of the Constitution of India specifically talks about three kinds of justice such as social justice, political justice and economic justice. Now, the term justices denotes establishment of various courts, family court, village courts, legal aid camps, legal aid forums, mediation center, women centers, consumer protection forum, arbitration and specially commercial arbitration in the country. Justice also denotes giving social justice to all classes of the society through these medium or through these institutions.

Apart from the Preamble of the Constitution of India, various provisions of the Constitution of India talks about giving legal and social justice. For example, Article 21 of the Constitution of India guarantees to all the people of India the right to life and right to personal liberty. Furthermore, the judiciary has extended the scope of Article 21 and brought right to speedy trial under its cover. The famous case in this behalf is *Hussainara Khatoon vs Home Secretary, Bihar*². Judiciary has broadened the scope of Article 21 and gave fundamental right to get free legal aid. Apart from fundamental rights, our Directive Principles of State Policy has also talked about free legal aid under Article 39-A.

(I) Cases suitable and unsuitable for Alternative Dispute Resolution

Not every case is suitable for Alternative Dispute Resolution. Therefore, it is necessary to outline which of the cases are suitable and which of the cases are excluded from its purview. For example disputes relating to any contract, money issues, any specific performance, any matrimonial issues, and custody of children, partition matters, and problems of partnership, employment, insurance matters, and cases related to tort, compensation claim in accidents, disputes between bankers and customers, between landlord and tenants, and neighbors. In short, all disputes relating to trade, commerce, and contract can be solved through ADR method. Moreover, some cases are unsuitable for ADR such as representative suits, dispute relating to election to public offices, criminal cases, etc. Suitable and unsuitable cases for alternative dispute resolution have been discussed in the case of *Afcons Infrastructure and others v. Cheria*

² *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar*, AIR 1979 SC 1369

Verkay Construction Company Pvt. Ltd. and others.³

(J) Arbitration and Conciliation Act, 1996

The applicability of this Act is well described in the Act itself. This whole Act extends to the whole of India except the State of Jammu and Kashmir. In case of International Commercial Arbitration, Parts I to IV will be applicable to State of Jammu and Kashmir also. Basically, this Act is based on the Model Law on International Arbitration and Conciliation adopted by the United Nations in the year of 1965. This Act is divided into four parts such as Part-I (Sections 2 to 43), Part-II (Sections 44 to 60), Part -III (Sections 61 to 81) and Part-IV (Sections 82 to 86). Moreover, this Act consists of three schedules such as Schedule I, Schedule II and Schedule III.

Various important terms such as Arbitration, Arbitration Agreement, Arbitral Award, Arbitral Tribunal, Courts and most importantly International Commercial Arbitration have been defined properly. Before approaching for Arbitration, certain conditions have to be followed such as presence of Arbitration Agreement, demand of Arbitration, etc. This Act clearly gives the will of the parties to choose the number of arbitrators who will preside and decide the case amicably. But one thing has to be kept in mind that even numbers of arbitrators will not be sitting in this process. Before appointing any arbitrators, certain conditions have to be fulfilled such as giving proper notice of appointment to another party in the dispute, informed arbitrators and their consent. After fulfilling all the requirements, a proper process of arbitration can be started.

Recent Amendments to the Arbitration and Conciliation Act

The Arbitration and Conciliation (Amendment) Act, 2021 is the most relevant important amendments to the Arbitration and Conciliation Act of 1996. This Amendment Act brought changes to Section 36 regarding stay of the operation of awards. Another significant changes brought by this Amendment Act is omission of 8th Schedule. But this Amendment Act has faced certain criticisms. Now enforcement of arbitral award has been made tougher because grounds are very vague.

(K) Problems in Implementation of Arbitration and Conciliation Act, 1996

Alternative Dispute Resolution has been accepted by many people in our country, but it's acceptance in large number of society is still in question.

³ Afcons Infrastructure and others v. Cherian Verkay Construction Company Pvt. Ltd. and others, (2010) 8 SCC 24.

- **Lack of Awareness**

Many people are ignorant of its existence and still go to court for those cases which can be solved without the help of traditional courts. Many don't know the chances of incorporating the provision of Arbitration in their agreement clause. For this reason, the proper implementation of Arbitration processes in our country has been suffering mostly. 27 years have been passed since the Arbitration and Conciliation Act, 1996 has been passed by the Parliament, and the main object behind the passing of this Act has been lost due to the ignorance of common people

- **Lack of Trust**

Next hindrance in the proper implementation of Arbitration is the lack of trust of parties in the Alternative Dispute Resolution process. They still believe in getting justice only through traditional judicial system. Lack of faith in arbitrators, mediators or third party is one of the hindrances in proper implementation of Alternative Dispute Resolution process.

- **Lack of Knowledge in ADR Process**

Apart from the common people, legal practitioners in India don't have sufficient knowledge regarding ADR process. Lack of knowledge in the specific area of Arbitration and Conciliation Act, Lok Adalats and other related area is another major issue. In this area, skilled lawyers and Arbitrators are required.

- **Lack of Precedents**

Lack of Precedents is one of the drawbacks of ADR methods in contemporary world.⁴ In court proceedings, court while dealing with a particular matter has considerable amount of previously decided case laws which helps the judges to decide that particular issue. On the other hand, lack of ruling in Alternative Dispute Resolution creates confusion in the legal process.

- **Solution through Compromise**

In many cases, it happens that ultimately disputes are being solved through compromise done between parties. Unlike Court proceeding where order of the Court requires a particular thing to be done, arbitration and mediation proceeding end with compromise. Even in business dispute cases, so many instances happened where compromise is the only solution.

(L) Future of Arbitration in India

In order to catch the international market, Parliament continuously has amended various laws

⁴ Sterling Miller, *The problems and benefits of using alternative dispute resolution*, THOMSON REUTERS, (Apr. 29, 2022), <https://legal.thomsonreuters.com/en/insights/articles/problems-and-benefits-using-alternative-dispute-resolution>

which deal with economy, monetary matters and dispute solution method. Indian arbitration law needs improvement. Limited court's intervention in arbitration proceeding is one of the solution which will strengthen alternative method of traditional court system. New technology will definitely help arbitration and other alternative dispute resolution process because hybrid mode of conducting litigation process has been accepted by our country. If arbitral award is more effectively enforced, the faith and trust of the citizens of India on arbitration can be earned.

II. CONCLUSION

Two-hundred years of British rule no doubt had impacted a lot on the legal concept and judicial system of our country. India has adopted so many laws on current issues so that it can deal with those issues just like other developed nations. In the area of alternative dispute resolution especially arbitration, India has long road to go. Effective awareness amongst the citizens, proper amendment, effective arbitral award and its enforcement are some of the solutions to the hindrances to the success of Alternative Dispute Resolution. Proper knowledge in this area to every legal practitioner is the need of hour. The ultimate aim of this process should be to give justice without any delay and with less expense. Convenience of common people should be the priority above all the things.
