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Alternative Dispute Resolution to Reduce Civil Cases in Bangladesh

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ABSTRACT

Keeping pace with the developed world, the provision of Alternative Dispute Resolution (hereinafter referred as ADR) has been inserted in the laws of Bangladesh long ago. Immediately after inserting the provisions, it started to play an important role in dispute resolutions resulting in reducing the number of civil cases. But it couldn't retain its momentum mainly because the lawyers are reluctant to resolve disputes through this process. And the government didn't show promptness in popularising the process or training judicial officers to encourage people to resolve disputes through ADR. Even still the legal provision relating to ADR is not comprehensive. For all these things alternative dispute resolution cannot play any important role in significantly reducing the number of civil cases in Bangladesh. There is no gainsaying that lots of cases are being resolved through alternative dispute resolution, but the number is not mentionable in comparison with the total number of running civil cases in Bangladesh.

I. INTRODUCTION

In most of the countries civil courts are overburdened with a huge backlog of cases, and Bangladesh is not an exception. How to reduce the number of cases in civil courts in Bangladesh is now a talked about issue. Because due to this, so many problems are caused and litigating parties don't get the benefits that they are craved for. For that reason, different governments and other stakeholders took so many initiatives to reduce the number of civil cases in civil courts in Bangladesh. Alternative Dispute Resolution (ADR) is such an initiative that is now widely accepted around the world as an effective mechanism for comfortably resolving disputes between parties. And this system is surprisingly fruitful to reduce the cases in courts if it becomes popular. Bangladesh has adopted this mechanism many years ago, and it has had some great successes. But still the procedure for ADR is not well-known to common people, and the procedures are not free from all material defects.

(A) Literature Review

1. Dispute Resolution beyond Court

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"ADR is the process of resolving dispute without going through the assessment of the court." (Md. Sefat Ullah, 2018, P. 134)

To put it simply, it is a process of resolving disputes by a person, often called a mediator or so, where the court doesn't interfere. And obeying all the procedural provisions is not necessary in settling a dispute through ADR. Due to this, the ADR process doesn't involve any lengthy or complex procedure that the court follows ordinarily in settling a dispute. But that doesn't mean the person who will resolve the dispute through ADR can do and undo anything. The dispute resolution outside court shall be "based on substantive and procedural rules that are vague, unwritten, flexible and good common sense- so that the law does not stand in the way on achieving substantive justice in the instant case." (Michael Palmer and Simon Roberts, P. 18) That means achieving substantive justice is important here and it's the ultimate goal of dispute resolution by the court and through ADR.

2. No shortcomings of formal judicial system

In all countries including Bangladesh, the formal judicial system has some shortcomings that cannot be ignored. Rules and procedures of a judicial system are framed keeping in mind the overall scenario. And the procedure to be followed by the judiciary is the same in all cases no matter what type the case is. But the same procedure is not fit for different types of cases, and the formal judicial system around the world cannot keep them away from such shortcomings. But there is no strict procedure to be followed in alternative dispute resolution (ADR). And due to this, ADR is gaining popularity around the world, Md. Sefat Ullah (2018) pointed out this issue. "The system of alternative dispute resolution (ADR) along with the formal trial system has been gaining its grounds to subdue shortcomings of our formal judicial system" (Md. Sefat Ullah, 2018, P. 133) But that doesn't mean that the formal judicial system is ineffective, rather it is effective though it contains some shortcomings. As the ADR process doesn't involve any strict procedure the requirements of litigating parties can be met through ADR.

3. Moral Consideration is Possible

Every court is bound to follow the strict provisions of law when it comes to procedures in civil cases. But sometimes strict provisions are not favorable for properly enjoying civil rights. There is no scope for moral consideration when a court hears a civil case, but in many situations, moral consideration may be necessary. Another thing is that the court has to consider so many things, and for that reason, proper attention to all the factors involved in a case may not always be possible. Court has nothing to do here due to the huge backlog of cases in every civil court in Bangladesh. So, if the litigating party or the lawyers representing the party is not efficient

enough, then the party will lose the legal battle. But in the case of ADR, the person leading the process has to think only about the disputes he is resolving. He doesn't have so many cases in hand like a regular civil court. Due to this, he can attentively focus on the litigating parties, their demand, redress claimed, and what should be the proper redress. "Ethical considerations demand the highest level of attention and often go beyond compliance with the law, and focus on what is morally correct in the given situation." (Pauline Collins & others, 2021 P. 34)

As going beyond compliance with the law regarding procedures is possible in the case of ADR, it becomes favorable for parties. It is especially favorable in some civil cases where prompt action should be taken. Because there's no need to comply with the steps followed by a formal court. If the person leading the dispute resolution process is efficient enough then the dispute resolution is just a matter of hours. All these things are favorable for litigating parties, but, still ADR is not so popular in this country that it should be, and that's why it cannot play the expected role in reducing the number of civil cases in Bangladesh.

4. Adversarial Process vs. Win-win Situation

In every civil case in a formal court, one party will win and the other will lose, it's certain. And, in an adversarial system following countries like Bangladesh, the court's verdict is just like declaring who wins. This approach creates further division between parties as litigating parties consider it just a battle where they have to win, by hook or by crook.

"The adversarial process can easily increase rather than resolve conflict because it is designed to divide those involved into two parties." (Susan Blake & others, 2012, P. 18) Division between parties may not affect the result of a case, because everyone is bound to obey the decision of the court. But such a situation is severely harmful to society as it can't bring peace. But in the case of ADR, the phenomenon is different, "as it sequels win-win situation which not only settles the dispute but also brings peace and healing that preserve the future relationship between the parties." Mohammad Saidul Islam, 2014, P. 97-98)

5. Expense of Cases

It is well known to all that every litigating party has to pay a certain amount of fees to the lawyer engaged in his case. This fee is really a burden on poor litigating parties, but it's a practice going on for a long time around the world. And the fee is not specified, parties and lawyers determine it considering overall factors. Usually, "they are to pay lawyers' every time they visit their lawyers. The consequence of this is that the people are to buy a hugely expensive judgment from formal courts." (Dr. Zahidul Islam, 2015, P. 28)

Here Dr. Zahidul Islam focuses on the consequence- parties buy a "hugely expensive judgment"

at the end. Obviously, it is a burden on the litigating parties, and due to this most of the poor people are reluctant to file civil cases before the court, when their civil rights are violated. ADR is favourable for those parties who cannot manage the fees of a lawyer for a long time. But another aspect of the fact is that lawyers are not interested in encouraging parties to resolve disputes through ADR. As a result, the number of resolved disputes through ADR is still low in Bangladesh. And, due to this, ADR cannot play the role that it should play in reducing the number of civil cases in courts around Bangladesh.

(B) Goal of this study

Mainly, the goal of this study was to examine the role of ADR in reducing the number of civil cases in Bangladeshi civil courts. And, the goal also includes- why still ADR is not so popular among the common people in Bangladesh or why ADR cannot play the expected role in significantly reducing civil cases, though it ensures a favorable outcome to parties.

(C) Methodology of The Study

a. Collection of Data

To conduct the study on the role of ADR to reduce civil cases in Bangladesh, different provisions relating to ADR in the laws of Bangladesh have been examined. Besides that, to show the role of ADR in reducing civil cases some information from several previous researches has been cited here. In addition to that, ADR-related reports published in some widely circulated Bangladeshi dailies like The Daily Star, or The Dhaka Tribune had been taken into view.

(D) Scope of ADR in Reducing Civil Cases and Current Situation

The code of civil procedure, 1908² (hereinafter referred as CPC) determines the process relating to civil cases in Bangladesh and the provision of ADR had been inserted there in 2003 at first (through section 89A). And then the court may mediate or refer civil cases for mediation as per section 89A. In 2012, by inserting the words “the court shall” in section 89A mediation by the court or referring the civil cases for mediation had been made mandatory. In section 89B of CPC, there’s a scope of arbitration according to the Arbitration Act, 2001.³

Whenever a civil case is sent to mediation or arbitration then it will no more be the consideration of a civil court. Under section 89A(7) of CPC, the court will proceed with the case referred to mediation if the mediation fails, or the case will be re-instituted in the civil court under section 89B(1) of CPC, if the arbitration does not take place. That means if the mediation or arbitration

² Act No. V of 1908 (bdlaws.minlaw.gov.bd/act-details-86.html)

³ Act No. 1 of 2001 (<http://bdlaws.minlaw.gov.bd/act-details-850.html>)

process is successful, then the court will not be burdened with the case. So there's a great opportunity to reduce the number of cases in civil courts through ADR.

Section 89A(7) states "when the mediation fails" and Section 89B(1) states "if....arbitration proceeding....does not take place." But these sections do not state anything about grounds of failure, or the liability of parties for whom the mediation failed or arbitration does not take place. For that reason, creating complexity in mediation or arbitration by any party or his lawyer is easily possible, and by this way they can spend a huge time in court.

Immediately after inserting the ADR procedure in CPC dispute resolution through ADR gained momentum. "Under section 89A of C.P.C total 12402 cases were disposed through mediation from July 2003 to June 2006." (Md. Mominur Rahman, 2015, P. 246)

Even in resolving different types of disputes, ADR started to get popular due to its promptness. And in that time a former Chief Justice of Bangladesh named Justice Mustafa Kamal uttered this fact in a speech. "The civil courts started mediation in non-family disputes since the 1st July, 2003. As of 31st July, 2004, 3.432 non-family litigations have been disposed of by mediation. In Money Loan Recovery Cases, the Loan Courts have disposed of 13,157 cases from the 1st May, 2003 to 31st July, 2004 and have realized Taka 996 crores and 5 lakhs.....The realization is 10 times higher than the realization by execution cases over the last 10 years."⁴ If the ADR process could retain the expected momentum then civil courts do not face the huge backlog of cases that civil courts are facing today. And the number of pending cases is increasing day by day before all the civil courts in Bangladesh,

The total case pending to 2021 was 1580066, which was 1311680 in 2020, and 1088881 in 2019.⁵ Such a huge backlog of cases indicates that the common people don't consider the ADR process favorable for them due to their ignorance or other reasons. They want to resolve their disputes by filing formal suits before competent civil courts. For that reason, ADR cannot play the important role in reducing civil cases in Bangladesh.

II. WHY ADR CANNOT SIGNIFICANTLY REDUCE THE NUMBER OF CIVIL CASES IN BANGLADESH?

ADR has all the attributes to conveniently resolve any civil dispute and in this case, the parties have to pay a lesser amount like mediator fee or so. It is advantageous for parties, not for lawyers

⁴ Justice Mustafa Kamal, Former Chief Justice of Bangladesh, speech on "Judicial Settlement and Mediation in Bangladesh," International Centre for Alternative Dispute Resolutions, New Delhi, 20th and 21 St November, 2004, P. 5 (https://www.hrpb.org.bd/upload/PDF_File_%20RPB/Justice%20Mustafa%20Kamal.pdf)

⁵ Pending Case Forecasts, Published by Justice Audit Bangladesh (<https://bangladesh.justiceaudit.org/baseline-data/>)

because lawyers are dependent on the fees obtained from litigating parties. So it is likely that the lawyers don't encourage people to resolve disputes through ADR. And when the court directs to resolve disputes through ADR, lawyers usually don't play the perfect role. And people usually go to lawyers to discuss legal problems, as legal procedures or complexities are not known to most of the people in Bangladesh. But ADR is favorable for parties in terms of costs, relation between parties, dispute resolving period, etc. It is likely that people should be inclined to resolve disputes through ADR. But it doesn't happen in Bangladesh and that's why piles of cases remain before all the civil courts in Bangladesh.

ADR is not new in Bangladesh as the Arbitration Act was enacted in 2001, and in CPC, ADR has been made mandatory in 2012. But the Government or other relevant authorities did almost nothing to popularize it among people or to show them the benefits that they will not get in ordinary courts. Even some incidents conspicuously show our policymakers are just reluctant to popularize the ADR procedure.

“In Bangladesh, the Arbitration Act, 2001 came into force on the 10th day of April 2001, which permits the government to make rules in exercising its powers conferred by section 57 of the Act. It was expected that the rules would be framed immediately to make the use of arbitration simpler, easier, and less cumbersome. However, although twenty years have elapsed since enactment of the Act, the government is yet to make rules.”⁶

If the government makes rules then it will be simpler for all the relevant parties, but the government hasn't done it in 20 years. As the rules are not framed, mentioning every single issue hasn't become possible. And the government has almost no role to familiarize ADR to common people in Bangladesh, through different programmes. That is why, even after decades of inserting ADR provisions in Bangladeshi laws, ADR is unknown to many litigating parties.

To implement a system perfectly or to encourage people to follow a system, training is a must, and it's applicable for ADR too. But the word “training” is not mentioned in the CPC and in the Arbitration Act, even not once. Judicial Administration Training Institute (JATI) in Bangladesh conducted training for judicial officers. Its 42nd Special Foundation Training Course Brochure shows that it offers "Training Courses on ADR" for "One week or less."⁷ It can be easily assumed how successful the judicial officers will be, in encouraging the people to resolve their

⁶ Kamal Hossain Meahzi, In quest for rules to be laid down under the Arbitration Act, 2001, *The Daily Star*, May 7, 2022 (<https://www.thedailystar.net/law-our-rights/law-vision/news/quest-rules-be-laid-down-under-the-arbitration-act-2001-3018191>)

⁷ Course Brochure 42nd Special Foundation Training Course for the Assistant Judges and Judicial Magistrates (2021), P. 13 (https://jati.gov.bd/public/uploads/publication/1634974422_811acf1c4d2f9603947d.pdf)

disputes through ADR when they are not properly trained up.

Some not-for-profit organizations like Bangladesh International Arbitration Centre (BIAC) arrange different programmes to train people. But as a non-profit organization they cannot train a large number of people due to their capacity. A few days ago, "as a part of its regular activities, Bangladesh International Arbitration Centre (BIAC) organized two separate day-long training courses on negotiation and mediation at the BIAC office in Dhaka on October 12 and 13. The training sessions were attended by a total of 55 participants."⁸ Training 55 participants only for 2 days will do almost nothing to change the overall situation, it can be said without thinking anymore.

For all these things ADR cannot play the important role to reduce the number of civil cases in Bangladesh that it should play. And that is why a huge backlog of cases remains before all the civil courts in Bangladesh, and every year the number is increasing.

III. MAJOR FINDINGS

1. Provisions of ADR in laws of Bangladesh are not comprehensive, and many important things are not mentioned there.
2. ADR brought expected momentum to resolve disputes in a few years immediately after inserting ADR in Bangladeshi laws, but it couldn't retain the expected momentum.
3. Government has almost no effective programmes to familiarize or popularize ADR to common people, nor it arranges long training sessions to perfectly train up judicial officers to resolve disputes through ADR. Some NGOs arrange programmes for focusing on different ADR issues, but these are not enough due to their capacity.
4. Due to lack of government efforts, and reluctance of lawyers, ADR cannot play its necessary role to significantly reduce civil cases in Bangladesh.

IV. CONCLUSION WITH RECOMMENDATIONS

It is well-known that ADR can resolve disputes between parties in a very short time, and can bring peace between parties in spite of increasing enmity between them. ADR should be made popular among all the litigating parties, especially poor litigants. But due to the lack of government initiative, and reluctance of lawyers, this most advantageous process is just a less known dispute resolving method in Bangladesh. That is why ADR cannot significantly reduce

⁸ Two day-long training on negotiation and mediation held at BIAC, The Dhaka Tribune, October 16, 2022 (<https://www.dhakatribune.com/business/2022/10/16/two-day-long-training-on-negotiation-and-mediation-held-at-biac>)

the number of civil cases and people are buying hugely expensive judgments after a long time of filing a case. But if a large number of people follow ADR to resolve their disputes then the number of civil cases will significantly reduce. Adopting some measures may improve the overall situation in a few years.

- Government should arrange long training sessions, on a regular basis, to train up judicial officers, who will lead the process of ADR.
- Making the relevant laws comprehensive is a must, otherwise any party can take the unfair advantage by misusing shortly described provisions.
- Government should make an alternative system for the lawyers who are reluctant to resolve disputes through ADR. It may be by appointing lawyers who resolved a higher number of cases through ADR to highly prestigious posts like government pleader or to attorney general's office, so.
- Government and non government organizations should arrange different programs on a regular basis to popularize ADR, by focusing on its advantageous features.
- The government may celebrate a day every year around the country as “Alternative Dispute Resolution Day,” to popularize it among common people in Bangladesh.

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