
Role of Indian Courts in ADR

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ABSTRACT

Though India's judiciary is oldest with various statutory laws, but due to cumbersome procedure the cases are not resolved earlier to meet the very objective behind the statute. Due to the call of the hour and need for faster delivery of justice, the judiciary promoted Alternative Dispute Resolution (also known as ADR). ADR is an alternative mechanism to conventional or traditional method developed to resolve the dispute amicably with the help of a neutral third party. It is a form of settlement where both the parties mutually agree and co-operate to resolve the dispute outside the vicinity of court. It resolves matter starting from contractual, commercial to family and matrimonial related issues. The benefit attached to ADR are many like it not only win-win approach for both the parties but on the other hand is time-saving, cost effective, ensure confidentiality, maintain better relations between the parties etc.

The objective of this paper is to discuss the role of the court in the context of promoting and development of ADR as a dispute resolving mechanism in India. This article highlights the advent of ADR and its expansion in the recent era. It not only focuses on pros of ADR over the adversarial method of resolving dispute but also analyses the cons attached to it. Provisions as well as judicial precedents are highlighted in the paper to show the transition and acceptance of ADR in India.

Key Words: *Alternative dispute resolution, ADR, access to justice, hands-off approach of judiciary, the arbitration and conciliation (amendment) act, 2019*

1) INTRODUCTION

Indian Judiciary, one of the primitive judicial systems, is becoming ineffective due to the pendency of unsettled cases. Even though thousands of fast track courts have been established the scenario remains the same. Here comes into picture Alternative Dispute Resolution (ADR), which acts as a helpful mechanism to resolve the dispute amicably. In simple terms, ADR is a process to resolve the dispute outside the court by a neutral third party known as arbitrator. It is a substitute to the conventional or traditional approach of court and provides opportunity for better satisfaction of the outcome. This concept can be broadly classified into two categories – first court-annexed option, where a neutral third party assists to reach a mutual acceptable solution. For example - mediation, conciliation. Second, community- based dispute resolution mechanism which is designed to be independent of a formal court system. This includes arbitration and negotiation.

ADR is also recognized in our Constitution under article 14 (equality before law) and 21(Right to life and personal liberty). Under article 39-A (DPSP), it strives to achieve free legal aid power. The objective of ADR is to provide social, economic, political justice and maintain integrity as enshrined in the preamble of our Constitution.

The importance of ADR over litigation in recent years is many. They are less formal, speedy disposal of cases; avoid cumbersome procedure, time and money friendly. It encompasses varied streamlined resolution technique to dispose the cases efficiently over the traditional litigation process.

2) ADR - ITS ORIGIN AND ADVENT IN INDIA

To deal with the pendency of cases in Courts in India and secure justice, ADR mechanism was introduced in India. The foundational pavement of ADR mechanism in India was laid back in 1940 when the first Arbitration Act was passed. But due to inadequacy it failed to fulfill the needs both at international and national level to settle the disputes. Then, in the year 1996, the Arbitration and Conciliation Act was passed as a boom having its basis on UNCITRAL model. Also, the Legal Services Authorities Act, 1987 made explicit provisions for the establishment of Lok Adalat system to settle the dispute at low cost and fast. Section 89 of the Code of Civil Procedure, 1908 based on the recommendation made by the Malimath Committee and Law Commission report of India made it mandatory for the Court to refer the dispute with the concurrence of the parties resolved by ADR mechanism¹. The ADR method provide for various modes like settlement, conciliation, mediation, recognition and Lok Adalat to resolve the dispute.

3) ADR – THE PIVOTAL ROLE OF JUDICIARY

3.1 The courts have played a pivotal role in promoting ADR in India by adopting hands-off approach from the dispute resolved through arbitration and are on appeal before the court. Since few years, the Supreme Court and High Court have consistently adopted ADR as friendly approach to resolve dispute even ignoring the minute errors and upholding the arbitration agreement where both the parties have mutually agreed to and intention are clear. In the case of *Enercon India Limited & Ors. Vs Enercon GmbH & Anr*², the Supreme Court upheld the arbitration agreement despite of errors. It stated even if the arbitration agreement has some error in it but it is workable as the intention of both the parties concluding the arbitration agreement is clear.

3.2 The Supreme and High Court have also refused to interfere with the awards passed by the arbitrator under the Arbitration act. In the case of *Kandla Export & Anr. Vs OCI Corporation &*

¹ <https://legodesk.com/legopedia/role-of-judiciary-in-promoting-adr-in-india/>

² (2014) 5 SCC 1

*Anr*³, the Supreme Court held that the party cannot bypass the provisions of the Arbitration Act by using the provisions of Commercial Courts Act, 2015 even if no provision for appeal is provided under the Arbitration Act.

3.3 Not only have this but the Courts also taken cautionary steps while granting anti- arbitration injunctions. In *Ravi Arya & Ors Vs Palmview Overseas Limited & Ors*⁴, one of the contracting party alleged that the arbitrator was appointed after the collusion with the third party and without following the proper procedure agreed upon by both the parties. The aggrieved party seek an injunction order from the Court to restrain the arbitral proceeding. But the Bombay High Court held that the aggrieved party has a remedy under Section 12 of the Arbitration Act to challenge the appointment of the arbitrator. Therefore, the person cannot obtain an anti- arbitration injunction bypassing the remedies under provided under the Arbitration Act.

3.4 In the case of *Avitel Post Studios Limited V. HSBC PI Holdings (Mauritius) Limited*⁵, the Supreme Court laid down the two test which when fulfilled lead to non-arbitrability arising from ‘*serious allegation of fraud*’. The Court limited the grounds on which the party can avoid arbitration by citing fraud. All other cases will be arbitral unless “*the Court finds-*

- i) *The arbitration agreement cannot exist on being vitiated by fraud; or*
- ii) *Allegations made against the State or its instrumentalities regarding arbitrary fraudulent, mala fide conduct give rise to the question of public law opposed to question limited to the contractual parties between the parties.”*

3.5 The judiciary have also opened its arms and responded proactively to the amendments introduced in the Arbitration Act by the Legislature. In the case of *BCCI V. Kochi Cricket Private Limited & Ors*⁶, section 87 of the Arbitration and Conciliation Act (Amendment) Act, 2019 was directly in conflict as it made the application of 2015 amendment prospectively. By 2015 amendment, section 36 was introduced which wouldn’t apply to petition under section 34 against the arbitral award passed by the proceeding which commenced before 23rd October, 2015. The Bench in the case of *Hindustan Construction Company Limited & Anr. V. Union of India & Ors.*⁷, nullifies the ratio laid in the *BCCI Vs Kochi Cricket Private limited* case and held that section 87 is contrary to the objective of the Arbitration Act as well as the intent behind the 2015 amendment.

³ (2018) 14 SCC 715

⁴ (2018) SCC OnLine Bom 19886

⁵ 2020 SCC OnLine SC 656

⁶ (2018) 6 SCC 287

⁷ (2019) SCC OnLine SC 1520

4) ADR – ISSUES AND CHALLENGES

Even though the courts refrained from interfering with the decision or awards passed by the arbitral proceeding but there lays certain issues which don't attract the overseas entity to opt for ADR mechanism in India. No doubt, the judiciary and legislature have tried to remove the hurdles involved during and after the arbitration proceeding, but there are cornerstone left untouched. In India, arbitrators generally resolve matters which involve money. Being a catalyst, they cannot pass any order against any party to do or refrain from doing something. There is limited scope for judicial review of an arbitrator's decision⁸. The proceeding also fails to provide the safeguard measures to protect the interest of the parties which is generally provided by courts. For example- the decision of the tribunal is final and binding upon all the parties. No appeal before the court against the arbitral award can be allowed except on the specific ground in the case of arbitral fraud. Even via arbitration dispute involving criminal matters; transfer of title of the property cannot be resolved.

5) CONCLUSION

ADR has come a long way and have acted as one of the strongest pillar in the legal fraternity for resolving the dispute amicably. It not only offers various method starting from arbitration, mediation, conciliation, negotiation for the settlement of dispute in streamlined manner. Various centres' including Lok Adalt have been established throughout the country for the execution of ADR's principle for resolving disputes. Judiciary has played a major role for the promotion of ADR mechanism in India. In the case of *ONGC Vs Collector of Central excise*⁹, there was a dispute between public undertaking and Government. The court directed to resolve the dispute by any mechanism offered under ADR rather than opting for litigation. This shows how judiciary kept on encouraging ADR over traditional litigation method to resolve dispute in a cost- effective and time saving manner. The Court restricts itself from intervening the proceeding of arbitration and awards passed by the impartial arbitrator. This ensures the speedy resolution of commercial cases which thereby improve the economy and growth of trade.

Like every coin have two sides, similarly there exist discrepancies and loopholes in the ADR mechanism too. ADR is yet to achieve its full potential to meet the needs of the future. More efforts should be made to promote institutionalized arbitration over ad-hoc arbitration. Parties should be encouraged and cases must be made mandatory for the reference to ADR mechanism. High amount of penalty should be charged by the courts on the frivolous filing of appeal petition against the arbitration award. Number of arbitrators and courts must be increased in every jurisdiction and the appointment should be based depending upon the nature of the dispute to be

⁸<https://www.mondaq.com/india/trials-appeals-compensation/1013892/role-of-judiciary-in-making-india-an-arbitration-friendly-jurisdiction>

⁹ 1992 supp2 SCC 432

resolved. The arbitrators appointed shall be given proper advocacy training organized by the judiciary to conduct the proceeding effectively. Not only judiciary alone but government shall also directives to all public undertakings, ministries to resolve dispute by arbitration and abide by the award unless cogent reasons are cited.