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Alternative dispute resolution mechanism as a tool to ensure access to justice

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Abstract
Alternative dispute resolution methods have come like a breath of fresh air. In the traditional system of courts the dispute would take a long time to be resolved and would also result in ultimately destroying the relations between the parties. Their the parties are at loggerheads with each other, contesting the dispute and fighting it out. However in alternative dispute resolution system, like arbitration, conciliation, mediation, negotiation, Lok Adalat and Judicial Settlement, the parties resolve the dispute amicably. This helps in restoring their relationship, save money, time and anxiety. In India arbitration and conciliation is governed by Arbitration and Conciliation Act, 2015; Lok Adalat is governed by Legal Services Authorities Act, 1987. However there is no particular statutes which governs mediation. Mediation is resorted mostly in matrimonial and family matters. Arbitration on the other hand is used as a system of dispute resolution in commercial and business matters. Although traditionally in India we were using mediation techniques in panchayat and gram sabha to resolve day to day disputes between parties and to maintain peace and harmony in the society. But Britishers introduced court system in India and took us away from our traditional methods of dispute resolution. There is a need to go back to roots.

Keywords: alternative dispute resolution, arbitration, conciliation, mediation, lok adalat, litigation

Introduction

There is no one particular definition of justice. Several scholas have defined justice in their own unique way. Confucius defines justice in a traditional sense where the king should do justice by punishing the dishonest and rewarding the righteous. There is a very basic query that we all have, that is, people who are dishonest and are breaking the law, are found to be more wealthy and better off than who lead life as a law abiding citizen, then why we should follow laws? Plato answers it by emphasizing on the role of law and justice in our lives. If everyone starts breaking the law, then there would be no just society and no one would be able to enjoy their rights. Plato and Socrates, show the relevance of justice and just society. As per John Rawls, justice can be ensured only by following as specific mechanism, where a person forgets his own identity and puts a "veil of ignorance". While deciding on any policy a person needs think as a neutral being, completely forgetting his own standing, position and identity, then make a decision that would be for the benefit of all the sections of society, rich and poor alike. However there is a major flaw with this theory, because it is not practically possible for a human being to completely forget his interests and identity while making decisions.

Each country has to look at its justice delivery system in context of its socio- economic conditions. India has a very diverse demography, it a country with diversity in terms of culture, religion, languages and even in terms of access to justice. Traditional system of dispute resolution, that is through courts and litigation is very time taking, expensive and cause mental agony to the parties.

Access to justice is a basic human right that everyone must possess. Litigation or trial in court fails to bring justice to the doorsteps, especially the poor, illiterate and ignorant parties. This is infact a luxury that probably the rich can afford but not the indigent.

The backlog of the cases in courts is abundant, judges are overburdened with work and litigants have to slog for years to get justice.

There is one ray of hope in form of Alternative Dispute resolution mechanism. As the name itself suggests it refers to the alternate methods for resolution of disputes, which is different from traditional method of litigation. It includes several methods like- Arbitration, Conciliation, mediation, negotiation, Lok Adalat and judicial settlement. These mechanisms have helped in providing cost effective, fast and effective justice to the people.

Section 89 of Code of Civil Procedure provides that if a case comes to the courts, which can be resolved through any of the alternative dispute resolution methods like arbitration, conciliation, mediation, Lok Adalat or judicial settlement, it becomes the duty of the court to refer the parties to ADR. However there are some errors in drafting of section 89, therefore it was also challenged. The court finally harmoniously interpreted Section 89 Code of Civil Procedure in *Salem Advocate Bar Association v. Union of India* [1] case.

First problem is with the language of Section 89 (1), which suggested that if the court before which matter is brought feels it can be resolved through then court has to form the settlement agreement for parties, then show it to parties and ask for their suggestion in case they wanted some change, thereafter refer the parties for ADR. This caused great confusion. It is a technical fault. If the court is already making a settlement agreement, then what is the need to send parties for ADR? Also while making this settlement the court is not consulting the parties. This issue was clarified in Salem Advocate Bar Association, where purposive interpretation was

given to this phrase and court said, in Section 89(1) "terms of settlement" actually means "summary of the dispute". Meaning thereby that court needs to just make a summary of case and thereafter refer parties to their preferred means of alternative dispute resolution mechanism.

Order 10 Rule 1A Code of Civil Procedure provides that after recording the admissions of the parties, the magistrate should send the parties to ADR forum chosen by the parties.

Initially when ADR was introduce, lawyers were very unhappy about it, as they perceived it as a threat to their earnings and revenue. In fact, ADR was referred to by lawyers as Alarming Decline in revenue. However with the passage of time, lawyers too got familiar with this methods. Many of the layers took mediation training and are now working as mediators. Also, lawyers are encouraging parties to go for mediation and other alternate methods of dispute resolution. It leads to happy parties and at the end of the day lawyer also earns his fees and also goodwill of his client. The goodwill of lawyer travels great distances with the word of mouth and a happy client always returns to same lawyer in case of future dispute. This process gives mental peace to the parties as well as the lawyer and mediator.

Now let us discuss alternative dispute resolution mechanisms one by one.

Arbitration

In this method the parties choose their own judge known as arbitrator. In traditional litigation, the parties cannot choose who would decide their case. But here before the dispute arises or even after the dispute, the parties enter into an agreement stating that this dispute would be resolved through arbitration. Parties have liberty to decided on the procedural and substantive law that would apply to their case, they can choose the place, venue and seat of arbitration. Parties determine the qualifications of the arbitrator. For arbitration there must be a written contract between the parties. This particular procedure is very effective because it facilitates dispute resolution through a person who is an expert in this areas. For example if there is a dispute relating to construction design, then a civil engineer can be appointed as an arbitrator instead of a judicial officer who has no knowledge on this subject. Arbitration proceeding are not bound by procedural rules given in Code of Civil Procedure or in Indian Evidence Act. If there is an agreement between parties to resolve dispute through arbitration, then court will not entertain that matter. Although assistance of court can be taken for obtaining interim relief from the court [2]

Here arbitrator is acting as judge in the case and he gives a decision. The award given by the arbitrator has the same valve as the decree of the court. This award is not appealable. However parties can request the court to set aside this award on the ground of public policy under section 34 of Arbitration and Conciliation Act, 2015. Arbitration is mostly used in commercial matters. In business time is money, so by resorting to arbitration parties save a lot of time. There are different kinds of arbitration: Adhoc arbitration, where parties themselves decide everything; Institutional arbitration, where a specialized institution do arbitration and have their own rules. These institutional arbitrations are very effective as they provide infrastructure, rules and also trained arbitrators. However normally they charge huge fees so, arbitration here becomes very expensive. Another area of concerned in arbitration is the fact that most of the arbitrators are retired judges. They have a traditional mindset and are used to working in court setting. This at times becomes an issue as speedy decisions is at the core of arbitration, but the judges fail to provide that.

Conciliation

In this method a neutral third party assists the disputing parties to resolve their dispute. Conciliation is governed by Arbitration and Conciliation Act, 2015. It provides that parties can enter into a contract that if a dispute arises between it would be resolved through conciliation. Unlike arbitration, a conciliator is not giving a decision or verdict in the case, rather he is acting only as a facilitator, helping the parties to come at an amicable solution. It is the parties who themselves arrive at the decision. The conciliator pays an active role in assisting the parties and also giving the possible solutions and suggestions. Once the parties arrive at a decision, it is drafted and signed by the parties, now this agreement becomes binding on the parties and has the same value as an arbitral award. It is not appealable. The rationale behind this is since the parties themselves arrived at the solution mutually, it is kind of consent decree and so, no appeal should be allowed from it, otherwise it will defeat the whole purpose of going for settlement outside court and will end up wasting time of parties. Conciliation too is used mostly in commercial or business matters.

Negotiation

In this method there is no third party involvement. The parties themselves sit together and try to resolve their dispute mutually. There is no requirement of a written agreement for doing negotiation. Parties are normally accompanied by their lawyers.

Mediation

Mediation is a method of alternate dispute resolution where there is a third party assisting the disputing parties in resolution of their dispute. He /she is a neutral party and has no interest in the matter in controversy. There are several advantages of mediation that is, it is confidential, quick and also restored the relations. Normally mediation is resorted to in matrimonial matters, family disputes etc. The problem with a matter going to the court is, that their parties are pitted against each other, they are contesting each other and behave like enemies. Each party wants to defeat the other. But in case of mediation, the parties are not working against each other, but with each other and trying to resolve the dispute amicably. When a decision is not imposed on a person but he or she himself or herself arrives at that decision, then there are greater chances of the person abiding by that settlement. because their point of view was heard and also they were the ones who gave decision in the case and not a third party. Although it is best. To resolve the dispute between parties through negotiation. But the problem is many a times parties are not in talking terms are and not willing to see an eye to eye. There a mediator is needed who will act as a bridge between the parties and help them to communicate with each

other. This process gives a chance to the parties to vent out their anger and show their concerns. The best part about mediation is confidentiality. Whatever information is given to a mediator cannot be used as evidence in court and mediator cannot be called to court as witness by any of the parties. If the mediation is successful then this agreement signed by the parties will be taken to the court ad court will issue it as decision in the case, it is consent decree. However if the mediation is not successful then the matter goes back to the court and thereafter the court will give decision as a regular case after taking into account the evidences. There are four stages in mediation, first is introduction, where the mediator introduces himself and also tells the parties about the process of mediation. He informs the parties that whatever communication happens here will be kept confidential and will not be used as evidence in the court. He will be a neutral party and will act only as a facilitator and not as a judge.

Second stage of mediation is the joint session, where mediator sits along with both the disputing parties and try to find out the actual cause of dispute. The third stage of mediation is caucus, this means a private session with the parties individually. Here the mediato tires to find out the confidential information and the root cause of dispute between the parties. He will keep all this information confidential an will not tell it even to the other party, if it has been so requested. The last and the final session here is the again a joint sitting were the parties arrive at a settlement and this settlement agreement is signed by both the parties in the presence of the mediator. This is deposited in the court and is taken as a consent decree and court passes order on it. thereafter it is the decree of court and both the parties are bound by it. in case an agreement is not arrived at, then the matter again goes back to the court.

Lok Adalat

The proceedings of Lok Adalat are governed by Legal Services Authority Act, 1987. The cases which are not complex and can be resolved in a single sitting are sent to Lok Adalat. Lok electricity theft cases, bank loan repayment cases etc. it is very beneficial for the parties to go to Lok Adalat as it saves their time and also money. The courts all over India organize Lok Adalat once in two months. It helps to lessen the burden of courts.

A very important issue that arose in Afcons Infrastructure Ltd. V. Cherian Varkey Construction Company Pvt. Ltd [3] Case was that, is the consent of parties essential to refer them for various alternative dispute resolution mechanisms. The Supreme court in this case held that if the court before which the matter comes wants to send the parties for arbitration, the consent of parties is mandatory. The reason being that arbitration and conciliation act provides that there must be a written agreement between parties in order to settle the dispute though arbitration. So, the situation is, if there is already an arbitration agreement then parties cannot get the matter resolved in court, they must go for arbitration only. Secondly, if there was no arbitration agreement in the beginning, but parties enter in to an arbitration agreement after the dispute arises, again, court has no jurisdiction to try this case and matter will be settled only through arbitration. Third case is when there is no arbitration agreement between the parties and matter reaches court, here court can ask the parties if they wish to settle the dispute through arbitration, if the parties agree, they will be sent to an arbitrator, however if any of the parties refuses, then court has no power to force the parties to go for arbitration as it is mandatory to have an arbitration agreement.

Same is the case for conciliation, as it is clearly provided there must be an agreement between parties if they have to go for conciliation. So, court does not have the power under Section 89 to force the parties to go for conciliation. It is only when both the parties agree, then only matter can be sent for conciliation.

However the case is different for mediation and Lok Adalat, here in mediation as soon as the matter comes to the court, the court has power under section 89 of code of civil procedure to send the parties to a mediator, even if any of the parties is not willing to do so. Similarly is the case of Lok Adalat and judicial settlement. However one thing needs to be kept in mind and that is, here court only has power to send the parties for alternate dispute resolution system, but the ultimate settlement is arrived at by parties only, with their free consent.

Conclusion

Alternate dispute resolution is the future of dispute resolution. This concept is not novel to us. in Indian tradition we have seen that such method and especially mediation has been used since centuries. These is instance of mediation where Lord Hanuman goes to Ravan with Lord Ram's Proposal. Similarly we find, Lord Krishna went as mediator to Duryodhan and asked him to give only five villages in order to avoid the war. But he refused to do so the result was a massive war which caused lot of destruction. These instances show us that where we try to avoid solving the dispute mutually, it results in serious consequences. In criminal justice system also we find that there are elements of alternate dispute resolution, where t provides for Compounding of offences in Section 320 of Code of Criminal Procedure, where the parties can themselves resolve the dispute without the interference of the court. Similarly we find concept of Plea Bargaining in Code of Criminal Procedure where an accused can agree before the court about his guilt and there remains no need to conduct the trial as such. Criminal offences are seen as an offence against the society as it threatens the spirit of society, that is why in serious criminal offences alternate dispute redressal mechanism is not allowed. but it is allowed in criminal cases that cause personal injury and not injury to the society as a whole. Many countries have resolved to alternate dispute resolution as the first choice. India is also not far behind. We are also taking steps in the right direction and hopefully India will also become a hub for arbitration.

References

1. 2003 (1) SCC49
2. Section 9 Arbitration and Conciliation Act
3. (2010) 8 SCC 24