APPROPRIATE DISPUTE RESOLUTION MECHANISM / ALTERNATIVE DISPUTE REDRESSAL MECHANISM: EQUIPMENT FOR TACKLING POST COVID BACKLOG OF CASES PEACE IN LIS THE END RESULT OF ADR

INTRODUCTION

This Article is a narration of importance of ADR mechanism and its use along side Information Technology so as to mitigate the hardships which are caused due to this COVID 19 pandemic. We would have to detox the system by declogging certain disputes. We will have to fall back on alternative dispute redressal mechanisms, namely, negotiation, mediation and conciliation. As we are now shifting to what is known as virtual hearing we would have to also move on to dispute redressal by use of information technology. In the year 1980, Justice Krishna Iyer has opined that in "Commercial causes, we may observe in prolegomenary fashion, should, as far as possible, be adjusted by non-litigative mechanisms of dispute-resolution, forensic processes, dilatory and contentious, hamper the flow of trade and harm both sides, whoever wins or loses the lis."[2]. These words are applicable even today to commercial causes as in 2015, the Commercial Court Act, 2015 has mentioned about pre litigation mediation and, therefore also, the way ahead is alternative/appropriate dispute resolution like mediation. The recent decisions of the Apex Court would also show that we need to lean on the alternative modes of disposal which can be acceptable to the parties. Reference to Judgment in *Moti Ram v. Ashok Kumar*[3] is an apt example of the same. The government and its authorities under Article 12 of the Constitution of India would have to take a practical approach as far as litigations are concerned and try to resolve the disputes by alternative methods. We need to detox our body (physical) at regular intervals in the same way, any of the alternative techniques would act as detox for the system.

This article is not a research paper but can be said to be a guide on why and what we need for reduction of backlog. The idea sought to be canvass is the necessity of ADR mechanism post COVID 19 which has lost its importance. The scope of the article is present why we need ADR mechanism in a conjoint fashion so as to combat with the backlogs.

[1] Retd Judge High court of Gujarat

2 *V.R. Krishna Iyer, J. In Agarwal Engineering Co. Vs. Technoimipex Hungarian Machine Industries Foreign Trade Co., (1977) 4 SCC 367, para I.*

3 *Moti Ram v. Ashok Kumar , (2011) 1 SCC 466 9 (India)*

(2) **IMPORTANCE OF ALTERNATIVE DISPUTE REDRESSAL:**

Justice R.V. Raveendran in his article[4] penned about a decade ago has said, "Resort to Alternative Disputes Resolution processes was found necessary to give speedy relief to the litigants and to reduce pendency in Courts, through a user-friendly system of disputes resolution".

Pre-independence, under the British Regime, a procedure for arbitration was established as an alternative method. In 1908, the original Section 89 was enacted in the Code of Civil Procedure which provided for Arbitration as a viable alternate method. This provision was re-enacted in 2002 in the post-independence enactment of Arbitration Act. Arbitration as a method of dispute resolution has outlived its utility and now a days proves to be cumbersome.The answer can be found in the recent article of the undersigned on 'Reflection on the Judicial Approach in Arbitration Matters Concerning Government and Public Sector Enterprises[5]' and it can be seen that litigations under the Arbitration Act are even after the award is passed being challenged. The Apex Court in *Ramji Dayawala and Sons (p) Ltd. V. Invest Import*[6] has lamented over the way the arbitration proceedings are undertaken. Whereas mediation does not even need filing of papers before mediator and, therefore, it is less cumbersome as compared to other ADR mechanism. The expansion of mediation-oriented redressal under the Consumer Protection Act and the recent changes in methodology in light of Covid-19 goes to show that the arbitration law will have to give way to other redressal systems, because arbitration as narrated above is a long drawn battle and the theme of the article is to remove backlogs and, therefore arbitration will be more cumbersome and parties may not like to go for it. A mediation Centre can be seen to be a place where all disputes whether on the criminal side or arbitral or non-arbitral whether it relates to any egocentric dispute can be resolved by way of mediation. The biggest advantage of these other mechanisms is that the procedural requirement are less under the other types of redress mechanisms which a party may prefer as an appropriate dispute redressal system. As far as Arbitration is concerned, litigation under Section 9 and 34 are brought before the Court. All kinds of hyper technicalities are raised. Where as under Mediation under Section 89 of C.P.C. mediation can be resorted to any stage of the litigation. .

Legislations have always tried to deescalate conflicts by law whereby alternative/appropriate dispute resolution has been incorporated in many of legislations. The first known non adversarial system was the Arbitration Act, 1940. Law covering one of species of alternative redressal, namely, mediation in India are: Industrial Disputes Act, 1947, Code of Civil Procedure, 1908, Arbitration and Conciliation Act, 1996, Companies Act, 2013, Commercial Courts Act, 2015 and Rules, Consumer Protection Act, 2019, Real Estate (Regulation and Development) Act, 2016, Insolvency and Bankruptcy Code, 2016, RBI Online Dispute

4 *Section 89 CPC : Need For An Urgent Relook by Justice R.V. Raveendran*
5 *Indian Review of International Arbitration Published online MNLU 2021*
6 *Ramji Dayawala and Sons (p) Ltd. V. Invest Import (1981) 1 SCC 80 (India)*

Resolution (ODR) System for Digital Payments, Mediation in Family Disputes. A reference to the decision in most wellkown is Afcons Infrastructure Ltd. v Cheriyan Varkey Construction Company is considered to be an important judicial pronouncement laying down the way ahead for mediation. [7]

Now consumer related disputes also can go for mediation which is a remedy under the Consumer Protection Act. As can be seen post Covid-19, appropriate dispute redressal would be the best method so as to diminish the pendency of cases in the courts.

The alternative dispute redressal mechanism even for family relations is a better option than to litigate as in future as far as disposals are concerned we will have to adopt conflict management and court management for all kinds of litigation. It goes without saying that the matters /disputes which cannot be referred to meditation centre or Lok Adalat will have to be decided by the courts. Practical suggestions of adoption of any of the redressal mechanism can reduce the quantum of conflicts between the parties. Even in the health care sector we need this alternative system which was prevailing in India.

The settlement carried out at the Lok Adalat in the dispute redressal process will help the judiciary in managing the backlog in the future. The decision in the Lok Adalat will be enforceable as a decree of a Court. By settling the matter through ADR mechanisms, the judicial officer also saves his time from deciding the matter in favour of one and against the other which will give rise to appeal.. The parties who have settled their dispute may restart their relationship once again. The parties would move on in life which is the main advantage of ADR system. The first Lok Adalat post COVID19 in India was held on 10.7.2021 throughout India and webinar on mediation was organised by GSLSA on 26th and 27th June 2021 so as to re energise the mediation movement.

Recently, in *M.R. Krishna Murthi v. New India Assurance Co. Ltd. and others*[8], the Court has again reiterated the idea of trying to assess compensations by ADR mechanism for victims of road accidents. The matters under Motor Vehicles Act also will have to disposed of at Lok adalats and, therefore, the observation of the Apex Court will give a fillip. The importance of this judgment can be seen as various observations are made for disposing of matters and also for feasibility of settlement of such cases.So as to prevent delays the Mediation/Conciliation Project Committee has to be also revived. Through the umbrella provision in the form of Section 89 of Code of Civil Procedure, 1908 providing for court annexed mediation, the advantages of mediation would be manifold in this coming period of COVID 19 which will add to the speedy disposal of cases. Thus, according to the author, as far as motor vehicles accident claims or the land acquisition matters are concerned, if the government which is the main party decide to settle and by settlement grant compensatory amount to the claimants by way of holding Lok Adalats. Even matters

7 *Afcons Infrastructure Ltd. v Cheriyan Varkey Construction Company, 2010 (7) SCALE 293. (India)*
8 *M.R. Krishna Murthi v. New India Assurance Co. Ltd. and others, (2020) 15 SCC 493 (India)*

concerning economic loss suffered by return of cheque and matters under the Negotiable Instrument Act can be settled by a decree at Lok Adalat which would be enforceable as held in *Arun Kumar v. Anita Mishra and others*[9] and *K.N. Govindan Kutty Menon v. C.D. Shahji*[10].

(3) USE OF TECHNOLOGY IN ADR

The technology which has developed can now be used to bring about solution between parties which are located at different districts, States or Countries. There can be meetings on ZOOM, WhatsApp and other digital platforms. Emails can also contribute to settlement being arrived at. The author feels that conciliation/mediation/negotiation and judicial settlement all can be together stage by stage explore and deal with disputes expeditiously by way of these online facilities. The adoptable procedures can be even left to the parties before they come to the Court and also after they come to the court but before the issues are settled. The parties may be requested to go for a compulsory conciliatory procedure for a possible out of court settlement which will bring a respected non resentment satisfaction to the parties. The information and communication technology namely online dispute resolution is basically employing of available information and communication technology to deliver ADR services or is implementation of ADR in online environment[11].

(4) APPROPRIATE DISPUTE RESOLUTION MECHANISM

The ADR mechanism can also be termed as 'Appropriate' which would be in the interest of the party so as to give them an option to choose their own process which may bring resolution to their conflict and, therefore, the term 'Alternative' can be interchangeably used as appropriate conflict resolution mechanism and that will permit the party to conciliate, mediate and negotiate to a settlement which would bring about a proper solution may be not exact solution but proper solution to an unwilling situation. The government and its companies should now be mandatorily sent for such dispute resolution. The officers of government should be sent for taking training in mediation as that may inculcate them in reaching a resolution instead of litigating at public exchequer. They should now learn to be content with the decisions at different levels of the Court namely if a decision is given by the Court of the first instance relying on an authoritative precedent, the government organisation should not challenge the verdict in higher forum and that if the litigation can be brought to an end by non-adversarial method it should not be prolonged. The reflection on their approach should be non-adversarial where on facts they can patiently go through the issues which are

9 *Arun Kumar v. Anita Mishra and others , (2020) 16 SCC 118 (India)*
10 *K.N. Govindan Kutty Menon v. C.D. Shahji , (2012) 2 SCC 51 (India)*
11 *Dr. P.C. Markanda, Mediation : Step by Step First Edition, 2021, Thomson Reuters page No.232*

raised by the stakeholders and they should have an inclusive approach for solving the difficulties which can be solved. There must be a jurisprudential change in the thinking of the government and its organisations.

It is worth considering the idea floated in the year of 2007 when Notification was issued by the High Court of Gujarat at Ahmedabad for insertion in the Gujarat Government Gazette, Part-IV-(C) termed as Part X of the Code of Civil Procedure, 1908 (5 of 1908) calling it Appropriate Dispute Resolution Guidelines Title. The rules were very important as they suggest about Appropriate Dispute Redressal on which a litigant may chose and subjected to. The Rules were exhaustive and very important. (a)These Guidelines in Part I shall be called the Civil Procedure Appropriate Dispute Resolution (Gujarat) Draft Rules, 2007 (b)These Draft Rules shall come into force from the date of their publication in the official Gazette. Unfortunately, these are not notified till date but if they are followed and if parties are directed-requested or explained that they opt for one of the options, it would really be helpful to resolve the dispute or pending lis.

(5) MEDIATION BEING A SAVIOR TO LITIGANTS POST 2021: A BRIEF LOOK INTO IMPORTANCE OF MEDIATION.

5(1) (a) Concept of Mediation:

Mediation has been defined in many manners. Mediation is defined as negotiation which is carried out between parties assisted by an outsider who can be a catalyst in deciding the dispute between the parties. It can be defined as a conflict resolution mechanism with the aid of a third party but without intervention of judge. It is meant for settling disputes. In ADR especially Mediation Mediator looks/appreciates from heart and eyes. In judicial proceeding, a Judge decides with mind and brain and has to decide on papers. The Apex Court recently in the case *Chief Executive Officer Vs. Asiatic Steel Ltd*[12]*(referred as Asiatic Steel Ltd.)* while considering the matter has lamented on the pendency of matters specially pertaining to Governments or its organisations and though it was a matter under law of contract the writ petition under Article 226 was accepted by the High Court, The Apex Court has touched on the importance of mediation when there is huge pendency of litigation. While quoting *Gurgaon Gaon Gramin Bank Case*[13] where the Court had vehemently conveyed for settling the disputes when there was rise in litigations. It is often observed that Central and State Governments litigate in Court either on some petty clash or save its officers and, therefore, the Court considered considered falling back on ADR mechanism. The United Nations Environment Programme based in AAR HUS Conventions has considered mediation to be one of the methods which can be used for bringing about changes in the environment jurisprudence also. The concept of mediation post covid would be important the reason is that litigations are increasing, the judicial administration in State would be

12 *Chief Executive Officer Vs. Asiatic Steel Ltd , 2020 SSCONLINE SC 949 (India)*
13 *Gurgaon Gaon Gramin Bank Case, (2012) 8 SCC 781 (India)*

affected by the arrears and performance standards to be fixed for the Judges would be too great. E-courts will have its importance. We will have to set up our disposal plan and for that steps will have to be taken and one of the steps in future is resorting to alternative mode namely mediation or Lok Adalat which are in the Courts and disposed in definite time frames.

5(1)(b)In family matters:-

Reference to this kind of litigation in *Parry Kansgra Vs. Smirit Madan Kansgra*[14] is being made as the importance of mediation and confidentiality is very important in family disputes . The matter was pending before the Apex court and the Apex Court was monitoring the matter since long trying to settle the dispute between husband and wife. The decision in the said matter came in October, 2020. The judgment can be said to be based on child custody matters where the majority granted the custody of Aditya Vikram Kansgra to the father with certain modifications and after lot of negotiations, the court considered the fact that no mirror order would be necessary while taking Aditya to Kenya. This shows that the court tried to mediate and bring an end to the long drawn lis between the parties.

5 (2)b)Term 'CONCERN' And Meaning

As far as ADR is concerned, the term concern has its own importance as the parties who are interested in litigation are to be taken care of as they would be anxious to have their litigation decided. "The word 'concern"is not a term of art, having a precise, fixed meaning. It has several nuances and is used to convey diverse shades of meaning over a wide spectrum. It may mean 'to have a relation to, or bearing on, be of interest or, importance' or 'to have an anxiety, worry'. 'Concerned' as an adjective may mean 'interested', 'involved'. In one context, it may mean one thing, and in a different context another. The decisions as to the meaning of this word used in a different context in another statute, are scarcely of much value in construing it in the setting of the provision which which we are concerned. The best way therefore to construe this word is with reference to the context in which is used."[15]

(6) WHY HAVE PRE TRIAL ADVISORY

Before trial, as elsewhere throughout the adversary process to begin, the parties play the dominant role in directing the litigation as lot of churning goes on. The increasing presence in the judicial system of more complex cases, and the pendency of other types of litigation would permit judges to take a more active role in managing the litigation in the interest of promoting efficiency. The pretrial process takes several forms. The Commercial courts Act and I.D. Act specify that the parties must participate in a series of pretrial conferences (called mediation) designed to convey the status of party to the case. Under the Commercial Courts Act Section 12A provides for pre institution mediation and settlements. At such meetings,

14 *Parry Kansgra Vs. Smirit Madan Kansgra, 2019(3)SCALE573 (India)*
15 *R.S. Sarkaria, J. In R. Dalmia Vs. CIT, (1977) 2 SCC 467 (India)*

preliminary matters can be discussed at an early stage. The judge might hold a conference in which everyone agrees on a plan for the schedule and amount of discovery to be taken in the case. Many courts or rather all courts require a pretrial conference between the attorneys, the judges and occasionally the parties to the case (namely stake holders). Depending on the rules and customs of the jurisdiction and the technique of the person trying or resolving the dispute the pretrial conference may serve to finally prepare the case for trial or otherwise and to encourage the parties to settle all disputes or let go some and litigate on unsolved issues or both. At the conference the parties will try to narrate facts which are not in dispute try to narrow down the issues remaining and agree on a schedule for the settlement. If they cannot agree, the judge will try to decide those issues but at that stage, the judge also will also try to resolve pending motions on evidence, witnesses, and other matters. A major function of the pretrial process is to encourage the parties to settle the case before it gets to trial. This is why the reason is judges are under considerable pressure to conclude as many cases as possible and so the judge may use the pretrial resolution technique as an occasion to persuade, cajole, and pressure the parties as also persons represented by them to settle the case before trial. The constitutional values vis a vis his right to what is known to be giving speedy justice has eluded the society as the courts are over clogged with litigations. The legislations as are being brought on the statute book they give rise to one or the other reason for a citizen to show their concern about interpretation and or construction of the same and this word concern is not a term of art which would have a precise or a fix meaning. It may convey so many shades. A person may be anxious to see decision being taken in a different manner. As early as 1976 in *Statesman Ltd. Vs. Workmen*[16], the Court described what the word 'concern' meant and so pre trial resolution must be tried

(7) DIFFERENT RESOLUTION TECHNIQUES

There are different resolution techniques in comparison to each other namely mediation vis a vis Lok Adalat; vis a vis Arbitration; vis a vis Conciliation; Plea bargaining vis a vis section 320 of Cr.P. Code

7(a)Term 'CONCILIATION' And its Meaning

Mediation and Conciliation

Mediation as seen in the western world and conciliation recognised in India are the same. In order to understand that mediation and conciliation are synonyms, the following meanings attached thereto in Black's Law Dictionary are reproduced below:-Mediation

A method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solutions-Also termed conciliation. **(Black's Law Dictionary Seventh Edition Page 96).**Conciliation

16 *Statesman Ltd. Vs. Workmen, (1976) 2 SCC 223, para 5 (India)*

a. A settlement of a dispute in an agreeable manner.

b. A process in which a neutral person meets with the parties to a dispute (often labor) and explores how, the dispute might be resolved. **(Black's Law Dictionary Seventh Edition Page 284).**The distinction between MEDIATION AND CONCILIATION is widely debated among those interested in ADR, arbitration and international diplomacy, some suggest that conciliation is a 'non binding arbitration', whereas mediation is merely 'assisted negotiation'. Others put it this way: conciliation involves a third party's trying to bring together disputing parties to help them reconcile their difference, whereas mediation goes further by allowing the third party to suggest terms on which dispute might be resolved. Still other reject these attempts at differentiation and contend that there is no consensus about what the two words mean – that they are generally inter changeable. Though a distinction would be convenient, those who argue that usage indicates a broad synonymity are most accurate.

(8) COURTS' ENDEAVOR FOR ADR

The Supreme Court decisions for unclogging over flowing dockets of Courts are numerous. The latest being *Asiatic Steel Ltd* with a view to implement the 129th Report of the Law commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the Court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat"'If the parties are able to come to terms at the gentle suggestion of a court as what it considers just, aided by the activist endeavours of counsel, it would be a far more satisfactory solution of the situation between two neighbours who have fallen out than bare adjudication of the points of fact and law raised which will leave the parties as bitter neighbours."[17]"Dispute-processing is not by court litigation alone. Industrial peace best flourishes where non-litigative mechanisms come into cheerful play before tensions develop or dispute brew. Speaking generally, alternatives of the longish litigative process is a joyous challenge to the Indian activist jurist and no field is in need of the role of avoidance as a means of ending or pre-empting disputes as industrial life. Litigation, whoever, wins or loses, is often the funeral of both."[18]"In the rough and tumble of industrial disputes conciliation is a necessary grace to the stronger party, the socially conscious management, must cultivate and huff a flaw it must eschew."[19]

Training manual by Supreme court on Mediation be also glanced. The decisions in *Shymlika Das v. GRIDCO*[20], *Guru Nanak Foundation v. Ratan Singh*[21], *Sukanya Holdings (pvt)ltd v. J H Pandya* [22]*In Re vs*

17 *V.R. Krishna Iyer, J. In Brahmananda Vs. Saushalya Devi, (1977) 3 SCC 1, para 5.*
18 *In Mumbai Kamgar Sabha Vs. Abdulbhai Faizullabhai (1976) 3 SCC 832, para 41.*
19 *V.R. Krishna Iyer, J. In Statesman Ltd. Vs. Workmen, (1976) 2 SCC 223, para 15.*
20 *Shymlika Das v. GRIDCO, (2010) 15 SCC 268 (India)*
21 *Guru Nanak Foundation v. Ratan Singh, A 1981 SC 2075(India)*

State[23] *Dipankar Debapriya Haldar V Teesta Dipankar Haldar*[24]*The most wellkown is Afcons Infrastructure* Ltd. v Cheriyan Varkey Construction Company. These decisions and the the training manual of the Supreme Court shows us that mediation and the ADR mechanism will have to be adhered to for the future to come and ADR mechanism should be resorted to for clearing the backlogs which has been the endeavour of the Apex Court also.

CONCLUSION AND SUGGESTIONS

All three pillars of justice delivery system are overburdened, namely, Courts, Tribunals and Revenue or quasi judicial authorities, hence adopting ADR mechanism by all is the call of the day. The pendency is highly increasing with every day of non physical hearing. Compromise – vis a vis Settlement – vis a vis Mediation for burying the conflict so that peace is achieved and there is decrease in arrears is the necessity of the day. .

During this time there are steps of Court management with the aid of information technology which we will have to be undertaken as challenges before us are enormous. In the year 2021 and thereafter, we have to start thinking of what is known as flexible working schedules for all. The most innovative way of dispensing justice would be in a different platform. The major challenge to dispose these arrears which have mounted in the already clogged system can be undertaken by adhering to ADR mechanism. In this trying time a separate wing for disposal of matters before issues are framed will have to be sent to this wing and that separate wing has to be what can be said to be either of the alternative modes of dispensing justice to the satisfaction of the litigants. The Legal Services Authorities of the States will have to create more awareness atDistricts and the Talukas and at village level also. The Courts will have to shift from analogue to digital. No doubt the Commercial Courts Act, 2015 has legislated alternative dispute redressal by way of mediation but all these formalities of legislation would create further delay. The author feels that creation of tribunals and specialised Courts is not the only solution as at times they may turn counter productive because of lack of infrastructure. The pre institutional mediation and settlements brought about in the statute with effect from 3.5.2018 should be vigorously applied by commercial courts in the country. We are awaiting the new Mediation legislation to be notified and see how it works, as each legislation brings with it litigation as it would require interpretation of the provisions of the legislation and its intent. We will have to fathom the rhythm of change as the recent judgments have shown that legislation provide for mediation.

22 *Sukanya Holdings (pvt)ltd v. J H Pandya, 2003 5 SCC 531. (India)*
23*Re vs State , A2021 Sc1957 (India)*
24*Dipankar Debapriya Haldar V Teesta Dipankar Haldar , 2021 AIJEL-SC 67259 (India)*