

Chapter – 3

Different Modes of Alternative Dispute Resolution (ADR)

[3.1] INTRODUCTION:

Dispute resolution is an indispensable process for making social life peaceful. Dispute resolution process tries to resolve and check conflicts, which enables persons and group to maintain co-operation. It can thus be alleged that it is the *sin qua non* of social life and security of the social order, without which it may be difficult for the individuals to carry on the life together.³⁷

Alternative Dispute Resolution (ADR) is a term used to describe several different modes of resolving legal disputes. It is experienced by the business world as well as common men that it is impracticable for many individuals to file law suits and get timely justice. The Courts are backlogged with dockets resulting in delay of year or more for the parties to have their cases heard and decided. To solve this problem of delayed justice ADR Mechanism has been developed in response thereof.

Alternative dispute redressal method are being increasingly acknowledged in field of law and commercial sectors both at National and International levels. Its diverse methods can helps the parties to resolve their disputes at their own terms cheaply and expeditiously. Alternative dispute redressal techniques are in addition to the Courts in

³⁷ Park and Burger, Introduction to the Science of Sociology p. 735

character. Alternative dispute redressal techniques can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. Alternative dispute redressal techniques can be employed in several categories of disputes, especially civil, commercial, industrial and family disputes³⁸. From the study of the different alternative dispute redressal techniques in the proceedings chapters it is found that, alternative dispute redressal methods offers the best solution in respect of commercial disputes where the economic growth of the Country rests.

The goal of Alternative dispute redressal is enshrined in the Indian Constitution's preamble itself, which enjoins the state: "to secure to all the citizens of India, justice-social, economic and political-liberty, equality and fraternity".³⁹

The Law Commission of India has maintained that, the reason judicial delay is not a lack of clear procedural laws, but rather the imperfect execution, or even utter non-observance, thereof.⁴⁰ The Law Commission of India in its 14th Report categorically stated that, the delay results not from the procedure laid down by the legislations but by reason of the non-observance of many of its important provisions particularly those intended to expedite the disposal of proceedings. Given the huge number of pending cases, the governance and administrative control over judicial institutions through manual processes has become extremely

³⁸ Hindu Marriage Act 1955, Industrial Dispute Act, 1947, The Code of Civil Procedure, The Family Court Act, 1984.

³⁹ The Preamble of Indian Constitution

⁴⁰ Law Commission of India, 77th Report, pr. 4.1.

difficult.⁴¹ The Supreme Court made it clear that this stage of affair must be addressed: ‘An independent and efficient judicial system in one of the basic structures of our constitution... It is our Constitutional obligation to ensure that the backlog of cases is declared and efforts are made to increase the disposal of cases.’⁴²

Wide range of process are defined as alternative dispute redressal process often, dispute resolution process that are alternative to the adjudication through Court proceedings are referred to as alternative dispute resolution methods. These methods usually involve a third party referred to as neutral, a skilled helper who either assists the parties in a dispute or conflict to reach at a decision by agreement or facilitates in arriving at a solution to the problem between the party to the dispute.⁴³

The alternative disputes resolution mechanism by the very methodology used, it can preserve and enhance personal and business relationships that might otherwise be damages by the adversarial process. It is also flexible because it allows the contestants to choose procedures, which fir the nature of the dispute and the business context in which it occurs.

The term “Alternative Disputes Resolution” takes in its fold, various modes of settlement including, Lok Adalats, arbitration,

⁴¹ In all, 33,79,033 cases are pending before the High Courts. As on December 31, 2004, the total number of civil cases are pending before the subordinate judiciary is 82,36,254 and criminal cases pending are 1,95,85,776. The total pendency thus is 2,78,22,030. This shows that out of the total national pendency at the subordinate Courts level, 70% is criminal cases and the remaining is civil cases. The total number of district and subordinate Courts are 12,401. These Courts are located in 2,066 towns.

⁴² Brij Mohan Lal vs. Union of India & Other (2002-4-scale-433), May 6, 2002

⁴³ Tania Sourdin, Alternative Dispute Resolution. p. 4

conciliation and Mediation. This technique of Alternative Disputes Resolution has been used by many countries for effective disputes resolution. The most common types of Alternative Disputes Resolution is Mediation. In, fact mediation had been described by some as the most Appropriate Dispute Resolution method. Mediation as a tool for dispute resolution is not a new concept. To put it in simple terms, mediation is an amicable settlement of disputes with the involvement of a neutral third party who acts as a facilitator and is called a ‘Mediator’.

ADR is usually less formal, less expensive and less time-consuming than regular trial. ADR can also give people more opportunity to determine when and how their dispute will be resolved.

[3.2] DIFFERENT TYPES OF ALTERNATIVE DISPUTE RESOLUTIONS: -

The most common types of ADR for civil cases are Arbitration, Conciliation, Mediation, Judicial Settlement and Lok Adalat.

In India, the Parliament has amended the Civil Procedure Code by inserting Section 89 as well as Order 10 Rule 1-A to 1-C. Section 89 of the Civil Procedure Code provides for the settlement of disputes outside the Court. It is based on the recommendations made by the Law Commission of India and Malimath Committee. It was suggested by the Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an

attempts to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the Court to refer the dispute, after issues are framed, for settlement either by way of Arbitration, Conciliation, Mediation, Judicial Settlement through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate disputes resolution method that the suit could proceed further. In view of the above, new Section 89 has been inserted in the Code in order to provide for alternative dispute resolution.

It is worthwhile to refer Section 89 of the Civil Procedure Code, which runs as follows: -

Sec. 89. Settlement of disputes outside the court. - (1) *Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for –*

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) where a dispute has been referred –

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for

- arbitration or conciliation were referred for settlement under the provisions of that Act;*
- (b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;*
- (c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;*
- (d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."*

On perusal of the aforesaid provisions of Section 89, it transpires that it refers to five types of ADR procedures, made up of one adjudicatory process i.e. arbitration and four negotiatory i.e. non adjudicatory processes such as Conciliation, Mediation, Judicial Settlement and Lok Adalat. The object behind Section 89 is laudable and sound. Resort to ADR process is necessary to give speedy and effective

relief to the litigants and to reduce the pendency in and burden upon the Courts.

Of course, Section 89 has to be read with Rule 1-A of Order 10, which runs as follows: -

Order 10 Rule 1-A. Direction of the Court to opt for any one mode of alternative dispute resolution.--After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

Order 10 Rule 1-B. Appearance before the conciliatory forum or authority.--Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Order 10 Rule 1-C. Appearance before the Court consequent to the failure of efforts of conciliation.--Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.

On joint reading of Section 89 read with Rule 1-A of Order 10 of Civil Procedure Code, it transpires that the Court to direct the parties to

opt for any of the five modes of the Alternative Dispute Resolution and on their option refer the matter.

Thus, the five different methods of ADR can be summarized as follows: -

1. Arbitration
2. Conciliation
3. Mediation
4. Judicial Settlement &
5. Lok Adalat

(3.2.1) ARBITRATION:

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons – arbitrators, by whose decision they agree to be bound. It is a resolution technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding for both sides and enforceable. There are limited rights of review and appeal of Arbitration awards. Arbitration is not the same as judicial proceedings and Mediation.

Arbitration can be either voluntary or mandatory. Of course, mandatory Arbitration can only come from a statute or from a contract that is voluntarily entered into, where the parties agree to hold all existing or future disputes to arbitration, without necessarily knowing, specifically, what disputes will ever occur.

The advantages of Arbitration can be summarized as follows: -

- a) It is often faster than litigation in Court.
- b) It can be cheaper and more flexible for businesses.
- c) Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential.
- d) In arbitral proceedings the language of arbitration may be chosen, whereas in judicial proceedings the official language of the competent Court will be automatically applied.
- e) There are very limited avenues for appeal of an arbitral award.
- f) When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed as one cannot choose judge in litigation.

However, there are some disadvantages of the Arbitration, which may be summarized as follows: -

- a) Arbitrator may be subject to pressures from the powerful parties.
- b) If the Arbitration is mandatory and binding, the parties waive their rights to access the Courts.
- c) In some arbitration agreements, the parties are required to pay for the arbitrators, which add an additional cost, especially in small consumer disputes.

- d) There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.
- e) Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.
- f) Arbitration awards themselves are not directly enforceable. A party seeking to enforce arbitration award must resort to judicial remedies.

In view of provisions of Section 89 of the Civil Procedure Code, if the matter is referred to the Arbitration then the provisions of the Arbitration and Conciliation Act, 1996 will govern the case.

(3.2.2) CONCILIATION:

Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately in order to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bring about a negotiated settlement. It differs from Arbitration in that.

Conciliation is a voluntary proceeding, where the parties involved are free to agree and attempt to resolve their dispute by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when

proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and /or personal interests.⁴⁴ The terms conciliation and mediation are interchangeable in the Indian context. Conciliation is a voluntary process whereby the conciliator, a trained and qualified neutral, facilitates negotiations between disputing parties and assists them in understanding their conflicts at issue and their interests in order to arrive at a mutually acceptable agreement. Conciliation involves discussions among the parties and the conciliator with an aim to explore sustainable and equitable resolutions by targeting the existent issues involved in the dispute and creating options for a settlement that are acceptable to all parties. The conciliator does not decide for the parties, but strives to support them in generating options in order to find a solution that is compatible to both parties. The process is risk free and not binding on the parties till they arrive at and sign the agreement. Once a solution is reached between the disputing parties before a conciliator, the agreement had the effect of an arbitration award and is legally tenable in any court in the country⁴⁵.

Most commercial disputes, in which it is not essential that there should be a binding and enforceable decision, are amenable to conciliation. Conciliation may be particularly suitable where the parties in dispute wish to safeguard and maintain their commercial relationships.

⁴⁴ See <http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/>

⁴⁵ See <http://www.ficci-arbitration.com/htm/whatisconcialation.htm>

The following types of disputes are usually conducive for conciliation:

- commercial,
- financial,
- family,
- real estate,
- employment, intellectual property,
- insolvency,
- insurance,
- service,
- partnerships,
- environmental and product liability.
- Apart from commercial transactions, the mechanism of Conciliation is also adopted for settling various types of disputes such as labour disputes, service matters, antitrust matters, consumer protection, taxation, excise etc

Conciliation proceedings⁴⁶:

Either party to the dispute can commence the conciliation process. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation

⁴⁶ Conciliation as an Effective Mode of Alternative Dispute Resolving System Dr. Ujwala Shinde Principal I/C Shri. Shivaji Maratha Society's Law College Pune University Maharashtra. India

proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute. Generally, only one conciliator is appointed to resolve the dispute between the parties. The parties can appoint the sole conciliator by mutual consent. If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not termed as Presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived at is signed by the parties and authenticated by the conciliator. In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award. If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration.

A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings; (b) admissions made by any party during the course of the conciliation proceedings; (c) proposals made by the conciliator for the consideration of the parties; (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings.

Conciliation has received statutory recognition as it has been proved useful that before referring the dispute to the civil court or industrial court or family court etc, efforts to concile between the parties should be made. It is similar to the American concept of court-annexed mediation. However without structured procedure & statutory sanction, it was not possible for conciliation to achieve popularity in the countries like USA & also in other economically advanced countries

Justice M. Jagannadha Rao has, in the article “CONCEPTS OF CONCILIATION AND MEDIATION AND THEIR DIFFERENCES”, stated as under:⁴⁷

⁴⁷ Judge, Supreme Court of India. See http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf

“In order to understand what Parliament meant by ‘Conciliation’, we have necessarily to refer to the functions of a ‘Conciliator’ as visualized by Part III of the 1996 Act. It is true, section 62 of the said Act deals with reference to ‘Conciliation’ by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This makes no difference as to the meaning of ‘conciliation’ under sec. 89 because; it says that once a reference is made to a ‘conciliator’, the 1996 Act would apply. Thus the meaning of ‘conciliation’ as can be gathered from the 1996 Act has to be read into sec. 89 of the Code of Civil Procedure. The 1996 Act is, it may be noted, based on the UNCITRAL Rules for conciliation.

Now under section 65 of the 1996 Act, the ‘conciliator’ may request each party to submit to him a brief written statement describing the “general nature of the dispute and the points at issue”. He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Sub-section (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account “the circumstances of the case, the wishes the parties may express,

including a request for oral statements”. Subsection (4) is important and permits the ‘conciliator’ to make proposals for a settlement. It states as follows:

“Section 67(4) - The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.”

Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can formulate terms of a possible settlement_if he feels there exist elements of a settlement. He is also entitled to ‘reformulate the terms’ after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

“Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement_and submit them to the parties for their observations. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations.”

The above provisions in the 1996 Act, make it clear that the ‘Conciliator’ under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible settlement” or “reformulate the terms”. This is indeed the UNCITRAL concept.”

(3.2.3) MEDIATION:

Now, worldwide mediation settlement is a voluntary and informal process of resolution of disputes. It is a simple, voluntary, party centered and structured negotiation process, where a neutral third party assists the parties in amicably resolving their disputes by using specified communication and negotiation techniques. Mediation is a process where it is controlled by the parties themselves. The mediator only acts as a facilitator in helping the parties to reach a negotiated settlement of their dispute. The mediator makes no decisions and does not impose his view of what a fair settlement should be.⁴⁸

In the mediation process, each side meets with a experienced neutral mediator. The session begins with each side describing the problem and the resolution they desire – from their point of view. Once each sides’ respective positions are aired, the mediator then separates them into private rooms, beginning a process of “Caucus Meeting” and thereafter “joint meetings with the parties”. The end product is the

⁴⁸ An Article “Disputes among Business Partners should be Mediated or Arbitrated, Not Litigated” by William Sheffield, Judge, Supreme Court of California (Ret.) published in book “Alternative Dispute Resolution – What it is and how it works” Edited by P. C. Rao and William Sheffield, page No.291

agreement of both the sides. The mediator has no power to dictate his decision over the party. There is a *win – win* situation in the mediation.

The chief advantages of the mediation are⁴⁹: -

1. The agreement which is that of the parties themselves;
2. The dispute is quickly resolved without great stress and expenditure;
3. The relationship between the parties are preserved; and
4. The confidentiality is maintained.

(3.2.4) JUDICIAL SETTLEMENT:

Section 89 of the Civil Procedure Code also refers to the Judicial Settlement as one of the mode of alternative dispute resolution. Of course, there are no specified rules framed so far for such settlement. However, the term Judicial Settlement is defined in Section 89 of the Code. Of course, it has been provided therein that when there is a Judicial Settlement the provisions of the Legal Services Authorities Act, 1987 will apply. It means that in a Judicial Settlement the concerned Judge tries to settle the dispute between the parties amicably. If at the instance of judiciary any amicable settlement is resorted to and arrived at in the given case then such settlement will be deemed to be decree within the meaning of the Legal Services Authorities Act, 1987. Section 21 of the Legal

⁴⁹ Ibid page 289

Services Authorities Act, 1987 provides that every award of the Lok Adalat shall be deemed to be a decree of the Civil Court.

There are no written guidelines prescribed in India as to judicial settlement. But in America, ethics requiring judicial settlement has been enumerated by Goldschmidt and Milford which are as under:

(3.2.4.1) JUDICIAL SETTLEMENT GUIDELINES⁵⁰

The following are guidelines for judicial settlement ethics:

1. Separation of Functions:

Where feasible, the judicial functions in the settlement and trial phase of a case should be performed by separate judges.

2. Impartiality and Disqualification:

A judge presiding over a settlement conference is performing judicial functions and, as such, the applicable provisions of the code of judicial conduct, particularly the disqualification rules, should apply in the settlement context.

3. Conference Management:

Judges should encourage and seek to facilitate settlement in a prompt, efficient, and fair manner. They should not, however, take unreasonable measures that are likely under normal circumstances

⁵⁰ Goldschmidt and Milford, Judicial Settlement Ethics, American Judicature Society, 1996, grant SJI-95-03C-082 from the State Justice Institute; see <http://www.judiciary.state.nj.us/civil/>

Judicial SettlementGuidelines.pdf

to cause parties, attorneys, or other representatives of litigants to feel coerced in the process. The judge should take responsibility in settlement conferences.

4. Setting Ground Rules on Issues Such as Confidentiality, Disclosure and Ex Parte Communications:

In settlement conferences, judges should establish ground rules at the onset, either orally or in writing, informing parties and their attorneys of the procedures that will be followed. The rules should include ground rules governing issues such as confidentiality, disclosure of facts and positions during and after conferences, and ex parte communications.

5. Focusing the Discussions:

A judge should use settlement techniques that are both effective and fair, and be mindful of the need to maintain impartiality in appearance and in fact.

6. Guiding or Influencing the Settlement:

The judge should guide and supervise the settlement process to ensure its fundamental fairness. In seeking to resolve disputes, a judge in settlement discussions should not sacrifice justice for expediency.

7. Sanctions or Other Penalties Against Settlement Conference Participants:

A judge should not arbitrarily impose sanction or other punitive measures to coerce or penalize litigants and their attorneys in the settlement process.

(3.2.5) LOK ADALAT:

The concept that is gaining popularity is that of Lok Adalats or people's courts as established by the government to settle disputes through conciliation and compromise. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromise reached through systematic negotiations. The first Lok Adalats was held in Una aim the Junagadh district of Gujarat State as far back as 1982. Lok Adalats accept even cases pending in the regular courts within their jurisdiction.

Section 89 of the Civil Procedure Code also provides as to referring the pending Civil disputes to the Lok Adalat. When the matter is referred to the Lok Adalat then the provisions of the Legal Services Authorities Act, 1987 will apply. So far as the holding of Lok Adalat is concerned, Section 19 of the Legal Services Authorities Act, 1987 provides as under: -

Section 19 Organization of Lok Adalats . (1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluka Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

(2) Every Lok Adalat organised for an area shall consist of such number of:-

(a) serving or retired judicial officers; and

(b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee, or as the case may be, the Taluka Legal Services Committee, organising such Lok Adalat.

(3) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats organised by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

(4) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats other than referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of -

(i) any case pending before it; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before any court for which the Lok Adalat is organised :

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

The Lok Adalat is presided over by a sitting or retired judicial officer as the chairman, with two other members, usually a lawyer and a social worker. There is no court fee, thus making it available to those who are the financially vulnerable section of society. In case the fee is already paid, the same is refunded if the dispute is settled at the Lok Adalat. The Lok Adalat are not as strictly bound by rules of procedure like ordinary courts and thus the process is more easily understood even by the uneducated or less educated. The parties to a dispute can interact directly with the presiding officer, which is not possible in the case of normal court proceedings.

Section 21 of the Legal Services Authorities Act, 1987 is also required to be referred to here which runs as follows: -

Section 21 Award of Lok Adalat. (1) *Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under subsection (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870).*

(2) *Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.*

In view of the aforesaid provisions of the Legal Services Authorities Act, 1987 if any matter is referred to the Lok Adalat and the members of the Lok Adalat will try to settle the dispute between the parties amicably, if the dispute is resolved then the same will be referred to the concerned Court, which will pass necessary decree therein. The decree passed therein will be final and binding to the parties and no appeal will lie against that decree.

On the flip side, the main condition of the Lok Adalat is that both parties in dispute have to be agreeable to a settlement. Also, the decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of finality attached to such a determination is sometimes a retarding factor for however be passed by Lok Adalat, only after obtaining the assent of all the parties to dispute. In certain situations, permanent Lok Adalat can pass an award on merits, even without the consent of parties. Such an award is final and binding. From that, no appeal is possible.⁵¹

This is not to the say that Lok Adalat don't have many advantages. Lok Adalat are especially effective in settlement of money claims. Disputes like partition suits, damages and even matrimonial cases can also be easily settled before a Lok Adalat as the scope for compromise is higher in these cases. Lok Adalat is a definite boon to the litigant public, where they can get their disputes settled fast and free of cost. The

⁵¹ ADR – Its Facets, by Snajay Kishan Kaul. J. Chairman, Overseeing Committee Delhi High Court

Mediation and conciliation centre written in SAMADHAN –Reflections – 2006 – 10 page. 97.

appearance of lawyers on behalf of the parties, at the Lok Adalats is not barred.

Lok Adalat are not necessarily alternatives to the existing courts but rather only supplementary to them. They are essentially win-win systems, an alternative to 'Judicial Justice', where all the parties to the dispute have something to gain.

There are certain hybrids of Alternative Dispute Resolution that also deserve a mention. These processes have evolved in combination of various Alternative Dispute Resolution mechanisms with the ultimate objective of achieving a voluntary settlement. The purpose of many of these hybrids is that the principle objective of achieving a settlement is kept in mind and all permutations and combinations should be utilized towards that objective to reduce the burden of the adjudicatory process in courts. The different Alternative Dispute Resolution processes and their hybrids have found solutions to different nature of disputes and thus the knowledge of these processes can be a significant aid.

[3.3] DIFFERENCE BETWEEN THE MEDIATION AND OTHER DISPUTE RESOLUTION PROCESS: -

The alternative dispute resolution procedures can be broadly classified into two groups, first those that are adjudicative and adversarial, and second those, which are consensual and non-adversarial. The latter group includes mediation.⁵² Sir Robert A. Baruch Bush and Joseph P. Folger, in, "The promise of mediation" say that, in any conflict,

⁵² Manka, ADR: What Is It And Why Do You Need To Know? 47 J Mo Bar 623, 625.

the principal objective ought to be to find a way of being neither victims nor victimizers, but partners in an ongoing human interaction that is always going to involve instability and conflict.⁵³

There are several types of different dispute redressal methods that have evolved owing to the different needs and circumstances of the society. The study of the differences between them will help the disputant in choosing the best and the apt method of resolving their disputes according to their needs. The dominant form of dispute redressal method that is broadly adopted for the resolution of a dispute is, by filing of case before the Court of law. With the bird eye view, it can be said that, in the process of adjudication through Court of law, someone has to lose among the disputing party. The litigation route has now become slow, expensive, and uncertain in its outcome. The Courts and Tribunals do not 'resolve' a dispute, but they only “decide” a dispute or “adjudicate” on them. Whereas, in the case of mediation, the parties can try to agree with one another, were a mediator acts as a facilitator. Mediation has the advantage as it can lead to finality because, it allows for informed and un-coerced decisions to be taken by everyone involved. Disputes are resolved in the process of mediation through consensual interaction between the disputants.⁵⁴ The mediator in promoting or in other words, facilitating resolution of the dispute by the parties themselves does not purport to decide the issue between them. Mediation is more flexible, quick and less expensive than the process of adjudication through Court of Law. Thus,

⁵³ See Robert A. Baruch Bush and Joseph P. Folger, *The promise of mediation* (1994) at 229-59.

⁵⁴ Tania Sourdin, *Alternative Dispute Resolution*,(2002) p 2,3.

the study reveals that, litigation produces provides for fair and just results, but it is procedurally disadvantages as compared to mediation. Mediation affords a far greater degree of flexibility, relative informality, confidentiality and control over its resolution.

Comparative study of the process of 'mediation' and 'arbitration' shows that, mediation is a form of expedited negotiation. The parties control the outcome. Mediator has no power to decide. Settlement in the dispute is done only with party approval. Exchange of information is voluntary and is often limited. Parties exchange information that will assist in reaching a resolution. Mediator helps the parties define and understand the issues and each side's interests. Parties vent feelings, tell story, and engage in creative problem solving. Mediation process is informal and the parties are the active participants. Joint and private meetings between individual parties and their counsel are held in this process. Outcome based on needs of parties. Result is mutually satisfactory and finally a relationship may be maintained or created. Mediation when compared with arbitration is of low cost. It is private and confidential. Facilitated negotiation is an art. Mediator is not the decision maker. Mediator is a catalyst. He avoids or breaks an impasse, diffuse controversy, encourages generating viable options. He has more control over the process. The process of mediation gives the parties many settlement options. Relationship of parties is not strained in the process of mediation. There is a high degree of commitment to settlement. Parties' participation is there in the decision making process. Thus, there is no winner and no loser in this process, only the problems are resolved. In

this process the disputed parties maintains the confidentiality of proceedings.⁵⁵

The Arbitration and Conciliation Act, 1996 has provided for the legislative framework of the processes of arbitration and conciliation in India. The process of ‘arbitration’ is adjudicative in nature as the arbitrators control the outcome. Arbitrator is given power to decide. Arbitration award is final and is a binding decision. Often extensive discovery is required in this process. Arbitrator listens to facts and evidence and renders an award. The parties present the case, and testify under oath. The process of arbitration is formal. The attorneys can control the party participation. Evidentiary hearing is given in this process. No private communication with the arbitrator is possible. Decision is in the form of award based on the facts, evidence, and law. The process of arbitration is more expensive than mediation, but less expensive than traditional litigation. It is a private process between the arbitrator and the disputed parties but in some cases, decisions are publicly available. Thus, it is an informal procedure, which involves decision-maker impasse when it is submitted to an Arbitrator. The parties have less control in the proceedings and the final award, as the decision making process is with the arbitrator.⁵⁶

The ‘Conciliator’ under the Arbitration and Conciliation Act, 1996, apart from assisting the parties to reach a settlement, is also permitted to make “proposals for a settlement” and “formulate the terms of a possible

⁵⁵ L, Boule, Mediation: Principles, process, practice (Butterworths, Sydney,1996) p10-14.

⁵⁶ P. C. Rao, Secretary General ICADR , Alternative Dispute Resolution (1997) at 19-25.

settlement” or “reformulate the terms”. ‘Conciliation’, is a procedure like mediation but the third party called the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help the disputed parties to reach a settlement. The difference between the process of mediation and conciliation lies in the fact that, the ‘conciliator’ can make proposals for settlement, ‘formulate’ or ‘reformulate’ the terms of a possible settlement, while a ‘mediator’ would not do so but would merely facilitate a settlement between the parties. Under Section 30 and Section 64(1) and Section 73(1) of the Arbitration and Conciliation Act, 1996, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL⁵⁷ and Conciliation Rules and in UK and Japan. Conciliation and Mediation process is distinguishable from Arbitration as the parties’ willingness to submit to mediation or conciliation does not bind them to accept the recommendation of the conciliation or mediator but an arbitrator’s award, by contrast, is binding on the parties.⁵⁸

(3.3.1) THE DIFFERENCE BETWEEN CONCILIATION AND MEDIATION⁵⁹:

Under our law and the UNCITRAL model, the role of the mediator is not pro-active and is somewhat less than the role of a ‘conciliator’. We

⁵⁷ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

⁵⁸ Robert Merkin, Arbitration Law edn 2004,p 168, para 6.6.

⁵⁹ Justice M. Jagannadha Rao, Judge Supreme Court of India. See

<http://lawcommissionofindia.nic.in/>

[adr_conf/concepts%20med%20Rao%201.pdf](http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf)

have seen that under Part III of the Arbitration and Conciliation Act, the 'Conciliator's powers are larger than those of a 'mediator' as he can suggest proposals for settlement. Hence the above meaning of the role of 'mediator' in India is quite clear and can be accepted, in relation to sec. 89 of the Code of Civil Procedure also. The difference lies in the fact that the 'conciliator' can make proposals for settlement, 'formulate' or 'reformulate' the terms of a possible settlement while a 'mediator' would not do so but would merely facilitate a settlement between the parties. Brown quotes⁶⁰, which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative. It is there stated that conciliation "is a process in which the Conciliator plays a proactive role to bring about a settlement" and mediator is "a more passive process".

This is the position in India, UK and under the UNCITRAL model. However, in the USA, the person having the pro-active role is called a 'mediator' rather than a 'conciliator'. Brown says⁶¹ that the term 'Conciliation' which was more widely used in the 1970s has, in the 1970s, in many other fields given way to the term 'mediation'. These terms are elsewhere often used interchangeably.

Where both terms survived, some organizations use 'conciliation' to refer to a more proactive and evaluative form of process. However, reverse usage is sometimes employed; and even in UK, 'Advisory, Conciliation and Arbitration Service' (ACAS) (UK) applies a different meaning. In fact, the meanings are reversed. In relation to 'employment',

⁶⁰ (at p 127) the 1997 Handbook of the City Disputes Panel, UK

⁶¹ Page 272, *ibid.*

the term ‘conciliation’ is used to refer to a mediatory process that is wholly facilitative and non-evaluative. The definition of ‘conciliation’ formulated by the ILO (1983) is as follows:

“the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator.”

However, according to the ACAS, ‘mediation’ in this context involves a process in which the neutral “mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject. (The ACAS role in Arbitration, Conciliation and Mediation, 1989). It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The National Alternative Dispute Resolution Advisory Council, (NADRAC), Barton Act 2600, Australia⁶² in its recent publication (ADR terminology, a discussion Paper, at p 15) states that the terms “conciliation” and “mediation” are used in diverse ways. (The ‘New’ Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001). It points out that the words ‘conciliation’ and ‘counselling’ have disappeared in USA. In USA, the word ‘conciliation’ has disappeared and

⁶² see www.nadrac.gov.au

‘mediation’ is used for the neutral who takes a pro-active role. For example:

“Whereas the terms ‘conciliation’ and ‘conselling’ have long since disappeared from the literature in reference to dispute resolution services in the United States and elsewhere, these terms have remained enshrined in Australian family laws, with ‘mediation’ grafted on as a separate dispute resolution service in 1991.”

Conversely, policy papers in countries such as Japan still use the term ‘conciliation’ rather than ‘mediation’ for this pro-active process⁶³ report of Justice System Reform Council, 2001, Recommendations for a Justice System to support Japan in the 21st Century). NADRAC refers, on the other hand, to the view of the OECD (The Organisation for Economic Co-operation and Development) Working Party on Information, Security and Privacy and the Committee on Consumer Policy where ‘conciliation’ is treated as being at the less formal end of the spectrum while ‘mediation’ is at the more formal end. Mediation is described there as more or less active guidance by the neutrals. This definition is just contrary to the UNCITRAL Conciliation Rules which in Art 7(4) states

“Article 7(4). The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute....”

In an article from US entitled “Can you explain the difference between conciliation and mediation”⁶⁴, a number of conciliators Mr.

⁶³ see www.kantei.go.jp/foreign/judiciary/2001/0612.

⁶⁴ <http://www.colorado.edu/conflict/civil-rights/topics/1950.html>

Wally Warfield, Mr. Manuel Salivas and others treat ‘conciliation’ as less formal and ‘mediation’ as pro-active where there is an agenda and there are ground rules. In US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a ‘conciliator’. The above article shows that in US the word ‘mediator’ reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. In fact, in West Virginia, ‘Conciliation’ is an early stage of the process where parties are just brought together and thereafter, if conciliation has not resulted in a solution, the Mediation programme is applied which permits a more active role.⁶⁵ The position in USA, in terms of definitions, is therefore just the otherway than what it is in the UNCITRAL Conciliation Rules or our Arbitration and Conciliation Act, 1996 where, the conciliator has a greater role on the same lines as the ‘mediator’ in US.

I have thus attempted to clear some of the doubts raised as to the meaning of the words ‘conciliation’ and ‘mediation’. Under our law, in the context of sec. 30 and sec. 64(1) and sec. 73(1) of the 1996 Act, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a ‘conciliator’ is a mere ‘facilitator’ whereas a ‘mediator’ has a greater pro-active role. While examining the rules made in US in regard to ‘mediation’, if we substitute the word ‘conciliation’ wherever

⁶⁵ see <http://www.state.wv.us/wvhic/Pre-Determination/20comc.htm>

the word ‘mediation’ is used and use the word ‘conciliator’ wherever the word ‘mediator’ is used, we shall be understanding the said rules as we understand them in connection with ‘conciliation’ in India.

(3.3.2) DIFFERENCE BETWEEN THE MEDIATION AND ARBITRATION

TOPIC	MEDIATION	ARBITRATION
Structure of Process	Introduction Joint Session, Causes, Agreement	Claims/ counter claims, Examination of witnesses, Arguments
Nature of Process	Negotiatory, Collaborative	Adjudicatory, Directive
Procedure	Non-procedural	Procedural rules and rules of evidence
Neutral third party	Facilitator	Adjudicator
Role of Parties/ Advocates	Active and direct	Active only during evidence
Level of formality	Informal	Formal

(3.3.3) DIFFERENCE BETWEEN THE MEDIATION AND LOK ADALAT

TOPIC	MEDIATION	LOK ADALAT
Forum	Private Conferences	Only in Court Premises
Morphology	Structured process	Persuasion and discussion
Who Controls the process	Mediator controls structured process	Presiding Officer. Process is not structure
Selection of neutral third party	Generally parties	Parties do not enjoy any say in selection
Time	Reasonable time	Time Constrains
Who Control the Outcomes	Parties	Presiding Officer
Confidentiality	Private	Public
Depth of Analysis	Detailed analysis discussion	Casual of facts and law
Types of disputes settled	All types of disputes	Recovery/ Claims disputes
Role of Parties	Active and Direct	Not active and direct

“I realized that the true function of a lawyer was to unite parties... The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. I lost nothing thereby not even money; certainly not my soul”.

--- Mahatma Gandhi