Chapter-VI

Conclusion and Suggestions

Conclusion:

The formal courts are performing a primary and leading role in justice delivery system for a very long time universally. The courts follow adversary form of procedure to decide the disputes. In this form of procedure litigation becomes never-ending exercise. Disputes resolution through legal proceedings in the courts has become excessively procedural and this has resulted in undue delays, high costs and unfairness in litigation. Besides that the adversarial nature of litigation is not favourable to the social and commercial relationships, which are needed to be preserved. All concerned are worried over the problems of delays, congestion in the courts and high costs of litigation, the justice delivery system is facing. The adversarial system creates two mutually opposing, exclusive, unfriendly, competitive, challenging and adamant parties to litigation. This system does not generate a climate of consensus, compromise and cooperation. As the litigation proceeds, so does the disagreement. At the end of litigation one party comes out as the winner and the other party as the defeated. Adversarial litigation does not end in an agreement. It creates more animosity between the parties that result in more litigation between them or even their successors.

Justice delivery system plays a vital role in promoting public interest and in the maintenance of order in the society. In administering justice the courts apply legal standards, which reveal social values. To get justice through courts one has to go through the complex and costly procedures involved in litigation. A large part of the population in
India is illiterate and live in utter poverty. Therefore, they are totally ignorant about the court-procedures, are terrified and confused when faced with the judicial machinery. Thus, most of the citizens of India are not in a position to enforce their rights, constitutional or legal, which in effect generates inequality. It is one of the most important duties of a welfare state to provide judicial and non-judicial dispute-resolution mechanisms, to which all citizens have equal access for resolution of their legal disputes and enforcement of their fundamental and legal rights. Poverty, ignorance or social inequalities should not become barriers to it.\(^1\)

The delay in the judicial system results in loss of public confidence on the concept of justice. Faith in the judicial system is determined by its ability to provide accessible, speedy and cost effective justice to all equally. It is a fundamental right of every citizen to get speedy justice, which also is the basic requisite of good judicial administration. While the Supreme Court, in a number of rulings, has stressed the need for right to speedy justice and free legal aid, successive governments have failed to translate the court’s orders into legislative Acts. In Hussainara Khatoon v. State of Bihar\(^2\) Justice Bhagwati observed, “No procedure which does not ensure a reasonably quick trial can be regarded as ‘reasonable, fair or just’ and it would fall foul of Article 21 of the Constitution. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.”

The judiciary faces a large backlog of cases which in the end results in denial of real access to the courts on account of delay that takes place in many cases in

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\(^1\) 222nd Report of Law Commission of India, para 1.7 and 1.8

dispensation of justice. In the words of Justice K. G. Balakrishnan, former Chief Justice of India, “... the people’s faith in the judicial system will begin to wane, because justice that is delayed is forgotten, excluded and finally discharged.”

There are many causes of delay in the courts, main of them being- increase in number of institution of cases year after year, huge pendency of cases in the courts at all levels, vacancy of judges in the courts, low judge-population ratio and the lengthy procedural laws. Though there is a considerable increase in the disposal of cases in various courts, the institution has increased more rapidly. This has resulted in huge pendency of cases in all the courts. The huge backlog of cases only makes justice less accessible. There were 59,058 (more than 59 thousands) cases pending in the Supreme Court as on February 29, 2012.\textsuperscript{4} The pending cases in all the 21 High Courts as on 30.6.2011 were 43, 50,858 (more than 43 lakhs) cases-34, 34,666 civil and 9, 16,202 criminal. The position is worst at the subordinate courts. There were 78,34,130 (more than 78 lakhs) civil cases and 1,98,36,287 ( nearing 2 crores) criminal cases totalling 2,76,70,417(near about 3 crores) cases pending as on 30.6.2011.\textsuperscript{5} The sanctioned number of judges is inadequate to deal with the load of cases at all the levels of courts. Above that there are vacancies even in that number of judges in all the courts. There are only 13.05 judges per million of people in India as against Australia’s 58 per million, Canada’s 75, the UK 100 and the U.S.A. 130 per million.\textsuperscript{6} The approved strength of judges in the Supreme Court is 31, but the working strength as on 1.3.2012 was 26

\textsuperscript{4} http://www.supremecourtofindia.nic.in/pendingstat.htm, cite visited on 23.3.2012.
\textsuperscript{5} Court News, Vol. VI, Issue 3, July-September 2011, available at www.supremecourtofindia.nic.in
leaving 5 vacancies. The approved strength of judges in the High Courts is 895, though the working strength was 627 as on 1.3.2012 leaving 268 posts vacant. At the district and subordinate courts the approved strength of judges is 18,008, while the working strength as on 30.6.2011 was 14,374 leaving behind 3,634 vacancies. The currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time.

On account of such deficiencies in the system, huge arrears of cases have piled up in courts at all levels, and ways and means are required to be found out urgently, to bring them to a manageable limit, so as to sustain the faith of common man. Various suggestions have been given by different Law Commissions in their different reports time to time. The 14th, 54th, 77th, 79th, 114th, 124th, 129th, 221st, 222nd Reports of the Law Commissions, recommended numerous changes keeping the system in its basic framework intact, directed towards secondary changes. Governments have tried to provide speedy justice by adopting some of these suggestions, but the problem persists.

Due to changes in international trade, the court system is not able to meet the requirements of international traders or the corporate sector in dispensing quick justice. Litigation has not kept pace with the fast moving society and the growing changes in business practices. The formal legal system has been unable to meet the demands of justice not only of the business community but also of the ordinary citizens. As a result

8 Court News, Vol. VI, Issue 3, July-September 2011, available at www.supremecourtofindia.nic.in
many people are denied access to justice. Because of the failures in the traditional mechanisms of dispute resolution, development of new approaches for dispute resolution in lieu of litigation has become essential. The need of today is for some effective measures consistent with demands of justice, equity and fairplay, to speed up the disposal of cases and clear up the mounting arrears of cases.

Since disputes vary in nature and roots, the type of processes suitable for the resolution of disputes must also vary. Hence, no single dispute resolution process can be suitable for all types of disputes. Ideally justice must be delivered speedily, efficiently and with minimum costs, but practical experience has proved otherwise. Concept of speedy justice is the cause of development of the ADR processes. The term ADR can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or mini trials that look and feel very much like a courtroom process.

In developing ADR as an alternate to the traditional litigation to resolve disputes, importance must be given to two matters. The first is to assess the extent to which these techniques can seek to avoid those problems which plagued the litigative system. The second is, that the basic principle underlying the functioning of the judicial system, on which is founded the commitment of our system to the rule of law, is not destroyed in the search for alternatives.

Court annexed mediation was formally introduced in India by Amendment Act of 1999, by inserting Section 89 of the Civil Procedure Code, 1908, which became effective from 1st July, 2002. The court may require the attendance of any party to the suit or proceedings to appear in person with a view to arrive at an amicable settlement. It
has now made obligatory for the court to refer the disputes for settlement either by way of 1) arbitration 2) conciliation 3) judicial settlement including settlement through Lok Adalats or 4) mediation. However, the judges are not in the position of resorting to this provision unless mediation and conciliation centres are set up at all the courts.

The introduction of court annexed mediation has brought many developments in the area of ADR in India. The Mediation and Conciliation Project Committee of the Supreme Court of India (MCPC) conducts training programmes on mediation for lawyers and judicial officers, in furtherance of the newly added Section 89 of the Code of Civil Procedure. State Legal Services Authorities are entrusted with the establishment of Mediation Centers in districts.

The legislative history of arbitration in India dates back to the British period. After various other laws on arbitration one after another the Arbitration Act, 1940 was enacted, which dealt with domestic arbitration. Arbitration (Protocol and Convention) Act, 1937 and Foreign awards (Recognition and Enforcement) Act, 1961 dealt with the enforcement of foreign arbitral awards. Thereafter the Arbitration and Conciliation Act, 1996, based upon the UNCITRAL Model Law on International Commercial Arbitration 1985, was enacted to correct the deficiencies noticed in the earlier Act and also to hasten the process of settlement of international commercial disputes. Arbitration clause is now getting much greater consideration in the contracts than it did in the past. It is true about businesses in India as well. The popularity of arbitration as a mode of settling disputes is due to the fact that arbitration is considered as speedier, more informal and cheaper than conventional judicial procedure and provides a
forum more convenient to the parties who can choose the time and place for conducting arbitration.

One of the objectives of the 1996 Act was to achieve the goals of cheap and quick resolution of disputes, but the reality is that these goals are yet far to be achieved. It has been noticed that arbitration is becoming a costly affair, which is a different approach from the intent of the 1996 Act. This is particularly factual in ad hoc arbitration, where the fees of the arbitrators are not regulated, but decided by the arbitral tribunal with the consent of the parties. The main purpose of the Act was to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system. But an analysis of behaviour of the courts in the arbitration system reveals that it has failed to achieve its desired objectives. Both Indian and international parties want more control over the proceedings. But Indian arbitration is criticized because of intervention by the Indian courts in the proceedings.

UNCITRAL Model was mainly intended to enable various countries to have a common model for ‘international commercial arbitration’ and the Indian Act, 1996 has made provisions similar to the model law and made applicable to, cases of purely domestic arbitration between Indian nationals and that this has given rise to some difficulties in the implementation of the Act. The present arbitration system in India is still plagued with many loopholes and shortcomings. Although the huge entry of international commercial transactions encouraged by the growth of the Indian economy has resulted in a significant increase of commercial disputes, arbitration practice has lagged behind.
Considering the backlog of cases in our courts and the fact that there exist a huge number of vacancies in the courts at various levels, Lok Adalats have emerged as the answer to the mounting backlog of cases. The goal of the Lok Adalat is to affect a compromise but in mass scale disposal of cases in Lok Adalats, it is difficult to expect that compromise settlements of mutual benefits would be searched for. In some cases natural justice has been surrendered in the name of expediency. Sometimes it appears that in Lok Adalats the justice has fallen victim to the desire for the speedy resolution. Instead of trying genuine compromise, in some cases Lok Adalats try to force an adjudicatory decision upon unwilling litigants. The right to fair hearing, which is one of the basic principles of natural justice, is denied to the people. Such acts instead of fostering alternative dispute resolution through Lok Adalats will drive the litigants away from the Lok Adalats.

After the establishment of the Mediation and Conciliation Centres in the Courts these methods have proved to be very helpful in the settlement of a large number of cases. These methods are also widely used in the Lok Adalats. But there is not much interest or acceptance of these methods independent of that. Though there is extensive legal framework governing ADR and there is a strong tradition of domestic mediation and conciliation in India, the concept is not as successful as it is in other developed countries. But these goals cannot be achieved unless requisite infrastructure is provided. Most of our courts do not have adequate space even for their existing work; it may not be possible for them to provide suitable accommodation for the ADR system.

The alternative institutions have played a substantial role in the delivery of justice. Some have fared much better than the others. The performance of these has been
hampered by a number of constraints e.g. insufficient financial, material and human resources. The benefits of these techniques have not been explored in the way that these should be. There is still room for improvement if the institutions are to perform to optimum levels. ADR in India, as compared to the western countries, is still at its early stages. Though ADR is being gradually brought to use, litigation is still on the forefront and is made use of most of the times. One of the reasons is the preference towards a right-based dispute resolution rather than that of interest-based. Right-based system prefers litigation whereas ADR is preferred by interest-based dispute resolution system.

The study shows that ADR has contributed immensely to disputants’ pursuit of justice in India, but at the same time this must also be kept in mind that ADR is not to supplant the formal adversary system of dispute resolution. The benefits of this can be harvested if it works as complementary to the formal system. Now the need of the ADR is not disputed, but the concern is as to how this system can be improved to make ADR actual alternative to litigation.

**Suggestions:**

On the basis of my research work I furnish the following suggestions:

1. The first and foremost step is the creation of awareness and the need for backing towards Alternative Disputes Redressal Mechanisms among the consumers of justice. To increase awareness seminars, workshops can be held.

2. A sensitized awareness is necessary within the legal profession as well. It is necessary to make the lawyers realize that the service which is rendered by the legal profession is in the cause of justice to the common man. The needs of litigants must occupy a
position pre-eminence. Any method of ADR which ensures expeditious and inexpensive justice to the ordinary litigant must, therefore, be supported.

3. Professional bodies such as the Bar Council in the States should conduct refresher courses for lawyers and it would be appropriate if knowledge and awareness in mediation is imparted through such bodies.

4. Proper training programmes should be launched for the judges and advocates for speedy disposal of the cases. Intense training is required to be imparted to referral judges so as to enable them to identify the cases which may be considered fit for mediation or to identify cases which would be suitable for taking recourse to a particular form of ADR.

5. Incentives should be provided to the judges and the advocates who take personal pain in speedy disposal of the cases.

6. Courts are authorized to give directions for the adoption of ADR mechanisms by the parties and for that purpose Court has to play an important role. Power is also conferred upon court so that it can intervene in different stages of proceedings. But these goals cannot be achieved unless requisite infrastructure is provided and institutional framework is put to place. Courts should be provided with requisite infrastructure. Effective/modern facilities should be provided to the judges and the bar which may help in speedy disposal of cases effectively.

7. Formal changes in the syllabus for legal education should be brought about. Alternative dispute resolution should be made a compulsory subject for all law courses. Arbitration law should be taught as a specialized subject in the law courses.
Legal education should be so oriented as to train law students in innovative approaches to dispute-resolution.

8. There is desirability and necessity of encouraging ADR on a large scale. More and more ADR centres should be created for settling disputes out of court as is being done in many other countries.

9. Vacancies of Judges in Supreme Court, High Courts and Sub-ordinate Courts should be filled to the approved strength and the judge-population ratio should be increased to at least 50 per million population in phased manner.

10. The quality of legislation needs to be improved. Poorly drafted laws encourage litigation. If the law is clear, chances of litigation are less.

11. There is requirement for legislative amendment to remove the anomaly which enables a defeated party to avoid execution of arbitral awards by merely filing an application for setting aside under Section 34 of the 1996 Act, without being required to deposit a part of the award amount.

12. When the parties to a suit are referred to Conciliation by the court under section 89 of the Civil Procedure Code, 1908, the case does not go out of the court process. If there is no settlement, the matter is returned to the court for proceeding with the trial. If there is settlement then the award is to be filed in the court for recording and passing decree. Section 74 of the Arbitration and Conciliation Act is needed to be amended accordingly.

13. Same provisions under the Arbitration and Conciliation Act 1996 for domestic and international arbitration are creating difficulties. The principle of least court interference should not be made applicable on domestic arbitration, having regard to
Indian conditions and the fact that several awards are passed in India as between Indian nationals sometimes by lay men who are not well familiar with law. Separate provisions should be made for domestic and international arbitration.

14. Arbitrators, judges and lawyers should make efforts to change general attitude towards arbitration. Despite the 1996 Act’s prohibition of judicial intervention, courts continue to intervene in direct defiance of the agreement of the parties. Therefore, it is necessary for arbitrators, judges and lawyers to know and to understand the objective of the new law, respect the will of the parties set out in arbitration clauses.

15. The fee of the arbitrators is quite high in ad hoc arbitration. This is one of the reasons as to why arbitration is being used by the big corporate sector, but not by small commercial units. It is important to educate the business community in India about the merits of relying on institutional arbitration mechanisms.

16. Lok Adalats should not act as judges and always attempt to function as conciliators. The effort of the Lok Adalats should be to guide the parties with reference to principles of justice, equity and good conscience to compromise and settle the dispute by explaining the strengths and weaknesses, advantages and disadvantages of their respective claims.

17. Definite qualifications should be spelt out for the other members of the permanent lok adalats, so that the litigants will have confidence that the persons deciding their disputes are sufficiently qualified and able. Members of Lok Adalats should be judicially trained.

18. Daily Lok Adalat should be held for the settlement of cases under Section 138 Negotiable Instrument Act, MACT Cases and Matrimonial Disputes.
19. Sunday Lok Adalats should be organized in respect of Compoundable Traffic Offences.

20. Special lok Adalats on plea bargaining for the settlement of cognizable and criminal compoundable cases and for bank recovery cases at pre-litigation stage should be organized.

21. The Kerala Legal Services Authority has given statutory expression to the principles of natural justice in the Kerala Regulations, 1998. Such regulation should be made by the Central Legal Services Authority under section 27 or by the State Legal Services Authorities under section 28 of the Legal Services Authorities Act, 1987. In this way Lok Adalats may be restrained from assuming adjudicatory functions which they were not intended to perform.

22. More and more government litigations and disputes by and against the Government should go to Lok Adalat since Government is the largest litigant in the country.

23. Retired judges can be invited to be on the panel of the court annexed mediators in India with minimum basic training to change their mind set for their intended role of mediators.

24. For the development of Mediation in India there is need of internationally trained professional mediators. Engineers, Chartered Accountants etc. can also be good mediators in cases relating to their specialized fields. These persons should also be included in mediation programmes.

25. There is need to generate confidence of the litigants in mediation and to encourage recourse to it.
26. A litigant under pressure of time and money spent in courts easily succumbs to the pressure and agrees to the small amounts which may not be adequate to compensate the actual loss suffered. The court should keep a watch that no such pressure prevails on a litigant.

27. In order to reduce the pending litigation between various Governments and the citizens an internal mechanism should be set up at the Central, State and district levels in the government offices by the respective heads for resolving the disputes and for making bona fide attempts to resolve the same. All the departments should ensure that genuine cases are resolved at pre-litigation stage itself. In this manner a large number of cases by or against Governments and their instrumentalities can be reduced. Only those cases may be taken to courts where it is not possible to resolve the disputes because of legal technicalities.

28. When a notice under Section 80 CPC is received, the matter should be thoroughly and carefully examined instead of the present tendency of giving a routine recording without application of mind. Appeals are filed mechanically irrespective of the merits. The filing of appeals irrespective of the merit of the case should be avoided.

29. A provision similar to section 80 of the CPC should be introduced for all the other civil matters. When a person has to file a case, he can be required to give two months’ notice to the affected party. When he presents his case in the Court, he should file affidavit along with his plaint stating the fact of service of notice along with a copy of the plaint. However, if any matter is urgent and notice will frustrate the purpose, the Court can dispense with the notice and hear the plaintiff or petitioner, giving reasons for urgency. If the urgency is not found, the plaint/petition can be returned for filing,
if necessary, after giving notice. This will encourage pre-litigation mediation and settlement of disputes.

30. Legislature should introduce certain provisions which discourage initiation of litigation in cases where out of court settlements can easily be worked out. ADR may be made pre condition for all civil cases in India.

31. In view of the contribution made by the Fast Track Courts of Sessions Judges towards clearing of backlog and number of huge pendency of cases triable by Magisterial Courts, there is an urgent need to formulate a similar scheme for setting up of Fast Track Courts of Magistrates in each State and Union Territory.

32. There is need to modify the amended Section 89 and Order X Rules 1A to 1C of the CPC as is recommended by 238th report of the Law Commission of India. The requirement that the Court must formulate the terms of possible settlement places a significant burden on the Court even before referring the parties to alternative forum.

33. Mediation and conciliation centres have been set up at many courts, but there are many courts where these centres have not been set up. Efforts should be made to set up the centres in the remaining courts so that cases could be referred to them. To realize the benefits of court annexed mediation completely, court annexed mediation should be extended to lower courts also, which handle a lot of more cases than higher courts.

34. There is necessity and urgency of creating more Family Courts under the Family Courts Act, 1984, which will contribute to the resolution of family law disputes by ADR. There should be a Family Court in every District and such Courts should be provided with adequate infrastructure, staff and other support systems.
35. Different High Courts have laid down different rules of the procedure of family courts. There should be a uniform set of Rules for the functioning of the Family Courts. To achieve this, the Department of Justice should frame Model Rules and circulate them to the High Courts and to the State Governments so that there is uniformity in the provisions of the Rules. These Rules should be simple and brief and also available in local languages so that women litigants’ could understand them easily.

36. It may not be possible for the litigants to present their cases which may involve complex issues of law and fact. Family Court should ascertain at the scrutiny stage itself, as to whether the parties desire to be represented by their lawyers and if such a desire is expressed at this or any subsequent stage of the proceedings, the permission should be granted if the Court is satisfied that the litigant requires such assistance and would be handicapped if the same is not permitted.

37. Sufficient and well-trained Counsellors should be appointed in the Family Courts and they should be paid adequately. Well-known local NGOs may be associated with the Family Courts to serve as Counsellors on behalf of the litigants.

38. Judges should be exclusively appointed to deal with cases in the family courts and the practice of assigning the duties to the District Judges to function as Family Court Judges should be avoided. Preference should be given to women while appointing judges.

39. In some States, the Family Courts have not been set up due to scarcity of funds. The State Governments should be provided some financial assistance from the Central
Government for infrastructure for setting up of Courts. Increased budgetary allocation may be made for the purpose.

40. Judiciary ought to be sensitized about women’s problems. Judges of the Family Courts should be given suitable training from time to time to enable them to understand complicated family disputes.

41. Family Courts should act more in the nature of friendly conciliatory forum and procedure laid down in the CPC, Cr. P.C. or Evidence Act should not be strictly followed. Otherwise the Family Courts will not serve the purpose and timely justice will not be afforded to the parties.

42. The incentives for adopting the ADR must not be the failure of the formal judicial system, but the positive things that the ADR is able to produce, so that the disputants may willingly resort to ADR.

It would be best for the legal system if the several methods of dispute resolution could win equal standing, both in practice and professional training. Justice will be better served by a holistic approach which recognizes that there are legal problems of various kinds, for which different methods of resolution are appropriate and effective.