CHAPTER- I

Introduction

Justice delivery system plays a fundamental role in promoting public interest and in the preservation of order in the society. There has been requirement of some form of dispute resolution since the beginning. Effective system for the resolution of disputes is essential for dispensing justice. The forum chosen for resolution of disputes by its subjects distinguishes the cultures of the societies. In administering justice the courts apply legal standards, which reveal social values. Justice is the foundation of any civilized society. Though litigation may be considered as the primary means of dispute resolution in India, some other forums are also used frequently. India has a tradition of encouragement of dispute resolution outside the formal legal system.

Preamble to the Indian constitution includes as a constitutional goal, ‘Justice- social, economic and political’. To get justice through courts one has to go through the difficult and expensive procedures involved in litigation. One has to bear the costs of litigation, including court fee and the lawyer’s fee. A poor litigant who is hardly able to feed himself will not be able to afford justice or obtain legal redressal for a wrong done to him, through courts. Further 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 frightened and puzzled 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 causes 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.\textsuperscript{1} Justice is administered for the protection of the innocent, punishment of the guilty and to resolve the disputes satisfactorily. An effective judicial system is one, which provides not only just results but also provides them swiftly.

Indians are also a society of litigants. As people are becoming more right conscious, this has resulted in a spurt of institution of cases in courts by the aggrieved parties. The human and material resources to meet the ever-growing demands in courts are inadequate, resulting in backlog of cases and delay in the administration of justice. With the piling of cases decisions are delayed and this trend is not healthy and may prove dangerous even going to the extent of denying justice as it is said, ‘Justice delayed is justice denied’.

\textbf{1.1 Need of ADR System:}

The formal courts worldwide are playing a fundamental and leading role in justice delivery system for a very long time. But it is experienced that sometimes litigation becomes endless exercise. Serious concerns have been shown by all the concerned with the justice dispensing system over the costs, delays and congestion in the courts. The justice delivery institutions in this country are confronted with grave and serious crisis, mainly on account of delays in resolution of civil disputes and disposal of criminal cases. Disputes resolution through legal proceedings in the courts has become

\textsuperscript{1} 222nd Report of Law Commission of India, para 1.7 and 1.8.
excessively procedural and adversarial in nature, thereby resulting in undue delays, high costs and unfairness in litigation. Huge pendency of cases has serious implications upon the trust and credibility, which the society has in the judicial system.

Besides this the adversarial nature of the litigation in the formal courts is found unconducive to the social and business relationships which are needed to be preserved. The adversarial system creates two mutually contending, exclusive, hostile, competitive, confrontational and uncompromising parties to litigation. This system does not generate a climate of consensus, compromise and co-operation. As litigation progresses it generates conflict after conflict. At the end of litigation one party emerges as the victor and the other party is put to the position of the defeated. Adversarial litigation does not end in a harmony. It creates more bitterness between the parties that manifests itself in more litigation between them or even their successors. This state of affairs has caused dissatisfaction among disputants and led to the development of more flexible means of dispute resolution.

Investors from all over the world are looking ahead to India for investment purposes. But those investors may believe that a legal system that is slow is a risk for investment. The investors may think twice before investing in a market where the procedure for dispute resolution is obsolete and cumbersome. 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. If those contemplating investment in India are satisfied that they will get the benefit of international dispute resolution procedures in India they will be comfortable investing in
India. Thus the globalization of the business has also contributed to the development of more flexible means of dispute resolution.

Structure and form of legal institutions although apparently indisputable are always subject to change. Such changes are made primarily to meet the requirements of the contemporary society. As eminent jurist Roscoe Pound states, “The legal order must be flexible as well as stable. It must be overhauled continually and refitted continually the changes in the actual life which it is to govern”. Taking cue from this perspective of legal institutions, certain proponents regard the emergence of alternatives as an outcome of evolutionary process, which modify existing structures until they become capable of performing new functions. This evolutionary perspective brings into focus the dynamic nature of dispute resolution structures. The adversarial system prevalent in common law countries were no longer adequate to address the growingly complicated technical legal problems of modem-day litigation. It implies that justice delivery system, as developed centuries ago is not appropriate to meet the needs of contemporary society. Therefore, the legal institutions must embrace change if they are to survive.

The trend worldwide for the last decade has been to resort to alternative dispute resolution (ADR) methods due to the shortcomings faced in the formal justice delivery system. 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. The reasons for this are many. As a result many people are denied access to justice. Given 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 fair play, to speed up the disposal of cases and clear up the mounting arrears of cases. In 1985, Hon’ble Mr Justice P.N. Bhagwati, in his Law Day address referring to the problem of arrears of cases virtually lamented openly by saying that “the judicial system of the country is almost on the verge of collapse. Our ad-judicatory system is creaking under the weight of arrears”. Either directly or otherwise these factors have necessitated the formulation of alternative process for dispute resolution so as to diversify the mechanisms for dispute resolution thereby taking pressure off the judicial system.

Further, the world has also undergone a significant socio-economic transformation thereby, requiring changes in the legal system. New alternative dispute resolution mechanisms are being formulated to meet the requirements of this changed scenario. These are organized more on scientific lines, meeting the requirements of the disputants. This new process emphasizes on consensual resolution of disputes and provides the much-required flexibility to the disputants. This change signifies a marked shift away from public service approach towards customer’s service approach of dispute resolution.

With the onset of various developments in different fields of human intercourse need also arose to bring out change in the approaches to dispute resolution. It is with regard to this need that the alternative mechanisms for disputes are being introduced in different legal systems. There is an urgent need to supplement the infrastructure of courts by means of Alternative Disputes Redressal mechanisms.

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2 (2004) 1 SCC (Jour) 1.
1.2 Concept of ADR:

The process of dispute resolution by ADR is different from judicial process. Under ADR disputes are settled with the assistance of a neutral third person generally of parties’ own choice; that person is generally familiar with the nature of the dispute. Here the proceedings are informal without any procedural technicalities. It is expeditious, inexpensive and confidential. Thus the decision making process aims at substantial justice. The goal is to provide more effective dispute resolution. Availability of ADR creates more choices within the justice system. The alternative movement is not just a response to judicial administrative shortcomings; it is also a demand for higher standards of justice. The movement and concern for alternatives, including alternatives to the courts as well as alternatives in the courts also represent a desire to move the justice system closer to the people and their problems, needs, perceptions and understandings.

Alternative Dispute Resolution (ADR, sometimes also called ‘Appropriate Dispute Resolution’) is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way. It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies “mediation,” a process by which a third party aids the disputants to reach a mutually agreed solution.\(^3\)

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The technique of ADR is an effort to design a workable and fair alternative to one traditional judicial system. It is a fast track system of dispensing justice. These measures are being taken throughout the world for resolving pending disputes as well as at pre-litigation stage. The law commission noted that in all developed systems normally not more than 15% of the cases go for final adjudication. The rest of the cases are resolved by alternative dispute resolution mechanisms like conciliation, mediation and arbitration. Pre-trial conciliation accounts for the disposal of a large number of cases. ADR has emerged as a significant movement in these countries and has not only helped reduce cost and time taken for resolution of disputes but also in providing a congenial atmosphere.

The main aim of these fora is to settle the dispute in such a manner that the mutual relations of the disputants remain virtually the same as these had been before the commencement of such dispute. They aim not only at the restitution of normal relations between the disputing individuals and families, but also at a better and more durable resolution of the problem, so that their future relations might not get tense at the slightest aggravation and a tense situation in immediate future might be avoided. All this lays a great importance on the social aspect of the dispute also. It holds that the aim of the justice is not to state a unproductive decision on the basis of the law of evidence only, but it should also have two aims and objectives in the decision making process. First, the wrongdoer might be sorry and put right his ways. He may not repeat the wrong. Second, the strain between the two parties may be reduced, so that their mutual relation might again get normalized. These alternative redressal fora always intend to remove the
misunderstanding at the early stage so that any slight dispute might not develop, out of proportion to reach a position of no returns.

In substance the ADR process aims at rendering justice in the form and content, which not only resolves the dispute but also tends to resolve the conflict in the relationship of the parties, which has given rise to that dispute. Alternative mechanisms for disputes resolution play an important role in the justice dispensation system not only by improving access to dispute resolution processes but also by providing quality ‘Justice’. Alternative Dispute Resolution is a term that refers to several different methods of resolving disputes outside traditional legal and administrative forums. A wide variety of ADR procedures has developed over the years as a result of the growth in international trade as well as a result of the search for quicker and cheaper alternatives to litigation. A well modeled set of ADR (Alternative Dispute Resolution) mechanisms such as mediation, negotiation, Conciliation, Arbitration, Lok Adalats and various other hybrid ADR techniques plays a significant role in the resolution of conflicts in general and commercial disputes in particular.

1.3 Various ADR Techniques:

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. These procedures include negotiation, conciliation, mediation, arbitration and a group of hybrid procedures like med-arb, mini-trial, MEDLOA, private judging (rent a judge), early neutral evaluation, last offer arbitration.
These techniques have been developed on scientific lines by some leading universities and ADR Centres in the United States, Britain, Canada and Australia.\(^4\)

The ADR mechanisms can be divided into two parts. These are adjudicatory and non-adjudicatory. Adjudicatory method is that where the neutral third party hears to both of the parties thereafter deciding the matter. This method is Arbitration. Non-adjudicatory method is where the neutral third person does not decide the matter. The parties to the dispute retain their control over the outcome of the proceedings. These mechanisms are Negotiation, Mediation and Conciliation.

**Arbitration:**

Arbitration is a legal process, which takes place outside the courts, but still results in a final and legally binding decision similar to a court judgment. It is the procedure by which parties agree to submit their disputes to an independent neutral third party, known as an arbitrator, who considers arguments and evidence from both sides, then hands down a final and binding decision.

**Negotiation:**

It is a non-binding procedure involving direct interaction of the disputing parties, wherein a party approaches the other with the offer of a negotiated settlement based on an objective assessment of each other’s position. It is a voluntary non-binding process in which parties control the outcome as well as procedures. Negotiation differs from other dispute resolution procedures in as much as it does not involve a third party to facilitate or promote the settlement while all other procedures essentially involve a third party.

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Mediation:

Mediation is a facilitated and structured negotiation presided over by a facilitator with the skill, training and experience necessary to help the parties reach a resolution of their dispute. A Mediator uses special negotiation and communication techniques to help the parties to come to a settlement. A third party is involved in order to structure the meetings and to come to a final settlement based on the facts given through the discussions. It is a non-binding procedure, in which a neutral third party assists the disputing parties in mutually reaching an agreed settlement of the dispute.

Conciliation:

Conciliation is one of the non binding procedures where an impartial third party, known as the conciliator, assists the parties to a dispute in reaching a mutually agreed settlement of the dispute. A conciliator does not give a decision, but his main function is to induce the parties themselves to come to settlement. The Conciliator may formulate or reformulate the terms of settlement.

Judicial Settlement:

Judicial settlement means a compromise entered by the parties with the assistance of the court adjudicating the matter or another judge to whom the court had referred the dispute. In Black’s Law Dictionary, “judicial settlement” is defined as “the settlement of a civil case with the help of a Judge who is not assigned to adjudicate the dispute”.

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Med-Arb:

It is a blending of mediation with its persuasive force and arbitration with its guarantee of an assured outcome.\textsuperscript{6} If the parties reach a settlement, it can be reduced to writing and signed by the parties, making it binding. If the parties fail to reach a settlement within a specified time, the mediator then acts as an arbitrator and gives a binding award.

The Mini-Trial:

A moderately formal non binding arbitration, like case presentation held in an office, conference room or borrowed court room; the presentations are made to the decision makers from each party and to one or more neutral third parties. The neutral makes a non binding opinion. The parties try to make settlement. If they fail to settle, the neutral becomes a mediator and attempts to facilitate discussion and induce a settlement between the parties.\textsuperscript{7}

Last Offer Arbitration:

Each of the parties submits their last offer of settlement to the arbitrator. Thus the parties set the limits of the award. The arbitrator has to choose between one and the other offer. The parties are bound by the award.

MEDLOA:

It is a combination of mediation with last offer arbitration. Parties agree to proceed to mediation with the understanding that if mediation fails, they will submit their


final offer made during the mediation to the neutral. The neutral considers the final offers and gives his binding decision on the basis of the offer he considers to be just and fair.\(^8\)

**Rent a Judge (Private Judging):**

Where the disputing parties mutually approach the court to appoint a referee, usually a retired judge, before whom they present their case in an informal proceedings. The referee gives his decision which is enforceable by the court. The fee of the referee is paid by the parties.\(^9\)

**Early Neutral Evaluation:**

The evaluator looks at the strengths and weaknesses of the case at an early stage of a case and gives a confidential assessment of the dispute. The evaluator predicts based on other cases, what the outcome will be in the court, thereby checking the unrealistic expectations and encouraging settlement.

### 1.4 ADR System in India:

India has a long tradition and history of such methods being practiced in the society at grass root level. Alternative to the traditional litigation in state administered courts in India existed right from the ancient period in the form of village panchayats, caste panchayats, trade guilds etc. They functioned unofficially and varied considerably in practice from province to province. The ADR ‘movement’ in the present form started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation. Today, ADR is successful throughout the world.

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\(^9\) Ibid.
because it has proven itself, in various ways, to be a better way to resolve disputes. The search for efficient and better ways to resolve disputes and the skill of managing conflicts, are as old as humanity itself, yet it has only been within the last thirty years or so that ADR as a movement has begun to be embraced actively by the legal system. In recent times, ADR has become institutionalized as part of many court systems and system for justice as a whole throughout the world.

The system of dispensing justice in India has come under great stress for several reasons mainly because of the huge pendency of cases in courts. In India, the number of cases filed in the courts has shown a tremendous increase in recent years resulting in pendency and delays underlining the need for alternative dispute resolution methods. Justice Krishna Iyer, depicted the public suffering in his language, “commercial causes should as far as possible be adjudged by Non-Litigative mechanisms of dispute resolution since forensic process, dilatory and contention hamper the flow of trade and harm both sides whoever wins or loses the lis. A legal adjudication may be flaw less but heartless. A negotiated settlement will be satisfying, even if it departs from strict law”.

It was only after independence and after recognition that the formal legal system will not be in a position to bear the entire burden, it was felt that the system requires drastic changes. The mounting arrears in the courts, inordinate delays in the administration of justice and expenses of litigation have gradually undermined the people’s faith in the system. Today, therefore, the issue is to examine and choose a right
formal legal system, such as the Alternative Dispute Resolution procedures and to organize the same on more scientific lines.\textsuperscript{10}

Justice through state courts is not the only way. In every society there are a number of conflict-resolving or dispute-settling systems or modes for justice, and it is generally well recognised that resort to a court of law should be the last one. Social resolution of disputes is generally preferable to official resolution because it is more socially acceptable and does not ordinarily leave behind bitterness. The underlying principle for ADR is professed in terms of reducing the arrears of cases in Courts. The technique of ADR is an effort to design a workable and fair alternative to our traditional judicial system. It is a fast track system of dispensing justice. The argument that is expressed in the advocacy of ADR is the incapability of Courts to handle the existing file of cases. Alternative dispute resolution covers a variety of means to resolve conflicts out of formal system. The modern ADR movement, prompted by a desire to avoid the cost, delay, and adversarial nature of litigation, originated in the United States in the 1970s.

The field of conflict resolution gained momentum in the last three decades of the twentieth century. It has developed into a widely accepted field of study, where skills and strategies are being taught, and changes in philosophical attitudes occur through training and enhanced self-awareness. The increasing academic activity and practical training initiatives have generated a vast and expanding body of research and publications.\textsuperscript{11}


\textsuperscript{11} Supra Note 3.
The idea of alternative dispute resolution system was first mooted at the conference of Chief Ministers and Chief Justices of various High Courts, which was held in New Delhi on 4th December 1993. The conference observed, “The Chief Ministers and Chief Justices were of the opinion that courts were not in a position to bear the burden of the justice system and that a number of disputes lend themselves to resolution by alternative dispute resolution which provide procedural flexibility, saves valuable time and money and avoid the stress of conventional trial”.  

It was due to these conditions that the International Centre for Alternative Dispute Resolution (ICADR) was established and registered as a society under the Societies Registration Act, 1860 on 31st May 1995 for the promotion and development of ADR facilities and techniques. An autonomous organization under the aegis of the Ministry of Law, Justice and Company Affairs, Government of India, the Centre was inaugurated by the then Prime Minister at New Delhi on October 6, 1995. The Chief Justice of India is its Patron.

The main objectives of the ICADR are to propagate, promote and popularize the settlement of domestic and international disputes by different modes of ADR. It establishes facilities and provides administrative and other support services for holding conciliation, mediation and arbitration proceedings along with promoting reform in the system of settlement of disputes and its healthy development within the framework of the social and economic needs of the community.

By Amendment Act of 1999, which came into effect on 1.7.2002, Section 89 of the Civil Procedure Code, 1908 has been re-enacted. The new provisions have been introduced for settlement of disputes outside the court. 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 after issues are framed for settlement either by way of 1) arbitration 2) conciliation 3) judicial settlement including settlement through Lok Adalats or 4) mediation.

There are already provisions in the Code of Civil Procedure, 1908 which encourage settlement of some specified disputes outside courts. Section 80(1) of Code of Civil Procedure lays down that no suit shall be instituted against government or public officer unless a notice has been delivered at the government office stating the cause of action, name, etc. The whole object of serving notice under section 80 is to give the government sufficient warning of the case which is of going to be instituted against it and that the government, if it so wishes can settle the claim without litigation or afford restitution without recourse to a court of laws. The object of section 80 is to give the government the opportunity to consider its or his legal position and if that course is justified to make amends or settle the claim out of court.

Order XXIII Rule 3 of CPC is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order XXIII proves that if the court is satisfied that a suit has been adjusted wholly or partly by lawful agreement or compromise, the court shall pass a decree in accordance to that. Order XXIII, Rule 3 gives mandate to the Court to record a lawful adjustment or compromise and pass a decree in term of such compromise or adjustment. Order XXVII Rule 5B confers a duty

14 Raghunath Das v. UOI, AIR 1969 SC 674.
on court in suit against the government or a public officer to assist in arriving at a settlement. In a suit where Government or public officer is a party it shall be the duty of the Court to make an endeavor at first instance, where it is possible according to the nature of the case, to assist the parties in arriving at a settlement. If it appears to the court in any stage of the proceedings that there is a reasonable possibility of a settlement, the court may adjourn the proceeding to enable attempts to be made to effect settlement. Order XXXII-A of CPC lays down the provision relating to “suits relating to matter concerning the family”. It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships.

The Law Commission of India, as early as in 1988, in its 129th Report recommended that alternate modes of dispute redressal be obligatory on the courts after framing of issues. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit may proceed further in the court where it was filed and where the matter was pending before settlement was attempted. The Law Commission recommended introduction of the Conciliation Court system which had been in vogue in Himachal Pradesh to deal with house rent/possession litigation as well as other litigations such as disputes as to inheritance/succession, partition, maintenance and wills which are usually between near relations.

The Commission referred to Order XXVII Rule 5B of the CPC which bears the heading “Duty of court in suits against the Government or a public officer in arriving at a settlement” and then observed, “Though rule 5B is limited in its application to a suit to which the Government or the public officer acting in his official capacity is a

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party, it is time to expand the coverage of the method of resolution of disputes therein provided to all suits in civil courts, including the claim for compensation before the Motor Accidents Claims Tribunal.” The features of Conciliation Courts set up in Himachal Pradesh were then adverted to by the Commission. The Commission, with a view to remove the difficulty experienced by the Conciliation Court in H.P., in cases in which the parties do not appear in person before the court, considered it necessary to introduce a provision in Order X of the CPC to the following effect: ‘(i) The following may be added as sub-clause (c) immediately after sub-clause (b), clause (i) rule 2 of Order X of the Code of Civil Procedure, “may require the attendance of any party to the suit or proceedings, to appear in person with a view to arriving at an amicable settlement of the dispute between the parties and make an attempt to settle the dispute between the parties amicably”.’ ‘(ii) The following may be added as clause (3) immediately below clause (2) of rule 4 of Order X Code of Civil Procedure: “Where a party ordered to appear before the court in person with a view to arriving at an amicable settlement of the dispute between the parties, fails to appear in person before the court without lawful excuse on the date so appointed, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit”.

With these additions, the Law Commission was of the opinion that the scheme will be very effective and must be made obligatory in all courts, while removing the limitations that are implicit in rule 5B of Order XXVII in the matter of application of the procedure to suits other than those set out therein. In fact, the scheme must apply to all suits of a civil nature coming before the civil courts, it was observed. The Supreme

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16 Id, para 3.28 p. 49.
Court has also issued various directions so as to see that the public sector undertakings of the Central Government and their counterparts in the States should not fight their litigation in court by spending money on fees of counsel, court fees, procedural expenses and wasting public time. In *ONGC v. Collector of Central Excise*¹⁷, (ONGC I) there was a dispute between the public sector undertaking and Government of India involving principles to be examined at the highest governmental level. The Court held that it should not be brought before the Court wasting public money any time.

In *ONGC v. Collector of Central Excise*¹⁸, (ONGC II) dispute was between govt. department and Public sector undertaking. It was held that public undertaking is to resolve the disputes amicably by mutual consultation or through good offices empowering agencies of government or arbitration avoiding litigation. Government of India directed to constitute a committee consisting of representatives of different departments to monitor such disputes and to ensure that no litigation comes to court or tribunal without the Committee’s prior examination and clearance. The order was directed to communicate to every High Court for information to all subordinate courts. In *Chief Conservator of Forests v. Collector*¹⁹ ONGC I AND II were relied on and it was said that state/union government must evolve a mechanism for resolving interdepartmental controversies. Disputes between departments of Govt. cannot be contested in court.

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In _Punjab & Sind Bank v. Allahabad Bank_\(^{20}\), it was held that the direction of the Supreme Court in ONGC II, to the government to set up committee to monitor disputes between government departments and public sector undertakings makes it clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee.

1.5  **Amendments to the Civil Procedure Code 1908:**

Resort to alternative disputes resolution processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1A to 1C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits.\(^{21}\) The alternative modes of settlement of disputes have been given momentum by the amendments to the Code of Civil Procedure, 1908.

1.5.1  **Section 89 of the Code of Civil Procedure, 1908:**

By the Code of Civil Procedure (Amendment) Act 1999, section 89 has been introduced in the Code of Civil Procedure, 1908 and it became effective from 1st July 2002. The objective of Section 89 is to ensure that the court makes an endeavour to facilitate out-of-court settlements through one of the ADR processes before the trial commences. Under Section 89 of the Code, courts have been empowered to explore the possibilities of settlement of disputes through Lok Adalats, arbitration and conciliation. Section 89 of the CPC reads as under:

\(^{20}\) 2006(3) SCALE 557.

“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 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 Authorities Act, 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 Authorities Act, 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.”

Taking notice of various lacunas in the drafting of Section 89, Hon’ble Mr. Justice R.V. Raveendran has observed:22 “Section 89 apparently was drafted in a hurry. It is not very happily worded. It is not very practical. But the object behind Section 89 is sound…” After pointing out various anomalies it was suggested that clause (c) and (d) of sub-section (2) of Section 89 deserve to be interchanged and went on to detail the reasoning as under:

Mediation is a dispute resolution by a suitable neutral institution or person assisting disputing parties to arrive at a negotiated settlement. When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, defining or using such words with completely different meanings in Section 89 has led to confusion, and created complications in implementation. The mix-up of meaning of the terms ‘judicial settlement’ and ‘mediation’ in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word ‘mediation’ in clause (d) and the words ‘judicial settlement’ in clause (c) are interchanged, the said clauses click and make perfect sense, as is demonstrated below:

(c) for mediation, 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 judicial settlement, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.”

The validity of the Code of Civil Procedure (Amendment) Act 1999 was challenged in the Supreme Court through a writ petition by Salem Advocates Bar Association in *Salem Advocates Bar Association, T.N. v. Union of India*23 (*Salem Bar I*). The Supreme Court upheld the validity of the amendment and observed, “Keeping in mind the law’s delays and the limited number of judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date.” The court constituted a Committee headed by Justice Jagannadha Rao, to clarify the apprehensions which may exist in the mind of the litigating public or lawyers. The Committee was also considered to devise a model case management formula as well as rules and regulations to be followed while taking recourse to the ADR. The matter was again considered by the Supreme Court in *Salem Advocates Bar Association, T.N. v. Union of India in 2005*24 (*Salem Bar II*). The Committee placed its Report in three parts. Report I is about application of amendments made in 1999 and 2002. Report II contains the draft rules for ADR and mediation as envisaged by Section 89 of the Code of Civil Procedure and Report III is about rules regarding case flow management. The Supreme Court after providing justification to frame rules under Part X of the Code went on by adopting the Model Rules framed by the Committee in this case.

23 2003 (1) SCC 49.
24 2005 (6) SCC 344.
1.5.2 Order X, Rules 1A, 1B and 1C of the Code of Civil Procedure, 1908:

The provisions which were incorporated by the same Amendment Act, 1999 are contained in Rules 1A, 1B and 1C of Order X, CPC, which are extracted hereunder:

Rule 1A provides that after recording the admissions and denials, the court shall direct the parties to 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.

Rule 1B provides that where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

Rule 1C provides that where a suit is referred under rule 1A and the forum or authority to whom the matter has been referred 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.

With the introduction of these provisions, a mandatory duty has been cast on the civil courts to endeavour for settlement of disputes by relegating the parties to an ADR process. The emergence of alternative dispute resolution has been one of the most significant movements as a part of conflict management and judicial reform and it has become a global necessity. Lawyers, law students, law-makers and law interpreters have started viewing disputes resolution in a different and divergent environmental light and with many more alternatives to the litigation. While ADR is, now, envisioned and
ingrained in the conscience of the Bench and the Bar and is an integral segment of modern practice.  

1.6 The Civil Procedure Alternative Dispute Resolution Rules, 2003:

It is for the respective High Courts to take appropriate steps for making rules in exercise of their rule making power subject to modifications, if any, which may be considered relevant.

Rule 2 provides procedure for directing the parties to opt for alternative modes of settlement:

(a) The court shall, after recording admissions and denials at the first hearing of the suit under Order X Rule 1, and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, formulate the terms of settlement and give the same to the parties for their observations. The parties shall furnish their observations to the Court within next thirty days.

(b) On the next date of hearing, which shall be not later than thirty days of the receipt of responses, the Court may reformulate the terms of possible settlement and direct the parties to opt for one of the modes of settlement of disputes out of Court as specified in clauses (a) to (d) of sub-section (1) of Section 89 read with Order X Rule 1A in the manner stated hereunder.

Provided that the Court, in exercise of such power, shall not refer any dispute, to arbitration or judicial settlement by a person or institution, without the written consent of all the parties to the suit.

Rule 3(1) provides that for the purpose of Rule 2, the Union of India, State Government, Union Territory, Local Authority, a Public Sector Undertaking, a Statutory Corporation or Public Authority, shall nominate a person or group of persons who will be empowered to take a final decision as to the mode of alternative dispute resolution which it may prefer to opt in the event of direction by the court under section 89 and such nomination shall be communicated to the High Court within the period of three months from the date of commencement of these Rules and the High Court shall notify all the subordinate courts in this behalf as soon as such notification is received from such Government or authorities.

Rule 3(2) provides that if a person or persons have not been nominated then, such party shall, if it is plaintiff, file along with the plaint, if it is a defendant, file along with or before the filing of the written statement, a memo into the court nominating a person or group of persons authorized to take decision as to the mode of alternative dispute resolution.

Rule 4 stipulates the Court to give guidance to parties while giving direction to opt for settlement. Before directing the parties to exercise option under clause (b) of Rule 2, the Court shall give such guidance to them as it deems fit, by drawing their attention to the following factors which they shall take into account, before exercising their option as to the particular mode of settlement:
(i) That it will be to the advantage of the parties, so far as time and expenses are concerned, to opt for one of the modes of settlement rather than seek a trial of the dispute arising in the suit;

(ii) That where there is no relationship between the parties which requires to be preserved, it will be their interest to seek reference of the matter to arbitration as envisaged in clause (a) of sub-section (1) of section 89;

(iii) That where there is a relationship between the parties which requires to be preserved, it will be in their interest to seek reference of the matter to conciliation or mediation, as envisaged in clauses (b) or (d) of sub-section (1) of Section 89.

(iv) That where the parties are interested in final settlement which may lead to a compromise, it will be in their interest to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section (1) of Section 89.

(v) The difference between the various modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement should be explained to the parties.

Rule 5 provides for the procedure for reference by the Court to the different modes of settlement:

(a) Where all the parties to the suit decide to exercise their option and agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under clause (b) of Rule 2 and the Court shall, within thirty days of the receipt of such application, refer the matter to arbitration and then the provisions of the Arbitration and Conciliation Act 1996 (26 of 1996) shall apply as if
the proceedings were referred for settlement by way of arbitration under the provisions of that Act;

(b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat or where one of the parties applies for reference to Lok Adalat, the procedure envisaged under the Legal Services Authorities Act 1987 and in particular by section 20 of that Act shall apply.

(c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the receipt of application, transfer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to the Lok Adalat under that Act shall apply as if the proceedings were referred for settlement under the provisions of that Act;

(d) Where none of the parties are willing to agree to opt or agree to refer the dispute to arbitration or Lok Adalat or judicial settlement, within thirty days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

(e) (i) where all the parties opt and agree for conciliation, they shall apply to the Court within thirty days of the direction under Rule 2 clause (b) and the Court shall, within thirty days of the receipt of application refer the matter to conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 shall apply, as if
the proceedings were referred for settlement by way of conciliation under the provisions of that Act;

(ii) Where all the parties opt and agree for mediation, they shall apply to the court, within thirty days of the direction under clause (b) of Rule 2 and the Court shall, within thirty days of the receipt of application, refer the matter to mediation and then the Mediation Rules, 2003 contained in Part II shall apply.

(f) Where under clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within thirty days of the direction under clause (b) of rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application, and

(i) In case all the parties agree for conciliation, the Court shall refer the matter to conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act shall apply.

(ii) In case all the parties agree for mediation, the Court shall refer the matter to mediation and then the provisions of the Civil Procedure Mediation Rules, 2003 shall apply.

(iii) In case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be.
(g) (i) Where none of the parties apply for reference either to arbitration, Lok Adalat, judicial settlement, conciliation or mediation, within thirty days of the direction given under clause (b) of Rule 2, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

(ii) After hearing, the parties or their representatives on the date so fixed, the Court shall whether parties agree or not, and if there exist elements of settlement which may be acceptable to them, refer the matter to (a) conciliation, if the court considers that the matter is fit for conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act; or (b) mediation, if the Court considers that the matter is fit for mediation and then the provisions of the Mediation Rules contained in Part II shall apply.

(h) No next friend or guardian for the suit shall, without the leave of the court, opt for any one of the modes of ADR, nor shall enter into any settlement on behalf of a minor or person under disability with reference to the suit in which he acts as mere friend or guardian. If a counsel or pleader is appearing on behalf of the minor, the said counsel shall file a certificate along with the application to the effect that the settlement is for the benefit of the minor or other person under disability.

Rule 6 provides that where a suit has been referred for settlement and has not been materialized or where it is felt that it would not be proper in the interests of justice to proceed further with the matter, then the suit shall be referred back to the court
directing the parties to appear before the court on a specific date and that the court shall proceed in accordance with law.

Rule 7 directs the High Courts to take steps to conduct training courses to lawyers and judicial officers and to nominate a committee to prepare a manual of procedure for alternative dispute resolution to be used by the court as well as by the arbitrators, conciliators or mediators. Besides this the High Courts and the District Courts are directed to conduct seminars and workshops on ADR procedures throughout the State to bring awareness and to impart training for lawyers and judicial officers.

Rule 8 provides that the rules shall apply to Family Courts in addition to the rules framed under the Family Courts Act, 1984.

1.7 Suitability of ADR:

Alternative dispute resolution is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. It offers only alternative options to litigation. There are still a large number of important areas, including constitutional law and criminal law, in respect of which there is no substitute for court decisions. ADR may not be appropriate for every dispute even in other areas; even if appropriate, it cannot be invoked unless both parties to a dispute are genuinely interested in a settlement.

In Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd, the Supreme Court clarified the legal position more aptly by stating that ‘cases which are not suited for ADR process should not be referred under Section 89 of the

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Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR processes’.

Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under Section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category, there need not be reference to ADR process. In all other cases reference to ADR process is a must’. The Supreme Court categorized the cases, considered suitable or not suitable for ADR process. It was observed that the following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association, etc.)
(iii) Cases involving grant of authority by the section after enquiry, as for example, suits or grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of sections, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

(vi) Cases involving prosecution for criminal offences.

The Supreme Court also proceeded to enumerate the cases (whether pending in civil courts or special tribunals), suitable for ADR processes. Such cases are classified under five broad headings:

(i) All cases relating to trade, commerce and contracts;

(ii) All cases arising from strained relationship, such as matrimonial cases, partition cases between family members or co-owners;

(iii) All cases where there is a need for continuation of the pre-existing relationship, such as disputes between neighbour and members of societies;

(iv) All cases relating to tortuous liability, including motor accident claims;

(v) All consumer disputes.

Having thus categorized the cases normally ‘suitable’ and ‘not suitable’ for ADR process, the Supreme Court made it clear, “They are illustrative, which can be subjected to just exceptions or additions by the court/tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process”.

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The emerging Alternative Dispute Resolution methods which are non-litigation alternatives offer opportunities for effectively resolving disputes. Depending on the nature of the relationship between the parties involved in the disputes and the circumstances under which the dispute is evolved, different methods of dispute resolution mechanism may be preferable.

1.8 Benefits of ADR System:

The benefits of the Alternative Dispute Resolution system in India are as under:

1. ADR is able to produce better outcome than the traditional courts because different kinds of disputes may require different kinds of approaches, which may not possibly be available in the courts. Settlement of commercial disputes may require specialized resolution. Complex or technical disputes can be handled more effectively by ADR systems.

2. ADR methods are less formal than that in the courts. The provisions of the Code of Civil Procedure or the Evidence Act are not applicable on them. The procedure there is flexible, without formal pleadings. Parties can formulate their own rules of procedure and decide on the language they wish the proceedings to be conducted in. This creates a more conducive atmosphere for settlements. Parties are free to withdraw at any stage of time. For large masses of people who may be unable to participate in more formal systems, these methods are comfortable.

3. Alternative dispute resolution methods involve direct participation of the parties. Parties have direct dialogue with each other and with the presiding officer. This increases the opportunity of reconciliation between the parties. Except in arbitration
the parties themselves create settlements without direct power of enforcement by the presiding officer. They exercise control over the outcome of the disputes.

4. ADR processes are able to settle the disputes swiftly, at least in comparison to the litigation in the courts. Adjournments at the courts lead to lengthy delays in disposing of cases. Long twisting procedures and a complicated system of revisions and appeals from the order of the court of first instance further delay the final decision.

5. Litigation is adversarial and not concerned with the future relationships between the parties to the dispute, social or commercial. ADR is non-authoritarian and founded on the principle of compromise. Disputants arrive at settlements while taking into account their interests. Certain kinds of disputes such as matrimonial disputes, family disputes and several other categories of petty civil and criminal cases can be better and more satisfactorily resolved by the process of mediation and conciliation.

6. ADR techniques are extra judicial in nature. They can be used in almost all controversial matters, which are capable of being resolved under law, by agreement between the parties.

7. Resolution of disputes is cheaper through ADR. Due to heavy court fee, lawyer’s fee and incidental charges high cost is involved in prosecuting or defending a case in a court of law.

8. Parties at the ADR have a choice of judges/experts who understand the technicalities of their dispute. The parties are sure that the chosen person will have the expertise to resolve the dispute to the satisfaction of the parties.
1.9 Limitations of ADR system:

The limitations of the Alternative Dispute Resolution system in India are as under:

1. ADR processes can not be used where the dispute is regarding systematic injustice, discrimination, violation of human rights or serious frauds.

2. ADR processes do not set precedent, since they function in private. They seek to resolve individual disputes and resolution may be different in two similar cases, depending on the surrounding conditions.

3. ADR processes can not work well, where there is extreme power imbalance between the parties. A more powerful party may coerce the weaker party to accept the unfair consensus.

4. ADR processes can not work effectively, where there are multi party disputes, in which some of the parties do not participate.

5. ADR settlements do not have any educational or deterrent effect on the public, since they are settled privately. Only courts can award punitive damages.

6. Many people are not aware of the existence of ADR methods. Unless they are aware they can not use these methods.

Though there are some limitations of the ADR processes, but it must also be kept in mind that ADR is not the substitute to litigation. People are becoming aware of these processes. The benefits of ADR outweigh its limitations.
1.10 Objectives of the Study:

The general objective of the study is to trace the development of ADR and assess the impact of ADR on the justice delivery system in India. The specific objectives are:

1. to investigate and assess the performance of the traditional or formal justice delivery institutions in India;
2. the current weaknesses in the adversarial system of justice delivery and to examine the reasons for the introduction of ADR in India;
3. to define and examine the most frequently used alternative methods to the traditional litigation proceedings and the assessment of ADR includes the examination of history of ADR in the Indian legal system and the benefits of the ADR processes;
4. to evaluate the performance of ADR and to critically analyse ADR from an Indian viewpoint, to throw light on the relevance, practice, methods and the legal as well as social implications of ADR with special reference to the Indian experience;
5. To locate the classes of disputes in which ADR process can be utilized effectively and in which it is not proper to use these processes;
6. to assess its future prospects in India;
7. to recommend, where appropriate, means for improvement as to how ADR can complement the Indian Legal System so as to benefit the society at large.

1.11 Research Methodology:

The present study entails both empirical as well as non-empirical methods of research. The nature of the study requires that it be mainly descriptive, analytical and
evaluative. An in-depth study is undertaken to evaluate the legal provisions relating to Alternative Forums and to point out shortcomings and infirmities in substantive and procedural laws. The actual working of the institutions is studied and examined. The basic research tools which the study has employed in the investigation, collection and analysis of data is the traditional legal methods of literature survey normally employed in the positive analysis of traditional sources of law. Statutes, Codes, case law, text books and journals have been used as sources of information.

The findings of the study as per the objectives are gathered through analysing the various reports. Data relating to the functioning of the Lok Adalats is procured from Legal Services Authority, Punjab and National Legal Services Authority. The other sources of study include Reports of the Law Commission of India, judgments, books, journals and related websites.

1.12 Scheme of the Study:

The present study is divided into six Chapters. Chapter I deals with the ‘Introduction’ of the research work. The chapter discusses the concept of Alternative Disputes Redressal (ADR) and the need of the ADR system in India. Various ADR techniques including the hybrid techniques are defined. Position of ADR system in India before and after the Civil Procedure Amendment Act, 1999 has been discussed. The categories of cases where ADR is suitable or not suitable are discussed. The objectives of the study and the research methodology adopted are discussed.

Chapter II relates to ‘Historical Background of the ADR System in India’. It discusses the position of ADR in ancient India. That disputes are being settled out of the formal justice delivery system since ancient times.
Chapter III examines the ‘Right to Speedy Justice’. It is a fundamental right of every citizen to get speedy justice as part of the right to life and liberty. The importance of speedy disposal of cases is discussed, as it is recognized in several reports of the Law Commission of India. Position of disposal of case and the causes of delay in the courts is discussed. Data relating to institution of cases in the courts, disposal of cases in the courts, pendency of cases in the courts and vacancy of judges in all the courts are collected. Steps taken to provide speedy justice are discussed.

Chapter IV is about the ‘Adjudicatory Method of Dispute Resolution i.e. Arbitration’. Legislative history of arbitration in India is traced. Circumstances which led to the enactment of new Arbitration and Conciliation Act, 1996 are discussed. Dispute resolution through arbitration and the law developed through judicial interpretation in India is discussed. It is found that though legal and institutional framework is firmly in place in India its full benefits are yet to be realized. Advantages and limitations of the arbitration mode are discussed. View of the Law Commission of India in 176th report is analysed.

Chapter V is about ‘Non-Adjudicatory Methods of Disputes Resolution’. These methods are successfully employed in the indigenous system of lok adalats in India. The success of lok adalats in decongesting courts is explored. Working of the lok adalats and permanent lok adalats is examined critically. Use of non-adversarial methods outside the lok adalats is rather new. The establishment of ‘Mediation and Conciliation Centres’ to employ court annexed mediation in India is discussed.

Chapter VI is the concluding chapter and summarises the findings of the study. It is shown in this chapter that though there are many advantages of ADR which
weigh more than that of the courts, but this is not the cure all solution nor a substitute of the courts. Rather ADR should be taken as complementary to the courts. It is also found that despite of a well enacted framework for the ADR, it is still in its infancy and has a long way to go before the full benefits are realized. In the last some suggestions are made for the improvement, as to how ADR can complement the Indian legal system so as to benefit the society at large.