Chapter- II

Historical Background of the ADR System in India

2.1  Introduction:

Dispute resolution outside of courts is not new; societies world-over have long used non-judicial, indigenous methods to resolve conflicts. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realize goals broader than the settlement of specific disputes.¹

Alternate Dispute Resolution system is not a new experience for the people of this country also. It has been prevalent in India since time immemorial. Legal history indicates that down the ages man has been experimenting with procedure for making it easy, cheap, unfailing and convenient to obtain justice². Procedure for justice is indicative of the social consciousness of the people. Anywhere law is a measuring rod of the progress of the community. Ancient system of dispute resolution made a considerable contribution, in reaching resolution of disputes relating to family, social groups and also minor disputes relating to trade and property. Village level institutions played the leading role, where disputes were resolved by elders, comprising Council of Village (popularly called Panchayats), which was an informal way of mediation. In earlier days disputes hardly reached courts. Decisions given by the elderly council were


respected by all. But subsequently boon accompanied bane, the very system lost its impression due to intervention of political and communal elements.

2.2 Position of ADR in Ancient India:

It is generally presumed that the commonly prevalent system of Government in Ancient India was monarchy and instances of republic were either exceptions or aberrations. The view is based on the apparent perception that since there were kings in ancient India, the system was that of monarchy. ³

In the beginning of the Vedic age people did not have a settled life and were nomads but with development in agriculture people started to settle down in groups. ⁴ The first Indian civilization arose in the Indus valley about 2,600 BC. It actually straddled modern India and Pakistan. By 6,500 BC the people of the area had begun farming. By 5,500 BC they had invented pottery. By about 2,600 BC a prosperous farming society had grown up. The farmers used bronze tools. They grew wheat, barley and peas. They also raised cattle, goats and sheep. Water buffalo were used to pull carts. The people spun cotton and they traded with other cultures such as modern day Iraq. Some of the people of the Indus Valley began to live in towns. ⁵ The Indus Valley people were most likely Dravidians, who may have been pushed down into south India when the Aryans, with their more advanced military technology, commenced their migrations to India around 2,000 BCE. Though the Indus Valley script remains undeciphered down to the present day, the numerous seals discovered during the excavations, as well as statuaries and pottery, not to mention the ruins of numerous Indus Valley cities, have enabled

⁵ http://www.localhistories.org/india.html
scholars to construct a reasonably plausible account of the Indus Valley civilization. Harappans may have developed the first democracy. Very little evidence has been found of a king in the Indus Valley, except the one white priest-king idol and a silver crown; not enough to establish that the “royalty” were the rulers. Instead the empire was divided into regions with half a dozen cities functioning as capitals and was governed by a group of people. Archeologist Jonathan Mark Kenoyed has speculated that the Harappan rulers were merchants, ritual specialists and individuals controlling important resources, instead of just one social group controlling the rest. From the construction of the cities however it does appear there were some social classes, as the citadel is usually 20 feet higher than the middle and lower town.

The decline of the Indus Valley civilization saw the arrival of Aryans in India. From their original settlements in the Punjab region, they gradually began to penetrate eastward, clearing dense forests and establishing “tribal” settlements along the Ganga and Yamuna plains between 1500 B.C. and 800 B.C. By around 500 B.C., most of northern India was inhabited and had been brought under cultivation, facilitating the increasing knowledge of the use of iron implements, including ox-drawn plows, and spurred by the growing population that provided voluntary and forced labour. As riverine and inland trade flourished, many towns along the Ganga became centres of trade, culture and luxurious living. Increasing population and surplus production provided the basis for the emergence of independent states with fluid territorial boundaries over which disputes frequently arose.

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6 http://www.sscnet.ucla.edu/southasia/History/Ancient/Indus2.html
7 http://www.hyperhistory.net/apwh/essays/comp/cw02sumeriansharappans34100118.htm
In earlier times, disputes were peacefully decided by intervention of kulas (family or clan assemblies), srenis (guilds of men following the same occupation), parishads (assemblies of learned men who knew law) before the king came to adjudicate on disputes.\(^9\) The political system of the Aryans in their initial days here was amazingly complex, though quite ingenious. They hung around together in small village settlements (which later grew to kingdoms) and the basis of their political and social organization was, not surprisingly, the clan or kula. Being of somewhat militant nature, this was very much a patriarchal society, with the man in the house expected to keep his flock in control. Groups of kulas together formed a Grama or village, which was headed by a Gramina. Many villages formed another political unit called a Visya, headed by a Visyapati. The Visyas in turn collected under a Jana, which was ruled by a Rajana or king. However, the precise relationship between the grama, the visya and the Jana has not been clearly defined anywhere.\(^10\)

In ancient India there were several grades of arbitration, for example the Puga or a board of persons who belonged to different sects and tribes but lived in the same locality; the Sreni or assemblies of tradesmen and artisans belonging to different tribes but connected in some way with each other, the Kula or groups of persons bound by family ties. From early times, the decisions of Panchayats were accepted as binding. According to Colebrooke (an English scholar and commentator on ancient Hindu law), Panchayats were different systems of arbitration subordinate to the regular courts of law. The decision of a Kula or kin group was subject to revision by the Sreni which, in turn, could be revised by the Puga. From the decision of the Puga, appeal was maintainable to


\(^{10}\) [http://voice.indiasite.com/ancient.html](http://voice.indiasite.com/ancient.html)
Pradvivaca and finally to the sovereign and the prince. In ancient times the Kula, sreni and Gana were the three types of popular courts, each succeeding one being more important than the preceding one. When and where these three failed to administer proper justice, the king or his officers were to interfere. Unfortunately Sukra does not explain the nature of the above three types of courts. But on the evidence of the Mitakshara, it can say that kula court consisted of a group of relations near or distant. It is important to note that in ancient India joint families were the order of the day and they were usually very large. When therefore, a disagreement or dispute used to take place between two members of a family, it was usually settled by its elders. If they failed to bring about any compromise, the sreni or the guild courts used to intervene. Srenis or guilds became a prominent feature of commercial life in ancient India from 500 B.C. They were well organized and had their own executive committees of four or five members. The nature of the Gana Court is difficult to ascertain. Probably it was identical with the Puga Court of Yajnavalkya, which consisted of persons of different castes and professions but residing in the same place. It was obviously the popular panchayat courts.  

2.3 Ancient Indian Trade-Guilds System:

Ancient Indian guilds are a unique and multi-faceted form of organization, which combined the functions of a democratic government, a trade union, a court of justice and a technological institution. The guilds of ancient India are often referred to by Sanskrit writers as the ‘Srenya’. This term means a fraternal organization of a group of labourers or artisans. A Srenya is thus primarily a combination of manual workers for

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12 http://www.infinityfoundation.com/mandala/h_es/h_es_shah_m_sreni_frameset.htm
some common purposes. The early Hindu, Jain and Buddhistic traditions often refer to the Srenyas.  

The earliest associations of manual workers should have been due to the communistic spirit of Indian civilization. Men of the same profession and so of the same caste had that common caste feeling, which brought them together. When once these organizations came into being, the cohesive forces added strength and they became corporate bodies with a separate existence and personality of their own. These bodies had for their existence, the sanction of religion and hence they occupied such a large place in the socio-economic structure of the Hindu States. These bodies gradually acquired some influence in the political affairs of the tribes to which they belonged.

When the transition from small petty kingdoms to huge empires had taken place, the political organization had also to change. There was more of centralization and all political power tended to be concentrated in the hands of the king and of the Royal Council. The territories of the empire were often so wide as to preclude effective supervision by the king from his far-off capital. Hence a certain amount of administrative decentralization was necessary. Out of this decentralization process, the guilds would have gained something. By reason of their corporate character and organization, they would have been vested with a certain amount of administrative functions. Thus often the king would have endowed the guilds with judicial functions. The guilds in the 4th and 3rd centuries B.C. settled disputes among their members. Form its sentence however there was an appeal to the Royal Courts. Disputes between several

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14 Id, p. 180.
guilds were settled by means of arbitration. The settlement of disputes between or within the guilds by arbitration is a characteristic feature of the ancient trade guilds system of India. In the judicial arrangements of the state, the guilds occupied a prominent place and should have performed the duties of a subordinate judiciary subject to the supervision of royal authority. In this lies one of the unique features of the Indian trade-guild system.

It is important to note that the Somadeva, who flourished in the 10th century, observes that the royal courts could be approached only after a case was decided by the town or village court. The village court he refers to must obviously have been the Gana court of the Narada and Sukara. Had it not been functioning, Somadeva could hardly have laid down that the royal courts should come in the picture only after a case was decided by the village court. Thus the village panchayat played an important part throughout the long course of Indian history. They flourished in India not due to anarchy as was propounded by Sir Henery Maine but, because the central government was itself refusing to entertain any suit at the first instance and were deliberately referring all of them back to the village panchayat. The village panchayat thus reduced the burden of the central government, helped the cause of justice and encouraged the principle of self government.

2.4 Dispute Settlement During Mauryan Dynasty:

In 322 BC Chandragupta Maurya became king of the powerful and highly centralized state of Magadha in the North of India. Aided by his able advisor Kautilya

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15 Id, p. 181.
16 Id, p. 182.
17 Supra Note 11, p. 211.
Chandragupta created an empire. After Alexander the Great died his empire had split up. Seleucos took the eastern part. He attempted to reclaim the Indian provinces once ruled by Alexander. However his army was stopped by Chandragupta in 305 BC. Seleucos was then forced to cede most of Afghanistan to Chandragupta, who also conquered parts of central India. This new empire was rich and trade thrived. Its capital was one of the largest cities in the ancient world. In 296 B.C. Chandragupta abdicated in favour of his son Bindusara who pushed the frontier of the empire further south. The greatest Mauryan ruler was Ashoka or Asoka (269-232 BC). He conquered Kalinga (modern day Orissa). Afterwards he declared he was appalled by the suffering caused by war and decided against any further conquest. After his death the Mauryan Empire declined, as all empires do. It suffered an economic decline and political instability as different brothers strived to become king. A general assassinated the last Mauryan ruler in 185 BC. The general then took over running the empire and founded the Shunga dynasty. However in 73 BC the last Shunga ruler was, in turn, assassinated. They were replaced by the Kanva dynasty which ruled from 73-28BC. The influence of the Mauryans penetrated into Southern India. In the time of the Mauryans the farmers there became more advanced. By the first century BC organized kingdoms had grown up and trade and commerce were flourishing there.\footnote{Supra Note 5.}

During Mauryans the king was the head of justice-the fountainhead of law and all matters of grave consequences were decided by him. At the local level, there were courts formed by citizens, apart from courts formed by trade guilds and village
assemblies. There were special courts in the cities and villages presided over by the pradesika, mahamatras and rajukas.

There were two kinds of courts:

1. Dharmastheya which dealt with civil matters and was presided over by three amatyas and three dharmansthas.

2. Kantakasodhana deciding cases of a criminal nature. The criminal courts were special tribunals presided over by three amatyas or pradestris aided by spies and informers.

In all important cities and headquarters, at least one court and one police head office was set up. Besides these courts petty cases in the villages were settled by the village elders in their panchayats. In civil cases the Hindu code of law, as envisaged in the shastras, was administered.\(^\text{19}\)

The law sources, according to Kautilya, were dharma (accepted principles), vyavahara (legal codes current at the time) charitra or customs and rajasasaru (the king's decree). Cases were registered and witnesses were produced. Decision was taken by a body of arbitrators with a system of appeal to the king. Megasthenes’ account seems to indicate that theft was a rare occurrence in the Mauryan kingdom. But it actually appears that crime and breach of laws were common at the time. The Arthashastra mentions punishments ranging from ‘mild’ to ‘severe’. Megasthenes mentions the punishment of mutilation for false evidence and death for harming the artisans attached to the royalty. Those who enforced the law had to face punishments if they themselves broke the law. The penalties mentioned in the Arthashastra were graded according to

\(^{19}\)http://www.preservearticles.com/2011101815640/essay-on-the-judicial-system-of-the-mauryan-rulers-india.html
Varna hierarchies. Scholars have noted that a shudra was punished more severely than a Brahman for the same type of offence.

2.5 Dispute settlement during Kushan Dynasty:

Kushan Empire is one of the most interesting Dynasties which ruled over the land of Jammu & Kashmir. After the disintegration of the Mauryan Empire in the second century B.C., South Asia became a collage of regional powers with overlapping boundaries. India’s unguarded northwestern border again attracted a series of invaders between 200 B.C. and A.D. 300. The invaders became “Indianized” in the process of their conquest and settlement. Also, this period witnessed remarkable intellectual and artistic achievements inspired by cultural diffusion and syncretism. The Indo-Greeks, or the Bactrians, of the northwest contributed to the development of numismatics; they were followed by another group, the Shakas (or Scythians), from the steppes of Central Asia, who settled in western India. Still other nomadic people, the Yuezhi, who were forced out of the Inner Asian steppes of Mongolia, drove the Shakas out of northwestern India and established the Kushana Kingdom (first century B.C.-third century A.D.). The Kushana Kingdom controlled parts of Afghanistan and Iran, and in India the realm stretched from Purushapura (modern Peshawar, Pakistan) in the northwest, to Varanasi (Uttar Pradesh) in the east, and to Sanchi (Madhya Pradesh) in the south. For a short period, the kingdom reached still farther east, to Pataliputra.

In Kanishka’s time Kushan Kingdom has seen its highest rise (78-123 AD). Kanishka was the legendary ruler of ancient India and according to most historians the greatest ruler of Kushan dynasty. He and his descendents called themselves

20 http://www.indianmirror.com/dynasty/kushandynasty.html
21 http://www.gatewayforindia.com/history.htm#Golden period of Indian History
‘Devputra’ which means son of god, who ruled Aryavarta, the India. He established an era, commonly known as Shaka era, starts from 78 AD. Shaka era is still in use in India. Huvishka succeeded Kanishka I. He was founder of a city Hushka in Kashmir named after him (described by Kalhan in Rajatarangini). Kushana Empire was at its zenith during Kanishka’s and Huvishka’s reign. After Huvishka’s reign, Vasudeva I took control of this dynasty which by then had lost control over regions beyond Bactria or perhaps the Bactria itself. The Kushan dynasty had been totally assimilated in Indian culture. Vasudeva I was the last great king of the dynasty when Kushana empire was at it’s height of splendor and prosperity.

Kushan Empire had started its decline soon after Vasudeva’s death. Vasudeva was followed by his son Kanishka II, who lost all the territories west of river Indus to Sassanians. Vasudeva II, Vashishka, and Shaka are the kings who followed after the Kanisha II. After Vashishka the Kushan Empire had completely disintegrated into few small kingdoms. By fourth century AD this dynasty went into total obscurity with advent of mighty Gupta emperors.22

2.6 Dispute Settlement during Gupta Age:

Gupta age is known as golden age of India. It existed approximately from 320 to 550 AD.23 The administrative system during the Gupta dynasty reign was similar to that of the Mauryan Empire. The King was the highest authority and possessed wide powers to enable the smooth functioning of the empire. During the Gupta period, the empire was classified into separate administrative divisions like Rajya, Rashtra, Desha,

22 http://www.gloriousindia.com/history/kushans.html
23 http://www.indianetzone.com/5/gupta_dynasty.htm
Mandala, etc. The provinces were divided into numerous districts or Vishayas.\textsuperscript{24} Gupta kings were not autocrats. They shared their powers with ministers and other high officers. A large number of powers were delegated to the local bodies such as village Panchayats and town councils. According to Kalidas, there were three ministers- foreign minister, finance minister and the law minister. Office of minister in charge of law and order was called Vinayasthiti Sthapaka.\textsuperscript{25}

The Gupta Empire had a separate judicial system. At the lowest level of the judicial system was the village assembly or trade guild. These were the councils appointed to settle the disputes between the parties that appear before them. There were separate councils appointed to decide various matters that came before them. Thus, if people could not reach to any amicable settlement, it was resolved by the councils. The King presided over the highest court of appeal. In discharging his duty, the King was assisted by judges, ministers, priests, etc.\textsuperscript{26} Inscriptions of Gupta’s refer to such judicial officers as ‘Mahadanda nayaka’, ‘Mahakshapatalika’ etc. Probably, ‘Mahadandanayaka’ combined the duties of a judge and a general. The ‘Mahadandanayaka’ was probably the ‘Great keeper of Records’. It appears that the ‘Kumaramatya’ a ‘Bhondapashika’ and the ‘Uparika’ had each his separate ‘Adhikarna’ or ‘court or office’ where the transactions pertaining to land were decided. It is possible that judicial matters were also decided there. According to Fa-Hien, punishments were very lenient and capital punishment was very rare. However, the testimony of Fa-Hien is not accepted and it is pointed out by the Kalidas, Visakhadatta that punishments were pretty harsh in the Gupta period such as

\textsuperscript{24}http://www.theindianhistory.org/Gupta/gupta-empire-administration-and-administrative-system.html

\textsuperscript{25}http://www.preservearticles.com/2011081610828/essay-on-the-administrative-system-of-guptas.html

\textsuperscript{26}Supra Note 24.
death, death by elephant etc. Four kinds of ordeals seemed to have been employed to ascertain the guilt or innocence of a person. These are by water, by fire, by weighing and by poison. The decision or the judgment of the court was based on the legal texts, the social customs prevailing during those times, or upon the decision of the King.

2.7 Dispute Settlement during Mughal Rulers:

The administrative system of the Mughal Empire was largely the work of Akbar, for the early two Mughal kings (Babur and Humayun) did not really get the chance to implement much of a system. Jalal ud-Din Muhammad Akbar laid the foundation of the first lasting Muslim dynasty in Hindustan, the Mughal Empire; he ascended the throne in 1556, after the death of his father, Humayun. At that time, Akbar was only 13 years old. Akbar was the only Mughal king to ascend to the throne without the customary war of succession.

Akbar’s action ultimately provided the Indian subcontinent with a more efficient form of government than it had endured under earlier Muslim dynasties. Before the rise of Mughals, Muslim rulers had striven tooth and nail for more than three centuries to impose their authority over the majority of Hindu population. Nothing like modern legislation, or a written code of laws, existed in the Mughal period. The only notable exceptions to this were the twelve ordinances of Jahagir and the Fatawa-i-A Xatâ a digest of Muslim law prepared under supervision. The judges chiefly followed the Quranic

27 Supra Note 25.
28 Supra Note 24.
29 http://library.thinkquest.org/C006203/cgi-bin/stories.cgi?article=government&section=history/mughals&frame=story
injunctions or precepts, the Fatawas or previous interpretations of the Holy Law by eminent jurists, and the qanunus or ordinances of the Emperors. They did not ordinarily disregard customary laws and sometimes followed principles of equity.\textsuperscript{31} Foreign writers like Sir Thomas Roe point out that in the Mughal period there was no codified law as such. Likewise, there was no highest court of justice which could finally lay down the law for the country. The Mughals had three separate judicial agencies, all working at the same time and independent of each other. Those were the courts of religious law, court of secular law, and political courts. As regards the courts of religious law, those were presided over by the Qazis who decided cases according to Islamic law. However, the Qazi was never “considered authoritative enough to lay down a legal principle, elucidate an obscurity in the Quran or supplement the Quranic law by following the line of its obvious intention in respect of cases not explicitly provided by it.” The Qazis were helped by the Muftis who expounded the law. The Mufti was “urged to spend his days and nights in reading books on jurisprudence and the reports of cases from which one can learn precedents.” The Miradls drew up and pronounced the judgment. Muslim Law in India did not grow and change according to the circumstances and needs of the country.

As regards the courts of secular law, they were presided over by Governors, Faujdars and Kotwals. In the time of Akbar, Brahmans were appointed to decide the cases of Hindus. The Panchayats also fell under this category. The courts of secular law were not under the thumb of the Qazi. Political courts tried political cases like

\textsuperscript{31} http://www.drgokuleshsharma.com/pdf/mughal%20rule.pdf
rebellion, rioting, theft, robbery, murders, etc. They were presided over by Subahdars, Faujdars Kotwals, etc.  

Mughal emperors had keen interest to deliver speedy justice to its citizens. The justice system placed even senior officers within the law, and perhaps the only person really above the law was the emperor himself. The Mughal emperors were very keen on justice, but for most of the Mughal period, appealing to the emperor was a complex procedure. Two notable exceptions were Akbar and Jehangir, who allowed subjects to directly petition them. In addition to the emperor there were other officers in charge of justice. The chief justice was known as the Quazi-ul-Quazat. He was in charge of maintaining the judicial system throughout the empire. For this purpose he was responsible for the appointment and management of Quazis all over the empire. Under them there were no lower courts.

Most villagers however resolved their cases in the village courts itself and appeal to the caste courts or panchyats, the arbitration of an impartial umpire (salis), or by a resort to force”. The punishments were fairly severe, ranging from imprisonment to amputation, mutation and whipping. The approval of the emperor was however mandatory for capital punishment. In the Mughal judicial system, the emperor was the final court of appeal.  

Ample evidence exists to show that the village panchayat court continued to function efficiently even under the Muslim Rule in the Deccan. We find the Muslim emperor Ibrahim Adil Shah of Bijapur refusing to entertain the appeal of Bapaji Musalman for the retrial of his case in the royal court. While there thus exists ample


33Supra Note 29.
evidence to show that the village panchayats and guild courts were actually functioning
even in Muslim Rule in Maharashtra, but no contemporary epigraphical evidence were
found to show that they were actually functioning as suggested by Sukara.34

2.8 Dispute Settlement during Maratha Rulers:

The Maratha administration of justice was simple and it was suited to the
temper and situations prevailed during that time. The law was not codified, its procedure
was not certain and it was mostly informal.35 Justice under Marathas was based upon
Dhramashastras, Vijnanesvara, Vyavaharamayukha and the Dhanakamalakara were the
principle authorities while Manu, Hemadri, Madhava were also quoted by judicial
authorities. Similarly there were special books embodying various caste-laws such as
Jati-nirnaya and Vyvahar-nirnaya which were consulted in deciding caste disputes.36

There are several salient features of the judicial administration of the
Marathas which are as under:

1. It depended upon the old Sanskrit treatises like Mitakshara school of thought and
   Manu’s codes for legal theories.

2. It also banked upon the old customs which prescribed the trial by ordeal. The Maratha
   judges allowed the offender to undergo the ordeal of fire and water. They also
   believed in the divine intervention and taking oath in sacred temple.

   google book store
3. The Marathas acted as patriarchs of the old laws. They were little softer on the enforcement of the civil suits and emphasised on the amicable settlement of these disputes.

4. They gave almost all facilities or chances to the suitor or complainants to prove his case.

5. They also showed some considerations to the defeated party or defend to ensure the good relations between the parties in future.\textsuperscript{37}

Shivaji was one, the famous Maratha king. The situation of judiciary was not satisfactory in Shivaji’s kingdom. Nor the courts were established according to the prevalent system in the neighbouring states neither it was a modern judicial system.\textsuperscript{38}

Panchayat was the first instrument of the civil administration of justice under the Marathas. It was the duty of the Patil in each village and Shete Mahajan in the town and market places to appoint a Panchayat to adjudicate cases of simple and minor nature. The disputing parties were to sign an agreement regarding the abiding of the rules and regulations of the Panchayat. It was the Panchayat to study the case and pass its judgement impartially or without any bias to any party. Mamlatdar, the higher officer in the succession of judicial administration was to confirm the judgement. In case, the Patil refused to conduct lighter judgement or appoint a Panchyat or the disputing parties declined the adjudication of the dispute in their village, it was the duty of the Mamlatdar to arrange for Panchayat at another village with the help of Patil and get the dispute adjudicated. It is also said that if any matter was beyond the jurisdiction of the Patil, the Mamlatdar was to conduct the hearing of the case and was to finalise it in a fair manner.

\textsuperscript{37} Supra Note 35.

\textsuperscript{38} http://www.indiabuzzing.com/2009/12/31/maratha-administration/
Generally, the Patil and the Panchayat used to adjudicate the cases, which were upheld by the Maratha Government. It was noteworthy that the party never abided by the judgement which was delivered in his absence. Such judgement was quashed by the appeal of the absent party to the Government.\(^{39}\) At that time small scale civil cases were handled by the Panchayat at the village level while criminal cases were handled by the Patil. Nyayadhish heard the appeals of the civil and criminal cases.

Hazir Muzlis was the Maratha Supreme Court. King himself gave him judgments in major cases. Shivaji did relentless efforts to provide justice to the needy people. Maratha kingdom did not have written rules and judgments were given according to the Hindu religious books and rituals. Criminals were sent to prison or fined for minor crimes.\(^{40}\) During medieval period we come across several Maratha kings, refusing to entertain any case at the first instance. Thus when the dispute about the Patilki-watan of Ravet in Poona pargana was taken to Shahaji, the father of Shivaji, he ordered that the panchayat of the place concerned should decide the case. Shivaji also, while declining to entertain the case of one Ramaji Krishna, makes an interesting statement, which is very important. He said to the plaintiff “if you so wish, I shall send your case to your own village panchayat if that will meet your desire or I shall refer it to the district panchayat, if that course itself recommends itself to you. Let me know what you like.” It is interesting to note here that though Shivaji puts before the plaintiff a number of alternatives, he nowhere refers to the possibility of the trial of the case by himself or by any of his officers.

\(^{39}\) Supra Note 35.

\(^{40}\) Supra Note 38.
Shivaji’s son Rajaram also followed the same practice. When a very important dispute involving the watan right to more than twenty villages was referred to him, he immediately directed to the local panchayat to decide it.\textsuperscript{41} Chhatrapati Pratap Sinha, the ruler of Satara between 1808 and 1839 had prepared a list which is known popularly as YADI of all procedural customs prevailed during the period of Marathas. The ruler emphasised on the amicable settlement, he further says that in case the parties failed to settle their dispute amicably, they should move to the arbitrator and get satisfactory settlement for both the parties. In this case the arbitrator should adjudicate the issue impartially, without fear and favour of any party. The Maratha king was the fountain of Justice and honour like the king of England. In towns, there were learned judges, well versed in almost all shastras were appointed for exercising the judicial duties. These judges were popularly known as Nayadhish. In short the theory of separation of power of the Executive, the Legislature and the Judiciary was not observed.\textsuperscript{42}

2.9 Alternative Dispute Resolution during British Period:

The British East India Company opened their first trading centre at Surat, Gujarat in 1612. This was as per the deed of right Mughal Emperor Jehangir granted to them. Their first major interference with the internal politics of India was when they supported Mir Kasim, a minister of Bengal, militarily to sabotage Siraj-ud-Daula, the Nawab. On 23rd June, 1757, the Nawab was defeated by a joint military action of Robert Clive’s troops and those of Mir Kasim in a battle at Plassey. And this was the turning

\textsuperscript{42} Supra Note 39.
point where the British formally entered the political arena of India and began to play a
direct role in the administrative supremacy. They managed to bring under their
administrative control most of the princely states of India either by direct annexation
using force or by giving military support. They brought Punjab also under their control in
1849. Along with Punjab, the North West Frontier Province, which is now under
Pakistan, was also brought under them. And in those states where a legitimate heir
apparent to the crown was not available they were brought under the British rule. Sattara
(1848), Udaypur (1852), Jhansi (1853), Tanjore (1853), Nagpur (1854), Oudh (1856)
were some of the princely states the British annexed using this excuse – that there were
no legitimate heir apparent. When Tipu was defeated in 1792, they annexed Malabar
too.\(^{43}\)

Judicial administration was changed during British period. The current
judicial system of India is very close to the judicial administration as prevailed during
British period. The traditional institutions worked as recognised system of administration
of justice and not merely alternatives to the formal justice system established by the
British. The two systems continued to operate parallel to each other.\(^{44}\) The system of
alternate dispute redressal was found not only as a convenient procedure but was also
seen as a politically safe and significant in the days of British Raj.

However, with the advent of the British Raj these traditional institutions of
dispute resolution somehow started withering and the formal legal system introduced by


\(^{44}\) Sarvesh Chandra, ADR: Is Conciliation the Best Choice, in P.C. Rao and William Sheffield (eds.),
Alternative Dispute Resolution: What it is and How it Works, Universal Law Publishing Co., New Delhi,
the British began to rule.\textsuperscript{45} Alternate Dispute Resolution in the present form picked up pace in the country, with the coming of the East India Company. Modern arbitration law in India was created by the Bengal Regulations. The Bengal Regulations of 1772, 1780 and 1781 were designed to encourage arbitration.\textsuperscript{46} Bengal Resolution Act, 1772 and Bengal Regulation Act, 1781 provided parties to submit the dispute to the arbitrator, appointed after mutual agreement and whose verdict shall be binding on both the parties. Hence, there were several Regulations and legislation that were brought in resulting considerable changes from 1772. After several Regulations containing provisions relating to arbitration Act VIII of 1857 codified the procedure of Civil Courts except those established by the Royal Charter, which contained Sections 312 to 325 dealing with arbitration in suits. Sections 326 and 327 provided for arbitration without the intervention of the court.

After some other provisions from time to time Indian Arbitration Act, 1899 was passed, based on the English Arbitration Act of 1889. It was the first substantive law on the subject of arbitration but its application was limited to the Presidency – towns of Calcutta, Bombay and Madras. Act, however suffered from many defects and was subjected to severe judicial criticisms. In 1908 the Code of Civil Procedure was re-enacted. The Code made no substantial changes in the law of arbitration. The Arbitration Act of 1940 was enacted replacing the Indian Arbitration Act of 1899 and section 89 and clauses (a) to (f) of section 104(1) and the Second Schedule


\textsuperscript{46} Nripendra Nath Sircar, Law of Arbitration in British India (1942), p. 6 cited in 76\textsuperscript{th} Report of Law Commission of India, 1978, p. 6, para 1.14
of the Code of Civil procedure 1908. It amended and consolidated the law relating to arbitration in British India and remained a comprehensive law on Arbitration even in the Republican India until 1996.

2.10 Alternative Dispute Resolution post independence:

Bodies such as the panchayat, a group of elders and influential persons in a village deciding the dispute between villagers are not uncommon even today. The panchayat has, in the recent past, also been involved in caste disputes. In 1982 settlement of disputes out of courts started through Lok Adalats. The first Lok Adalat was held on March 14, 1982 at Junagarh in Gujarat and now it has been extended throughout the country. Initially, Lok Adalats functioned as a voluntary and conciliatory agency without any statutory backing for its decisions. By the enactment of the Legal Services Authorities Act, 1987, which came into force from November 9, 1995, the institution of Lok Adalats received statutory status. To keep pace with the globalization of commerce the old Arbitration Act of 1940 is replaced by the new Arbitration and Conciliation Act, 1996. Settlement of matters concerning the family has been provided under Order XXXIIA of the Code of Civil Procedure, 1908 by amendment in 1976. Provisions for making efforts for reconciliation under Sections 23 (2) and 23 (3) of the Hindu Marriage Act, 1955 as also under Section 34 (3) of the Special Marriage Act, 1954 are made. Family Courts Act was enacted in 1984. Under Family Courts Act, 1984 it is the duty of family court to make efforts for settlement between the parties.

Introduction of section 89 and Order X Rule 1A, 1B and 1C by way of the 1999 Amendment in the Code of Civil Procedure, 1908 is a radical advancement made by

the Indian Legislature in embracing the system of “Court Referred Alternative Disputes Resolution”.

2.11 To Sum up:

India has a long history of settlement of disputes outside the formal justice delivery system. The concept of parties settling their disputes by reference to a person or persons of their choice or private tribunals was well known to ancient India. Long before the king came to adjudicate on disputes between persons such disputes were quite peacefully decided by the intervention of the kulas, srenis, pugas and such other autonomous bodies. 48 These traditional institutions worked as main means of dispute resolution, not an alternative. During the British rule the system of dispute resolution was changed and a new formal, adversary system of dispute resolution originated. Arbitration was recognised as out of court method of dispute resolution and several provisions were enacted relating to that. The ADR system as is understood in the present scenario is the result of the shortcomings of that formal judicial system. Now the alternative disputes resolution techniques are being used to avoid the costs, delays and cumbersome procedure of the formal courts.