Chapter – 1

Introduction

Equal justice for all is a cardinal principle on which entire system of administration of justice is based. We cannot conceive of justice which is not fair and equal, which is given to one and denied to another. The role of Courts as dispenser of justice has been recognized since time immemorial. Complete justice is the purpose of rule of law and administration of justice in every welfare state.

There is a long and old tradition in India of the encouragement of the dispute resolution outside the formal legal system. Disputes were quite obviously decided by the intervention of the elders or assemblies of learned men and other such bodies. Nyaya Panchayats at grass-root level were there even before the advent of British system of justice.

There is presence of Indigenous methods of disputes resolution in present India also, which must not take us to the conclusion that they are similar to existing alternative dispute resolution. Though Panchayat system appears to be based on similar process of dispute resolution to that of alternative dispute resolution; Panchayat was most efficient mechanism which stood as part of Human civilization in the Orient (India). The later one, unlike alternative dispute resolution (modern), involves community participation, and operates in friendly environment. The main object of dispute resolution by Panchayat is community good and not the interest of parties, it is the concept of Dharma, Custom,
Charitra that abides Panchas (Adjudicators) and they are not wholly free to arrive at the conclusion at their whim.

After Independence we altogether adopted alien philosophy and system of justice administration and still imitate Anglo-Saxon methods of dispute resolution. At this juncture we are in confused state of mind to choose either of the one, because common-law had its deep roots in India, undoing what happened in almost 400 hundreds of Indian history is myth. However, adopting and blind appraisal of alien philosophy will take us from bad to worse.

Mediation is not something new to India. Centuries before the British arrived, India had utilized a system called the Panchayat system, whereby respected village elders assisted in resolving community disputes. Such traditional mediation continues to be utilized even today in villages. Also, in pre-British India, mediation was popular among businessmen. Impartial and respected businessmen called Mahajans were requested by business association members to resolve disputes using an informal procedure, which combined mediation and arbitration.

After the British adversarial system of litigation was followed in India, arbitration was accepted as the legalized ADR method and is still the most often utilized ADR method. Mediation has only in the past few years begun to become familiar to lawyers and judges generally, except in traditional community settings and except where mediation has been court-directed or statutorily-prescribed, such as in the intra-governmental disputes between government agencies and undertakings, in labor disputes and in public utility services disputes. So when we compare the
US and Indian system, over the last twenty (20) years, American lawyers and judges have warmly embraced mediation as a primary tool for resolving conflicts in court and out of court, while Indian lawyers and judges are still warily examining mediation, discussing whether and in which types of cases mediation should be used – similar to what was happening in the US in the 1980's.

The development of mediation in India holds enormous promise. In particular, the neutralizing communication skills and powerful bargaining strategies of facilitated negotiation can strengthen the system's capacity to bring justice to the society. Despite the demonstrable value of these techniques, however, several large obstacles block the path to mediation in India. Exposure to these facilitated negotiation processes, though spreading rapidly, remains limited.

1.1 Objectives of the Study

With the advent of the British Raj the traditional institutions of dispute settlement somehow started withering and the formal legal system introduced by the British began to rule on the basis of concept of omissions of rule of law and the supremacy of law.

In was only after independence and after realization that the formal legal system will not be in a position to bear the entire burden, it is 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 ADR procedures and to organize the same on more scientific lines/manner.

It was on 4th December, 1993 that the Chief Ministers and Chief Justices in a conference declared and resolved that the Courts were not in a position to bear the entire burden of justice system and the justice should be resolved by ADR procedure which provides procedural flexibility, saving of valuable time and money, and avoiding the stress of a regular trial etc.

The ADR mechanism is intended to cover Negotiation, Mediation, Conciliation, Arbitration and Lok Adalat. Section 89 of the Code of Civil Procedure, prescribes Mediation as one of the modes of alternative dispute resolution processes, to be resorted to in civil matters.

The mediation mechanism has been recognized universally and it is adopted in countries like U.S.A., U.K. etc. Gradually in India also this mechanism is being recognized by virtue of Section 89 of the Code of Civil Procedure.

The object of this research work is to find out the challenges and obstacles in mediation mechanism implementation and to find of out solution thereof. Not only that, but, the role of Advocates, Referral Judges as well as Mediators in implementing the mediation mechanism is also to be studied and need of enhancement of standard of mediation practices is also to be studied while doing research. It is proposed to provide remedial measures thereof.
The main objectives of the study are:

1. To understand the different concepts related to the research problem.

2. To trace out the history of dispute resolution mechanisms in India.

3. To study, the major legislations that provides for different types of alternative dispute resolution methods in India.

4. To study, the different alternative dispute resolution methods and their hybrids in resolution of the disputes.

5. To explore the, uniqueness of the mediation as an effective tool of dispensation of justice that are successfully functioning in other Countries and the major Institutions providing for them in India and abroad.

6. To comprehend the problem of judicial crises arising out of judicial arrears and delays in the Courts of law.

7. To evaluate and find out Challenges, obstacles and solution in mediation implementation in India.

8. To evaluate and find out Role of Advocates and Referral Judges in mediation.

9. To study, Need for enhancement of standard of mediation practices
1.2 Significance of the Study

Now, it is universally known that the Alternative Dispute Resolution or simply “ADR”, has been adopted due to its advantages over the prevalent administration of justice system. It is of common knowledge that existing justice delivery system is unable to cope up with the ever increasing burden of litigation. The problem is not of load alone. The deficiency lies in the adversarial nature of judicial process which is time consuming and more often procedure oriented. The adversarial procedure of Courts does not aim at “resolution” of competing claims of the members of the society. It aims at upholding the one and repeating the other, leaving the conflict between the parties unremedied. It is also felt that in the bulk of cases legal action in the Court is not an appropriate course for seeking justice.

Being one of the ADR mechanism, mediation is also well structured procedure devised to afford easy access to justice without undue delay and at a lesser cost by which the parties can participate in resolution of their disputes. It is a process where disputes are settled with the assistance of a neutral third person, generally of parties’ own choice; where the neutral is generally familiar with the nature of the dispute and the context in which such disputes normally arise; where the proceedings are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where is dispute is resolved expeditiously and with less expenses; where the confidentiality of the subject matter of the dispute is maintained to a great extent; where
decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities. In substance this mechanism of mediation aims at rendering justice in the form and context which not only resolves the dispute, but tends to resolve the conflict in the relationship of the parties which has given rise to that dispute.

The study of alternative dispute resolution methods is preferred by the for reducing with the problem of judicial delays and arrears due to the unique characteristics of these methods. When compared with the Courts, alternative dispute resolution methods are cost savings for parties and Courts. They give early resolution of disputes. They are more satisfying procedure for disputes resolutions. The outcome reflects the party’s interests and values. The litigant’s get more amount of satisfaction and compliance with result. The disputed parties get finality of resolution of disputes. It provides for win-win situation and preservation of relationship. Thus, reducing backlog and freeing judicial resources.

It is widely known that mediation is nonbinding procedure in which an impartial third party mediator assists the parties in dispute in reaching the mutual satisfactory and agreed settlement of dispute. In the mediation process, a mediator facilitates communication and negotiation as well as assists the parties in resolving the dispute. He also allows mediation remedies and entire process is flexible one.

It is aimed that through this research the challenges and obstacles arise in implementing the mediation mechanism and the need in improvement of standard of mediation practices would be highlighted and
remedial measures can also be suggested, which will ultimately enhance the dispute resolution mechanism to be implemented in the society at large. Further, ultimately the resolution of real dispute between the parties will also be benefited to the society at large as there will be peace in the society.

1.3 Hypothesis

So far as Arbitration and Conciliation is concerned, the Arbitration and Conciliation Act, 1996 is in force, the Legal Services Authorities Act, 1987 deals with the Lok Adalat and Permanent Lok Adalat. Whereas, Section 89 of the Code of Civil Procedure deals with the various modes of alternative dispute resolution which includes Arbitration, Conciliation, Mediation, Lok Adalat and Judicial Settlement. However, there is no specific enactment regarding the mediation mechanism. Of course, many countries like U.S.A., Australia etc. have adopted the rules for mediation, which includes model standards of conduct for mediators.

Moreover, considering the Section 89 of the Code of Civil Procedure, a matter pending in the Court can be referred to the mediation, but, there is no specific provision for referring the Pre Litigative matters for resolution through mediation. Of course, in Gujarat the Gujarat State Legal Services Authority has formulated a mechanism for referring the Pre Litigative matters to the mediation center and to give legal sanctity to the agreement arrived at between the parties through such mediation, such agreement or settlement is to be referred to Permanent Lok Adalat where a necessary award would be passed. Thus, there is a viability of
providing legal sanctity to the Pre Litigative matters referred to the mediation mechanism.

Dispute resolution process in each and every case cannot be confined to the Courts of Law. Due to the increased burden, procedural complications and inadequate knowledge about alternative dispute resolution methods among the public the Courts of Laws are facing the problem of judicial crises. The study is based on the assumption that, when the rate of filing of the cases before the Courts is decreased the judicial delays and arrears before the Courts can be properly managed. Different forms of alternative dispute resolution methods either socially or legally can effectively be used as a mechanism in reducing the problem of judicial delays and arrears. The lack of knowledge on the part of then disputed party has also made the existing system not to function in an effective manner. To study whether the use of mediation is a tools of alternative dispute resolution mechanisms can play a constructive role in reducing the crisis of judicial delays and arrears existing before the Courts of law in India.

The alternative dispute resolution methods cannot be said to be are placement of the adversarial system of Courts of law. Mediation can be quick and economical methods, unless the parties are equally interested in settlement. If these methods are not put to proper use, they can be very well be used as a strategy to delay the resolution, and further prolong the possibility of litigation of the dispute without a sincerity of settling the issues for their own reasons. Consequently, the right to speedy trial can successfully be given its due respect only with the appropriate use of
mediation methods as a supplement and not as supplant to the conventional method of resolution of disputes through Courts of law.

During this research work, various aspects relating to the mediation process which includes standards of conduct of the Mediators, Advocates, role of the Referral Judges will be tested.

1.4 Research Methodology

The doctrinal method of research will be adopted in this research work. The researcher used the doctrinal research method for gathering the opinions of the textbook writers, the Law Commission reports on the structural and operational part of the legislative machinery. The methodology helped in systematizing legal propositions and judicial interpretations for theoretical assessment of the research problem with the help of the various law journals, and books of the eminent jurists forming the secondary sources of the research. The researcher has tried to scrutinize and identify the institutional deficiency present in the Indian legal system, which has resulted in the crises like situation. The study will also be conducted on analytical basis. It would also be conducted with an informal, explorative and evaluative in nature. The doctrinal research method was further used to study the different alternative dispute resolution methods, the major institutions providing for the same at national and international levels and a comparative study of the different dispute resolution methods functioning in different Countries. The chosen methodology of the research aimed at identifying the functional bottlenecks that are widening the gap between the filings and disposal of
cases before the Courts of law and finding the solution to the problem with the help of mediation.

1.5 Scheme of the Study

Chapter 1: - Introduction

This chapter includes brief explanation as to the ADR Mechanism including different modes of ADR Mechanism and Mediation.

Chapter 2: - Need for Alternative Dispute Resolution (ADR)

Disputes resolution is an indispensable process for making social life peaceful. Dispute disturbs the integration of the group and since social stability is required for the social order, in every society efforts have been made to bring about resolution of conflict between antagonistic groups. Disputes resolution process tries to resolve and checks conflicts, which enables persons and group to maintain cooperation. It can be said that it is the sine qua none of social life and security of the social order, without which it may be difficult for the individuals to carry on the life together.

Alternative Dispute Resolution is a generic term that refers to a wide array of practices, the purpose of which is to manage and quickly resolve disagreements at lower costs and with a little adverse impact as possible on business and other relationship. The said system emanates from dissatisfaction of many people with the way in which disputes are
traditionally resolved resulting in criticism of the Courts, the legal profession and sometimes lead to a sense of alienation from the whole legal system.

Alternative Dispute Resolution Methods are being increasingly acknowledged in the field of law and commercial sectors both at National and International levels. Alternative Dispute Resolution techniques are in addition to the Courts it can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties.

This chapter deals with the concept of Alternative Dispute Resolution. The problems of formal legal systems which includes lack of awareness, mystification, delays, expenses and costs as well as the evaluation of Alternative Dispute Resolution Mechanism in Indian Judiciary. It also includes the advantages of Alternative Dispute Resolution highlighting the need for adoption of Alternative Dispute Resolution.

Chapter 3: - Different modes of Alternative Dispute Resolution (ADR)

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

The Indian Parliament has amended the Civil Procedure Code by inserting Section 89 as well as Order 10 Rule 1–A to 1–C. Section 89 thereof provides for the settlement of disputes outside the Court.

Arbitration, a form of Alternative Dispute Resolution, is a technique for the resolution of disputes outside the Courts, where the parties to a dispute refer it to one or more persons – Arbitrators, by whose decision they agree to be bound. It is a resolution technique in which a third party reviews the evidence in a case and imposes a decision that is legally binding for both sides and enforceable. There are limited rights of review and appeal of Arbitration Award.

Conciliation, is an Alternative Dispute Resolution process, whereby the parties to a dispute use a Conciliator, who meets the parties separately in order to resolve their differences. It is a voluntary proceeding where the parties involved are free to agree and attempt to resolve their dispute by Conciliation. The process is flexible, allowing parties to define the time, structure and content of the Conciliation proceedings.
Mediation is a simple, voluntary and informal, party centered and structured negotiation process, where a neutral third party assists the parties in amicably resolving their disputes by using specified communication and negotiation techniques.

Judicial Settlement is not defined anywhere. But, in view of the provisions of Section 89 of the Code of Civil Procedure, the case can be referred to Judicial Settlement. It is also provided therein that when there is a judicial settlement then the provisions of the Legal Services Authorities Act, 1987 will apply. It means that in a Judicial Settlement the concerned Judge tries to settle the disputes between the parties amicably.

The concept of Lok Adalat is process to settle disputes through conciliation and compromise. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromised reached through systematic negotiation.

This chapter describes the different types of Alternative Disputes which includes Arbitration, Conciliation, Mediation, Lok Adalat and Judicial Settlement. It also includes the difference between the Mediation and other dispute resolution processes.
Chapter 4: - Mediation as an Alternative Dispute Resolution (ADR)

This chapter deals with the concept of Mediation as an Alternative Dispute Resolution Mechanism. It also includes the components relating to specific value of Mediation process, advantages of mediation, stages in mediation, structure of mediation, roles and function of mediator, quality of effective mediator, ethics for mediator, mediation techniques including communication, listening, drafting of settlement etc., nature of cases suitable for mediation, cases not suitable for mediation, court annexe mediation centre, rules relating to mediation framed by the Gujarat High Court as well as Delhi Mediation Centre. It also includes the instances of settlement of disputes which includes Post as well as Pre-litigative stages through mediation and the statistical information relating to settlement of cases through Lok Adalat as well as reference and settlement of cases through mediation process.

Chapter 5: - Challenges and obstacles in mediation implementation and need for enhancement of standard of mediation practices

This chapter deals with the challenges and obstacles which are being faced in implementation of the mediation process. Such challenges and obstacles are in the nature of lack of trained mediators, lack of trainers, lack of referrals, lack of infrastructure, absence of suitable legislation, resistance amongst basic factors i.e. Judges, Lawyers and Litigants, lack of mediation management, lack of adequate funds,
mediation process itself and lack of awareness. It also describes the necessity of enhancement of standard of mediation practices which should be adopted by a mediator as well as referral judges.

Chapter 6: - Role of Advocates and Referral Judges in mediation

This chapter describes the role of advocates in a mediation process which includes at the state of pre-mediation, during mediation and post-mediation. It also deals with the role of referral judges in the mediation process which includes pre-mediation stage, during mediation and post-mediation stage. It also deals with the points relating to the exercise to be done by the referral judges before referring the case to the mediation and relating to the communication between a referral judge and a mediator. It also deals with the contents of the referral order.

Chapter 7: - Conclusions and Suggestions

This chapter describes conclusions and suggestions which are to be made for effective implementation of mediation process as tool of dispensation of justice.
“Discourage litigation. Persuade your neighbors to compromise whenever you can point out to them how the nominal winner is often a real loser, in fees, expenses, and waste of time”.

--- Abraham Lincoln