Chapter – 2
Need for Alternative Dispute Resolution

[2.1] INTRODUCTION

Alternative Disputes 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 cost and with as little adverse impact as possible on business and other relationship. The term alternative dispute resolution also refers to any means of setting disputes outside the formal Courts/ Tribunals established by the State in exercise of its sovereign function to decide disputes between citizens and also disputes between itself and citizen. There are two types of dispute resolution RDR and ADR. RDR means Regular Dispute Resolution which refers to the resolution of dispute through regular judicial proceedings or through the formal legal system and ADR means Alternative Dispute Resolution which is an alternative to the Formal Legal System. It is an alternative to litigation. It was being thought of in view of the fact that the Courts are overburdened with cases. 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- thus, the need for alternative dispute resolution.

[2.2] ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute Resolution methods are being increasingly acknowledged in the field of law and commercial sectors both at National
and International levels. Its diverse methods can help the parties to resolve their disputes at their own terms cheaply and expeditiously. Alternative dispute Resolution techniques are in addition to the Courts in character. Alternative dispute Resolution techniques can be used in almost all contentious matters, which are capable of being resolved, under law, by agreement between the parties. Alternative dispute Resolution techniques can be employed in several categories of disputes, especially civil, commercial, industrial and family disputes. From the study of the different alternative dispute Resolution techniques in the proceeding chapters it is found that, alternative dispute Resolution methods offer the best solution in respect of commercial disputes where the economic growth of the Country rests.

Alternative Dispute Resolution originated in the USA (United States of America) in a drive to find alternatives to the traditional legal system, felt to be adversarial, costly, unpredictable, rigid, over-professionalized, damaging to relationships, and limited to narrow rights-based remedies as opposed to creative problem solving. The American origins of the concept are not surprising, given certain features of litigation in that system, such as: trials of civil actions by a jury, lawyers' contingency fees, lack of application in full of the rule "the loser pays the costs".

Actually informal dispute resolution has a long tradition in many of the world societies dating back to 12\textsuperscript{th} century in China, England and

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America. The business world has rightly recognized the advantages that the alternative dispute resolution in one of or other is a right solution. It is felt that it is less costly, less adversarial and thus more conducive to the preservation of business relationship which is of vital importance in the business world. The use of alternative dispute resolution has grown tremendously in the international business field in recent years. The growth has been permitted by several factors including tremendous expansion of international commerce and the recognition of global economy. Many governments around the world have supported the demand for alternative dispute resolution as an efficacious way of handling international commercial disputes. We find that alternative dispute resolution has also become a common provision in United States trade treaties and the United State has been the strongest supporter of international commercial alternative dispute resolution. Many experts in this field are of the strong opinion that the impact of alternative dispute resolution on international commerce is great and will continue to expand. Numbers of alternative dispute resolution institutions are being established. In this background, the necessity for setting up the International Centre for Alternative Dispute Resolution, though was felt for quite some time, came to be true by the inauguration of the International Centre in India.

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 co-operation. It can thus be alleged 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.²

Mahatma Gandhi

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

Beginning in the late nineteenth century, creative efforts to develop the use of arbitration and mediation emerged in response to the disruptive conflicts between labor and management. In 1898, Congress followed initiatives that began a few years earlier in Massachusetts and New York and authorized mediation for collective bargaining disputes. In the ensuing years, special mediation agencies, such as the Board of Mediation and Conciliation for railway labor, (1913)(renamed the National Mediation Board in 1943), and the Federal Mediation and Conciliation Service (1947) were formed and funded to carry out the mediation of collective bargaining disputes. Additional state labor mediation services followed. The 1913 New lands Act and later legislation reflected the belief that stable industrial peace could be

² Park and Burgess, Introduction to the science of Sociology. p 735
achieved through the settlement of collective bargaining disputes; settlement in turn could be advanced through conciliation, mediation, and voluntary arbitration.³

In developing countries where most people opt for litigation to resolve disputes, there is excessive over-burdening of courts and a large number of pending cases, which has ultimately lead to dissatisfaction among people regarding the judicial system and its ability to dispense justice. This opinion is generated largely on the basis of the popular belief, “Justice delayed is justice denied”. However, the blame for the large number of pending cases in these developing countries or docket explosion, as it is called, cannot be attributed to the Courts alone. The reason for it being the non-implementation of negotiation processes before litigation. It is against this backdrop that the mechanisms of alternative dispute resolution are being introduced in these countries. These mechanisms, which have been working effectively in providing an amicable and speedy solution for conflicts in developed economies, are being suitably amended and incorporated in the developing countries in order to strengthen the judicial system. Many countries such as India, Bangladesh and Sri Lanka have adopted the alternative dispute resolution mechanism. Alternative Dispute Resolution in India is an attempt made by the legislators and judiciary alike to achieve the “Constitutional goal” of achieving Complete Justice in India. Alternative Dispute Resolution first started as a quest to find solutions to the perplexing problem of the ever increasing burden on the courts. A thought-process that started off to

³ http://courts.state.de.us/Courts/Superior%20Court/ADR/ADR/adr_history.htm
rectify docket explosion, later developed into a separate field solely catering to various kinds of mechanisms which would resolve disputes without approaching the Formal Legal System. The reasoning given to these alternative dispute resolution mechanisms is that the society, state and the party to the dispute are equally under an obligation to resolve the dispute as soon as possible before it disturbs the peace in the family, business community, society or ultimately humanity as a whole. In a civilized society, principles of natural justice along with the “Rule of Law” should result in complete justice in case of a dispute. Rule of Law is defined as the state of order in which events conform to the law. It is an authoritative, legal doctrine, principle, or precept applied to the facts of an appropriate case. These definitions give us the indication that the Rule of Law is an authoritative concept which might lead to a win-lose situation in cases of dispute. Therefore, alternative dispute resolution uses the principles of natural justice in consonance with the Rule of Law, in order to create a favorable atmosphere of a win-win situation. This is much needed in countries like India where litigation causes a great deal of animosity between the parties due to the agony caused by the long-standing litigation. Alternative Dispute Resolution, thus, gains its momentum in India today.

In India, adversary method of resolving a dispute is predominantly followed. The Britishers primarily introduced this method of resolving the disputes for the first time in India. In this method, the parties to the dispute compete with each other to get a favorable decision. This leads to

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4 http://www.icadr.org/news-speechcjhc.html
win or lose situation between the litigants ensuing animosity between them. Hence, the shortcoming of such a system is that the congenial atmosphere of the society is said to be affected. The Society makes efforts to control the dispute and the conflict, but irony is that the society, itself has created situation that leads to the dispute and perhaps cannot avoid doing so. By assigning different status to different occupations, society has laid the basis for jealousy, greed and resentments. By giving authority to one person over the other, society opens the doors for abuse of authority and consequently relation. By creating ends that are competitive, society makes it possible for competition to take the form of dispute. Despite some of its negative effects of litigations it cannot be denied that it is one of the most reliable sources of resolution of dispute among the public and has proved to be an outstanding method to the satisfaction of everyone. It is a unifying factor, which handles the disputes in accordance with uniform national standard. This is the reason why it is still functioning as a primary source of resolution of the dispute among the people.

In India, the quest for justice has been an ideal, which the citizens have been aspiring for generations down the line. Our Constitution reflects this aspiration in the Preamble itself, which speaks about justice in all its forms: social, economic and political. Justice is a constitutional mandate. About half a century of the Constitution at work has tossed up many issues relating to the working of the judiciary; the most important being court clogging and judicial delays. Particularly disturbing has been the chronic and recurrent theme of a near collapse of the judicial trial
system, its delays and mounting costs. Here, the glorious uncertainties of the law frustrated the aspirations for an equal, predictable and affordable justice is also a question, which crops up often in the minds of the people.

We are a country of a billion people. The fundamental question is: How do we design and structure a legal system, which can render justice to a billion people? The possibility of a justice-delivery mechanism in the Indian context and the impediments for dispensing justice in India is an important discussion. Delay in justice administration is the biggest operational obstacle, which has to be tackled on a war footing. As Justice Warren Burger⁵, observed in the American context:

“The harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of judges in numbers never before contemplated. The notion — that ordinary people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible.”

Therefore, this explains the need for Alternative Dispute Resolution in India. In a country, which aims to protect the socio-economic and cultural rights of citizens, it is extremely important to quickly dispose the cases in India, as the Courts alone cannot handle the huge backlog of cases. This can be effectively achieved by applying the

⁵The former Chief Justice of the American Supreme Court
mechanisms of Alternative Dispute Resolution. These are the reasons behind the introduction of Alternative Dispute Resolution in India.

Alternative Dispute Resolution techniques can be resorted to in almost all types of contentious matters capable of resolution by agreement between parties under the law where both parties are generally interested in a settlement. Conflict is a fact of life. It is not good or bad. However, what is important is how we manage or handle it. Negotiation techniques are often central to resolving conflict and as a basic technique these have been around for many thousands of years. Alternative Dispute Resolution refers to a variety of streamlined resolution techniques designed to resolve issues in controversy more efficiently when the normal negotiation process fails. Alternative Dispute Resolutions an alternative to the Formal Legal System. It is an alternative to litigation. It was being thought of in view of the fact that the Courts are overburdened with cases. Alternative Dispute Resolution only offers an alternative option to litigation, it is intended only to supplement and not supplant the legal system. It can be invoked in civil, commercial, industrial and family disputes. It is particularly useful in all types of business disputes and is considered to offer the best solution in respect of commercial disputes of international character. Even if the alternative dispute resolution proceeding fails, it is never a waste since it helps the parties to see each other’s view point and understand the case better.

At present, there is a single hierarchy of Courts in India. India's judicial system is made up of the Supreme Court of India at the apex of the hierarchy for the entire country and various High Courts at the top of
the hierarchy in each State and Union Territories. These Courts have jurisdiction over a State, a Union Territory or a group of States and Union Territories. Below the High Courts are a hierarchy of Subordinate Courts such as the Civil Courts, Family Courts, Criminal Courts and various other District Courts. The High Courts are the principal Civil Courts of original jurisdiction in the State, and can try all offences including those punishable with death.

The goal of Alternative Dispute Resolution is enshrined in the Indian Constitution’s preamble itself, which enjoins the State: “to secure to all the citizens of India, justice-social, economic, and political—liberty, equality, and fraternity.” Alternative Dispute Resolution in India was founded on the Constitutional basis of Articles 14 and 21 which deal with Equality before Law and Right to life and personal liberty respectively. These Articles are enshrined under Part III of the Constitution of India which lists the Fundamental Rights of the citizens of India. Alternative Dispute Resolution also tries to achieve the Directive Principle of State Policy relating to Equal justice and Free Legal Aid as laid down under Article 39-A of the Constitution. The Acts which deal with Alternative Dispute Resolution are Arbitration and Conciliation Act, 1996 (discussed in detail later) and the Legal Services Authorities Act, 1987. Section 89 of the Civil Procedure Code, 1908 makes it possible for Arbitration proceedings to take place in accordance with the Acts stated above. The Legal Services Authorities Act, 1987 has also been amended from time to time to endorse use of alternative dispute resolution

\[6\] The Preamble of Indian Constitution.
methods. Section 89 of the Code of Civil Procedure as amended in 2002 has introduced conciliation, mediation and pre-trial settlement methodologies for effective resolution of disputes. Mediation, Conciliation, Negotiation, Mini-Trial, Consumer Forums, Lok Adalat’s and Banking Ombudsman have already been accepted and recognized as effective Alternative dispute resolution methodologies.

In India, with major economic reforms under way within the framework of rule of law, necessitates the need of strategies for swifter resolution of disputes. It is required for lessening the burden on the Courts and for providing expeditious means of resolution of disputes. At this juncture, there is no better option but to strive to develop alternative modes of dispute resolution by establishing facilities for providing settlement of disputes through Arbitration, Conciliation, Mediation and their hybrid techniques. The acceptance of process of alternative dispute resolution techniques is not intended to supplant altogether the traditional means of resolving disputes by means of litigation.\(^7\) It only offers alternatives to litigation. There are a large number of areas like Constitutional law and the Criminal law cases where alternative dispute resolution methods cannot substitute Courts. In those situations, one has to take recourse of the existing traditional modes of dispute resolution through Court of Law.

Alternative dispute resolution has greatly expanded over the last several years to include many areas in addition to the traditional commercial dispute in the form of arbitration; mediation has become an

\(^7\)Food Corporation of India Vs Joginder Pal, AIR 1989 S.C. 1263.
important first step in the dispute resolution process. Arbitrators and mediators have an important role in resolving disputes. Mediators act as neutrals to reconcile the parties’ differences before proceeding to arbitration or litigation. Arbitrators act as neutral third parties to hear the evidence and decide the case. Arbitration can be binding or non-binding.

[2.3] **PROBLEMS OF FORMAL LEGAL SYSTEM**

2.3.1 Awareness:

The lack of awareness of legal rights and remedies among common people acts as a formidable barrier to accessing the formal legal system.

2.3.2 Mystification:

The language of the law, invariably in very difficult and complicated English, makes it unintelligible even to the literate or educated person. Only few attempts have been made at vernacular sing the language of the law and making it simpler and easily comprehensible to the person.

2.3.3 Delays:

The greatest challenge that the justice delivery system faces today is the delay in the disposal of case and prohibitive cost of litigation. Alternative dispute resolution wads thought of as a weapon to meet this challenge. The average waiting time, both in the civil and criminal

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8 ADR and Access to Justice: Issues and Perspectives, ByHon’ble Justice S.B.Sinha, Judge Supreme Court of India
subordinate courts, can extent to several years. This negates fair justice. To this end, there are several barricades. The judiciary in India is already suffering from a docket explosion. In fact as per latest information 3.2 crore cases were pending in high courts and subordinate courts across the country while 56,383 cases were pending in the Supreme Court according to available official data⁹. The huge backlog of cases only makes justice less accessible. The delay in the judicial system results in loss of public confidence on the concept of justice.

2.3.4 Expenses and Costs:

We are all aware of the ineffectiveness of our cost regime—even the successful litigant is unable to recover the actual cost of the litigation. The considerable delay in reaching the conclusion in any litigation adds to the costs and makes the absence of an effective mechanism for their recovery even more problematic.

[2.4] NEEDS FOR ALTERNATIVE DISPUTE RESOLUTION

A consequence of the judicial model is that the solution may not be well adapted to the parties’ needs and interests. The range of remedies available to the court is limited. An apology or acknowledgment of fault may not be awarded. The court is not in a position to try to salvage a relationship, whether it is commercial or domestic. The court’s decision is also binary in nature, one is right and one is wrong. This polarizes the parties, creates the need for self-justification and escalates the dispute.

into an emotionally charged process. Alternative dispute resolution offers efficiency and can enhance the quality of dispute resolution by permitting a wider array of outcomes and more client participation. Alternative dispute resolution is growing nationwide, providing individuals and businesses with cheaper, faster ways to resolve disputes.

Our courts follow the adversarial method of adjudication, which uses a neutral decision-maker (judge) who adjudicates disputes after they have been aired by the adversaries in contested proceedings. Alternative methods of disputes resolution, by contrast, are generally supposed to be less adversarial and reach speedier results because the neutral person may help to formulate the result while the process is under way. The basic difference between adversarial and non-adversarial methods of dispute resolution is as follows: In adversarial system disputant wins, the other must lose and disputes are resolved by a third party through application of some principle of law. on the other hand, in the case of alternative dispute resolution all the parties can benefit through a creative solution to which each agrees and the situation is unique and therefore, need not be governed by any general principle except to the extent that the parties accept it. The parties know the facts and where their economic interests lie far better than any decision-making tribunal would. The solution crafted by the parties clearly spells out their respective rights and obligations, binds both sides, and is enforceable.

It is important to distinguish between binding and non-binding forms of Alternative Dispute Resolution. Negotiation, mediation and conciliation are non-binding forms, and depend on the willingness of
parties to reach a voluntary agreement. Arbitration programs may be binding or non-binding. Binding Arbitration produces a third party decision that the disputants must follow even if they disagree with the result much like a judicial decision. Non-binding Arbitration produces a third party decision that the parties may reject. It is also important to distinguish between mandatory processes and voluntary processes. Some judicial systems require the parties to negotiate, conciliate, mediate or arbitrate, prior to court action. Alternative Dispute Resolution processes may also be required as part of prior contractual agreement between parties. In voluntary processes, submission of a dispute to an alternative dispute resolution process depends entirely on the will of the parties.

Therefore, this explains the need for alternative dispute resolution in India. In a country, which aims to protect the socio-economic and cultural rights of citizens, it is extremely important to quickly dispose the cases in India, as the Courts alone cannot handle the huge backlog of cases. This can be effectively achieved by applying the mechanisms of alternative dispute resolution. These are the reasons behind the introduction of alternative dispute resolution in India. Human ingenuity in law has given birth to various alternative dispute resolution systems in departure from the traditional time-tested and well established system and procedure of courts. The purpose of alternative dispute resolution is to encourage the peaceable/satisfactory resolution of disputes and litigation through voluntary settlement procedures. A dispute between two or more parties is usually based upon a difference in perception of rights/obligations and expectations between individuals or corporations.
The ultimate goal of alternative dispute resolution systems is to resolve disputes and arrive at a consensus – a mutually acceptable agreement that takes into consideration the interests of all concerned parties. A settlement or agreement reached through consensus may not satisfy each participant’s interests equally or receive a similar level of support from all participants. Yet, for reasons of practicability, it finds acceptable. There are several reasons why attention must be given to alternate disputes resolution, the first of which though not in the order of importance is the unsuitability of uniform court procedures to one and everything. To illustrate, for the ailment in question, if the Allopathic system of medicine is unsuitable, or the patient’s is sensitive/allergic to those drugs, or the strain of organism is resistant to known medicines, one must look to the Ayurvedic or Homeopathic form of medicine, or even plain Nature Cure. However, if the main Allopathic system is suitable, but the queue outside the public dispensary or the wait for the medication is so long that a person is not likely to survive the wait, a look at the alternative systems becomes imperative. These alternative systems are then resorted to not because of the comparative efficacy of the alternative system, but because of the inefficiency and inability as distinct from suitability of the main system to do its task and serve the purpose. Alternative dispute resolution by reason of its operational mechanics which revolve around informal discussions and exchange of thoughts as also listening to the other provides a greater opportunity to each to realize where the correct right, entitlement or liability lies. There is re-verification of perceptions and correction of any ‘errors’ therein.

10 Justice, Courts and Delays, by Dr. Arun Mohan, at p.g. no. 1944.
Alternative dispute resolution is also suitable, in fact require, where factors of confidentiality and privacy come into play. Family disputes are one and business disputes are another. Privacy apart, alternative dispute resolution is best suited for disputes where the parties are having some permanent relationship or ties, viz., family members, trade partners, employer-employee, etc. In such disputes, though the Court would render a decision as per law, it would leave the parties with a strained relationship. These disputes, more than ‘resolution’, need a ‘solution’, which can only come through alternative dispute resolution and not from a court.

Alternative Dispute Resolution is not an alternative to the court system but only meant to supplement the same aiming on less lawyering. Alternative Dispute Resolution mechanism is intended to cover negotiation, mediation, conciliation and arbitration. The ICADR (International Centre for Alternative Dispute Resolution) is a unique Centre in this country which makes a provision for promoting teaching and research in the field of alternative dispute resolution and also for offering Alternative Dispute Resolution services to parties not only in India but also to parties all over the world. Alternative Dispute Resolution is intended to cover almost all disputes, including commercial, civil, labour and family disputes in which parties are entitled to conclude a settlement and to be settled by alternative dispute resolution procedure.

The International Centre is intended to spread alternative dispute resolution concept effectively throughout the country. The main objectives of the Centre are:
(1) to propagate, promote and popularise the settlement of domestic and international disputes by different modes of alternative dispute resolution;

(2) to provide facilities and alternative and other support services for holding conciliation, mediation, mini-trials and arbitration proceedings;

(3) to promote reform in the system of settlement of disputes and its healthy development suitable to the social, economic and other needs of the community;

(4) to appoint conciliators, mediators, arbitrators, etc., when so requested by the parties;

(5) to undertake teaching in alternative dispute resolution and related matters and to award diplomas, certificates and other academic or professional distinction;

(6) to develop infrastructure for education, research and training in the field of alternative dispute resolution;

(7) to impart training in alternative dispute resolution and related matters and to arrange for fellowship, scholarship, stipends and prizes.

Another reason why Alternative resolution system needs attention is that it is in the interest of the parties that instead of trying to achieve more and sufficient accuracy and facing delays in process, the matter is decided expeditiously, even if it means sacrificing accuracy or leaving some degree of error. This would even include deciding appeals and overriding all technical objections in the way of execution, as the injury
in term of time and money loss would be far greater than the ‘difference’. Further in any adjudication, there is an inevitable component of error in or what should be the perfect result. The endeavor for perfect accuracy is not always worth it. In any case, it is a balance between five factors, namely:

(1) Depth of procedures;
(2) Expenses;
(3) Time taken/speed (or avoiding delays);
(4) Accuracy that has to be arrived at/ achieved; and
(5) Individual placements of each party\textsuperscript{11}.

The time it takes to decide a dispute has its own importance which must not be overlooked and this operates in several ways. The continuing uncertainty, consumption of mental energy, and other expenses towards the continuing litigations take a greater toll than generally thought of. In this context, time means normal or reasonable time and not anything beyond that. Otherwise, it ceases to be justice and becomes ‘coercion into submission’ by reason of delay. Therefore, while considering alternative dispute resolution, the wall calendar, if not the hour glass, must be kept in the forefront. Often, there is litigation where every month’s delay causes huge losses and even if one is ultimately successful, those losses cannot be really compensated.

Principle behind alternative dispute resolution in the context of how disputes arise, the needs, desires, hopes and fears of the parties that

\textsuperscript{11} Alternative Disputes Resolution, by Dr. Arun Mohan p.g. no. 1945.
lead them to take a particular position are generally referred to as the parties’ interests and serve as the influencing factor. They are the reasons, or underlying needs and concerns that motivate people to ask for certain outcomes. Further, there is, generally, also a component of error in perception of rights and obligations.

The Arbitration and Conciliation act passed in 1996 ensures high validity for these settlements. Section 34 and 35 of the act says that the Arbitration award shall be binding and final to the parties and person claiming under them. A recourse to a court against an arbitral award may be made only on a few circumstances like when a matter is decided beyond the scope of arbitration or, the procedures was not in accordance with the agreement between the parties; and only if the disputed party approach the court within 90 days from the date of arbitral award. Except that, section 36 says, “the award shall be enforced under the Code of Civil Procedure 1908 (5 of 1908) in the same manner as if it were a decree of a court” About a Mediation settlement: Section 74 says, “the settlement agreement shall have the same status and effect as it is an arbitral award on agreed terms of the substance of the dispute rendered by an arbitral tribunal”.

Even though the Arbitration & Conciliation Act, 1996 was enacted to give impetus to conciliation and giving statutory recognition to conciliated settlements, giving the same status of a court decree for its execution, no real effort was taken by the courts or by the lawyers to utilize the provisions and encourage the litigants to choose the method.
Even though some mediation training and familiarization programs were conducted it did not create the real effect.

The amendment of the Code of Civil Procedure referring pending court matters to alternate dispute resolution was not welcomed by a group of lawyers and the amendment was challenged. The modalities to be formulated for effective implementation of Sec. 89 also came under scrutiny. For this purpose a Committee headed by former judge of the Supreme Court and Chairman of the Law Commission of India, Justice M. Jagannadha Rao was constituted to ensure that the amendments become effective and result in quick dispensation of justice. The Committee filed its report and it was accepted and, the Hon’ble Supreme Court of India has pronounced a landmark decision (02/08/2005) “Salem Advocate Bar Association, Tamil Nadu v. Union of India”\(^\text{12}\) where it held that reference to mediation, conciliation and arbitration are mandatory for court matters. This judgment of the Supreme Court of India will be the real turning point for the development of mediation in India. But the growth of mediation should be carefully moulded so that the system gains the faith and recognition of the litigants.

Even though arbitration was to a certain extend accepted by the business world and corporate, the scope of mediation and its benefits has not yet been explored and utilised. The main reason may be the doubt about the validity of such a settlement as compared to a court decree. The respective sections of the Arbitration and Conciliation act referred earlier clears that doubt. Another major setback in the development of Mediation

\(^\text{12}\) JT 2010 (7) SC 616, (2010) 8 Supreme Court Cases 24
in India was the unavailability of internationally trained Professional Mediators. It is well accepted that if a dispute arise regarding medical field, a trained mediator with a medical background can settle the matter better; same is the case regarding a financial dispute or an industrial dispute; a mediator with a relevant back ground may settle the issues easier. This chance was utilised by developed countries like USA, UK Australia etc. as they have got mediators with professional background other than law.

[2.5] AN ANALYSIS ON EVOLUTION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN INDIAN JUDICIARY

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

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13 ADR and Access to Justice: Issues and Perspectives, ByHon’ble Justice S.B. Sinha, Judge Supreme Court of India
14 Law Commission of India, 77th Report, pr.4.1..
15 In all, 33,79,033 cases are pending before the High Courts. As on December 31, 2004, the total number of civil cases pending before the subordinate judiciary is 82,36,254 and criminal cases pending are 1,95,85,776. The total pendency thus is 2,78,22,030. This shows that out of
affairs must be addressed: “An independent and efficient judicial system is one of the basic structures of our Constitution…It is our Constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases.16

The analysis of the Law Commission of India reports sheds light on the factors contributing towards delays and huge backlog of cases before the Courts. The prominent contributory factors are the frequent adjournments at the instance of the clients and lawyers17, the boycotts of the Courts by the lawyers, shortage of presiding officers of the Tribunals and Courts18, lack of adherence to basic procedures and principles of case management and disposal.19 The Government is also known to be a huge contributor to delays, in matters where it is a party at various stages from evading notices, replying to notices and replying without application of mind, unnecessarily appealing even when the laws are clearly in favour of the other side.20 The improper management of Court diary, absence of strict compliance with the provisions of Code of Civil Procedure such as, provisions of the Order 10 Code of Civil Procedure relating to examination of parties before framing issues, to ensure narrowing and focusing the area of controversy, the laxity in enforcing the provisions of Order 8, R 1, Code of Civil Procedure by allowing repeated adjournments with Order 17, Rule 1, Code of Civil Procedure to be read with the

the total national pendency at the subordinate Courts level, 70% is criminal cases and the remaining is civil cases. The total number of district and subordinate Courts are 12,401. These Courts are located in 2,066 towns.

16 Brij Mohan LalVs. Union of India & Others (2002-4-Scale-433), May 6, 2002.
17 Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), (2005) 6 SCC 344
19 77th Law Commission Report (1978)
20 Tamil Nadu Vs. Union of India (UOI), (2005) 6 SCC 344, paras 38, 39
proviso to Order 17, Rule 2 where Clause (b) for giving adjournments also are the prominent contributors to the problem of delays and the resultant judicial arrears. The Code of Civil Procedure (Amendment Act) 2002, Act No. 22 was sought to bring a change in the procedure in suits and civil proceedings by way of reducing delays and compressing them into a year's time from institution of suit till disposal and delivery of judgment, yet the revised procedures are also not strictly adhered to. As a result, the time taken in the final disposal of the cases by the Courts still runs into years by unduly lengthy and winded examination and cross-examination of witnesses, protracted arguments, inadequate electronic connectivity and use of information technology and so forth. The problem judicial delay and judicial arrears are spreading like epidemic at every level of the judicial system and thus it is a major cause of concern for the very survival of the entire process of litigation.

Alternative dispute resolution was at one point of time considered to be a voluntary act on the apart of the parties which has obtained statutory recognition in terms of Code of Civil Procedure Amendment Act, 1999, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002. The Parliament apart from litigants and the general public as also the statutory authorities Like Legal Services Authority have now thrown the ball into the court of the judiciary. What therefore, now is required would be implementation of the Parliamentary object. The access to justice is a human right and fair trial is also a human right. In some

21The 14th and 77th Law Commission Reports.
countries trial within a reasonable time is a part of the human right legislation. But, in our country, it is a Constitutional obligation in terms of Article 14 and 21. Recourse to alternative dispute resolution as a means to have access to justice may, therefore, have to be considered as a human right problem. Considered in that context the judiciary will have an important role to play.

Even before the existence of Section 89 of the Civil Procedure Code, there were various provisions that gave the power to the courts to refer disputes to mediation, which sadly have not really been utilized. Such provisions, inter alia, are in the Industrial Disputes Act, the Hindu Marriage Act and the Family Courts Act and also present in a very nascent form via Section 80, Order 32 A and Rule 5 B of Order 27 of the Code of Civil Procedure. A trend of this line of thought can also be seen in ONGC Vs. Western Co. of Northern America and ONGC Vs. Saw Pipes Ltd. Industrial Disputes Act, 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes. Section 23(2) of the Hindu Marriage Act, 1955 mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance, make an endeavor to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case.

For the purpose of reconciliation the Court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with the direction to report to the court as to the result of the reconciliation. [Section 23(3) of the Act].
The Family Court Act, 1984 was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matter connected therewith by adopting an approach radically different from that ordinary civil proceedings. 23 Section 9 of the Family Courts Act, 1984 lays down the duty of the family Court to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter. The Family Court has also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility.

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 object of Section 80 of Code of Civil Procedure – the whole object of serving notice u/s 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 wished can settle the claim without litigation or afford restitution without recourse to a court of laws. 24

The object of section 80 is to give the government the opportunity to consider its or his legal position and if that course if justified to make amends or settle the claim out of court. 25 Order 23 Rule 3 of Code of Civil Procedure is a provision for making an decree on any lawful

25 Raghunath Das v. UOI AIR 1969 SC 674
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 23 proves that if the court is satisfied that a suit has been adjusted wholly or partly by and lawful agreement or compromise, the court shall pass a decree in accordance to that. Order 23, 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 27 Rule 5B confers a duty 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 32A of Code of Civil Procedure 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. Litigations involving affairs of the family seem to require special approach in view of the serious emotional aspects involved. In this circumstances, the objective of family counseling as a method of achieving the object of preservation of family should be kept in forefront. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement.
The provisions of this Order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession, etc., Rule 3 imposes a duty on the Court to make an effort of settlement by way of providing assistance where it is possible to do so. The Court may also adjourns the proceeding if it thinks fit to enable attempt to be made to effect a settlement where there is a reasonable possibility of settlement. In discharge of this duty Court may take assistance of welfare expert who is engaged in promoting the welfare of the family.[Rule 4]

The concept of employing alternative dispute resolution has undergone a sea change with the insertion of S.89 of Code of Civil Procedure by amendment in 2002. As regards the actual content, s.89 of Code of Civil Procedure lays down that where it appears to the court that there exists element of settlement, which may be acceptable to the parties, the Court shall formulate the terms of the settlement and give them to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer it to either:- Arbitration, Conciliation; Judicial Settlement including settlement through Lok Adalats; or Mediation. As per sub-section (2) of Section 89, when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act will apply. When the Court refers the dispute of Lok Adalats for settlement by an institution or person, the Legal Services Authorities, Act, 1987 alone shall apply.

Supreme Court started issuing various directions as so as to see that the public sector undertakings of the Central Govt. and their counterparts in the States should not fight their litigation in court by spending money
on fees on counsel, court fees, procedural expenses and waiting public time.\textsuperscript{26}

In ONGC v. Collector of Central Excise\textsuperscript{27}, there was a dispute between the public sector undertaking and Government of India involving principles to be examined at the highest governmental level. Court held it should not be brought before the Court wasting public money any time.

In ONGC v. Collector of Central Excise,\textsuperscript{28} dispute was between government department and PSU. Report was submitted by cabinet secretary pursuant to Supreme Court order indicating that an instruction has been issued to all departments. It was held that public undertaking to resolve the disputes amicably by mutual consultation in or through or good offices empowered agencies of govt. 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\textsuperscript{29} were relied on and it was said that state/union govt. must evolve a mechanism for resolving

\textsuperscript{27}1992 Supp2 SCC 432,[ ONGC I]
\textsuperscript{28}1995 Supp4 SCC 541 (ONGC II)
\textsuperscript{29}(2003) 3 SCC 472 ONGC I AND II
interdepartmental controversies- disputes between department of Government cannot be contested in court.

In Punjab & Sind Bank v. Allahabad Bank,\textsuperscript{30} it was held that the direction of the Supreme Court in ONGC III\textsuperscript{31} to the government to setup committee to monitor disputes between government departments and public sector undertakings make 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.

In the judgment of the Supreme Court of India in Salem Bar Association vs. Union of India\textsuperscript{32}, the Supreme Court has requested prepare model rules for Alternative Dispute Resolution and also draft rules of mediation under section 89(2)(d) of Code of Civil Procedure, 1908. The rule is framed as “Alternative Dispute Resolution and Mediation Rules, 2003”.

Rule 4 of the Alternative Dispute Resolution and Mediation Rules, 2003”, lays down that the Court has to give guidance to parties (when parties are opting for any mode of Alternative Dispute Resolution) by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their opinion as to the particular mode of settlement, namely;

\textsuperscript{30}(2006) (3) SCALE 557
\textsuperscript{31}(2004) 6 SCC 437
\textsuperscript{32}(2005) 6 SCC 344
(i) It will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;

(ii) Where there is no relation between the parties which requires to be preserved, it will be in the interests of the parties to seek reference of the matter to arbitration as envisaged in clause (1) of sub-section (1) of sec.89.

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

The Rule also says that Disputes are arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

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

According to Rule 8, the provisions of these Rules may be applied to proceedings before the Courts, including Family courts constituted under the Family Courts (66 of 1984), while dealing with matrimonial, and child custody disputes.
There is need for greater use of alternate dispute resolution. Alternative dispute resolution is required when there is need for (i) going into lesser depth of procedures, or more informal and less technical procedures, or special procedures; (ii) the decision-maker or facilitator to be familiar with the or otherwise conversant with the subject. In many technical matters, it eliminates the need to give evidence or even ‘educate’ the decision-maker thereby enabling lesser costs, and greater speed and accuracy; and (iii) adopting and encouraging ‘give and take’ by each. This occurs in many situations, particularly where reasoning/moral justification advanced by one is likely to persuade the other to more readily relent. It is wrong to send parties to alternative dispute resolution simply because the courts are not able to decide the cases in a reasonable time. The principle behind alternative dispute resolution as also the need thereof must be understood in its correct perspective. To emphasize further, pressing for alternative dispute resolution systems without first resolving the problem of delays before the courts is only driving people to alternative dispute resolution out to helplessness and giving them a feeling that “It takes so long for the court to decide and the cost of attending to all the hearings is so much that it is as good as justice denied. So whatever little alternative dispute resolution has to offer, we might as well accept, and more than that, we cannot except”. Although alternative dispute resolution systems are essential, and great attention and effort must go towards them to make successful, it is necessary that apart from many other factors, improvement in the functioning of the courts is brought first. Thereafter alternative dispute resolution be encouraged, but confined to matters where it is more suitable/appropriate as compared to
the ‘efficient and proper’ court procedures. It should not merely be regarded as an escape route form the inability of the courts to dispense justice in time.

[2.6] ADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION:

The benefits or advantages that can be accomplished by the alternative dispute resolution system are summed up here briefly:

1. The concept of Alternative Dispute Resolution is usually thought of as a voluntary chosen by the parties because of its greater efficacy and economy.

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

3. Reliable information is an indispensable tool for adjudicator. Judicial proceedings make halting progress because of reluctance of parties to part with inconvenient information. Alternative dispute resolution moves this drawback in the judicial system. The truth could be difficulty found out by making a person stand in the
witness-box and he pilloried in the public gaze. Information can be gathered more efficiently by an informal exchange across the table. Therefore, alternative dispute resolution is a step towards success where judicial system has failed in eliciting facts efficiently.\footnote{Tania Sourdin, Alternative Dispute Resolution. p 4.}

4. In Mediation or Conciliation, parties are themselves prodded to take a decision, since they are themselves decision-makers and they are aware of the truth of their position, the obstacle does not exist.

5. The alternative dispute resolution mechanisms by the very methodology used in it can preserve and enhance personal and business relationships that might otherwise be damaged by the adversarial process. The method has strength because it yields enforceable decisions, and is backed by a judicial framework, which, in the last resort, can call upon the coercive powers of the State. It is also flexible because it allows the contestants to choose procedures, which fit the nature of the dispute and the business context in which it occurs. The process of alternative dispute resolution mechanisms is facilitative, advisory and determinative in nature.

6. The formality involved in the alternative dispute resolution is lesser than traditional judicial process and costs incurred are very low in alternative dispute resolution.

7. While the cost procedure results in win-lose situation for the disputants.
8. Distinct advantages of alternative dispute redressal methods over traditional Court proceedings are its procedural flexibility. It can be conducted at any time, and in any manner to which the parties agree. It may be as casual as a discussion around a conference table or as structured as a private Court trial. Also unlike the Courts, the parties have the freedom to choose the applicable law, a neutral party to act as Arbitrator or as the Conciliator in their dispute, on such days and places convenient to them and fix the fees payable to the neutral party. Alternative dispute resolution methods being a private process between the disputed parties and the arbitrator, mediator or the conciliator it offers confidentiality, which is generally not available in Court proceedings. While a Court procedure results in a win-lose situation for the disputants, in the alternative dispute resolution methods such as Mediation or Conciliation, it is a win-win situation for the disputants because the solution to the dispute emerges with the consent of the parties.

9. Alternative dispute resolution systems will help ‘de-congest’ courts.

10. If the alternative dispute resolution systems in operation: (i) the parties/disputants will, more likely than not, realize that there exists no real dispute between them; and (ii) making an attempts operates as a pre-litigation that may ensure.
11. Finality of the result, cost involved is less, the time required to be spent is less, efficiency of the mechanism, possibility of avoiding disruption.

12. The Alternative dispute resolution process enables each party to more correctly understand his case, claim and defense in the backdrop of the admitted facts. Further, it enables each to access its 'strength' – from a combination of three factors; (i) tenability in law/ or prospects of success; (2) morality and fairness; and (3) the need to overcome technical issues without stifling fairness. With a clear understanding of these three factors and a balance between them, each party arrives at his notional ‘figure’ for settlement.

Some of the disadvantages that are found on the methods of alternative methods of dispute resolution are that, the arbitrators is not subject to overturn on appeal may be more likely to rule according to their personal ideals. Large corporations may exert inappropriate influence in consumer disputes, pressuring arbitrators to decide in their favor or lose future business. The burden of paying remuneration for the arbitrators is upon the parties to the dispute, which may sometime be felt as a burden by the disputants.

The parties can cure these difficulties by prudently entering into the contract and deciding the terms of referring the dispute, before choosing the alternative dispute redressal forum. The advantages of alternative dispute resolution methods are so prominent that there is global need and trend to adopt alternative dispute resolution methods to resolve the
dispute as it is quick as well as cheaper than that of adjudication through Courts of Law. As argued by the father of our Nation Mahatma Gandhi, the role of law, is to unite the parties and not to riven them.\textsuperscript{34} As compared to Court procedures, considerable time and money can be saved in solving the disputes through alternative dispute resolution procedures\textsuperscript{35}, which can help in reducing the workload of regular Courts and in long run can pave way in solving the problem of judicial arrears before the Courts of law.\textsuperscript{36}

\textsuperscript{34}Mahatma Gandhi, The story of my experiments with truth 258 (1962).
\textsuperscript{35}Hiram Chodosh, Global Justice Reform: A Comparative Methodology (2005).
\textsuperscript{36}A study on the role of alternative dispute resolution methods in reducing the crisis of judicial delays and arrears with special reference to Pondicherry, by D. Umamaheswari.
“The Law of Win-Win says, “Let’s not do it your way or my way; let’s do it the best way”.

--- Greg Anderson