Will Alternate Dispute Resolutions be the solution for decreasing the burden on Indian Courts?

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Differences we shall always have but we must settle them all, whether religious or other, by arbitration." Mahatma Gandhi.

Alternate Dispute Resolution mechanisms have evidently received significant impetus over the years through the Enactment of various legislations and by the efforts of various judges of the Supreme Court and the balance is Impliedly tilted in favour of these mechanisms, which suggests that the burden on Indian Courts would soon decline.The Indian judiciary, particularly the judges of the Supreme Court have contributed to a large extent in promoting Alternate dispute resolution mechanisms. In a recent case, a three judge bench, headed by the Chief Justice of India, Mr. D. Y. Chandrachud noted that the Respondent had filed several petitions to stall an international arbitration proceeding pending in Singapore International Arbitration Centre (SIAC) since October, 2020 and remarked to the counsel for the respondent that, "You cannot keep stultifying the proceedings before the arbitral tribunal and this is just a ploy to delay the Proceedings…...As a Chief Justice of this court I am concerned…..We will not let the arbitration process be stultified,"

1 In 1995 – 1996, the Supreme Court of India under the leadership of the then Chief Justice, Mr. A. M. Ahmadi, Undertook a joint study with the delegates of the Institute for Study and Development of Legal Systems, a San Francisco based institution, for finding solutions to the problem of delays in the Indian Civil Justice System. After Analysing the information received from the various States, the study team made some concrete suggestions and presented a proposal for introducing amendments relating to case management to the Civil Procedure Code, 1908, with special reference to the Indian scenario 2 . Consequently, with effect from 1 st July, 2002, an amendment was made to the Civil Procedure Code, 1908 emphasizing on the alternate dispute resolution mechanisms,arbitration, conciliation, mediation, judicial settlement including settlement through Lok Adalat (a settlement court). The said amendment was challenged by a group of lawyers, following which the Supreme Court issued a historic judgment, 3 holding that mediation, conciliation, and arbitration must be used in court cases. Although mediation, conciliation and arbitration have the same purpose, the process differs in the level of formality, responsibility and improvisation. In each case, a third party is involved

in the dispute resolution process between the parties. The parties often resolve to these alternate dispute resolution mechanisms due to the long-drawn pendency of litigation. The most commonly used form of alternate dispute resolution, particularly for commercial contracts, is arbitration, primarily due to speed, party autonomy, flexibility of proceedings and enforceability of the award. Arbitration being an adjudicatory process, always ends in a decision, which is enforceable in law.

2 According to the Halsbury's Law of England, "arbitration" is defined as "reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction". Arbitration, as a dispute resolution mechanism, has been in existence for the last several decades. According to certain theories, in the era of King Solomon, a dispute between two females claiming right to a baby was settled through arbitration. So also, arbitration was commonly used to settle territorial and commercial disputes. In India, the first statutory recognition of arbitration, as a form of dispute resolution was the Indian Arbitration Act, 1899, with limited applicability to the presidency towns of Bombay, Calcutta and Madras. Arbitration was further codified in Section 89 and Schedule II of the Code of Civil Procedure, 1908 and extended to the other regions of British India. Also, references to arbitration were found inter alia in the Indian Contract Act, 1872 and the Specific Relief Act, 1877. In order to provide speedy and efficacious dispute resolution and consolidate the law governing arbitration, the Britishers enacted a comprehensive legislation, the Arbitration Act, 1940. This 1940 Act repealed the 1899 Act as well as the relevant provisions of the Code of Civil Procedure, 1908. The 1940 Act was however criticized on several occasions, as it was slow, complex, expensive, hyper-technical and fraught with judicial interference and as such it provided only for domestic arbitration. This led to the growth of mistrust on the institution of arbitration in India as the 1940 Act was seen to be fraught with delays and expenses. In the case of Guru Nanak Foundation 4 the Supreme Court had succinctly remarked that, "Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep".

Thereafter, globalization, inflow of foreign investment into India and the need for ease of doing business, prompted the introduction of the Arbitration and Conciliation Act, 1996, which repealed the 1940 Act. This Act of 1996 was based on UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980 and

covered both domestic and international arbitration. The main reason for introducing the 1996 Act was to curb inordinate delays in arbitration and to provide a speedy resolution to disputes, limit judicial intervention, cover international and domestic commercial arbitration and conciliation, provide a reasoned award and enable parties to enforce the award as a decree of the court. Despite the introduction of the 1996 Act, the burden on the courts remained unaffected.

In the case of Bhatia International, 5 the Supreme Court held that Part I of the 1996 Act would also apply to arbitrations seated outside India, unless it was expressly or impliedly excluded. This once again led to a lot of criticism, which was finally settled by the Supreme Court in the case of Bharat Aluminium Company, 6 wherein it was held that Part I of the Act does not apply to Part II of the Act and that Indian Courts would not be permitted to entertain interim applications in foreign.

3 seated arbitrations, governed by Part II of the Act. Thus, the 1996 Act faced several hurdles including exorbitant costs and increased intervention of courts, particularly since an application filed for setting aside the award resulted in stalling the execution of the award. Further, the 1996 Act did not provide time limits for making an award, certain arbitral proceedings continued for years. In 2015, the following amendments were made to the 1996 Act, with inter alia with the objective of minimizing the burden on the court by limiting judicial interference, expediting the arbitration proceedings and improving the overall governance of arbitration:

(a) Section 9 of the 1996 Act [interim relief] was made applicable even to international commercial arbitrations;

(b) No interim relief application would be entertained by the court, upon constitution of the arbitral tribunal, unless demanded by circumstances;

(c) Arbitral tribunals were conferred all powers of a court;

(d) An award was to be passed within twelve months after the arbitral tribunal was constituted (extendable by further six months), failing which parties would have to approach the court for extension and possibly face penal consequences;

(e) An application to set aside the award would not automatically stay enforcement of the award, unless the stay has been expressly granted by the court. Vide the said 2015 amendment, a conscious effort was made to reduce interference by courts, with emphasis on challenge of an award, based on public policy of India. The recent amendments and judicial precedents, resulted in growth of arbitration as an efficacious alternate dispute resolution mechanism, thereby reducing the burden on Indian Courts.

In 2010, the Supreme Court held that all disputes are not suitable for being decided by the alternate dispute resolution process. 7 Later, in 2011, the Supreme Court noted that a right ‘in rem’ cannot be arbitrable but a right ‘in personam’ is capable of a settlement in private fora 8 and held that a plain allegation of fraud ‘simpliciter’ is not a satisfactory ground to invalidate the effect of an arbitration agreement between the parties and that some disputes including criminal offences, matrimonial disputes, disputes of guardianship, insolvency and winding up, testamentary matters, matters relating to unlawful consideration, tenancy and eviction disputes, disputes between trust, trustees, and beneficiaries are not arbitrable. Given the state of courts in India and with a view to avoid lengthy and expensive litigation including multiple levels of appeal that tend to exhaust both parties, in case of disputes which are not arbitrable, the parties often prefer to resort to other methods of alternate dispute resolution, such as mediation, conciliation or judicial settlement.

Mediation is a non-adjudicatory process wherein the parties meet with a mutually selected impartial and neutral person who assists them in negotiation of their differences. In addition to dispute resolution, mediation functions as a 4 means of dispute prevention, by facilitating contract negotiation. Unlike arbitration, the mediator does not decide the dispute. The mediator only helps the parties to communicate and settle the dispute amongst themselves. Mediation agreements may be oral or written, and the content may vary with the type of mediation. Also, most mediation agreements are considered enforceable contracts. In some court-ordered mediations, the judgement is passed in terms of the mediation agreement. If an agreement is not reached by mediation, the parties are entitled to pursue their claims in any other forum.

As compared to litigation, mediation is more prompt, inexpensive, informal, flexible, procedurally simple and a fairly satisfactory mode of resolving disputes, since in a mediated case there is no appeal or revision and all disputes get finally settled. In cases pertaining to family matters such as divorce, custody, maintenance and alimony, workplace matters such as wrongful terminations, harassment and labour management, motor accident claims, tenancy matters, environmental and land use matters, mediation is a preferred mode of alternate dispute resolution. While an offence punishable under Section 498-A of the Indian Penal Code, 1860 is not compoundable, the Supreme Court has held that in appropriate circumstances, if the parties are willing and the criminal court believes there are elements of resolution, it should order the parties to explore the possibility of settlement by mediation. 9 Typically, mediation is a voluntary process, although sometimes statutes, rules, or court orders may require participation in mediation. Recently, by an amendment to the Commercial Courts Act, 2015, 10 pre-institution mediation has been made mandatory, before initiating a suit, which does not contemplate any urgent interim relief.

Such compulsory pre-litigation mediation has been introduced primarily with a view to avoid clogging of the court docket, decongest the regular courts and aid in speedy and effective disposal of commercial suits. 11 In a recent case, the Supreme Court has further held that, “The speed with which the justice delivery system in any country responds to the problem of docket explosion, particularly in the realm of commercial disputes can be regarded as a safe index of the ease of doing business in that country”. 12 Resultantly, an emerging pro-mediation environment may uplift India on the ease of doing business index and tackle the challenge of docket explosion in commercial suits. Mediation therefore is proving to be an effective alternate dispute resolution mechanism which assists in reducing the burden on courts. Conciliation is yet another non-adjudicatory alternate dispute resolution mechanism, often used in industrial, civil, matrimonial and family disputes. Conciliation is governed by the provisions of Arbitration and Conciliation Act, 1996. The objective of conciliation is to reach settlement of the dispute upon mutual terms, in a speedy and cost- effective manner. Conciliation is a voluntary and informal process, in which a professional facilitator assists parties to resolve disputes when their own unassisted efforts have not succeeded. The process can be described as a rational and orderly discussion of differences between the parties to a dispute and a facilitated search for agreement between disputing 5 parties, under the guidance of a conciliator. The conciliator is free to use his own method to resolve the dispute. The conciliator typically plays an advisory role and may intervene in order to offer feasible solutions to both parties and help settle their disputes. Unlike arbitration, there is no requirement of an agreement however, acceptance by both parties is necessary. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party, either by an agreement or by the process of invitation and acceptance. If the parties do not agree, there can be no conciliation and in a pending litigation, in the absence of consent by all parties, the court cannot refer the parties to conciliation. Even after a matter is referred to conciliation, the court continues to retain its control and jurisdiction over the matter and if there is no settlement, the matter is restored and the court proceeds with framing issues and conducting trial. If a matter is settled through conciliation, the settlement agreement is enforceable, like an arbitral award, as if it is a decree of the court.

As the courts are faced with mounting arrears of pending cases, there is a serious need of speedy disposal, for which amicable settlement through conciliation is being perceived as a preferred alternative. Another reason for preference being given to conciliation is that it enjoys statutory recognition, by being included in the Arbitration & Conciliation Act, 1996, which is based on the UNCITRAL Model. Many High Courts in India, including the Bombay High Court, have been referring the parties to attempt a conciliation, for settlement of their dispute, with directions to approach the court only if conciliation fails. Another mode of

alternate dispute resolution which aims to provide informal, cheap and expeditious justice to the common people and reduce the burden on the Indian Courts, is judicial settlement including settlement through Lok Adalats. In case of judicial settlement, the court refers the dispute to the Lok Adalat or to suitable institution or person and such institution or person is deemed to be a Lok Adalat and the dispute is resolved in accordance with the provisions of the Legal Services Authority Act, 1987. Lok Adalat is a forum where disputes, either pending in the court or at pre-litigation stage are settled amicably except that a Lok Adalat does not have the jurisdiction with respect to matters relating to any non-compoundable offences. The matters that may be admitted to Lok Adalat include cases pending in the court or matters which are proposed to be filed in the court, pertaining to criminal offences which are compoundable, cases under Section 138 of Negotiable Instruments Act, 1881, consumer cases, bank recovery cases or labour disputes. Besides Lok Adalats, there are Permanent Lok Adalats which have the pecuniary jurisdiction to decide cases valued up to ₹10 lakhs. These Permanent Lok Adalats provide compulsory pre-litigative mechanism for conciliation and settlement of cases particularly relating to public utility services including transport, postal, telegraph, insurance, etc. In such cases, even if the parties fail to arrive at a settlement, these Permanent Lok Adalat has the jurisdiction to decide the case. 6 The object of the Lok Adalats is to provide free and competent legal services, particularly to the weaker sections of the society, to ensure that opportunities for securing justice are not denied to any citizen, by reason of economic or other disabilities, and to promote justice on the basis of equal opportunity. Lok Adalat has been accorded statutory status under the Legal Services Authorities Act, 1987 however, the persons deciding cases in Lok Adalats only act as statutory conciliators and do not have any judicial authority. These persons are permitted to only persuade the parties to come to a conclusion for settling the dispute, without exerting any pressure or force. An award of the Lok Adalat may either be made on merits or in terms of a settlement agreement between the parties. The award made by the Lok Adalat is deemed to be a decree of a civil court and is final and binding on all parties and no appeal against such an award lies before any court of law. The Lok Adalat is however, entitled to transmit its award to a civil court having local jurisdiction for execution of the award, as if it were a decree made by that court. As the award is not appealable, the parties dissatisfied with the award of the Lok Adalat are entitled to initiate litigation in a competent court. With passage of time, Lok Adalats have emerged as one of the most efficacious alternative dispute resolution mechanisms. This is evident from the outcome of the recent proceedings held before the Lok Adalat, on 12 th November, 2022, in Mumbai, wherein over 10.25 lakh cases were disposed of, of which approximately 8.74 lakh cases were pre-litigation matters and approximately 1.51 lakh cases were post-litigation matters, pending in the various courts, in Maharashtra. 13 The surmounting backlog of court cases and increased number of

new filings, has prompted the judiciary as well as the legislature to encourage and promote the alternate dispute resolution mechanisms. Some of the recent amendments to the legal provisions, such as restrictive timelines for arriving at a decision and penal consequences for delay, conferring additional powers upon the deciding authority, making the award/settlement agreement final and binding are some of the conscious efforts to reduce the burden on the courts. Further, incentives such as full refund of court fees 14 in cases where disputes referred by the courts are settled through any of the alternate dispute resolution mechanisms referred to in Section 89 of the Code of Civil Procedure, 1908, have been provided to encourage parties to explore these alternate dispute resolution mechanisms, thereby reducing the burden on the Indian Courts. “Alternative dispute resolution (ADR) mechanisms could go a long way in reducing the burden of pending cases on the courts, and also present a win-win situation for the two parties”. Chief Justice Dilip B. Bhosale (Retd.)

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