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# **THE ROLE OF ADR IN RESOLVING CORPORATE DISPUTES**

AUTHROED BY - SANJANA BHARGAVA

## **Introduction**

The Constitution of India based on the concept of welfare state. It is the duty of the state to secure access to justice to its citizens by ensuring judicial and non-judicial forums of dispute resolution that provides timely and effective justice and enforcement of their legal and fundamental rights. Ignorance, poverty and other social infirmities should not become barriers to securing justice.

It is settled now that free legal aid must be provided to the indigent person, who cannot defend themselves in a court of law due to the reason of money and other and now it also mandatory under Article 39-A and Article 21 of the Indian Constitution.<sup>1</sup>

The law has to help the poor who do not have means to fight their causes. The Constitutional Mandate rescue operation began with justice V.R. Krishna Iyer and Justice P.N. Bhagwati's Committee Report, which section thus become enable to approach law court's right from Munsif courts to the Supreme Court. CILAS (Committee for the implementation of Legal Aid Services) also come on the scene. Based on this states adopted (through state legal Aid and advice Boards) Lok Adalat.<sup>101</sup>

### **3.1 Constitutional Provision –**

#### **3.1.1- Preamble**

Our Constitution reflects this aspiration in the Preamble itself, which speaks about justice in all its forms: social, economic and political. The Preamble secures to all the citizens of India – Justice- Social, economic, and political. The expression Justice briefly speaking its –the and Legal Aid Camps, Family Courts, Village Courts, Mediation Centres, Commercial arbitration, Women Centres Consumer Protection Forums, etc which are but various facets of effective Alternative Dispute Resolution system. Constitution of India<sup>2</sup> is the grund-norm of this country;

<sup>1</sup> Avtar Singh —Law of Arbitration and Conciliation PP 397-398, 7 Edition, Eastern book Company, Lucknow

<sup>2</sup> Narendra Kumar Constitution of India PP.28, 250

it contains provisions which indicate promotion of justice harmonious reconciliation of individual conduct with the general welfare of society. An act or conduct of a person is said to be just if it promotes the general well-being of the community.

Therefore, the attainment of the common good as distinguished from the good of individuals is the essence of justice. Legal justice is a part of social justice. As whenever the legal justice is denied the society gets disturbed. A legal system is part of state which maintains social harmony through dispute resolution. 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.

### **3.1.2 Article 21 of the Constitution of India**

Article 21 declares in a mandatory tone that no person shall be deprived of his life or his personal liberty except according to procedure established by law.

The word –life and liberty are not to be read narrowly it is very wide in its sense.

In *Hussainara Khatoon I Vs. Home Secretary, Bihar*<sup>3</sup> it has been interpreted that right to speedy trial is also a part of the right to life and personal liberty. The Supreme court has allowed Article 21 to stretch as wide as legitimately can.

The reason of this liberal interpretation was very simple that Article-21 is to redress that mental agony, expenses and strain which a person proceeded against in litigation has to undergo and which, coupled with delay, may result in impairing the capacity or ability of the accused to defend himself.

The same has received recognition from the legislature as well as in the form of introduction of Alternative Dispute Resolution and Alternative Dispute Resolution Mechanism through various statutes.

### **3.1.3 Article 39-A Free Legal Aid**

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<sup>3</sup> *Hussainara Khatoon (No.) V. Home Secretary, Bihar*, AIR 1979 SC 1360; *Kadra Pahadiya V. State of Bihar*, AIR 1982 SC 1167; *Raghbir Sing V. State of Bihar*, (1986) 4 SCC 481. See also *Raj Deo Sharma V. State of Bihar*, AIR 1998 SC 3281; *Common Cause, Registered Society V. Union of India*, AIR 1997 SC 1539; *Kartar Sing V. State of Punjab*, (1994) 3 SCC 569; *Akhtari Bai V. State of M.P.*, AIR 2001 SC 1528 : In this case it is ruled that where matters are not disposed of within a period of say 5 years for no fault of the convict, they should be released on bail.

Article 39-A obligates the State of secure that –the operation of the legal system which promotes justice, on a basis of equal opportunity, and shall,in particular, provide free legal aid, by suitable legislation or schemes orin any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus promotion of justice is most important function of a state and ADR mechanisms helps in it. Hence much legislation like Arbitration and Conciliation Act 1996 ; Section 89 of CPC ; Legal Services Authority Act1987 have been passed to promote justice.<sup>4</sup>

### **3.2 Legal Provisions related to ADR -**

–The first Commandment to our legislative freedom fighters ought to be to bury these codes and the Evidence Act but re-create a simple, spacious,modern, and business management oriented code with scope for judicial initiative in doing justice to the people. |

.....Justice Krishna Iyer

In India Arbitration since end of nineteenth century was a statutorily recognized form of dispute resolution. The arbitration was originally governed by the provisions contained in different enactments, including those in the Code of Civil Procedure; the first India Arbitration Act was enacted in 1899, which was replaced by the Arbitration Act 1940. So Arbitration as an alternative to litigation was a recognized concept. But arbitration under this Act suffered the same maladies like courts as it allowed parties in every trivial matter resort to courts and ultimately frustrate the objective of arbitration as an alternative to litigation. In *Guru Nank Foundation V. Rattan Singh*<sup>5</sup> the Supreme Court of India while referring to the 1940 Act, observed that “the way in which the proceedings under the Act are conducted and without an exception challenged in courts has made lawyers laugh and legal philosophers weep” in view of “unending prolixity at every stage providing a legal trap to the unwary.” The Supreme Court made further observation in **Food Corporation of India. V. Joginderpal**<sup>6</sup> that the law of arbitration must be simple less technical and more responsible to the actual reality of situations, responsive to the canons of justice and fair play.

There are several statutes recognized Alternative Dispute Resolution Mechanism such are –

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<sup>4</sup> Dr. Anupam Kurlwal, An Introduction of Alternative Dispute Resolution System page 114

<sup>5</sup> AIR 1981 SC 2075

<sup>6</sup> AIR 1989 SC 1263

### **3.2.1 Civil Procedure code 1908**

*(i) Section 89. Settlement of disputes outside the Court. –*

*(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for –*

*(a) arbitration ;*

*(b) conciliation ;*

*(c) Judicial settlement including settlement through Lok Adalat*

*; or*

*(d) mediation.*

*(2) Where a dispute has been referred –*

*(a) for arbitration or conciliation, the provision of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provision of that Act;*

*(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub section (1) of section 20 of the legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute to referred to the Lok Adalat;*

*(c) For judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provision of the Act;*

*(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.*

*Section 89 lays down that whereby 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.<sup>7</sup> In *Salem Advocates Bar Association V. U.O.I.*,<sup>8</sup> the Supreme Court directed the constitution of an expert committee to formulate the manner in which section 89 and other provisions introduced in CPC have to be brought into operation. The Court also directed to devise a model case management formula as well as rules and regulations, which should be followed while taking recourse to ADR referred to in section 89 of CPC.

**(ii) Order X Examination of party by the Court**

Rule 1. Ascertainment whether allegations in pleadings are admitted or denied. At first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

1A. Direction of the Court to opt for any one mode of alternative dispute resolution. – After recording the admissions and denials, the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of section 89. On the option of the parties, the Court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1B. Appearance before the conciliatory forum or authority. Where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

1C. Appearance before the Court consequent to the failure of efforts of conciliation Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then it shall refer the matter again to the Court and direct the parties to appear before the Court on the date fixed by it.<sup>114</sup>

**(iii) Order XXXII 32(A)**

Order 32(A) Lays down the provision relating to suits relating to matter concerning the family. It is generally the commonly accepted view that regular court procedure may not be ideally suited to deal with 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. With this objective in mind family counseling as a method of achieving the object of

<sup>7</sup> Law & Practice of Alternative Dispute Resolution in India, a Detailed Analysis by Anirban Chakraborty Published by Lexis Nexis

<sup>8</sup> AIR 2003 SC 189

preservation of family is necessarily required to be encouraged in family and matrimonial disputes. 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 proceedings 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.

*(iv) Order 23 Rule 3 Compromise of suit*

Here it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit.

[Provide that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at the Court shall decide the question but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reason to be recorded, thinks fit to grant such adjournment.]

[Explanation. – An agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this rule.

Order 23 Rule 3 also make a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order 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.

### **3.2.2 Family Courts Act 1984**

The family courts act, (Act No. 66 of 1984) is in act to provide for the establishment of family courts with a view to promote conciliation in, and secure speedy settlement of dispute relating to marriage and family affairs and for matters connected therein.

(i) ***Establishment of Family Courts***

*2.1.1 Section 3 Establishment of Family Courts.-*

(1) For the purpose of exercising the jurisdiction and powers conferred on a Family Court by this Act, the State Government after consultation with the High Court, and by notification,-

a. shall, as soon as may be after the commencement of this Act, establish for every area in the State comprising a city or town whose population exceeds one million, a Family Court;

b. may establish Family Courts for such other areas in the State as it may deem necessary.

(2) The State Government shall, after consultation with the High Court specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase, reduce or alter such limits.

*Section 4 Appointment of Judges.*

(1) The State Government may, with the concurrence of the High Court appoint one or more persons to be the Judge or Judges, of a Family Court.

(2) When a Family Court consists of more than one Judge

a. each of the Judges may exercise all or any of the powers conferred on the Court by this Act or any other law for the time being in force;

b. the State Government may, with the concurrence of the High Court, appoint any of the Judges to be the Principal Judge and any other Judge to be the Additional Principal Judge;

c. the Principal Judge may, from time to time, make such arrangements as he may deem fit for the distribution of the business of the Court among the various Judges thereof;

d. the Additional Principal Judge may exercise the powers of the Principal Judge in the event of any vacancy in the office of the Principal Judge or when the Principal Judge is unable to discharge his functions owing to absence, illness or any other cause.

- (3) A person shall not be qualified for appointment as a Judge unlesshe
- a. has for at least seven years held a Judicial office in India or the office of a member of a tribunal or any post under the Union or a State requiring special knowledge of law; or
  - b. has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or
  - c. Possesses such other qualification as the Central Government may, with the concurrence of the Chief Justice of India, prescribe.
- (4) In selecting persons for appointment as Judges
- a. every endeavour shall be made to ensure that persons committed to the need to protect and preserve that institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counseling are selected; and
  - b. preference shall be given to women.
- (5) No person shall be appointed as or hold the office of, a Judge of a Family Court after he has attained the age of sixty-two years.
- (6) No salary or honorarium and other allowances payable to, and the other terms and conditions of service of, a Judge shall be such as the State Government may, in consultation with the High Court, prescribe.

*Section 5 Association of social welfare agencies, etc.-*

The State Government may, in consultation with the High Court, provide, by rules, for the association, in such manner and for such purposes and subject to such conditions as may be specified in the rules, with a Family Court of

- a. institutions or organisations engaged in social welfare or their representatives thereof;

- b. persons professionally engaged in promoting the welfare of the family;
- c. persons working in the field of social welfare; and
- d. any other person whose association with a Family Court would enable it to exercise its jurisdiction more effectively in accordance with the purposes of this Act.

*Section 6 Counsellors, officers and other employees of Family Courts.*

(1) The State Government shall, in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.

(2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees referred to in sub-section (1), shall be such as may be specified by rules made by the State Government.

**(ii) Jurisdiction of Family Courts -**

*2.2.1 Section 7*

(1) Subject to the other provisions of this Act, a Family Court shall :-

a. have and exercise all the jurisdiction exercisable by any district Court or any subordinate Civil Court under any law

for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

b. be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation – The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely :-

a. a suit or proceeding between the parties to a marriage for decree of a nullity marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

Now it is proved all over the world that Alternative Dispute Resolution as a mechanism of resolving dispute by consensus in a organised manner with skills and techniques that could be learned and used. Alternative Dispute Resolution mechanism is in addition to courts and complement them.

Every Method of Alternative Dispute Resolution mechanism has their own logic, purpose and justification. Arbitration is used definitively resolve a dispute like adjudication and that has transpired and requires fact finding, interpretation of contractual terms, or application of legal principles on the other hands mediation and conciliation are often used to improve communication between parties especially those with pre-existing relationship, to reorient the parties to each other and to develop future oriented solution to broadly defines conflicts.

The Administration of justice system in India has come under the great stress for so many reasons mainly because of the large number of pendency of case in courts. The large number of case filed in the court every year which has shown a tremendous change in recent year resulting in delay and pendency underlining the need of Alternative Dispute Resolution methods.

In the ultimate analysis it may be concluded that widening gap between the common people and the judiciary is indeed a serious cause of concern for all those who deal with administration of Justice. The concept of Alternative resolution of Dispute in alternate mode should be deeply ingrained in the minds of litigant, lawyers and the judges so as to ensure that ADR methods in desperation of justice are frequently adopted. The effective utilization of ADR mechanism would go a long way in plugging the loop hole which is obstructing the path of justice.

### **5.1.1. Critical Analysis of Arbitration**

Arbitration is the most popular process of ADR mechanism Arbitration is legally sanctioned mode of ADR. In fact arbitration is a coded statute which deals with the settlement of dispute mainly commercial and civil through arbitration in which on the basis of consent of parties or by the order of Court, an arbitrator or arbitrators are appointed to make award in form of settlement according to the arbitration clause in the agreement/contract entered into by the parties. Thus, in arbitration process, third party plays the role of presiding officer of the Court. Arbitration is

most simple, economic and speedy method of resolving dispute but there are some problem also with Arbitration which faced by the litigants. The most practical problem with arbitration is implementation of agreement of arbitration, because when they pre- appointed the arbitrator they have left no choice to go the court. The process of arbitration is also misuse in International commercial arbitration where the arbitration agreement or the arbitration clause may stipulate sole and mixed arbitral commission. There is no provision of appeal against the arbitral award this is also a loop point of arbitration unfortunately the process of arbitration is misused by companies and parties conclusively we can say for the survive of arbitration the courts and advocates must insist on Institutional Arbitration to save guard this wonderful concept of dispute resolution lest it gets hijacked by expenses arbitrators and fraudulently companies.

