ALTERNATIVE DISPUTE RESOLUTION : Need of the Day

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[I] Background :-

A serious thought to substitutes for litigation for dispute resolution is given all over the world. It is universally accepted that litigation is one of the ways of dispute resolution. However litigation has its own strengths, weaknesses and limitations. It is therefore incumbent for all of us to think about Alternative Dispute Resolution Mechanism. We in India inherited the British adversarial legal system with its emphasis on common law and litigation. It was in the year 2002 that the Parliament of India took the first concrete step by amending the Code of Civil Procedure 1908 and included mediation, conciliation, arbitration, judicial settlement and Lokadalat as alternatives to litigation.

[II] NEED –

There is an all pervasive felling which is partly real that people in this country are abandoning the judicial system, that criminal has more rights from the victim, defendants can defeat legitimate claims of the Plaintiff, business transaction are frustrated due to costs and delays. This has resulted in adoption of extra judicial methods run by goondas by people showing their disbeliefe in the judicial system. It is our duty to see to it that people come back to the system established by Constitution as extra judicial methods would destroy the legitimacy of the Constitution, democracy and control of State as a whole and the very sovereignty of the country.

The Constitutional goal as enshrined in Art 39 A [1]of equal and speedy justice has therefore remained a dream for millions of Indians. The question therefore is should we accept the status quo or try to make a change. There once was a smoker so disturbed by reading stories about the harmful effect of smoking that he decided to do something about the problem- He stopped reading ! I hope this article turns us away from the harmful effects of litigation through Alternative Dispute Resolution Mechanism.

It will not be out of place to mention that litigation is thought to be an obstacle to the growth of human beings, society country and the world. Moreover in the present era of globalization of the 21st century, people, and country need effective and multi-door dispute

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[1] Art. 39 A Equal justice and free legal aid – The State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

resolution system. In today's market place when we go out to buy any thing we look for and get variety of options. The present era is called an era of consumerism. People want choice and change and it is obvious that people want choice and change even in their dispute resolution mechanism. Voltaire once said " I was ruined twice in my life, once when I lost a law suit and once when I won a law suit !." Litigation thus creates a loose- loose situation though projected win-loose situation.

In India we have one judge for one lakh people while in a country like U.S we have 10 judges for one lakh people. Indian Judges and Judiciary are hard working as they dispose of on an average 4000 matters in a year still however Indian judiciary is unable to meet the challenges of 21st century. We therefore certainly need to think of ADR.

The statistics published by a recent newsletter of Supreme Court reveals the following figures of pendency of litigation in the country.

Courts		2009	2010
Supreme Court*	Admission	34,976	32,773
	Regular	20,815	21,827
	Total	55,791	54,600
High Courts**		4,060,709	4,183,731
Lower Courts**		27,275,953	27,889,465
Total (All Courts)		31,392,453	32,127,796

***Statistics as of October 31, 2010 **Statistics as of June 30, 2010**

[III] BASIS OF THE CONCEPT :-

As students of legal jurisprudence we must kept in mind that if our goal is dispute resolution between litigants then we must look at it as a problem to be solved together rather than a combat to be won. In the words of Chief Justice Mohit Shah , Bombay High Court : "Litigant is not a mere recipient of the court verdicts but consumer of justice delivery system".[2]

We therefore cannot fit all litigation and litigant in one straight jacket formula. Different litigants and litigation need different methods of dispute resolution. Infact our courts of law have alienated the litigants. Litigants do not understood the laws or the court system and are intimidated by it. They do not have a sense of participation in the system which is considered to be a cardinal principle of participatory democracy, and legal jurisprudence.

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[2] Hon'ble Mr. Mohit S. Shah, Chief Justice Bombay High Court "Mediation movement in Gujrat", an article published in "Access the Justice for All".

Prof Frank Sander of Harvard Law School therefore states that our civil court should not only offer litigation as the only method of dispute resolution. It should offer different resolution procedures tailored to fit the variety of disputes. Unfortunately, less attention seems to have been given uptill now by the law makers, judges lawyers and even litigant public to alternative disputes resolution mechanism. Infact there is lack of awareness amongst all the above sections about alternative dispute resolution mechanism.

This article therefore aims at creating this awareness. I am well aware of the fact that this mechanism will be successful only if the judges and the lawyers together are convinced of its utility and its benefit to them and the general litigant. I will therefore try to demonstrate in this article how alternative dispute resolution mechanism will create a win win situation for the Judges, lawyers and litigants as against win lose situation created by litigation.

COMPARATIVE TABLE OF ADR WITH ADJUDICATION (LITIGATION)

ADR Values	Adjudication Litigation Values
Much Compromise	Very Little Compromise
Help from the mediator in communication, in mood and tone, in reality checks, etc	Adjudicator decides rules
Party to party communications	Lawyer to tribunal communication
Party Control, nothing happens without party consent	All control given away to a stranger a stranger rules
Inquiry into and preservation of relationships	Inquiry to relationships is irrelevant
Broadened relevance to include focus on interests, values, goals, Aspirations, as well as relationships	Narrow relevance, essentially limited to issues defined by the pleadings
Focus on future and future relationships	Focus backward, on application of the rule of law only to past acts
Cultural factors are important	Cultural factors tend to receive de minimis attention. The law written in another factual context is applied.
Value misunderstandings are massaged out	Stranger determined value
Process flexibility	“One size” of rule tends to be force- fit upon all disputes
The law is determined, applied or disregarded by the parties	The law is determined and applied by the stranger
The facts are determined compromised or disregarded by	The facts are found on sometimes irresponsible evidence, by

the parties	stranger (s)

The National Litigation Policy, 2010 in India has given great importance and funding to ADR in the country. In the words of Ex Chief Justice of India Justice R.C. Lahoti " There is nothing as powerful as an idea and the time for idea of mediation has come."

It is not enough to recognize the importance of ADR. We must now also understand the concept and the techniques and skills of ADR. Infact going bank in history one can very well say that perhaps if Loard Krishna had learn the techniques of ADR we could have avoided Mahabharata!

TYPES OF ADR :-

Sec 89, Order 10, Rule 1A, 1B, 1C of the Code of Civil Procedure as inserted by the Code of Civil Procedure (Amendment) Act, 1999, with effect from 01-07-2002[3] mentions Mediation, Conciliation , Arbitration , Lok Adalat and Judicial Settlement as the modes of ADR. Out of them Arbitration , Lok Adalat and Judicial Settlement are well settled in this country. Arbitration is covered by the Indian

[3] Order 10 Rule 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 1-A, 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- 1-A 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.
Sec. 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 observation 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 had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions 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 and all other provisions of that Act shall apply in respect of the dispute so 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 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

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

Arbitration Act, 1996. Lok Adalat is covered by the Legal Services Authorities Act 1987. Judicial Settlement is synonyms with litigation though u/s 89 it has a different connotation. The concentration therefore is now mainly on Mediation and Conciliation.

Mediation :-

Meaning :-

- Mediation is the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and aim to reach a consensual agreement that will accommodate their needs.
- It is not an adjudicative process, where a neutral third party decides the outcome of the case.

The term mediation as defined in the Rules framed by Law Commission of India means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them.

Conciliation :-

MEANING OF CONCILIATION

Conciliation is a consensus based dispute resolution process in which the parties to a dispute meet with a conciliator to discuss mutually acceptable options for resolution of the dispute. The conciliator has some input into the resolution of the dispute reached by the parties in the sense that the conciliator encourages the parties to consider options for settlement, which are fair in all the circumstances, including the precedents for resolution of similar complaints within the formal justice system.

The term Conciliation as defined in the Rules framed by Law Commission of India means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) in so far as they relate to conciliation, and in particular, in exercise of his powers under sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

In short the heart of Mediation and Conciliation is skill of the Mediator and Conciliator to develop different options for settlement of a dispute. Whereas in litigation a Judge applies law to the facts proved before him, in Mediation and Conciliation the Mediator and Conciliator may even disregard the law and develop suitable options depending on the need of the litigation and the litigants. It is always possible that a dispute can be resolved in various ways. A Judge never think about the same. However Mediator and Conciliator would always think of different options of settlement of dispute and would finally take the parties to one which is acceptable to them. There is a subltle difference between Mediation and Conciliation in that whereas Mediator prefers to be more of a listener who would take the parties themselves to develop options and choose one of them, a Conciliator is proactive and would suggest the options himself. In some disputes Mediation is preferred depending on the nature of parties while in some Conciliation would be the right method. For example, if the parties are well educated, understand the facts and law better then the role of Mediator would perhaps be more suitable on the other hand parties which are not very well educated , do not understand the facts and law, the system and are not able or apprehensive of taking decisions, a proactive Conciliator would be more suitable.

[VI] STEPS / PROCESS OF MEDIATION AND CONCILIATION

The basis of Mediation and Conciliation is negotiation. Negotiation as defined in oxford dictionary means to confer with another for an agreement. Mediation and Conciliation aims at reaching a settlement and a win win situation as against a judgment which creates a win lose situation in litigation. The steps and process of Mediation and Conciliation are generally as under –

1 Introduction
2. Jt Session
3. Private Session
4. Jt Session
5. Agreement / or settlement

Today with the advent of information technology online mediation has also been practiced.[4]

The next vital point is as to what ADR would offer to the Lawyers, the Judges and the litigant public.

[VII] The following expectations of litigants /public are fulfilled by ADR mechanism.

- Reliefs
- Speed

[4] Please see the Article published by C.P. Nandini and G.B. Reddy titled " Resolution of Domain Name Disputes Through ADR – Impact of WIPO's Initiative Towards EUDRP" , 52 JILI (2010), at page 80.

- Solution
- Fair Hearing
- Peace of Mind
- Tell their story in detail
- Cost
- Discovery
- Participation
- Execution

[VIII] The following expectations of Lawyers are fulfilled by ADR

- Stable Fees
- Client's Satisfaction
- Speedy Solutions
- Avoid Adjudicatory Processes
- Options open on failure
- Less Hassle
- Restoration of client's faith in system

It is therefore necessary for Lawyers to realize that ADR is nothing but opening of new door of opportunities for them. Litigation will always be there and has its palce in dispute resolution. However, ADR offers a new opportunity to Lawyers to earn their fees and make a name in a different setting. The Role of Lawyers as Advocates for the parties and even as mediators and Conciliations is well recognized. The lawyers can therefore get legitimate fees for the same. The rules framed by different High Courts in this country have provided for such payments.

The First hurdle for ADR is mindset of our Lawyers which is excessively litigation originated. Ofcourse lawyers cannot be blamed for the same as our law training and thereafter law practice is excessively focused on litigation. Our law colleges teach the students principles of law on the basis of the cases decided impressing on them that nothing is more important than winning a case. This creates a win lose situation which can be turned into win win situation only through ADR mechanism. Even the very outlook of lawyers will change if one starts understanding and implementing the concepts of the ADR. They would start for looking at elements of settlement in every matter.

This is apart from the fact that ADR gives an opportunity to Lawyers to contribute to social harmony and piece in the society. It is in fact one of the ways in which Lawyers can contribute to the society. It is time lawyers understand that if people are abandoning the judicial system we must give them alternatives so that they come back to us otherwise the system we will invite a doomsday for our profession.

[IX] Qualities of Mediators :-

- Facilitator / Communicator
- - Follow broad frame work

- - Give importance to Private Meetings
- - Persuasive Techniques
- - Discreet / active participation
- - Build bridges
- - Human approach
- Give importance to parties and put
- solutions in their mind
- Parties problem are minor,
- pleadings make a wide gap
- Take help of Advocates
- Impartial and independent
- Make required Amendments
- Liberty to mould procedures
- Congratulate parties and Advocates
- whatever is the result

[X] Tips for Mediator :-

- Courtsey / respect
- Confidentiality
- Impartiality
- Empathy ; Compassion
- Integrity ; trustworthiness
- Speed
- Without Excessive Cost
- Active Listening
- Questioning
- Reframing
- Option Generation
- Breaking Impasses
- Reality Testing
- Non an Advocate of the Party
- Patience and Perseverance
- Interpersonal skills
- Good Human Being

[XI] BATANA, WATANA, MLATNA :

These words are most commonly used and are very effective techniques of Mediation and conciliation. They signify the following:-

- BATANA : Best Alternative To A Negotiated Agreement
- WATNA : Worst Alternative To A Negotiated Agreement
- MLATNA : Most I likely Alternative To A Negotiated Agreement.

A Mediator and Conciliator tries to tell the parties the best and the worst possible outcomes of their case and therefore takes them to a most likely alternative to a negotiated / settlement or agreement.

[XII] SOME EXAMPLES OF USE OF MEDIATION AND CONCILIATION -

[1] Story of Cattles
Dispute relating to partition of 17 cattles

17		
1/2	1/3	1/9

Mediator to add one cattle

17 +1		
1/2	1/3	1/9
9	6	2

[2] Two children fighting for a larger piece of a cake.
Both demand, they be allowed to cut and have the cake first. Mediator – One cuts and the other gets the choice for picking up the piece first.

[3] Two brothers fighting over an orange

- Ad-judication – cut into 2 and give each ½ share
- – Mediation -One Brother may want the orange, the other may want the cover.

[4] Fight between a Husband and Wife (universal)
They start sleeping separately –
Child best mediator - one night sleeps with Father other night sleeps with mother-
First night tells the father,
" Daddy, Mom yesterday told me that she too goes wrong and feels bad about it", - Next night he tells the mother, "Mom, Daddy tells me that he too is wrong and feels bad about it". – Third night the husband & wife came together.

[XIII] SUPREME COURT AND ADR MECHANISM :-

S. 89 of the Code of Civil Procedure came for scrutiny before the Apex Court and the Apex Court has pronounced two landmark Judgments giving an impetus to ADR in this country.

[1] SALEM ADVOCATES BAR ASSOCIATION V/S. UNION OF INDIA (II)
- 2005(5) All MR. (SC) 876

1. There should be a panel of well trained conciliators / mediators to which it may be possible for the Court to make a reference
2. Respective High Courts to take appropriate steps for making rules.

3. Draft rules framed and suggested by the Law Commission of India accepted by the Supreme Court.

[2] Afcons Infrastructure Ltd & Anr.

Vs.

Cherian Varkey Construction Co (P) Ltd.& Ors.

Supreme Court

Judgment given on 26 July 2010 by R.V. Raveendran J. & J.M. Panchal J.

Any new provision of Law leads to queries and problems when it is put for implementation. S. 89 also faced the same hurdles. For number of years there were grey areas and doubts about implementation of S. 89. Fortunately, the Supreme Court of India has now removed most of the hurdles in a landmark Judgment given by J. Raveendran.

I am giving below the main points in the Judgment which answer numbers of queries and questions about S. 89 posed by Lawyers and Judges.

1. U/s 89 of C.P.C, the court is only required to formulate a "short summary of disputes" and not "terms of settlement".

   There was a doubt amongst Judges as to how the Judges would formulate terms of settlement much before the matter is referrd for ADR. The SC has now clarified that before referring the parties to ADR, it is not necessary for court to formulate or refer the terms of a possible settlement. It is sufficient if the court merely states the nature of dispute and makes the reference. The court can do so after receipt of pleadings of parties. Infact the Apex court has even observed, that in some cases particularly matrimonial once the court can resort to ADR even before the written statement is received. Many a time once written statement is drafted and filed in the court the dispute gets flared up and the animosity between the parties increases leading to difficulties in settlement through ADR.

2. The civil court should invariably refer cases to ADR process except in certain recognized excluded categories by giving reasons.

3. The proper stage to refer the parties to ADR mechanism is when the matter is taken for preliminary examination of the parties [stage of Admission and Denial] u/o 10 of the Code.

Nothing prevents the Court form resorting to S. 89 even after framing of issues, but once evidence is commenced the Court will be reluctant to refer the matter to ADR lest it becomes a tool for protracting the trial.

4. The definition of judicial settlement and mediation in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman' error

for mediation, 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 provisions of that Act

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

Above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

5. The following cases are held to be the cases not suitable for ADR process :-

[A] (i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest or numerous persons who are not parties before the court (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(iii) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(v) Cases involving prosecution for criminal offences.

[B] All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

- (i) All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims); - disputes relating to specific performance;
- - disputes between suppliers and customers;
- - disputes between bankers and customers;
- - disputes between developers/builders and customers; - disputes between landlords and tenants/licensor and licensees; - disputes between insurer and insured;
- (ii) All cases arising from strained or soured relationships, including - disputes relating to matrimonial causes, maintenance, custody of children;
- - disputes relating to partition/division among family members/co- parceners/co-owners; an
- - disputes relating to partnership among partners.
- (iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- - disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- - disputes between employers and employees;
- - disputes among members of societies/associations/Apartment owners Associations;
- (iv) All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents; and
- (v) All consumer disputes including
- - disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.
- The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

[5] Choice of ADR Mechanisms

1. Arbitration: In the event of referral by the court to Arbitration due to arbitration agreement between the parties, the case will go outside the stream of court permanently and will not come back to the court.
2. Conciliation : As contrasted from arbitration, when a matter is refereed to conciliation, the matter does not go out of the stream of court permanently. If there is no settlement, the matter is returned to the court for framing of issues and proceeding with the trial.

3. Mediation : If the suit is complicated or lengthy, mediation will be recognized choice.
4. Lok Adalat: If the suit is not complicated and disputes are easily sortable or and be settled by applying clear legal principles Lok Adalat will be preferred choice.
5. Judicial Settlement : If the court feels that suggestion and guidance by a judge will be appropriate, it can refer it to another judge for dispute resolution.

[6] Settlement :-

1. When a matter is settled through conciliation the settlement agreement is enforceable as it is decree of the court having regard to S. 74 read with S. 30 of the A.C. Act.[Like on Arbitral Award]

2. When settlement takes place before Lok Adalat, the Lok Adalat award is also deemed to be decree of the civil court and executable as such u/s 21 of Legal Service Authority Act, 1931.

3. Where the reference is to conciliation, mediation or Lok Adalat through court, the settlement will have to be placed before the court for making a decree in terms of it by application of principles of u/o 23 R. 3 of the Code, as the Court continues to retain control and jurisdiction over the cases which it refers.

[7] The Court has summarized the procedure to be adopted by a court under section 89 of the Code as under :

a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option. d) The court should first ascertain whether the parties are willing for arbitration.

The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to 32

arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeble for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court 33

may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section

21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit. (j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

[8] Other Aspects :- The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code : (i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference. (iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process. (iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge. (v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

[XIV] CIVIL PROCEDURE ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION RULES, 2006 IN MAHARASHRA :-

The Apex Court in its Judgment of Salem Advocates Bar Association mentioned above, directed the High Courts to take appropriate steps for making rules. The Apex Court accepted the draft rules suggested by the law commission in this behalf. Accordingly various State High Courts started taking steps for framing of rules for ADR. Most of the High Courts accepted the Rules suggested by Law Commission. In Maharashtra also Bombay High Court accepted the rules suggested by the law commission with some modifications.

I am giving below the main rules titled as "Civil Procedure ADR and Mediation Rules, 2006", in Maharashtra :-

Rule 2 : Appointment of Mediator

A] Parties to a suit may all agree on the name of the sole mediator for mediating between them.

B] Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.

C] parties agree on a sole mediator under clause (a) or where parties nominate more than one mediator under clause (b), the mediator need not necessarily be from the panel of mediators referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5.

D] Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint sole mediator.

Rule 3 : Panel of mediators

The High Court, the Courts of the Principal District and sessions Judge in each District or the Courts of the Principal Judge of the City Civil Court or Courts of equal status and Family Courts shall, prepare a panel of mediators after obtaining the approval of the High Court.

Rule 4 : Qualifications of persons to be empanelled under Rule 3

The following shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 3, namely :-

(a) (i) Retired Judges of the Supreme Court of India ;

(ii) Retired Judges of the High Court;

(iii) Retired District and Sessions Judges or retired Judges of the City Civil Court or Courts of equivalent status

(b) Legal practitioners with at least 15 years standing at the Bar at the level of the Supreme Court or High Court; or the District Courts or Courts of equivalent status.

(c) Experts or other professionals with at least 15 years standing or retired senior bureaucrats or retired senior executives .

(d) Institutions which are themselves experts in mediation and have been recognized as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

Rule 5: Disqualifications of Persons:

- The following persons shall be deemed to be disqualified for being empanelled as mediators:

(i) Any person who has been adjudged as insolvent or is declared of unsound mind.

(ii) Or any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending, or

(iii) Persons who have been convicted by a criminal court for any offence involving moral turpitude;

(iv) Any person against whom disciplinary proceedings have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment.

(v) Any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing.

(vi) Any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings.

(vii) Such other categories of persons as may be notified by the High Court.

Rule 11: Procedure of mediation

(a) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

(b) Where the parties do not agree on any particular procedure to be followed by the mediator , the mediator shall follow the procedure hereinafter mentioned, namely:

(i) he shall fix, in consultation with parties, a time schedule the dates and the time of each mediation session, where all parties have to be present ;

(ii) he shall hold the mediation conference in accordance with the provisions of Rule 6;

(iii) he may conduct joint or separate meetings with the parties;

(iv) each party shall , ten days before a sessions, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to these issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties;

(v) each party shall furnish to the mediator, copies of pleadings or documents or such information as may be required by him in connection with the issues to be resolved. Provided that where the mediator is of the opinion that he should look into any original document , the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix.

(vi) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.

Rule 12: Mediator not bound by Evidence Act, 1872 or Code of Civil Procedure, 1908

The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, but shall be guided by principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute.

Rule 16: Role of Mediator:

The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the

dispute, emphasizing that it is the responsibility of the parties to take decision which effect them; he shall not impose any terms of settlement on the parties.

Rule 17: Parties alone responsible for taking decision:

The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

Rule 18:

Time limit for completion of mediation :
Sixty days extendable by thirty days

Rule 26 : Fee of mediator and costs :

(1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.

(2) As far as possible a consolidated sum may be fixed rather than for each session or meeting.

(3) Where there are two mediators as in clause (b) of Rule 2, the Court shall fix the fee payable to the mediators which shall be shared equally by the two sets of parties.

(4) The expense of the mediation including the fee of the mediator, costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Court.

(5) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.

(6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40 % of the probable costs of the mediation, as referred to in clauses (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipt and a statement of account shall be filed, by the mediator in the Court.

(7) The expense of mediation including fees, if not paid by the parties, the Court shall on the application of the mediator or parties, direct the concerned parties to pay, and if they do not pay, the Mediator or the parties, as the case may be, shall recover the said amount as if there was a decree.

(8) Where a party is entitled to legal aid under section 12 of the Legal Services Authority Act, 1987, the amount of fee payable to the mediator and costs shall be paid by the concerned Legal Services Authority under that Act.

Rule 27: Ethics to be followed by Mediator:

The mediator shall:

(1) Follow and observe these Rules strictly and with due diligence;

(2) Not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;

(3) Up hold the integrity and fairness of the mediation process;

(4) Ensure that the parties involved in the mediation and fairly informed and have an adequate understanding of the procedural aspects of the process;

(5) Satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;

(6) Disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;

(7) Avoid, while communicating with the parties, any impropriety or appearance of impropriety;

(8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator ;

(9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

(10) recognize that mediation is based on principles of self-determination by the parties and that mediation process relied upon the ability of parties to reach a voluntary, undisclosed agreement.;

(11) maintain the reasonable expectations of the parties as to confidentiality ;

(12) refrain from promises or guarantees of results.

Rule 24 : Settlement Agreement

(1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced to writing and signed by the parties or their power of attorney holder. If any counsel have represented the parties, they shall attest the signature of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the Court in which suit is pending.

(3) Where no agreement is arrived at between the parties, before the time limit stated in Rule 18 or where, the mediator is of the view no settlement is possible, he shall report the same to the said Court in writing.

Provided that wherever the mediation fails, the Mediator shall not express any opinion on the merits or demerits of the matter, conduct of the parties, the nature of process or causes which led to failure of mediation.

Rule (25): Court to fix a date for recording settlement and passing decree :

(1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement, if it is not collusive.

(2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposed of all the issues in the suit.

Rule 20: Confidentiality, Disclosure and Inadmissibility of Information:

(1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.

(2) When a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding the

documents or what is conveyed to him orally as to what transpired during the mediation.

(3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the documents nor in regards to the oral information nor as to what transpired during the mediation.

(4) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to :

(a) views expressed by a party in the course of the mediation proceedings ;

(b) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators ;

(c) proposals made or views expressed by the mediator ;

(d) admission made by a party in the course of mediation proceedings ;

(e) the fact that a party had or had not indicated willingness to accept a proposal ;

(5) There shall be no stenographic or audio or video recording of the mediation proceedings.

(6) A Mediator may maintain personal record regarding dates fixed by him and the progress of the mediation for his personal use.

The Supreme Court of India in Motiram (D) TR. LRS and anr Vs Ashok Kumar and anr, Civil Appeal No (s) 1095 of 2008 .

putting great emphasis on confidentiality of mediation process and recognizing that without confidentiality parties will not readily reveal the truth and come to a settlement, the Apex Court therefore observed :-

“In this connection, we would like to state that mediation proceedings are totally confidential proceedings.

This is unlike proceedings in Court which are conducted openly in the public gaze. If the mediation succeeds, then the mediator should send the agreement signed by both the parties to the Court without mentioning what transpired during the mediation proceedings. If the

mediation is unsuccessful, then the mediator should only write one sentence in his report and send it to the Court stating that the 'Mediation has been unsuccessful"

Beyond that, the mediator should not write anything which was discussed, proposed or done during the mediation proceedings. This is because in mediation, very often, offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process.
We are compelled to observe this because the mediators should know what kind of reports they should send to the Courts. The report send in this case should not have mentioned the proposals made by the parties, but should only have stated that the mediation was unsuccessful.

Let a copy of this order be sent to the Supreme Court Mediation Centre and the Mediation Centres in all the High Courts and District Courts in the country, including the Chandigarh Mediation Centre.

Rule 21 : Privacy

Mediation sessions and meetings are private ; only the concerned parties or their counsel or power of attorney holders can attend . Other persons may attend only with the permission of the parties or with the consent of the mediator.

Rule 22 : Immunity

Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of the Contempt of Courts Act, no Court shall entertain or continue any civil or criminal proceedings against any person who is or was a Mediator appointed by the Court, for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his officially delegated function as Mediator, nor shall he be summoned by any party to the suit to appear in a Court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

[XV] **Appointment of a full time Coordinator in Maharashtra** :- In many Districts in Maharashtra Bombay High Court has started appointing a Judge of the cadre of Sr. Division as full time coordinator.

The full time judge in-charge and co-ordinator of the Mediation Centre, is appointed to continuously and unflinchingly promote mediated settlement. He would also screen the cases sent by referral Judges to recommend appropriate mediator having expertise in the given subject. His duties include :-

1. To keep continuous supervision on the progress of each case referred for mediation.
2. To ensure that mediation is completed in specified time by the mediator as per Rules.
3. To submit periodical report to the Referral Judge before the next date of hearing of the case about the status of mediation proceedings.
4. To submit monthly returns in respect of disposal of case to Mediation Monitoring Committee Main Mediation Centre, Mumbai.
5. To maintain updated list of Mediators.
6. To ensure the none of the mediator on the panel is over burdened with Mediation work on account of direct appointment by the Court in different case. The ratio to be maintained shall not exceed ten cases per Mediator at any given point of time. If any discrepancy is noticed in this behalf, it should be forthwith brought to the notice of the concerned court which had appointed that mediator by submitting interim report so that some other mediator can be substituted without any loss of time.

7. The Co-ordinator shall as far possible appoint mediator by consent of parties in cases where the Court has not appointed mediator while making reference for mediation.

8. To ensure that feedback is received from the participants in every Mediation Case to analyse the same and take corrective measures where necessary.
9. To inspect complaint box on regular basis and take follow up action on complaint or suggestion so received.

10. Publish periodical handbills / pamphlets including on local cable TV, Theatre, etc. about the concept of Mediation and its benefit.

11. Informative pamphlets be displayed at conspicuous places in police station, court premises, Tehsil offices, Village Grampanchayat. etc.

12. Ensure that informative brochures / pamphlets are circulated with court summons / notices to the litigants and also regularly displayed on the notice board for lawyers / litigants in the court complex.

CONCLUSION :-

It will be appropriate to conclude by quoting J. Raveendran in Afcons Infrastructure Ltd & Anr Vs Cherian Varkey Construction Co (p) Ltd and Ors.

"Sec. 89 appears to be non- starter with many courts, Though the process u/s 89 appears to be lengthy and complicated, in practice, the process is simple – know the dispute, exclude unfit cases, ascertain consent for arbitration and conciliation, if there is no consent select Lok Adalat for simple cases and mediation for all other cases, reserving reference to judge assistance settlement only in exceptional or special cases" .

THE ROAD AHEAD :-

There seems to be a lot of pressure being put from above i.e. from the Supreme Court and High Court down for growth of ADR. However, the said growth needs to still get momentum at grassroots. The action plan floated by Bombay High Court in this behalf aims at holding workshops and spreading awareness of ADR Mechanism at the grassroots. As demonstrated above in this Article it is only if the community of Lawyers and the Litigants accept the concept as being beneficial to them that the ADR mechanism will get momentum.

Initially the parties may raise a question that they are already paying the Court fee for the matter and their Lawyers fees and therefore some parties may show reluctance to bear the fees of Mediator. In such cases the first need is to explain to the parties the benefits of mediation and saving of lost from a long turn point of view. However a proposal is being considered by Maharasthra Govt to give funds to ADR Mechanism particularly the cost of payment of mediators.

If we move in the right direction in years to come there will be rise of private mediation centers in this country. At present we have recognized and reputed Lawyers, Senior counsels in litigation. Time will come when we will also have a group of well recognized and reputed mediators who can then specialize in one or more areas of dispute resolution. Different skills and expertise would be required for different types of disputes for examples, different skills and expertise is required in matrimonial dispute would be different from commercial matters, so on and so forth.

Lawyers can make a simple beginning by including in their notices or replies a clause as under " without prejudice to the contentions raised and claims made in this notice, my client is willing to resort to any of

the modes of arbitration, mediation, conciliation and pre-litigation cells[5] in court to avoid actual litigation".

It will be appropriate to remember what Lord Denning has said about a new argument which was not made before, ADR seems to be fitting in the same as new method of dispute resolution which was not tried before.

To quote Lord Denning in Packer Vs Packer [1954] P 15 at 22.
"What is the argument on the other side?
Only this, that no case has been found in
which it has been done before. That
argument does not appeal to me in the least.
If we never do anything which has not been
done before, we shall never get anywhere.
The law will stand still whilst the rest of the
world goes on: and that will be bad for
both,"
It is therefore our duty to see to it that the law does not stand still while the rest of world goes on. We must meet the challenges of the world by offering effective ADR mechanism

In the words of Peter Durker, the best way to predict the future is to create it. Is said instead of blaming darkness light a candle where ever you can and that a journey of 1000 miles always starts with the first step. I hope this article lights a candle in the darkness of litigation and serves as first step to bring a 'win win' situation in dispute resolution in this countr

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[5] The Legal Services Authorities Act, 1987 S. 20(2) is provides for pre –litigation as under :-
S. 20(2) Notwithstanidng anything contained in any other law for the time being in force, the District Authority may, on receipt of an application from any person that any dispute or matter pending for a compromise or settlement needs to be determined by a Lok Adalat, refer such dispute or matter to the Lok Adalat for determination.
The National Legal Services Authority (Lok Adalat) Regulations, 2009, Rule 12 is as under :-
[12] Pre-litigation matters – (1) In a pre-litigation matter it may be ensured that the court for which a Lok Adalat is organized has territorial jurisdiction to adjusdicate in the matter.
(2) Before referring a pre- litigation matter to Lok Adalat the Authority concerned or Committee, as the case may be, shall give a reasonable hearing to the parties concerned:
(3) An award based on settlement between the parties can be challenged only on violation of procedure prescribed in section 20 of the Act filing a petition under articles 226 and 227 of the Constituion of India.