

MAKING ADR TECHNIQUES MANDATORY IN INDIA : PROPOSED CPC AMENDMENT

V.K. Ahuja*

I. INTRODUCTION

The alternative dispute resolution techniques (hereinafter referred to as 'ADR Techniques') are not alien to the justice dispensing system of India. In ancient India, people used to get their disputes resolved by arbitrators or tribunals not established by the King. Yajnavalkya and Narda stated that Village Councils (*Kulani*), Corporation (*Sreni*) and Assemblies (*Puga*) used to decide law suits. These institutions have been described as arbitral tribunals which have a status of *Panchayat* in modern India.

The *Panchayats* have played a very important role in resolving the disputes in ancient India. These *Panchayats* were generally located in the rural areas. They proceeded in an informal way free from technicalities of procedural law. If a person transgressed the permissible limits of the unwritten social, caste or quasi-legal rules of conduct, the aggrieved party could summon a *Panchayat* and place his case before it. The moral influence of these *Panchayats* was so great that the offending party could not easily dare to tell a lie before the *Panches*. It is also worth mentioning that these *Panchayats* were often influenced by local sentiments and factions and thereby became susceptible to prejudice and bias. Harsh and unfair decisions of village *Panchayats* were rampant. Even today, one can find barbaric decisions of the *Panchayats* in rural areas.

The simple and informal system of arbitration through *Panchayats* though useful was ineffective to deal with the complex legal, social and economic problems. The *Panchayat* system underwent considerable changes during the colonial period of British Raj. A number of statutes were passed providing for arbitration as a mode of dispute settlement.

The first statute providing substantive law on arbitration - the Indian Arbitration Act was passed in 1899. Its application was restricted only to Presidency towns of Calcutta, Bombay and Madras. This was not a complete law and suffered from many defects. In 1908, the Code of Civil Procedure (hereinafter referred to as 'CPC') was re-enacted and provisions relating to

arbitration were set out in the Second Schedule of the CPC in the hope that this would be transferred to a comprehensive arbitration act at a subsequent date.

Ultimately in 1940, the Arbitration Act was passed repealing the Indian Arbitration Act of 1899 and provisions relating to arbitration in CPC. In addition, Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961 were also adopted in India to meet the needs of domestic and certain aspects of international arbitration.

The Arbitration Act, 1940 though an attempt to provide a comprehensive code on arbitration was deficient in several respects and became increasingly outmoded and discredited. The Act could not meet the objectives for which it was enacted. The Supreme Court in *M/s Guru Nanak Foundation v. M/s Ratan Singh & Sons* observed¹ :

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. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical, accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts being clothed with 'legalese' of unforeseeable complexity.

With the liberalisation, globalisation and privatisation of the economy, it was felt that the economic reforms would remain incomplete without a system providing for a quick and efficacious settlement of commercial disputes involving international transactions.

In a meeting of the Chief Ministers and Chief Justices in 1993, it was also felt that the courts were not in a position to bear the entire burden of justice system² and that a number of disputes deserved to be resolved by alternative modes such as arbitration, mediation and negotiation. The desirability of disputants taking advantage of procedural flexibility of ADR methods, saving of time and money and avoidance of stress of a conventional trial was also emphasised in the meeting.

To remove the deficiencies in the Arbitration Act, 1940 as well as to provide quick, efficacious and less expensive settlement of disputes including commercial disputes, Arbitration and Conciliation Bill, 1995 was introduced in the parliament which was subsequently repealed by an Ordinance of 1996 and finally was replaced by Arbitration and Conciliation Act, 1996.

Section 85 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as an 'Act') has repealed the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

II. ADR TECHNIQUES - AN OVERVIEW

As the primary object of ADR system is avoidance of vexatious and expensive recourse to traditional justice dispensing machinery, the ADR techniques encourage the disputants to arrive at a settlement without going to court. It helps in avoiding delays and promotes access to justice for all. The techniques are extra-judicial in character and can be used in almost all contentious matters which are capable of being resolved, under law; and by agreement between the parties. They have been employed with very encouraging results in several categories of disputes, especially civil, commercial, industrial and family disputes.

The main techniques include (a) negotiation; (b) mediation/conciliation; (c) arbitration; (d) fast-track arbitration; (e) conciliation-arbitration; (f) mini-trial; and (g) fact-finding expert committee.³

Negotiation is a voluntary non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute. Mediation and conciliation are generally used as interchangeable terms. Both are non-binding procedures in which a neutral third party assists the disputing parties in mutually reaching an agreed settlement of the dispute. In both the procedures a successful completion of the proceedings results in a mutually agreed settlement of dispute between the parties. However, mediation is treated as distinct from conciliation in as much as in mediation the emphasis is on more positive role of the neutral third party than in conciliation. Arbitration is a procedure in which dispute is submitted to an arbitral tribunal consisting of a sole or an odd number of arbitrators which gives its decision in the form of an award that is binding on the parties. Fast-track arbitration is a form of arbitration in which the arbitral tribunal completes the arbitral proceedings and makes an award in a short time. Conciliation - arbitration is a procedure where the parties agree to settle their dispute first by attempting a conciliation within a specified time, failing which by arbitration. Thus, this procedure combines conciliation/mediation with arbitration. No arbitral proceedings can be initiated where the dispute has already been resolved by conciliation or mediation. Mini-trial is a non-binding procedure in which the disputing parties are presented with summaries of their cases to enable them to assess the strengths, weaknesses and prospects of their case and then an opportunity to negotiate a settlement with the assistance of a neutral adviser. Fact-finding expert committee

is constituted by the disputing parties to investigate into certain specific issues of fact, technicality or law. After investigation, the parties decide whether to resolve the dispute through negotiation, mediation or otherwise. However, the above techniques are not exhaustive.

III. ROLE OF LOK ADALAT IN DISPUTE RESOLUTION

Since the institution of Lok Adalats, a non-formal method of settling disputes, Lok Adalats have achieved a fair distinction of deciding about 68.86 lakh cases which related primarily to motor accidents, land acquisition, family disputes, mutation of land, encroachments on forest land, bank loans, workmens' compensation and compoundable criminal offences. A total of 17,633 Lok Adalats have been organised in different parts of the country.⁴

The Lok Adalats started initially as voluntary organisations for informal resolution of disputes and were mostly manned by retired judges supported by lawyers and social workers. Lok Adalats have received the statutory recognition in the Legal Services Authorities Act, 1987 which came into force on November 9, 1995.

Lok Adalats under the Legal Services Authorities Act, have jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal or revenue court or any tribunal constituted under any law for the time being in force in the area for which the Lok Adalat is organised.⁵ Lok Adalats also act expeditiously to arrive at a compromise or settlement between the parties and are guided by legal principles of justice, equity and fair play.⁶ It is open to a party where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, that the party may take recourse to court of law.⁷

The award of the Lok Adalat is deemed to be a decree of a civil court and every award made by it is final and binding on all the parties to the dispute. No appeal shall lie to any court against the award.⁸ The proceedings before a Lok Adalat are deemed to be judicial proceedings.⁹

IV. THE ARBITRATION AND CONCILIATION ACT, 1996 : SALIENT FEATURES

The Arbitration and Conciliation Act, 1996 provides that the arbitral tribunal with the consent of the parties, may use mediation, conciliation or other procedures at any time during the arbitral proceedings.¹⁰ The parties may also settle the dispute during the arbitral proceedings.¹¹ Thus, the Act allows the parties and the arbitral tribunal to use mediation and other ADR techniques to resolve the disputes.

The main objectives of the Act are to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation; and to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration. The Act provides that the arbitral tribunal gives reasons for its arbitral award and ensures that the arbitral tribunal remains within the limits of its jurisdiction. It minimises the supervisory role of courts in the arbitral process and permits an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes. The Act provides further that every final arbitral award is to be enforced in the same manner as if it were a decree of the court; and that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal. For the purposes of enforcement of foreign awards, the Act provides that every arbitral award made in a country to which one of the two international conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

The Act contains 86 sections and three schedules, and is divided into four parts.

A. Arbitration

Part I deals with arbitration. In the matter of composition of the arbitral tribunal and appointment of arbitrators, the parties may either agree on the number and procedures for appointment by themselves or agree to abide by an existing procedure for appointment. Section 11(2) of the Act empowers the parties to agree on a procedure for appointing arbitrator. It also provides the basis for institutional arbitration so far as the parties may, before or after a dispute has arisen, agree to abide by the rules of procedure of an arbitral institution for the purpose. Since the procedure for appointment of arbitrators is one of the most important aspects dealing with in the arbitration rules of all arbitration institutions, which makes it enabling provision from the point of view of arbitral institutions. It is worth mentioning that the Act takes into account the contingency of appointment of arbitrators by the Chief Justice of the respective High Court when the parties do not agree on a procedure for appointment of arbitrators.¹²

Unlike the Arbitration Act of 1940, the present Act allows the parties to challenge the appointment of arbitrator on specified grounds.¹³ The arbitral tribunal shall decide on the challenge.¹⁴ In addition, the arbitral tribunal has a self same jurisdiction, including ruling on any objections, with respect to the existence or validity of the arbitration agreement.

There are no legal procedural fetters on the arbitral tribunal and it is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The parties are free to adopt any procedure for settling disputes by the intervention of the arbitral tribunal.¹⁵ In addition, parties are free to decide the place of arbitration and the language of arbitral proceedings. Unlike Arbitration Act, 1940 detailed provisions have been laid in with regard to the conduct of arbitral proceedings.

Under Chapter VI of the Act which lays down provisions for the making of arbitral award and termination of arbitral proceedings, the arbitral tribunal decides the dispute submitted to arbitration in accordance with the substantive law for the time being in force. In addition, the arbitral tribunal is obliged to decide a dispute *ex aequo et bono* or as *amiable compositeur* if the parties have expressly authorised it to do so.¹⁶ It means that arbitral tribunal may deviate from substantive law while deciding a dispute if the parties to the dispute authorised the tribunal to do so. As section 30(1) provides that an arbitral tribunal may, with the agreement of the parties, use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement, which shall not be incompatible with an arbitration agreement the Act thus, encourages the parties to resolve their dispute not only by arbitration or conciliation but also by any other mode of ADR.

The Act obliges the arbitral tribunal to state the reasons upon which its arbitral award is based. However, if the parties agree that no reasons are to be given, this obligation can be dispense with.¹⁷ This provision is a significant departure from the provisions of the Arbitration Act, 1940 which contained no such mandatory provision. However, doubts have been expressed as to the wisdom of making it mandatory under the law to give reasons for the award. It has been contented that giving reasons in the award may invite criticism where ends and means of the award do not reconcile.

(i) Grounds for Setting Aside an Award

Under Arbitration Act, 1940, an award could be set aside on three grounds namely (a) that an arbitrator or umpire has misconducted himself or proceedings; (b) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid; (c) that an award has been improperly procured or is otherwise invalid.¹⁸ The Arbitration and Conciliation Act, 1996 widens the scope of setting aside the award on the following grounds :

- (i) the party was under some incapacity; or
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law for the time being in force; or

- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

The court may also set aside an arbitral award if it finds that —

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
- (ii) the arbitral award is in conflict with the public policy in India.¹⁹

The award can be considered conflicting with public policy only if making of the award was induced or affected by fraud or corruption or was in violation of section 75 which obliges conciliator as well as parties to keep conciliation proceedings confidential, or section 81 which provides for inadmissibility of evidence of conciliation proceeding in other proceedings.²⁰

The time limit has also been provided for setting aside the arbitral award. An application for setting aside of award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33 which lays down rules regarding correction and interpretation of award and for making additional award, from the date on which that request had been disposed of by the arbitral tribunal. However, the court may entertain the application within a further period of maximum thirty days, if it is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months.

(ii) Appeals

Appeals can be made against the arbitral awards in limited cases. The grounds for making an appeal have been laid down in section 37 of the Act. Section 37(1) provides that an appeal shall lie from the following orders to the court authorised by law to hear appeals from original decrees of the court passing the order, namely —

- (a) granting or refusing to grant any measure under section 9;
- (b) setting aside or refusing to set aside an arbitral award under section 34.

There are also provisions for interim measures as conceived in section 9 which provides that a party may appeal to the court before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced :

- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceeding; or
- (ii) for an interim measure of protection in respect of (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the court to be just and convenient.

An appeal also lies to a court from the order of the arbitral tribunal where it accepts the plea that it does not have jurisdiction²¹ or that it is exceeding the scope of its authority.²² Apart from this, an appeal can also be made against the order of arbitral tribunal where it grants or refuses to grant an interim measure under section 17.²³ Section 17 authorises the arbitral tribunal to order a party, at the request of another party, to take any interim measure of protection in respect of the subject-matter of the dispute. The arbitral tribunal may also require a party to provide appropriate security in connection with aforesaid measure.

The Act provides further that no second appeal shall lie from an order passed in appeal under this section. But parties shall have a right to appeal to the Supreme Court.²⁴

In no other cases an appeal shall lie under the provisions of the Act.

(iii) Finality and Enforcement of Arbitral Awards

An arbitral award shall be final and binding on the parties and persons claiming under them respectively subject to the provisions of Part I of the Act.²⁵ Thus, *inter alia*, the provisions of section 34 dealing with recourse against arbitral award and section 37 dealing with appeals will be applicable to an award before it becomes final.

An arbitral award is enforceable under CPC where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused. The award shall be enforced in the same manner as if it were a decree of the court.²⁶ This provision is a departure from the provisions of the Act of 1940.

There are some important questions such as, what remedy is available to the parties if the dispute has not been decided by the arbitral tribunal in accordance with the substantive law for the time being in force in India as is provided under section 28(1) (a) of the Act? Will such an award become final and binding on the parties and operate as *Res Judicata*? Since no qualification has been prescribed for the arbitrator, how can it be ensured that an arbitrator shall be acquainted with the substantive law including Supreme Court's judgements etc.?

B. New York Convention Awards and Geneva Convention Awards

The Act repeals the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Awards (Recognition and Enforcement) Act, 1961. However, the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force, whereas this Act shall be applicable in relation to arbitral proceedings which commenced on or after this Act came into force. In addition, all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.²⁷ Thus, India continues to perform its obligations under New York Convention on Recognition of Enforcement of Foreign Arbitral Awards, 1958 (First Schedule of the Act), the Geneva Protocol on Arbitration Clauses, 1923 (Second Schedule of the Act), and the Geneva Convention on the Executive of Foreign Arbitral Awards, 1927 (Third Schedule of the Act).

C. Conciliation

Part III of the Act deals with conciliation. This is a significant improvement upon its predecessor Act. Though the Act encourages the settlement of disputes by mediation and other procedures also but specific mention has been made for conciliation by laying down detailed provisions in this regard.

Generally, there shall be one conciliator unless the parties agree that there shall be two or three conciliators.²⁸ It is noteworthy that the maximum number of conciliators is restricted to three and there can be even number of conciliators also. Though the provisions of this Part apply to conciliation of disputes arising out of legal relationship, whether contractual or not, but the conciliator shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.²⁹

The Conciliator is obliged to assist the parties in an independent and impartial manner in his attempt to reach an amicable settlement of the dispute. For this purpose, the conciliator is guided by principles of objectivity, fairness and justice giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circum-

stances surrounding the dispute, including any previous business practices between the parties.³⁰

The conciliator is under an obligation to formulate the terms of a possible settlement and submit the same to the parties for their observations where he feels that settlement may be acceptable to the parties. If the parties agree to the settlement, a written settlement agreement may be drawn up and signed by the parties.

The settlement agreement has the same status and effect as that of an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

It is obligatory for the parties not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute which is the subject-matter of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.³¹

For the preservation of justice, it has been laid down by the Act that unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of the same dispute. Moreover, the parties are not allowed to present conciliator as a witness in any arbitral or judicial proceedings.³²

All conciliation proceedings including settlement agreement are to be kept confidential except where disclosure is necessary for purposes of implementation and enforcement.³³ It is also obligatory for the parties not to rely on or introduce as evidence in arbitral or judicial proceedings any views, suggestions or admissions made by the other party or proposals made by the conciliator etc.³⁴

Part IV of the Act which deals with supplementary provisions, empowers the High Courts and Central Government to make rules consistent with this Act for certain purposes.

V. MAKING ADR COMPULSORY IN INDIA

The legislative policy in India is to cast a duty upon the court to make efforts and to assist the parties in arriving at a settlement in litigation by or against the Government or public officers in their official capacity, litigation relating to matters concerning the family such as suits/proceedings for matrimonial relief, guardian and custody, maintenance, adoption, succession etc.³⁵

The mechanism of conciliation has also been introduced for settling industrial disputes under Industrial Disputes Act, 1947. However, in order to appreciate and find out whether ADR methods can substitute the formal method of settlement of disputes within the framework of formal procedures conceived in CPC and other enactments, the Government asked the Law Commission to look into the matter. Justice Malimath Committee was also appointed to study the subject. The terms of reference of the Law Commission was how far conciliation can be introduced into the urban litigation.

A. Recommendation of Law Commission

The Law Commission in its 129th Report examined at length the nature of litigation in urban areas and highlighted the staggering pendency of cases in various courts of urban areas. It was pointed out that as on 31st December, 1984, 2,48,845 cases were pending in Sessions courts, 77,41,459 cases in Magisterial courts, 29,22,293 cases in Civil courts of original jurisdiction and 10,91,760 cases on the Appellate side.³⁶ Special attention was given in the Report to house rent / possession litigation in urban areas and as an alternative to the present method of disposal of disputes under the Rent Acts, four distinct modes were considered.³⁷ They are :

- (i) Establishment of Nagar Nyayalaya with a professional Judge and two lay Judges on lines similar to Gram Nyayalaya and having comparable powers, authority, jurisdiction and procedure;
- (ii) Hearing of cases in Rent Courts by a Bench Judges, minimum two in number, with no appeal but only a revision on questions of law to the district court;
- (iii) Setting up of Neighbourhood Justice Centres involving people in the vicinity of the premises in the resolution of dispute; and
- (iv) Conciliation court system now working with full vigour in Himachal Pradesh.

In respect of suits involving disputes as to inheritance, succession, partition, maintenance and those concerning wills, which are generally blood relations, it has been recommended by the Law Commission that Conciliation Court system must be made compulsory by an effective amendment to the CPC on lines of rule 5B, order XXVII. Rule 5B of order XXVII of the CPC makes it obligatory for the court in a suit against the Government or public officer, to assist in arriving at a settlement in the first instance.³⁸

In respect of all other kinds of suits, it was recommended that an attempt would be made at the pre-trial stage by the lawyers of respective parties for a reasonable settlement of the dispute on give and take basis and that in case the

dispute is not resolved or fully resolved, litigation may start but in that case the matter should be referred to the Conciliation Court and if such court finds that its persuasion to the parties to go in for a fair settlement has failed the party who was recalcitrant and unjust in approach must be fined with heavy costs.

The Law Commission recommended in the field of criminal cases, the reintroduction of the system appointing Honorary Magistrates who should be drawn from amongst the retired personnel of the judiciary. Such Honorary Magistrates should be empowered to do any work which a Stipendiary Magistrate can undertake and they should take over all the old cases.

The recommendation of Law Commission regarding service related matters was that State Government must take steps for setting up State Administrative Tribunals under the Administrative Tribunals Act, 1985.³⁹

The Law Commission in its 126th Report on Government and Public Sector Undertaking Litigation recommended that the Central Government should issue a binding directive to the Public Sector Undertakings regarding reference of disputes *inter se* between them or between them on the one hand and the Government on the other to arbitration. The introduction of conciliation procedure in Writ matters, and the establishment of the Grievances' Cell to deal with disputes and complaints of employees of Public Sector Undertakings and the Government in regard to service matters and reference to compulsory arbitration of issues involving law points in certain eventualities has also been recommended by the Law Commission.

B. Malimath Committee's Recommendations

The Malimath Committee while making a study on 'Alternative Modes and Forums for Dispute Resolution' endorsed the recommendations made in the 124th and the 129th Report of the Law Commission to the effect that the lacuna in the law as it stands today, arising out of the want of power in the courts to compel the parties to a private litigation to resort to arbitration or mediation, requires to be filled up by necessary amendment being carried out. The Committee stated that the conferment of such power on courts would to a long way result in reducing not only the burden of trial courts but also of the revisional and appellate courts, since there would be considerable divergence of work at the base level and the inflow of work from trial courts to the revisional and appellate courts would thereby diminish.⁴⁰

C. The Code of Civil Procedure (Amendment) Bill, 1997

Following the recommendations made by Justice Malimath Committee, Law Commission in its 129th Report and the Committee on Subordinate Legislations (11th Lok Sabha), the Code of Civil Procedure (Amendment) Bill, 1997 was introduced in the Rajya Sabha on 14th August, 1997, keeping

in view, among others, that every effort should be made to expedite the disposal of civil suits and proceedings so that justice might not be delayed.

Clause 7 of the Code of Civil Procedure (Amendment) Bill, 1997 proposes to insert a new section 89 in the Code of Civil Procedure, 1908. The section reads as :

“Settlement of Disputes outside the Court

89. (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 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.”

Rule 1 of order X of CPC is also proposed to be amended consequently and new rules 1A, 1B and 1C are proposed to be inserted. Rule 1 ascertains whether allegations in pleadings are admitted or denied. It provides that at the 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 the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials.

The proposed rule 1A intends to provide that 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 namely arbitration; conciliation; judicial settlement including settlement through Lok Adalat; or mediation. 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.

The proposed rule 1B provides that where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.

The proposed rule 1C provides that 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.

No suit in which issues have been settled before the commencement of proposed amendment, shall be affected and every such suit shall be dealt with as if no amendment had come into force.⁴¹ Clause 35 of the Bill intends to enable the parties to claim refund of court fee in case the matter in dispute is settled outside the court.

The Code of Civil Procedure (Amendment) Bill, 1997 is a welcome initiative in resolving the disputes through ADR methods and reducing the number of cases in the courts.⁴² But unfortunately, no progress has been made by the present government over the Bill. This is high time when government should take up this Bill and amend the CPC in order to clear backlog in court cases and encourage the litigants to resolve their disputes through ADR methods. Settlement of disputes through ADR shall not only be beneficial to the litigants but help also in reducing the excessive burden of the courts, enabling them to concentrate on more important issues of law requiring judicial attention.

NOTES AND REFERENCES

- * Lecturer, Law Centre-II, Faculty of Law, University of Delhi, Delhi.
1. AIR 1981 SC 2075 at 2076.
 2. The mounting arrears of cases were estimated to be about 25 millions in about 8000 courts throughout India. See A.C.C. Unni, *The New Law of Arbitration and Conciliation in India - Some Significant Aspects*, ICSI BACKGROUNDER ON ALTERNATIVE DISPUTE RESOLUTION, 1996 at 7.
 3. P.C. Rao, *Alternatives to Litigation in India*, ICSI BACKGROUNDER ON ALTERNATIVE DISPUTE RESOLUTION, 1996 at 2-3; see also Sarvesh Chandra, *ADR : Is Conciliation the Best Choice*, ICSI BACKGROUNDER ON ALTERNATIVE DISPUTE RESOLUTION, 1996 at 16-17.

4. THE HINDUSTAN TIMES, July 3, 1998.
5. Section 19(3) of the LEGAL SERVICES AUTHORITIES ACT, 1987.
6. *Id.*, section 20(4).
7. *Id.*, section 20(5).
8. *Id.*, section 21(2).
9. *Id.*, section 22(3).
10. Section 30(1) of the ARBITRATION AND CONCILIATION ACT, 1996.
11. *Id.*, section 30(2).
12. *Id.*, sections 11(4), (5) and (6). See also Unni, *supra* n. 2 at 8.
13. *Id.*, section 12.
14. *Id.*, section 13(3).
15. *Id.*, section 19(1) and (2).
16. *Id.*, section 28.
17. *Id.*, section 31(3).
18. Section 30 of the ARBITRATION ACT, 1940.
19. Section 34(2), *supra* n. 10.
20. *Ibid.*
21. *Id.*, section 16(2).
22. *Id.*, section 16(3).
23. *Id.*, section 37(2).
24. *Id.*, section 37(3).
25. *Id.*, section 35.
26. *Id.*, section 36.
27. *Id.*, section 85.
28. *Id.*, section 63.
29. *Id.*, section 66.
30. *Id.*, section 67(1) and (2).
31. *Id.*, section 77.
32. *Id.*, section 80.
33. *Id.*, section 75.
34. *Id.*, section 81.
35. Rule 5 B of Order XXVII and rule 3 of Order XXXII - A of the CODE OF CIVIL PROCEDURE, 1908. See also sections 23(2) and (3) of the HINDU MARRIAGE ACT, 1955 and section 9(1) of the FAMILY COURT'S ACT, 1984.

36. Law Commission of India, 129th Report on *Urban Litigation - Mediation as Alternative to Adjudication*, 1988, para 2.9.
37. *Id.*, paras 3.16 - 3.21.
38. *Id.*, para 4.1.
39. *Id.*, para 4.5.
40. *Report of Justice Malimath on Alternative Modes and Forums for Dispute Resolution*, para 8.57.
41. Clause 33(2) (e) of the CODE OF CIVIL PROCEDURE (AMENDMENT) BILL, 1997.
42. There are nearly 30,00,000 cases pending in the 18 High Courts and nearly 2,50,00,000 in the 500 - odd district and lower courts in the country, see THE TIMES OF INDIA, April 26, 1998.