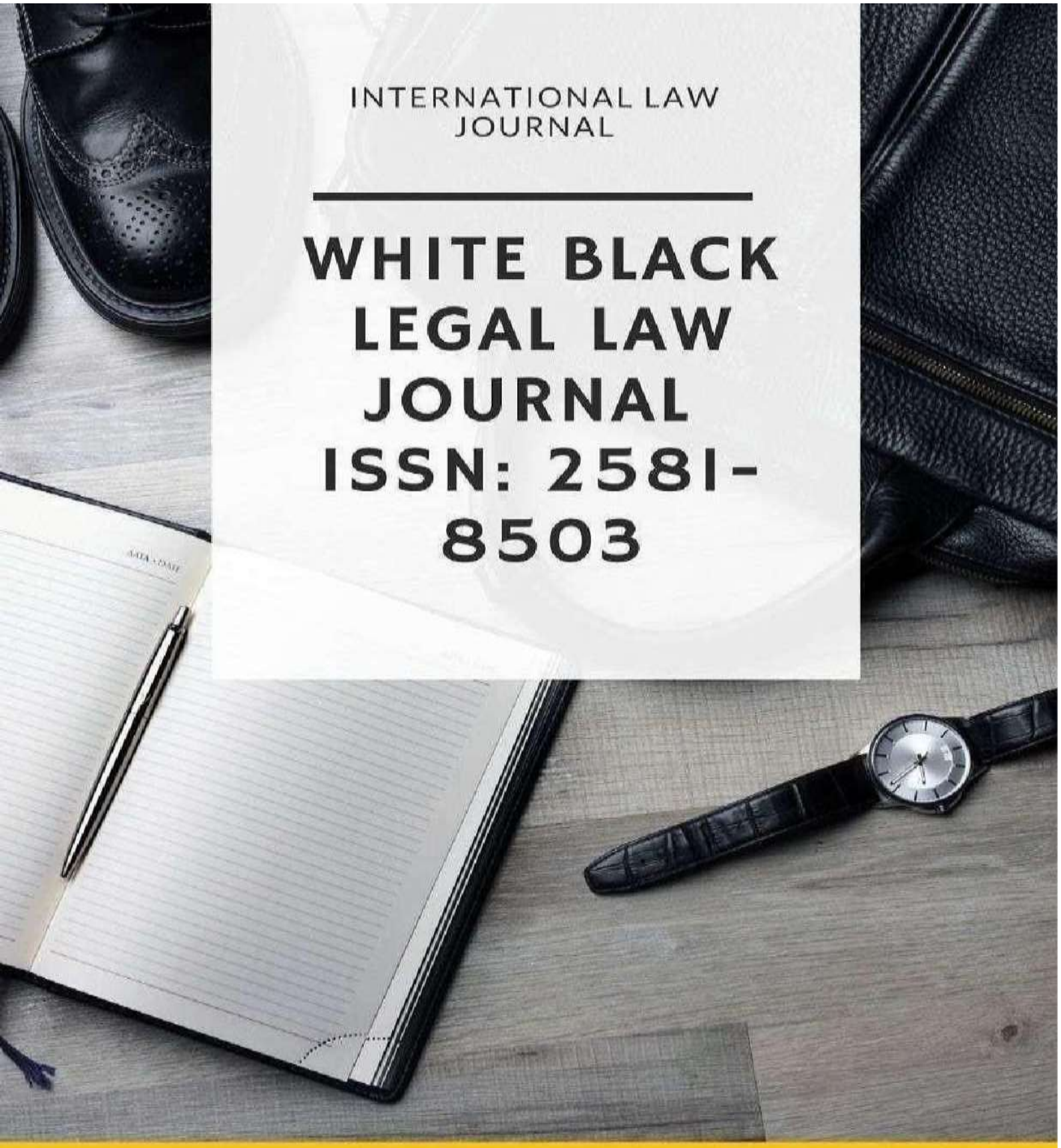

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ALTERNATIVE DISPUTE RESOLUTION – AN INEVITABLE PART OF INDIAN LEGAL SYSTEM

AUTHORED BY - R.SRIVINITHRA[1]

Abstract

With the increase in the number of disputes, the alternative dispute resolution mechanism plays a vital role in reducing the burden of the judiciary and also giving speedy redressal to the parties. Alternative dispute resolution provides the parties with an efficient and an effective methods to resolve their disputes. The various methods of alternative dispute resolution mechanisms are arbitration, mediation, negotiation, lok adalats. Though most of the people think these methods of dispute resolutions are more or less the same, these methods are different in their own way and have different enactments governing them. The latest enactment to be passed was The mediation Act, 2023. This enactment has brought in a legal frame work for mediation proceedings. With the development of technology and the facilities, parties to the dispute can also opt for online mode to resolve their disputes. With the growing popularity of alternative dispute resolutions, amendments have also been made to the existing enactments so as to facilitate alternative dispute resolution. One such instance is the consumer protection Act, 2019 which provides for the parties to opt for mediation in case of any disputes and if the dispute is not being settled in the mediation proceedings, the matter shall be subsequently moved to the respective consumer forum. With the alternative dispute resolution mechanism gaining popularity among people for its nature of being time saving and cost effective, it also helps the judiciary to reduce its burden and concentrate on the other existing cases. Though out of court settlements plays a vital role in dispute settlement between the parties, not all the disputes can be referred to arbitration, mediation or any other mechanisms. The alternative dispute resolutions also have its own limitations and the same has been mentioned in the respective enactments too. The alternative dispute resolutions are also encouraged by the judiciary and the judges have also made remarks on the working of these mechanisms and the scope of the same in the future. The alternative dispute resolution mechanisms gives the parties to a scope to settle the matters in an amicable matter which in turn helps the parties to have

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their disputes settled in a cost effective and in a much less time. With these advantages, alternative dispute resolution is preferred by the parties as against the traditional method of seeking the court for a solution to their disputes. The future of the legal system has more scope for these alternative methods of dispute resolution and lawyers too looking forward to use the alternative methods resolve the disputes between the parties. Apart from India, the alternative mechanisms are also welcomed in many other countries and various conventions are also signed with regard to these alternative dispute resolution mechanisms. The courts refer the parties to seek alternative dispute resolution so as to reach a speedy resolution of the disputes and can also reduce the burden of the courts. Thus the raising awareness about the alternative dispute resolution among the parties is a positive move to benefit both the parties and the judiciary.

Introduction

Alternative dispute resolution (ADR) is emerging as the most preferred method of dispute resolution. The reason behind the same is the fact that these dispute resolving methods have a lot of advantages compared to the cumbersome court procedures. ADR mechanism is not only beneficial to the parties involved but also reduces the burden of the court. ADR refers to a range of out of court settlement options available to the parties and each of the methods has its own advantages and procedures. ADR mechanisms are very much flexible in finding a solution to a dispute than the regular court proceedings. In the case of Guru Nanak Foundation V. Rattan Singh & Sons[2], the Supreme Court observed that expensive court procedures impelled jurists to search for an alternative forum, which is less formal more effective and speedy for resolution of disputes avoiding procedural claptrap.

Evolution and the legal status of ADR

The method of dispute resolution with the help of a third party has been practiced from time immemorial. Starting from seeking help from the elders of the family to the elders of the village, dispute resolution with the interference of a third party has been practiced for ages. Even at the global scenario, solving disputes with the help of a third person has been practiced for a long time. For example China practiced mediation from the ethics of Confucianism and Taoism. Justice Warren Burger the former Chief Justice of the American Supreme Court while discussing the importance of ADR, had observed: “The harsh truth is that we may be on our

[2] 1981 AIR 2075

way to a society over run by hordes of lawyers, hungry as locusts, and bridges of judges in numbers never before contemplated. The notion that ordinary people want black robed judges, well-dressed lawyers, fine panelled court rooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible." "The obligation of the legal profession is to serve as healers of human conflict and we should provide mechanism that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."

In the wake of British rule, the British Parliament made provisions relating to arbitration in the following regulations;-

- The Bengal regulation, 1772 made provisions for parties to the disputes relating to accounts to approach arbitration and the arbitral award passed by the arbitrator shall be the decree of the court.
- The Bengal regulation, 1781 provided that unless the arbitrator is guilty of misconduct in conducting an arbitration, the arbitral award passed by the arbitrator cannot be set aside.
- The Bengal regulation, 1787 empowered the courts to refer certain cases relating to accounts, debts, partnership to arbitration with the consent of the parties.
- The Bengal regulation, 1793 vested the courts with the power to appoint an arbitrator with the consent of the parties when the parties do not agree to appoint a person as arbitrator or the arbitrator appointed by the parties to the dispute refused to act.
- The Bengal regulation, 1813 expanded the scope of The Bengal regulation, 1793 to disputes related to land rights.
- The Bengal regulation, 1822 empowered the revenue officers to refer rent and revenue cases to arbitration

The provisions for arbitration were introduced under sections 312 – 327 in chapter VI of the Civil Procedure Code, 1859. The Arbitration Act was enacted in the year 1899 and the act was made applicable to matters which were not pending before any court. The Act did not empower the courts to refer parties to a dispute to arbitration. The Civil Procedure Code, 1908 which replaced the Civil Procedure Code,1899 dealt about arbitration under section 89. The provision was the repealed by section 49 of the Arbitration Act, 1940. On the recommendations of the

Chief Justices' conference, the Malimath Committee was constituted by the Central Government and the committee submitted its report in 1990. The committee made various recommendations including the other modes of alternative dispute resolution such as conciliation mediation. Over the span of time, the enactment relating arbitration has been repealed by subsequent enactments and the current legislation governing arbitration is The Arbitration and conciliation Act, 1996. The UNCITRAL Model Law acted as a model to the new Arbitration and Conciliation Act, 1996. The New enactment compiles the law relating to arbitration and conciliation.

Based on the recommendations of the Law Commission and The Malimath Committee, the new section 89 was included in the Civil Procedure Code by section 7 of The Civil Procedure Code (Amendment) Act,1999 but the amendment was brought into force on 01/07/2002. The new section 89 under The Civil Procedure Code refer to five different types of alternative dispute resolution mechanisms namely

- Arbitration
- Conciliation
- Judicial settlement
- Lok Adalat
- Mediation

From the above methods of ADR, arbitration is adjudicatory in nature whereas the other modes of ADR are non adjudicatory. Arbitration and conciliation is governed by the Arbitration and Conciliation Act, 1996, Lok Adalat is governed by section 20 of the Legal services Authorities Act, 1987 and for judicial settlement the court shall refer to a suitable institution or person and such person shall be deemed to be a Lok Adalat and the provisions of the Legal Services Authorities Act will be applicable. Until recently mediation was not governed by any specific enactment and the court may prescribe rules and procedures as it felt deemed fit. The Mediation Bill, 2021 received the President's assent on 15/09/2023. Therefore, mediation is governed by the Mediation Act, 2023.

Arbitration, Conciliation, Judicial Settlement, Lok Adalat and Mediation - Applicability

The 222nd Law report has discussed the importance and the need for the ADR mechanisms to reduce the burden if the courts as well help the parties for a speedy disposal of their cases.

Along with the fact that ADR mechanisms are time saving, these methods of dispute resolution are also cost effective and help to reach a solution to the disputes easily. The Supreme Court has summarised the evolution of the Arbitration and Conciliation Act, 1996 in the decision of Konkan Railway Corporation Ltd Vs. M/s Mehul Construction Co[3]. ADR mechanisms though having its own limitations, is used to derive an amicable settlement in various matters including consumer disputes, family matters, commercial disputes etc. Section 89 of the Civil Procedure Code, 1908 reads as "where it appears to the court that there exists elements of a settlement". The provision clearly stated that the matters which are suitable for an amicable settlement can only be referred to ADR and not otherwise. At the outset, there is a misconception that these three methods of dispute resolution are one and the same but in reality, they are different from each other. A reference can be drawn to the case of Alcons Infrastructure Ltd. Vs. Varkey Construction Co[4]. in which the Supreme Court has summarised the procedure to be adopted by a court under section 89 of the Civil Procedure Code. In a nut shell, the following procedure must be followed by a court while applying section 89 of the Civil Procedure Code.

- Once the pleadings are completed, before the issues are framed, the court shall acquaint itself with the facts of the case and the nature of the dispute between the parties.
- The court shall verify if the dispute is fit to be referred to ADR. If the dispute does not fall under the category of suits that can be referred to ADR, the court shall record the reasons for the same and proceed with the framing of the issues.
- If the dispute is of the nature that can be referred to ADR, the court shall explain the parties to the dispute with the five methods of alternative dispute resolution mechanisms mentioned under section 89.
- The court shall ascertain the willingness of the parties to submit the dispute before arbitration and shall also explain the procedure and cost involved in the arbitration. If the parties are not willing to submit the dispute for arbitration, the court shall explain the procedures involved in the other methods of alternative dispute resolution and refer the parties to the dispute to the same for an amicable settlement of the dispute.
- If the ADR fails, the court will continue with the case.

Disputes that are suitable for alternative dispute resolution

In Alcons Infrastructure Ltd Vs.Cherian Varkey Construction Co, the Supreme Court held that

[3] AIR 2000 SUPREME COURT 2821
[4] 2010(3) Arb LR 116(SC)

the following categories can be settled through ADR ;-

The disputes that can be referred to ADR can be broadly classified into 4 major categories

1. All cases related to business, trade, commerce -

Disagreements arising out of a contract, performance of specific acts

- Disputes arising between a bank and its customers
- Disputes relating to real estate
- Disputes between landlords and tenants
- Disputes relating to marriages, maintenance, custody of children
- Disputes related to the partition of property
- Disputes among partners relating to partnership

2. All cases arising out of soured relationships -

- Disputes relating to marriage, child custody, maintenance.
- Disputes related to partition of property
- Disputes among partners

3. Cases in which there is a need for a resolution without altering the previous relation –

- Disputes between neighbours, employers, and employees
- Disputes between people living in societies.

4. Cases relating to tortious liability.

If the parties directly approach any of the ADR methods, there is no requirement for the seal of the approval of the court or the enforcement of the arbitral award or the settlement agreement. If the parties to the dispute submit their disputes to ADR by the reference of the court, then the award must be placed before the court for recording and disposing in its terms.

Arbitration

This is the process in which a third party namely an arbitrator(s) is appointed by the parties to the dispute to decide upon the matter. In the case of State of Jammu & Kashmir Vs.Dev Dutt Pandit[5], the Supreme Court observed that arbitration is an important ADR process which is to be encouraged.

[5] Arb WLJ 704

The parties can submit their dispute to arbitration if there exists an arbitral agreement or an arbitral clause which mentions that the parties can solve their disputes through arbitration. In the absence of such arbitral agreement or arbitral clause, the parties to the dispute can submit their dispute to arbitration when the court refers the dispute to ADR under section 89 of the Civil Procedure Code. The arbitral award passed by the arbitrator is binding on the parties. The arbitral award is executable as a decree of court under section 36 of the Arbitration and Conciliation Act, 1996.

The Arbitration and conciliation Act, 1996 governs and lays down the procedures required for the smooth conduct of the arbitration proceedings. The enactment provides for the appointment of the arbitrator, the number of arbitrators, the powers vested on the arbitrator. The Act also provides for the provision for the removal of the arbitrator if the parties find the arbitrator to be biased or if the arbitrator failed to discharge his duties. Arbitration is a more formal process compared to other modes of ADR mechanism. The parties to the arbitration have a less control over the outcome of the arbitral proceedings. The arbitrator decides upon the dispute and passes an arbitral award and the same is binding on the parties to the dispute. There are several different types of awards that can be passed through arbitration namely interim award, partial award, consent award, performance award, draft award, final award. In 2019, the amendment to the Arbitration and Conciliation Act, 1996 mandates the establishment of the Arbitration Council of India (ACI) under section 43B of the Act. As per section 43C of the Act, the ACI shall consist of the following members;-

- The ACI shall consist of a chairperson who has been the judge of Supreme Court or a the Chief Justice or a judge of a High Court or anybody who got special knowledge in the administration of arbitration. The Chairperson will be appointed by the Central government of India in consultation with the Chief Justice of India.
- A member, who is an eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the central government.
- A member, who is an eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the central government.
- A Member, ex officio who is a secretary to the government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary.

- A Member, ex officio who is a secretary to the government of India in the Department of Expenditure, Ministry of Finance, or his representative not below the rank of Joint Secretary.
- A part time member who is a representative of a recognised body of commerce and industry chosen on rotational basis by the Central Government.
- Chief Executive Officer – Member – Secretary, ex officio.
- The chairman and other members have a tenure of 3 years.

Conciliation

Conciliation is the process by which the disputes between the parties are settled through a third party namely the conciliator. The conciliator acts as an unbiased third party who helps to arrive to an amicable settlement to the dispute. The main difference between arbitration and conciliation is that conciliation is much flexible compared to arbitration. Conciliation is consensual in nature and helps the parties in settling their disputes mutually. A conciliator can meet or communicate with the parties to the dispute either together or meet each one if them separately. The conciliator may invite the parties to meet him or may communicate with them orally or in written[6]. *In the HALSBURY"S LAWS OF ENGLAND, the terms arbitration and conciliation have been differentiated as under: "The term „arbitration" is used in several senses. It may refer either to a judicial process or to a non judicial process is concerned with the ascertainment, declaration and enforcement of rights and liabilities, as they exist, in accordance with some recognized system of law. An industrial arbitration may well have for its function to ascertain and declare, but not to enforce, what in the parties, and such a function is non- judicial. Conciliation is a process of persuading parties to reach agreement, and is plainly not arbitration; nor is the chairman of conciliation board an arbitrator"*. Conciliation is also governed by the arbitration and conciliation Act, 1996. The enactment lays down the procedure for the appointment of the conciliation, the number of conciliators and the procedure to appoint and the role of the conciliators. The conciliators may be retired judges, senior advocates or even non lawyers with expertise in the subject matter. The settlement agreement from a conciliation is enforceable like a court decree under section 74 read with section 30 of the arbitration and conciliation Act,1996. In the case of Haresh Dayaram Thakur Vs. State of Maharashtra and ors[7], the court observed that a conciliator is a person who is to assist the

[6] Sarvesh Chandra in his article – ADR: Is conciliation the best choice.
[7] AIR 2000 SC 2281

parties to settle the disputes between them amicably.

Judicial Settlement –

ADR Rules framed by Allahabad High Court define judicial settlement under Rule 2(g) as follows: 2(g) "Judicial Settlement means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the Legal Service Authority act, 1987 (39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the provisions of that Act."

Lok Adalat

The term lok Adalat is comprised of two words Lok which mean people and Adalat which means court. So, Lok Adalat means people's court. Lok Adalat settles the dispute among the parties by adopting the principles of justice and equity. In India, Lok Adalat has been prevailing from ancient times. Lok Adalat seeks to bring an amicable settlement between the parties to the dispute. In the year 1980, under the chairmanship of Hon. Justice Bhagawati , Former Judge of Supreme Court, a committee known as CILAS (Committee for Implementing Legal Aid Schemes) was formed to supervise legal aid programmes throughout the country. Sections 19 – 22 of the Legal services authorities Act deals with Lok Adalat. Lok Adalat shall consists of a chairman who must be a sitting or retired judge, two members who are lawyers and a social worker. The levels of Lok Adalats are name the State Authority level, the High Court level, District level and Taluk level.

The court can refer the cases to Lok Adalat when it is satisfied that the matter is appropriate one to be taken cognizance of by Lok Adalat. Cases that are pending before any court or the cases which have not come before the court can fall within the jurisdiction of Lok Adalat. However, the cases relating to non – compoundable offences cannot be referred to Lok Adalat.No court fee is to be payable when a matter is filed in a Lok Adalat. In the cases where the case was referred to Lok Adalat by courts and the disputes got an amicable settlement in Lok Adalat, the court fee which was originally paid by the parties shall be refunded. In case, the parties could not arrive to a settlement through Lok Adalat, the case will be sent back to the court that made the reference to Lok Adalat. The award passed by Lok Adalat shall be final and binding on the parties and the award is deemed to be a decree of a court under section 21

of Legal services authorities Act, 1987.

Permanent Lok Adalat

Permanent Lok Adalat shall be established by the National Legal Services Authority or State Legal Services Authority under section 22 B of The Legal Services Authorities Act, 1987. Permanent Lok Adalat has both conciliatory and adjudicatory power[8]s. Permanent Lok Adalat consist of a chairman and two other members. They exercise jurisdiction over pre – litigation conciliation and settlement matters relating to public utility services in section 22A (b) of Legal Services Authorities Act, 1987. The section defines transport service for the carriage of passengers or goods by air, water, or road, or postal services, supply of power, light, water etc. Either of the parties to the dispute shall make an application to Permanent Lok Adalat to attain an amicable settlement to the dispute. The parties cannot invoke the jurisdiction of a court once an application has been made to the Permanent Lok Adalat. The award of the Permanent Lok Adalat is final and binding on the parties to the dispute. In the case of Moni Mathai Vs. Federal Bank Ltd[9], the court observed that every award made by the Lok Adalat is binding on the parties and there lies no appeal against the award passed. However, if there is any patent illegality, error of law or jurisdiction or there has been any violation of any Act or rules or any principles natural justice, the High Court can interfere under Article. 226 of the Constitution of India. In the case of Life Insurance Corporation of India Vs. State of Rajasthan[10] observed that the Permanent Lok Adalat can decide a dispute relating to public utility services even if the parties failed to reach an agreement and under section 22 C(8), Permanent Lok Adalat is vested with the power to decide dispute on merit.

Mediation

Mediation is the method of dispute resolution where in the parties get their disputes settled with the help of a third party called the mediator. According to Harvard Law School professor emeritus Frank E. A. Sander: Mediators can help disputants break an impasse in the following ways;-

- Finding additional information that parties were unwilling to share with each other;
- Overcoming parties' resistance to communicating and reaching an agreement by presenting offers to both sides;

[8] Inter Globe Aviation Ltd Vs. N.Satchinand 2011(3) Arb LR 1 (SC)
[9] 2003 (7) ILD 92 (Ker)
[10] AIR 2005 Raj 65

- Contributing impartial, specialized expertise; and
- Brainstorming options to find a resolution that satisfies both parties

Mediation is conciliatory in nature. Under the Chairmanship of Hon'ble Mr. Justice R.C.Lahoti, the then Chief Justice of Supreme Court of India, Mediation and Conciliation Project Committee was constituted. The committee was later headed by Hon'ble Justice Mr. N.Santhosh Hedge. A trial project on mediation was initiated in Delhi in August, 2005. The project trained a batch of senior Additional District Judges in mediation in a 40 hours duration. Judicial mediation was started by the mediators in the end of August 2005.

The mediation Act, 2023 governs the procedure of mediation. Under the Act, mediation includes pre litigation mediation, online mediation, community mediation. The Act provides of the matters that can be settles through mediation, the number of mediators, the mode of appointment of mediators, the mode and the place of mediation. The Act also specifies the commencement of the proceedings. The Mediation Act, 2023 specifies that the mediation should be concluded within a period of 120 days, if a settlement is arrived with in the prescribed period, the mediation proceedings can be extended to an additional period of 60 days if the parties give their consent. The enactment provides that the mediator shall be unbiased in addressing the dispute and maintains confidentiality. If the parties to the dispute reach an amicable settlement through the mediation proceedings, the points of agreement shall be written down as a mediated settlement agreement which shall be signed by both the parties and authenticated by the mediator. The mediated settlement agreement shall be final and binding on the parties and the same shall be executed like a decree of court. The mediated settlement agreement can be challenged before a competent court within a period of 90 days from the date of receipt of the mediated settlement agreement. In case the mediation does not lead to a settlement within the stipulated time, the mediator has to prepare a non – settlement report. The signed copy of the same shall be shared with the parties and also be submitted to the Mediation Service Provider in case of institutional mediation. The Act provides for the establishment of the Mediation Council of India. The council shall maintain a register of mediators, regulate mediation institutions.

Conclusion

The law relating to Alternative dispute resolution has seen a lot of developments over the span of years. The enactments provide a legal framework to the different kinds of ADRs. With the

increase in the number of disputes and the over burdening of the courts, the ADR mechanisms act as a tool to reduce the burden of the courts and also facilitates the speedy redressal to the parties to the dispute. The ADR mechanisms are playing an important role in dispute resolution and has become an inevitable

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