CHAPTER- IX

PARADIGM SHIFTS IN DISPUTE RESOLUTION IN INDIA: A JOURNEY FROM ADVERSARIAL SYSTEM TO ALTERNATIVE DISPUTE RESOLUTION

India being a welfare state must ensure that three organs of the government work in consonance in order to prioritise the welfare of people. The judiciary steps in in the legal system only when any dispute arises. However, the Indian judiciary is infamous for being clogged with cases. Therefore, it becomes imperative that the justice delivery system is changed keeping pace with the dynamic nature of law and the changed requirement of the society. Delay in pronouncement of judgments by the judiciary is mainly because of inadequate number of judges compared to the growing number of litigation each day.

Therefore, Alternative Dispute Resolution is becoming a preferred mode of dispute resolution other than the traditional system in India. However, A.D.R. in India is still a nascent mechanism and requires wider application in resolving disputes. A.D.R. is that alternative mechanism to the traditional system which addresses issues like delay in delivery of judgment and overcrowding of the judiciary due to end number of litigations. Moreover, A.D.R. helps disputing parties to come to a consensus where it is possible.

COURT ANNEXED OPTIONS- Court-annexed alternative dispute resolution is arbitration, mediation and conciliation where the parties could reach to an acceptable resolution with the help of the third party. In case of arbitration the court can intervene if either of the parties does not abide by the arbitral award. The reason for opting court-annexed A.D.R. is that it saves both cost and time and a better substitute of litigation providing speedy access to justice.

COMMUNITY BASED DISPUTE RESOLUTION MECHANISM- This system of dispute resolution is different than court-annexed option and is separated from formal court system.

In India the origin of alternative method of dispute resolution could be traced back to the establishment of Lok Adalat (popularly known as People's Court). Lok Adalat is

undoubtedly a significant and innovative Indian contribution to the world jurisprudence, Lok Adalat is a system where parties could reach to an agreement with the help of methods like negotiation, conciliation without too much of emphasis upon legal technicalities.

With the passage of time the alternative method of dispute resolution becomes more organised and systematic. For example, if parties intend to resolve dispute through arbitration then the same has to be mentioned in the contract or agreement in the form of 'Arbitration Clause'. The Arbitration Clause shows that from the very beginning the parties intended to resolve the dispute outside the court through negotiation.

Mediation has also gained popularity in the field of out of the court settlement. In mediation the mediator assists the disputing parties to reach a consensus and find a resolution. The settlement is made by the parties depending on the alternatives suggested by the mediator. However, in conciliation the conciliator's role is of a more active nature and the conciliator acts as an advisory to the disputing parties. While mediation and conciliation are informal process of dispute resolution, arbitration is a formal process the arbitral award is binding upon the disputing parties.

INDIAN LEGAL FRAMEWORK ON ALTERNATIVE DISPUTE RESOLUTION- There are specialised legislations governing alternative method of dispute resolution. These legislations are the Arbitration and Conciliation Act, 1996 and the Legal Services Authorities Act, 1987. However, there are other legislations which have mentioned alternative dispute resolution as dispute resolution mechanism in specific sector. The Industrial dispute Act, 1947 has statutorily approved conciliation to resolve any labour dispute within industry. Section 5,6, 9 of the Family Court Act, 1984 provides that the government must encourage despairing parties to arrive at any settlement through Social Welfare Organization[1].

Access to justice is one of the most significant human right and has been elevated to the level of fundamental rights through several cases like *Hussainara Khatoon* v. *State of Bihar*.[2] Alternative Dispute Resolution has been seen as the most viable option to enable justice from amongst all the methods of enabling justice. However,

[1] Family Court Act, 1984

[2] *Hussainara Khatoon* v. *State of Bihar* AIR 1979 SC 1360.

abuse/ misuse of alternative method of dispute resolution is likely to happen when such alternate method is enforced upon by any institution.

The purpose of alternate method of dispute resolution is to provide disputing parties a common ground which eventually helps them reach consensus. Resorting to alternate method of dispute resolution is to avoid judgments delivered by the court which eventually is enforced. In this backdrop parties often do not choose arbitration because the same must arise out of contractual obligation of the parties. In case of conciliation the parties are directed towards the settlement by the conciliator who acts as an advisor. However, in mediation parties get more autonomy compared to arbitration and conciliation. Therefore, mediation has gained popularity as alternate method of dispute resolution.

SUPREME COURT CASES THAT COULD HAVE BEEN SETTLED THROUGH A.D.R.

Time and again it has been discussed that the Indian judiciary is overburdened with litigations and that in turn contribute to unexpected delay in judgments. In litigation often there can be found a party which thinks that his/her side has not either been properly represented or heard and understood by the judiciary. This feeling of being discriminated often led to demonstration and protest against any judgment delivered by the Apex Court of India.

Protest was carried out post the judgment of *Mohd. Ahmad Khan* v. *Shah Bano Begum*[3]. Finally the Muslim Women (Protection of Rights on Divorce) Act, 1986 altered the judgment delivered in Shah Bano case. In Shah Bano case the Supreme Court of India had to deal with the responsibility of Muslim husband to pay maintenance to his divorced wife beyond iddat period. It was held in this case that a Muslim husband can not deny his liability to maintain his divorced wife until she gets remarried. Therefore, in absence of payment of maintenance a divorced Muslim wife can always bring a suit under section 125 of Cr. P.C. Alteration of amount of maintenance could only be done under section 127 of the Cr.P.C. when the Muslim husband could prove that he has already paid adequate amount of money as maintenance or is paying enough money as maintenance. However, the Court also

[3] *Mohd. Ahmad Khan* v. *Shah Bano Begum* AIR 1985 SC 945.

clarified that 'mehr' can never be regarded as maintenance as the amount of 'mehr' is so less that it can never be adequate to maintain a divorced Muslim wife.

The issue of maintenance to divorced wife by the husband is a matter of Muslim personal law which was decided by the Supreme Court of India. Post the pronouncement of the judgment Parliament's enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986 definitely undermined the judgment delivered by the Apex Court. However, this situation could have been avoided had the issue been settled through alternate dispute resolution. Mediation as an alternative dispute resolution would have helped as in such case the disputing parties could come to a consensus. In this case the Muslim Personal Law Board question the authority of the Court to interpret the religious texts. However, the same could have been avoided had the court referred the case to be resolved through mediation.

Mediation provides disputing parties an opportunity to be in control of the settlement. The mediator in this case could be appointed either by the parties or by the Apex Court.

Since the issue of maintenance to divorced Muslim wife was not resolved satisfactorily in Shah Bano case and subsequently through the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, the same issue was again raised in *Daniel Latifi* v. *Union of India*[4]. In this case the validity of the Act of 1986 was challenged. However, the five judges Bench of the Supreme Court upheld the validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986, but observed that the liability of Muslim husband to pay maintenance did not end as soon as iddat period is over. Therefore, the husband was required to maintain his divorced wife beyond iddat period with reasonable and fair amount as maintenance.

Therefore, the factor giving rise to the disputes in aforementioned cases is conflict of interest. Human being often become more concerned about their own interest and completely ignore the interest of others, hence, the emergence of dispute become natural. History has recorded three types of dispute resolution, the first being resolution by force, the second is through formal adjudication and the third one is amicable settlement of dispute. In India, today, the first option of dispute resolution has been completely obsolete and the second option of resolution is widely used while

[4] *Daniel Latifi* v. *Union of India* (2001) 7 SCC 740.

the third option i.e. resolution through alternative method is largely unexplored compared to the second option i.e. formal adjudication. Informal method i.e. the alternative method of dispute resolution tries to settle the dispute by uprooting the conflicting interest. Litigation, on the other hand, ends in determination of issues which only bars further litigation on such matter. Therefore, in informal method of dispute resolution the settlement of dispute is completely left on disputant. Shariah has provided two modes of dispute resolution in amicable way i.e. i. *tahkim* which means resolution through arbitration, and

ii. *Sulh* refers to the non-adjudicatory techniques of dispute resolution. This includes lesser known methods of alternative dispute resolution i.e. mediation, conciliation, negotiation, family group conference etc.[5]

Another area of conflicting interest is reservation in educational institution and government employment for under-represented and/or unrepresented Indian population. The state in order to uplift the underrepresented and unrepresented in the society introduced 'Affirmative Action'. Affirmative action is a policy where the race, sex, colour, religion and nationality is considered to increase the opportunity provided to an underrepresented and/ or unrepresented strata of the society. In India several cases have been filed because of State's affirmative action which the other section of the society thought to be discriminatory. In these cases it is more important to resolve the issues amicably and by bringing parties into a common platform than enforcing upon a judgment.

In *T. Devdasan* v. *Union of India*[6] the issue was whether 'carry forward' rule in matters related to vacancy for reserved category was constitutional. Another significant question in this case was that what should be the permissible extent of reservation for reserved category. In this case four judges (the majority view of five judges Bench) observed that in any given year the reservation for reserved category could not exceed 50%. Therefore, the majority view was that since carry forward rule exceeded the total percentage of reservation, the rule was unconstitutional. However, the same issue arose again in 1981 in *Akhil Bhartiya Karmchari Soshit Sangh* case.

[5] Qazi Attaullah, & Lutfullah Saqib, 'Mediation: Application and Functioning under Shariah and Law', 56 (3/4), Islamic Research Institute (2017), 245-266.
[6] *T. Devdasan* v. *Union of India* AIR 1964 SC 179.

In *Akhil Bhartiya Karmchari Soshit Sangh* v. *Union of India*[7] the notification of recruitment in vacant posts reserved for Scheduled Castes and Scheduled Tribes by the Railway authority was challenged. The 'carry forward' rule was also challenged as the Railway Administration increased the 'carry forward' rule from 2 years to 3 years. The three judges Bench of the Supreme Court decided that there was no strict rule laying down the permissible extent of reservation for a year. This judgment was completely opposite of what was laid down in *T. Devadasan* case in 1964.

In *K.C. Vasanth Kumar* v. *State of Karnataka*[8] the issue of reservation was raised again. In this case the five judges Bench observed that 'means test' to be inducted to find out the extent of backwardness in order to separate the privileged one from underprivileged.

Thus, in three cases involving similar issues have three different judgments. This situation could have been avoided if it was settled with the help of mediation. These three cases are the examples where the Supreme Court could have referred these cases to be settled through alternate method of dispute resolution. The mediation proceeding could have been initiated between the petitioner (party aggrieved due to reservation policy) and representative of the government. Mediation would have helped parties to come to a consensus and understand the stand of each other. The settlement through mediation, unlike arbitral award, is not binding and if the mediation is not successful then the parties can resort to the formal system of court procedure.

In the United States of America use of Alternative Dispute Resolution for enhanced measures and increased effectiveness in environmental cases is a part of greater A.D.R. movement starting in 1970. In U.S.A. alternative dispute resolution is used to settle environmental disputes which is known as Environmental Conflict Resolution or ECR. Significant characteristics of ECR are-

i. Voluntary participation,
ii. Ability of parties to withdraw from the ECR process,
iii. Direct participation in ECR process,
iv. Use of neutral party with no-decision making authority,
v. Formulation of solutions and outcomes by the parties.

[7] *Akhil Bhartiya Karmchari Soshit Sangh* v. *Union of India* AIR 1981 SC 298.
[8] *K.C. Vasanth Kumar* v. *State of Karnataka* AIR 1985 SC 1495.

This conflict resolution process clearly shows that the United States of America prefers to settle environment related issues through informal process. India, despite having a large number of litigations involving environment related issues, has not preferred informal process of dispute resolution.[9] This means that India is still far away from applying A.D.R. method to settle environmental conflict. Nevertheless, some of the significant environmental cases in Indian legal regime are discussed hereinafter which could have been referred for settlement through informal method especially through mediation.

Environmental law jurisprudence in India was developed post 1980 because of two cases i.e. the Bhopal gas leak case[10] and the Sriram Food and Fertilizers case[11]. Post Bhopal gas leak case the Indian legal system realised that the Indian legal framework fell short of protecting its environment. Thus, the Sriram Foods and Fertilizers case paved the way for a new principle in environmental law jurisprudence i.e. Absolute Liability principle. The absolute liability principle holds a person liable for environmental pollution absolutely. Unlike the strict liability the absolute liability does not have any exception. Therefore, a person while enjoying his/her property must ensure utmost protection to the environment. However, the evolution of this new principle did not change the conventional method of dispute resolution. Thus, victims were largely overlooked or were not made part of the settlement process.

Union Carbide (India) Ltd., a sister concern of an MNC i.e. Union Carbide Ltd, owned and based in Bhopal. On the intervening night of 2nd and 3rd December, 1984 MIC gas (Methyl Isocyanate), a dangerous toxic gas, escaped from the tanks where it was kept. Due to the escape of this gas about 4000 people lost their lives and about 10,000 were affected to various degrees of seriousness. While the suit regarding this was pending the Indian Government enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. This Act was enacted to provide compensation to victims of Bhopal gas tragedy. However, this Act also enabled the Indian Government to file suit against the Union Carbide Corporation on behalf of victims. Section 3(1) of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 empowered the

[9] Joseph. A. Siegel, Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use, 24 (1), *Pace Envt. L. Rev*. (2007) 187-209.
[10] Union Carbide Corporation v. Union of India & Ors 1989 3 SCR 128.
[11] M.C. Mehta v. Union of India AIR 1987 SC 1086

Central Government acting as *parens patriae*[12] to represent victims of Bhopal gas tragedy in any suit having this cause of action. *Charan Lal Sahu* v. *Union of India*[13] questioned the validity of Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The petitioner challenged the enactment of the Act of 1985 and the taking away of right to represent by the victims themselves. The Supreme Court in this case observed that the Government of India was capable of representing the Bhopal gas tragedy victims in any suit.

However, this judgment did not go well with the victims who wanted to represent themselves and put their plea during settlement of the dispute. Keeping this situation in mind this case could have been referred for mediation. Nevertheless, the same was not sent for alternative method of resolution. In this context it has to be remembered that sending any dispute for informal method of dispute resolution does not mean the removal of the jurisdiction of the Court. If the matter could not be resolved through alternate method of dispute resolution, then the same could be sent back to the Court for settlement. In this case the Court did determine the rights of parties once and for all, but the decision of the Court was not welcome by the victims, probably because of two reasons,

a. Victims did not represent themselves in the case, and
b. Victims never came to consensus before settlement of the dispute.

In Sriram Food and Fertilizers case[14] is also about leakage of deadly gas in Sriram Food and Fertilizers. This incident happened immediately after the Bhopal gas leak tragedy which had already left the Supreme Court of India in dilemma regarding deciding the liability of the wrongdoer. Because of the experience regarding lack of legal framework in the field of liability in environmental pollution the Supreme Court of India introduced a new principle in environmental law jurisprudence which is known as absolute liability. Absolute liability imposes absolute liability upon an individual engaged in inherently any hazardous or dangerous activity and such activity caused environmental pollution. The introduction of this principle is no doubt significant in environmental law jurisprudence in India.

[12] Parens patriae means the principle that political authority carries with it the responsibility for such protection.
[13] *Charan Lal Sahu* v. *Union of India* AIR 1990 SC 1480.
[14] *M.C. Mehta* v. *Union of India* AIR 1987 SC 1086

Nevertheless, the judicial determination of issues related to environmental law violation was not proportional to the increasing numbers of environmental laws violation incidents. However, the environmental law cases were not referred for alternative method of dispute resolution. The environmental law cases are perfectly fit for reference to informal method of dispute settlement because the polluter and the victim must negotiate and come to an agreement regarding dispute settlement of the same. If the issue could not be resolved through informal method then the same can always be sent back to be judicially determined.

Another instance of failed attempt of mediation is Ayodhya dispute. This is a land dispute between two religious groups in India. the dispute dates back to1949 when the idol of a Hindu deity i.e. Ram Lalla was placed under the central dome of the disputed land. This incident soon took the shape of political dispute because of the following reasons-

a. Indian Muslims claimed that the disputed land belonged to them because Mir Baqi, commander of Mughal emperor Babur, built the Masjid on that land,
b. Hindus claimed Ayodhya as the Ram janmabhoomi and the structure of mosque was built by demolishing the temple of Ram Lalla, a Hindu deity.

After the dispute reached the local court for settlement, the local court in 1986 ordered the government to open the land for Hindu worship. The Allahabad High Court in 1992 also ordered to maintain the statua quo. M. Ismail Faruqui then filed a petition against the decision of the order of the High Court of Allahabad which was later on transferred to the Supreme Court of India.[15] The majority judgment in this case ordered the government to maintain the status quo. Nevertheless, this issue again arose in 2010 before the High Court of Allahabad and an appeal was filed before the Supreme Court of India where the issue was division of the disputed land between claimants. In 2011 the dispute was not determined satisfactorily which gave rise to several petitions in 2018 to the Supreme Court of India requesting it to revisit and settle the Ayodhya dispute.

The five judges Bench of the Supreme Court of India referred the dispute before mediation panel consisting of Justice Kalifulla, Retired Supreme Court judges, Ravi Shankar, a spiritual leader and Senior advocate Sriram Panchu. However, the attempt

[15] M. Ismail Faruqui v. Union of India AIR 1993 SC 605.

of mediation was not successful as the disputing parties could not be brought on the negotiating platform. Thus, the dispute was sent back to the Constitutional Bench of the Supreme Court for judicial determination.

The lack of interest between disputing parties of Ayodhya dispute remained a non-starter for mediation process till March, 2019. Finally the judgment was delivered by the Supreme Court of India in November, 2019. This showed the situation and/ or acceptance of informal method of dispute resolution in India. One of the significant reasons of not referring disputes to be settled through mediation is the non-acceptance of it by disputing parties. It is definitely not that the parties reject informal method, but in India a large number of litigators are still unaware that their disputes could be resolved through informal method of dispute resolution. Therefore, in India disputants are still heavily relied on litigation as the primary method of dispute settlement. Amongst the several shifts happened in Indian legal system, the shift from litigation i.e. adversarial system to alternative dispute resolution did not take place yet.