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A Critical Study of Alternative Dispute Resolution (ADR) in the Code of Civil Procedure, 1908

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Abstract:- Man is rational human being. Everywhere he searches the peace and keeps himself apart from disputes any kind. Discords are bound to arise in society and ingenious human minds have always devised ways and means for resolution of conflicts. The phenomenon, law, itself can be seen as a result of the quest to address potential problems. Nature has endowed people with rationality and they have constantly attempted to discover methods of establishing a cohesive society. Dispute resolution is one of the major functions of a stable society. Through the medium of the State, norms and institutions are created to secure social order and to attain the ends of justice or the least to establish dispute resolution processes. States function through different organs and the judiciary is one that is directly responsible for the administration of justice. In common place perception judiciary is the tangible delivery point of justice. Resolving disputes is fundamental to the peaceful existence of society. Therefore, effective and efficient systems for determination of disputes become an obvious appendage. For this end the ADR mechanism is introduced in the Code of Civil procedure 1898. This paper critically analyzes the development, categories, functional procedures, present prospects, conditions and weakness of ADR and also provides some recommendation for challenging the coming issues.

Kew words: *Critical, Study, ADR, Code of Civil Procedure*

I. INTRODUCTION

The proliferation and pendency of litigation in Civil Courts for a variety of reasons has made it impracticable to dispose of cases within a reasonable time. The overburdened judicial system is not in a position to cope up with the heavy demands on it mostly for reasons beyond its control. Speedy justice has become a casualty, though the disposal rate per-Judge is quite high in our country. The need to put in place Alternative Dispute Resolution (ADR) mechanisms has been immensely felt so that the courts can offload some cases from their dockets. The ADR systems have been very successful in some countries, especially USA wherein the bulk of litigation is settled through one of the ADR processes before the case goes for trial.The Constitution of Bangladesh enjoins that 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, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent Judiciary within a reasonable time are the cherished goals of our Constitutional Republic and for that matter, of any progressive democracy.

II. DEVELOPMENT OF ADR IN THE CODE OF CIVIL PROCEDURE 1908

In our country many civil suits are filed in the regular court but according to the proportion of the of the filing suit very small amount of suits are dismissed by the court as a result the court becomes the overloaded place with the suits. The suits which are decided by the courts again go to the appellate court if the other party is not satisfied. Besides this the aggrieved party has the right to apply for review and revision. It takes a lot time to dismiss a suit finally; apparently 20/30 years[3].To recover from this situation, historical step is taken to introduce ADR in the code of civil procedure 2003 by inserting the section 89A and 89B. In 2003 section 89A and 89B empowers the trial court to settle the dispute by ADR. Again in 2006 a new amendment is brought to provide this power to the Appellate court by section 89C.

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Procedure of Mediation under section 89A of the Code of Civil Procedure 1908
Definition of mediation under this section
"Mediation" under this section shall mean flexible, informal, non-binding, confidential, non-adversarial and consensual dispute resolution process in which the mediator shall facilitate compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise[4].

III. FUNCTION OF THE COURT AFTER FILLING THE SUIT BY THE PLAINTIFF

Section 89A(1) provides that except in a suit under the ArthaRinAdalatAin, 1990 (Act No. 4 of 1990), after filing of written statement, if all the contesting parties are in attendance in the Court in person or by their respective pleaders, the Court may by adjourning the hearing, mediate in order to settle the dispute or disputes in the suit or refer the dispute or disputes to the engaged pleaders of the parties or to the party or parties where no pleader or pleaders have been engaged or to a mediator from the panel as may be prepared by the District Judge under sub-section (10) for undertaking efforts for settlement through mediation.[5]

IV. APPLICATION BY THE PARTY FOR ADR

If all the contesting parties in the suit through application or pleadings state to the Court that they are willing to try to settle the dispute or disputes in the suit through mediation, the Court shall so send it to mediate or make reference under this section. In this case the court is bound to send for ADR.[6]

V. APPOINTMENT OF THE MEDIATOR

When the reference is made through the pleaders, the pleaders shall by their mutual agreement in consultation with their respective clients appoint

1. another pleader, not engaged by the parties in the suit, or
2. a retired judge, or
3. a mediator from the panel as may be prepared by the District Judge under sub-section (10), or
4. any other person whom they may seem to be suitable, to act as a mediator for settlement or
5. The court itself.[7]

VI. NON QUALIFICATION OF MEDIATOR

1. A person holding an office of profit in the service of the Republic shall not be eligible for appointment as mediator;
2. The person who acts as the advocate of the parties.[8]

VII. INCAPABILITY OF THE COURT

While referring a dispute or disputes in the suit for mediation, the Court shall not dictate or determine the fees of the pleaders and the mediator and procedure to be followed by the mediator and the parties. It shall be for the pleaders, their respective clients and the mediator to mutually agree on and determine the fees and the procedure to be followed for the purpose of settlement through mediation.[9]Provided that if the pleaders, their respective clients and the mediator fail to determine the fees, the Court shall fix the fees and the fees so fixed shall be binding upon the parties.[10]
But when the Court shall mediate, it shall determine the procedure to be followed and shall not charge any fee for mediation.[11]

VIII. TIME LIMITATION TO INFORM THE COURT OF THEIR CONSENT

The parties shall inform the Court in writing as to whether they have agreed to try to settle the dispute or disputes in the suit by mediation and whom they have appointed as mediator within ten days from the date of

[4]Section 89A (explanation) of The Code of Civil Procedure1908.
[5]Section 89A(1) of the Code of civil Procedure 1908
[6] Ibid
[7]Section 89A(2) of the Code of civil Procedure 1908
[8]Section 89A(2,provisio) of the Code of civil Procedure 1908
[9]Section 89A(3) of the Code of Civil Procedure 1908
[10]Section 89A(3,provosio) of the Code of Civil Procedure 1908
[11]Section 89A(3) of the Code of civil Procedure 1908

reference under sub-section (1). If they fail to inform the court within the fixed time which the reference will stand cancelled and the suit shall be proceeded with for hearing by the Court.[12]

But when the parties inform the Court about their agreement to try to settle the dispute or disputes in the suit through mediation and appointment of mediator as aforesaid, the mediation shall be concluded within 60 (sixty) days from the day on which the Court is so informed unless the Court of its own motion or upon a joint prayer of the parties extends the time for a further period of not exceeding 30 (thirty) days.[13]

IX. RULES AND FUNCTIONS OF THE MEDIATORS

When the mediation is completed, then the mediators have duties and liabilities those are:

1. the mediator shall without violating the confidentiality of the parties to the mediation proceedings submit through the pleaders to the court a report of result of the mediation proceedings; and
2. if the result is of compromise of the dispute or disputes in the suit, the terms of such compromise shall be reduced into writing in the form of an agreement bearing signatures or left thumb impressions of the parties as executants; and
3. Signatures of the pleaders and the mediator as witnesses and [14]
4. When the Court itself mediates, it shall make a report and passed order in a manner similar to that as stated in sub-section (5).[15]

Then the Court shall thereupon, pass an order or a decree in accordance with relevant provisions of Order XXIII of the Code.[16]

X. IF THE MEDIATION ATTEMPT IS FAILED

When the mediation fails to produce any compromise, the Court shall subject to the provision of sub-section (9) proceed with hearing of the suit from the stage at which the suit stood before the decision to mediate or reference for mediation in a manner as if there had been no decision to mediate or reference for mediation as aforesaid.[17]The proceedings of mediation under this section shall be confidential and any communication made, evidence adduced, admission, statement or comment made and conversation held between the parties, their pleaders, representatives and the mediator shall be deemed privileged and shall not be referred to and admissible in evidence in any subsequent hearing of the same suit or any other proceeding.[18] When a mediation initiative led by the Court itself fails to resolve the dispute or disputes in the suit, the same court shall not hear the suit if the Court continues to be presided by the same judge who led the mediation initiative and in that instance the suit shall be heard by another court of competent jurisdiction.[19]

XI. PANEL OF THE MEDIATOR

For the purposes of this section, the District Judge in consultation with the President of the District Bar Association shall prepare a panel of mediators to be updated from time to time consisting of pleaders, retired judges, persons known to be trained in the art of dispute resolution and such other person or persons, except the persons who are holding office of profit in the service of the Republic as may be deemed appropriate for the purpose and shall inform all the Civil Courts under his administrative jurisdiction about the panel.[20]

XII. REFUND OF THE COURT FEES

Where a dispute or disputes in a suit are settled on compromise under this section, the Court shall issue a certificate directing refund of the court fees paid by the parties in respect of the plaint or written statement and the parties shall be entitled to such refund within 60 (sixty) days of the issuance of the certificate. In this case provisions of the Court-fees Act, 1870 (Act no. VII of 1870) are not applicable.[21]

XIII. NATURE OF THE MEDIATORS' DECISION:

[12]Section 89A(4) of the Code of civil Procedure 1908
[13] Ibid
[14]Section 89A(5) of the Code of civil Procedure 1908
[15]Section 89A(6) of the Code of civil Procedure 1908
[16]Section 89A(5) of the Code of civil Procedure 1908
[17]Section 89A(7) of the Code of civil Procedure 1908
[18]Section 89A(8) of the Code of civil Procedure 1908
[19]Section 89A(9) of the Code of civil Procedure 1908
[20]Section 89A(10) of the Code of civil Procedure 1908
[21]Section 89A(11) of the Code of civil Procedure 1908

The decision of the mediator is final. It cannot be challenged by appeal and revision. As stated that no appeal or revision shall lie against any order or decree passed by the Court in pursuance of settlement between the parties under this section.[22]

XIV. MEDIATION IN THE APPELLATE STAGE

An Appellate Court may mediate in an appeal or refer the appeal for mediation in order to settle the dispute or disputes in that appeal, if the appeal is an appeal from original decree under Order XLI, and is between the same parties who contested in the original suit or the parties who have been substituted for the original contesting parties.[23]In mediation under sub-section (1), the Appellate Court shall, as far as possible, follow the provisions of mediation as contained in section 89A with necessary changes (mutatis mutandis) as may be expedient.[24]

XV. ARBITRATION

Another method of ADR is stipulated in the section 89B of the code of Civil Procedure 1908 and that is arbitration. The parties are free to choose either. in section 89B (1) If the parties to a suit at any stage of the proceeding apply to the Court for withdrawal of the suit on ground that they will refer the dispute or disputes in the suit to arbitration for settlement, the Court shall allow the application and permit the suit to be withdrawn; and the dispute or disputes, thereafter, shall be settled in accordance with Salish Ain, 2001 (Act No. 1 of 2001) so far as may be applicable.Provided that if for any reason, the arbitration proceedings referred to above do not take place or an arbitral award is not given, the parties shall be entitled to re-institute the suit permitted to be withdrawn under this sub-section.[25]An application under sub-section (1) shall be deemed to be an arbitration agreement under section 9 of the Salish Ain, 2001.[26]

XVI. THE PROBLEMS/WEAKNESSES FACING IN INTRODUCING THE ADR IN THE CPC

The ADR in the Code of Civil Procedure 1908 is totally new initiative which leads a lot problem in application of the ADR. The main problems are:

- In theCPC there is no general or specific guideline for the mediators regarding the maintenance ofequal participation and opportunity for the parties that may create serious problem in case of powerimbalance. Thereis also no explicit provision pertaining to reviewing the agreement arrived at uponconclusion of mediation undertheCPC[27]
- Further, theCPC incorporates mediation provisions at the pretrial and the appellate stage but mediation mechanism upon conclusion of the trial before the pronouncement of judgment has not beenincorporated intotheCPC. It is an established fact that the parties usually are aware of the merits oftheir case just upon conclusion of the trial. Therefore,post-trial mediation may prove to be more effective than that of the mediation at the appellate stage.
- Section 89A as it stands after the amendment in 2012 requires the court to refer the suit for compulsorymediation. If either or both the parties and their lawyers remain absent, the court has no option but to postpone the stage to another date. Again, when the parties are in attendance and the court has referredthe suit to the parties for mediation, but the parties or any of them does not appear before mediator,then the mediationis boundto fail. In this backdrop, the section does not empower the court with thetoolsto enforce the attendance of the parties. Thusthe present provision adds to the existing practiceof delay.
- Quite often it happens that after the suit has been referred to mediation any of the party does not wantto compromise and withdraws from mediation without assigning any reason in which case a mediatorhas no other option but to report the court about the failure of the mediation. Under section 89A there isnopenal provision for the party who unreasonably withdraws from mediation.
- It is often alleged that lawyersdiscourage their clients for resolving their disputes through ADR in fear of reductionof their incomelevel.

[22]Section 89A(12) of the Code of civil Procedure 1908
[23]Section 89C(1) of the Code of civil Procedure 1908
[24]Section 89C(2) of the Code of civil Procedure 1908
[25]Section 89B(1) of the Code of civil Procedure 1908
[26]Section 89B(2) of the Code of civil Procedure 1908
[27]Rana P.Sattar,Existing ADR Framework and Practice in Bangladesh: A rapid Assessment, A Study reportprepared for BangladeshLegal Reform Project (A Collaboration Project between Canadian International Development Agency (CIDA) and The Ministry ofLaw, Justice and Parliamentary affairs, Bangladesh), 28 February, 2007

XVII. CONCLUDING REMARKS AND RECOMMENDATIONS:

Although ADR programs can accomplish a great deal, however, no single program can accomplish all these goals. They cannot replace formal judicial systems which are necessary to establish a legal code, redress fundamental social injustice, provide governmental sanction, or provide a court of last resort for disputes that cannot be resolved by voluntary, informal systems. Furthermore, even the best-designed ADR programs under ideal conditions are labor intensive and require extensive management.In the development context, particular issues arise in considering the potential impacts of the ADR. Firstly, some are concerned that ADR programs will divert citizens from the traditional, community-based dispute resolution systems. To modernize the ADR in the Civil Procedure Code the mentioned loopholes should be removed.The legal framework of ADR has developed in Bangladesh over the last few years andacquired adistinct position in the dispute resolutionprocess.ADR mechanisms can now be applied in resolving a widearray of commercial disputes, family disputes and civil disputes, amongothers, thus easing access to justice.However,if we juxtaposethe ADR provisions under different laws of the country with their functional aspects, then it will be obvious thatthecourt based ADRmechanisms could not manage to yield satisfactory results ithas been expected at the time of their introduction.It is true thatCourt Based ADR under different laws can betransformed not only to an aid to the earlier resolution of litigationbutcan also be used as a tool forcasemanagement. Itis in thepublic interest that the constitutional function of the judiciaryshouldnot compromised byblurring its boundary with non-judicial services. So long as the clarity of the distinction is maintained andappropriate quality controls, including evaluative and cost-benefit assessments undertaken,thenthe ADR hasmuch to offer in connection with the judicial process. Alternatively, mandatory ADR requires careful oversight to ensure that it should not be coercive and shouldnot impose too much of a barrier totrial for those parties who want or need judicial determination.