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ADR: RECENT CHANGES IN THE CIVIL PROCESS

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Introduction

The legal system in Bangladesh is the legacy of the British rule in the Sub-continent. Most of the laws of that time have been adapted and are still in force with certain minor changes here and there in the title and reference to the country. Lack of consistent and sound growth of democratic institutions and practice there could be any remarkable headway in bringing substantial reforms in our legal system to keep pace with the present time. It is constrained by its traditional legal framework, cumbersome court procedures, uncontrolled adversarial and court management, eroding ethical standards and creeping corruption in some part of the system, limited institutional capacity including an inadequate human resources base and as such it is unable to offer adequate and proper service to the litigant public. The weakness of the system manifests itself in huge back log of cases and excessive costs. It also suffers negative perception by the public about the court system. The remedy for this State of affairs is clear. Speed up the process of law. How to accelerate the process? Of Course, Bangladesh is not the only country which suffers stock pihng up of courts cases. The developed countries such as United States of America, United Kingdom, Canada and Australia suffer from this problem, however in lesser degree.[1] The Supreme Court of India has made a critical observation regarding civil litigation:

> It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the court and in the majesty of law and that has been caused not so much by the scandalizing remarks made by politicians or ministers but the inability of the court of law to deliver quick and substantial

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1. Rao, P.C. "Alternatives to Litigation in India", edited by P.C. Rao and William Sheffield in Alternative Dispute Resolution: what it is and how it woks, Universal Law Publishing Co. Pvt. Ltd., pp. 24-32 at 24.

> justice to the needy. Many today suffer from remediless evils which Courts of justice are incompetent to deal with. Justice cries in silence for long, far too long. The procedural wrangle is eroding the faith in our justice system. It is a criticism which the judges and lawyers must make about themselves. We must turn the search light inward.[2]

The observation is valid in respect of our legal system. The Justice System universally faces crises of confidence. The public faith in the courts system is so low, and the cost of using them so high, that the parties often forego legitimate claims and shoulder substantial losses rather than file a suit or case for adjudication. Justice V.R. Krishna Iyer comments about the court system of India:

> Watching the dilatory complexities of our forensic procedures, the meaningless waste of judicial time and energy from the trial court to the high and supreme courts and the easy possibility of economy of time and money, one wonders why we hesitate to change. Witnessing the adversary system at work more as gladiators and umpire unconcerned with truth and justice but with the lawyer's logo, name of the game is to win, with making the worse appear the better reason, with oceanic flow of arguments whieh could be better presented with pointed brevity, how can the system but grind to a halt?[3]

In England many critics believe that the adversarial system has run into the sand, in that today, delay and costs are too often disproportionate to the difficulty of the issue and amount at stake. The solution now being followed to that problem requires a more interventionist judiciary: the trial judge as the trial manager.[4] When Lord Woolf began his examination of the civil law process in England and Wales, the problem facing those who used the system were many and varied. His interim Report published in June 1995 identified these problems. He noted, for exampel :

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2. AIR 1988 SC, 1208 at p. 1217

3. Justice Iyer, Krishna, V.R: Law, Lawyers and Justice, B.R. Publishing Corporation, Delhi. p.134

4. Thermawear v Linton (1995) CA, cited in Slapper, Gary & Keily, David, (2001), The English Legal System, Cavendish Publishing Limited, London, p. 257.

> ....the key problem facing civil justice today are cost, delay and complexity. These three are interrelated and stem form the uncontrolled nature of the litigation process. In particular there is no clear judicial responsibility for managing individual cases or for the overall administration of the civil courts. Just as the problems are interrelated, so too the solutions, which I propose are interdependent in many instances, the failure of previous attempts to address the problem stems not from the solutions proposed but from their partial rather than their complete implementation.[5]

Lord Woolf while publishing his interim report, stated that the main responsibility for the initiation and conduct of proceedings rested with the parties to each individual case, and it was normally the plaintiff who set the pace. Thus Lord Woolf noted:

> Without effective judicial control ..... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness have only a low priority. The consequence is that the expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable[6]

His three main aspects of reforms were: (i) judicial case management, (ii) pre-action protocols and (iii) alternatives to going to court. Even with that change in the Civil Procedure for expeditious disposal of cases through the traditional court process the reformer gave importance to alternative dispute resolution.

Today, the global issue is to examine and choose a right form of 'Alternative Dispute Resolution'. ADR as compliment to formal court process has already emerged as a significant movement and the various systems of the ADR are gaining increasing recognition and acceptance in all over the world. In Bangladesh recently legislative amendments have been introduced in the civil process by introducing ADR.

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5. Access to Justice, Interim Report, 1995, p.5, cited in Slapper, Gary & Keily, David, (2001), The English Legal System, Cavendish Publishing Limited, London, p. 258

6. Ibid at p 258.

ADR procedures such as arbitration, conciliation and mediation have had long and old tradition in the Sub-continent. The administration of justice was dispensed to villagers through the 'Panchayat' or Village Council. This Council was concerned with all matters relating to endowments, irrigation, cultivable land, punishment of crime, etc. This Council used to decide simple civil and criminal disputes of a purely local character. Though the decisions given by the Panachayats were based on local custom and were not strictly in accordance with once the law of the land, still there was no interference in the working of the Panachayats. Even during the Muslim rule in the Sub-Continent this ancient system was to a great extent, not disturbed.[7] However, with the advent of the British Raj these traditional institutions of dispute settlement somehow started withering and the formal legal system introduced by the British began to rule on the basis of the concept of omission of rule of law and the supremacy of law.[8]

Then, in Pakistan conciliation procedure was used as a mode of dispute resolution under the Conciliation Court Ordinance, 1961 which dealt with minor civil and criminal matters. This Ordinance was applicable to both village and town. Later with the emergence of Bangladesh two Ordinances were enacted with similar provisions to that of Conciliation of Court Ordinance, 1961: one is the Village Courts Ordinance, 1976 (LXI of 1976) which was amended by the Village Courts (Amendment) Ordinance, 1979 (Ordinance No.IV of 1979) and the other is the Conciliation of Dispute (Municipal areas) Ordinance, 1979 (Ordinance No V of 1979).

The Village Courts under the Ordinance (No. LXI 0f 1976) are constituted with the Chairman of the Union Parishad (Village Council) and two representatives of the parties to the disputes and the said Court decides petty offences and civil disputes up to the

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7. See Kulshreshtha, V.D., Landmarks in Indian Legal and Constitutional History, 4th Edition, Eastern Book Company, Lucknow, 1977, pp 6-25.

8. Reddy, K.Jayachandra, Alternative Dispute Resolution, in Alternative Dispute Resolution: what it is and how it works, edited by P C. Rao and William Sheffield, Universal Law Publishing Co. Pvt Ltd. Pp-79-81 at 79. 1997

value of five thousand taka only in rural areas. Village Court cannot sentence a person accused of an offence with imprisonment or fine if found guilty but can pass an order directing him to pay compensation to the affected person. Village Court in civil matters may pass a decree for recovery of money, movables or possession of immovable property. The decision of the Village Court made unanimously or by majority of four to one is binding on the parties to the litigation. But a decision made by a majority of three to two is appealable to the Magistrate in criminal matters and to the Assistant Judge in civil matters. Like the other conciliation proceedings, the provision of Evidence Act and Code of Civil Procedure and Code of Criminal Procedure are not applicable[9]

Similar power is exercised by the Municipal Arbitration Board constituted with one Ward Commissioner of the Pourashava or City Corporation and two representatives from each of the parties to decide petty offences and civil disputes up to the value of five thousand taka under the provisions of the Conciliation of Disputes (Municipal Areas) Ordinance 1979 in the urban areas.[10]

Built-in conciliation provisions are to be found in the Family Court Ordinance, 1985. This mechanism enables the parties to resolve family dispute like, dissolution of marriage, restitution of conjugal rights, dower, maintenance and guardianship and custody of children. The Family Court, set up under the Ordinance of 1985, is intended to settle the dispute informally, discreetly and with a sense of accommodation where the presiding judge is intended a well-wisher and to be friend rather than a formal adjudicator. The Family Court Judge here acts as a mediator or a conciliator between the disputant parties. These provision remained book bound till adoption in 2000 of a pilot project by the Government with the cooperation of a U.S Agency to settle family

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9. The Village Court Ordinance, 1976 and also see Hoque, Kazi Ebadul, Adminitration of Justice in Bangladesh, Asiatic Society of Bangladesh, 2003 at p.54.

10. The Conciliation of Disputes (Municipal Areas) Ordinance, 1979 and also see Hoque, Kazi Ebadul, Adminitration of Justice in Bangladesh, Asiatic Society of Bangladesh, 2003 at p. 54.

disputes in selected Family Courts by conciliation. Some lawyers and judges of such court were trained to apply conciliation to settle pending Family Court suits.[11]

The advantages of ADR are several.[12] First, it can be used at any time, even when a case is pending before a court of law, through recourse to ADR as soon as the dispute arises may confer maximum advantages to the parties; it can be used to reduce the number of contentious issues between the parties; and can be terminated within the specified time .Secondly, it can provide a better solution to disputes more expeditiously and at less cost than litigation. It helps keeping the dispute a private matter and promotes creative and realistic business solutions, since the parties are in control of the ADR proceedings. Thirdly, ADR methods are flexible and are not afflicted with rigorous rules of procedure. Fourthly, the parties are free to go for mediation or contest through the court procedure. Fifthly, ADR can be used with or without a lawyer. A lawyer, however, plays a very useful role in identification of the contentious issues, exposition of the strong and weak points in a case, rendering advice during negotiations and over-all presentation of his client's case. Sixthly, ADR procedures help in the reduction of the work load of the courts.

Very Recently the Code of Civil Procedure (Amendment), Act, 2003 (Act No. IV od 2003) and Artha Rin Adalat Act, 2003 (Act No. 8 of 2003) introduced ADR mechanism in the broad sphere of civil litigation.. The Code of Civil Procedure (Amendment), Act, 2003 has incorporated court annexed mediation as "Alternative Dispute Resolution" in Part V under the heading of Special Proceedings. In sections 89A and 89B of the Code of Civil Procedure, 'Mediation' and 'Arbitration' respectively have been incorporated within existing civil court system. The Arbitration

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11. Hoque, Kazi Ebadul, Adminitration of Justice in Bangladesh, Asiatic Society of Bangladesh, 2003 at p. 55

12. See Rao, P.C. "Alternatives to Litigation in India", in Alternative Dispute Resolution: what it is and how it woks, edited by P.C. Rao and William Sheffield, Universal Law Publishing Co. Pvt. Ltd., pp. 24-32 at 24. 1997

Act, 1940 in Bangladesh included statutory arbitration provided under the Statutes that were governed and regulated by the law and procedures laid down by the Arbitration Act, 1940. The Arbitration Act, 1940 is, however repealed by the new Act, Salish Ain 2001 or The Arbitration Act, 2001 (Act No. 1 of 2001). In respect of loan recovery suits at the instance of bank and financial institutions the Artha Rin Adalat Act, 2003 has introduced similar built-in procedure in the proceeding under section 21 titled, "Settlement Conference." and under section 22 titled, 'Mediation'. The intention of the legislature appears to avoid vexation, expense and delay, to improve quality and pace of civil justice delivery system, to reduce back logs of cases, to inspire confidence of the litigants in the civil justice system and to make the system more accessible to public at large. The ADR mechanisms involve the use of lawyers to try to resolve disputes at an early stage by using mediation, conciliation and arbitration and giving the parties an impartial view of the likely outcome of any trial. This paper attempts to examine and analyse the recently introduced court annexed ADR mechanisms in the legal system.

ADR in the Code of Civil Procedure

ADR techniques are extra-judicial in character. These can be used in respect of almost all contentious matters like civil, family and commercial banking, performance of obligation, interpretation of deeds and documents and requisition and acquisition of moveable and immoveable properties. ADR techniques are incorporated in the civil court procedure which bestow upon the judges, the authority and motivation to call upon the litigants utilize them. This is a departure from the past when the Judges had no such authority and did not feel motivated to guide the litigants to resolve disputes out of courts. The purpose of ADR is not to substitute consensual disposal or to abolish or discourage informal mediation or arbitration outside the courts, but to make alternative mechanism a part and parcel of the formal legal system preserving the trial court's statutory authority and jurisdiction to try the case, if the ADR fails.

Mustafa Kamal J. observed that mediation may be (i) direct or (ii) facilitative. In direct mediation, the mediator applies all methods

of squeezing into the heads of the parties of his own idea of a settlement. In facilitative mediation the mediator facilitates settlement negotiations, improves communication between the parties, helps the parties to articulate their respective interests and stakes in litigation and helps each party to understand the interests and stakes of their opponent in the litigation. The mediator probes the relative strengths and weaknesses of each party's legal position, identifies areas of agreement and helps to generate options amongst the parties themselves to arrive at a mutually acceptable resolution of their disputes.[13]

Direct mediation is more prevalent in case of commercial disputes involving the question of public law or statutory and administrative or fiscal law and the mediation or arbitration is conducted through private tribunal of arbitrator or arbitrators who sometime are attached to trade bodies like Federation of Bangladesh Chamber of Commerce and Industries. The facilitative mediation is more appropriate in case of family disputes regarding marriage, divorce, maintenance and custody of children, the obvious example is that of the Family Court Judge under Family Court Ordinance, 1985.

In the scheme of ADR mechanism the mediator's function is also important. The mediator must be someone who is committed to impartiality and neutrality. The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and disposition toward one another.[14] Raskin and Brook in their work 'Dispute Resolution Lawyers' analysed the mediator's role as follows:.

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13. Kamal, Justice Mustafa (Former Chief Justice Of Bangladesh), Keynote Paper presented at a National Workshop on October, 31 2002, organized by Ministry of Law, Justice and Parliamentary Affairs, Legal and Judicial Capacity Building Project, BCR 2004, Vol: XXIV, January, pp. 4-14

14. Raskin, Leonard and Brook, Games E. West, Dispute Resolution Lawyers: American Casebook Series, Hornbook Series and Basic Legal Texts, Black Letter Series and Nutshell Series, West Publishing Company, 1987, p 210.

> First, a mediator is a catalyst. The mediator's presence will affect the parties to interact. His presence should lend a constructive posture to the discussions rather than cause further misunderstanding and polarization, although there are no guarantees that the latter condition will not result.
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> Secondly, a mediator is also an educator. He must know the desires, aspirations, working procedures, political limitations, and business constraints of the parties.
>
> Thirdly, the mediator must be a translator. The mediator's role is to convey each part's proposals in a language that is in both faithful to the desired objectives of the party and formulated to insure the highest degree of receptivity by the listener.
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> Fourthly, the mediator may also expand the resources available to the parties. Persons are occasionally frustrated in their discussions because of lack of information or support services. The mediator, by his personal presence and with the integrity of his office, can frequently gain access for the parties to needed personnel or data.
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> Fifthly, the mediator is an agent of reality. Persons frequentiy become committed to advocating one and only one solution to a problem. The mediator is in the best position to inform a party, as directly and as candidly as possible, that its objective is simply not obtainable through those specific negotiations.
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> The last function of a mediator is to be a scapegoat. No one ever enters into an agreement without thinking he might have done better had be waited a little longer or demanded a little more. A party can conveniently suggest to its constitutions when it presents the settlement terms that the decision was forced upon it In this context of negotiation and mediation, the focus of blame- the scapegoat-can be the mediator.[15]

Mediation means a voluntary, confidential process in which a neutral third party assists the parties to negotiate a mutually acceptable settlement of their dispute.[16] 'Mediation' under section

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15. Ibid. at p 210.

16. Kershen, Lawrence. QC, Mediation in Land Dispute- a United Kingdom Perspective, a paper presented in British Council – South Asia ADR Symposium and Seminar, March 7th and 8th 2004, Dhaka, Bangladesh. pp 1-11, at p 3.

89A shall mean flexible, informal, non binding, confidential, non-adversarial and consensual dispute resolution process in which the mediation shall facilitate compromise of disputes in the suit between the parties without directing or dictating the terms of such compromise. The mediation under section 89A of the Civil Procedure Code does not allow the court to dictate or supervise mediation. After filing written statement, the contesting parties in the suit through application or pleadings may apply to the court stating that they are willing to try to settle the dispute through 'Mediation' or 'Arbitration' and then the court shall make reference under section 89A of Code of Civil Procedure.

Section 89A[17] provides:

(1) Except in a suit under the Artha Rin Adalat Ain, 1990[18] (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 in the said suit 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:

Provided that, 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 mediate, or make reference under this section.

In order to settle the disputes in a simple and quicker way, a time limit has been provided for in case of pending litigation. Sub-section 4 of the Section 89A[19] provides:

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17 Section 89 A of Code of Civil Procedure (as inserted by the Act of 2003)

18. Repealed by Artha Rin Adalat Ain, 2003.

19. Section 89 A (4) of the Code of Civil Procedure (as amended by the Act of 2003)

> Within ten days from the date of reference under sub-section (1), 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, failing which the reference under sub-section (1) will stand cancelled and the suit shall be proceeded with for hearing by the Court; and should 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 days form 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 further period of not exceeding 30 days.

The whole purpose of this sub-section is to dispose of the suit at the pre-trial stage if that is possible. If parties to suit failed to mediate, the Judge can go back to the full length proceeding with wasting much time. The confidentiality of the parties to the mediation proceeding is being maintained. The Court on the basis of the terms and condition of the compromise can pass an order or decree in accordance with relevant provisions of Order XXIII of the Code of Civil Procedure.

ADR by way of Arbitration

The modern arbitration law started with the Bengal Regulation 16 of 1793 which empowered courts to submit matters in dispute in a suit to the decision of a mutually agreed arbitrator.[20] Arbitration without the intervention of the court was introduced in the Code of Civil Procedure, 1859[21] (Act VIII of 1859). Sections 312 to 317 of the Code related to arbitration. A new Code of Civil of Procedure was enacted in 1908. Sections 89, 104(1) (a) to (f) and Schedule II contained provisions for arbitration. These provisions inter-alia encouraged the parties to the civil suits to seek reference of disputes to arbitration and empowered the courts to refer the

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20. Banerji. Milon, K, "Arbitration Verses Litigation", in Alternative Dispute Resolution: what it is and how it woks, edited by P.C. Rao and William Sheffield, Universal Law Publishing Co. Pvt. Ltd., pp. 59-67 at 59. 1997

21. Kulshreshtha, V.D., Landmarks in Indian Legal and Constitutional History, 4th Edition, Eastern Book Company. Lucknow. 1977, pp 6-25

dispute to arbitration and have control over arbitral proceedings and adjudicate on the validity of awards. The Arbitration Act, 1940 however, repealed these provisions of CPC[22] and instead re-produced them with slight changes by way of section 21[23] and section 24[24] of the said Act.

The sole purpose of the Arbitration Act, 1940 was to curtail litigation in Courts and to promote the settlement of the dispute amicably by avoiding all types of technicalities of procedural law but within the four corners of substantive law and to provide a domestic forum for speedy disposal of disputes.[25] It can be said that this Act was intended to provide for a simple or less formal, speedy and less costly alternative dispute resolution mechanism, however it failed to achieve its desired results. The main reason for this is the court interference in the functioning of the arbitration proceeding at all stages.

With the drastic changes to the existing law, a new Arbitration Act was enacted titled "Arbitration Act, 2001, (Salish Ain 2001)"

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22. Reddy, C.V. Nagarjuna, The Indian Council of Arbitration, "Role of Arbitration in the Wake of CPC (Amendment) Act, 1999", http:/www. Ficci.com/icanet/april-june2002/ica5.html

23. Section 21 of the Arbitration Act, 1940:

    Parties to suit may apply for order of reference- Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.

24. Section 24 of the Arbitration Act, 1940:

    Reference to arbitration by some of the parties: Where some one of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who have joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

25. PLD 1976 Kar 496.

repealing the old Arbitration Act, 1940. The Act of 2001 is designed to reduce interference of the court with the arbitral proceeding. The old system of making the arbitral award a rule of court before it is enforced has been dispensed with. The arbitral award itself, once it becomes final will be enforced as if it was a decree of the court, without having to go through with the now-defunct process of making it a rule of the court. This new law recognizes the autonomy of the parties in the conduct of arbitral proceeding. In the matter of the composition of the arbitral tribunal and appointment of arbitrators, the parties may either agree on the number and procedure for appointment of arbitrators all by themselves or agree to abide by the existing procedure for appointment in the Act. Section 11 of the Salish Ain, 2001 provides:

Number of arbitrators :

(1) Subject to the provision of sub-section (3), the parties are free to determine the number of arbitrators.

(2) Failing the determination of a number referred to in sub-section (1) the tribunal shall consist of three arbitrators.

(3) Unless otherwise agreed by the parties, where they appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as a Chairman of the tribunal.

The provision empowering the parties to agree on the procedure for appointing arbitrators provides for the basis for institutional arbitration inasmuch 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 aspect dealt with in arbitration rules of all arbitration institutions, this is an important enabling provisions from the point of view of arbitral institutions.[26]

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26. See Unni. A. C.C., The New Law of Arbitration & Conciliation, in "Alternative Dispute Resolution: what it is and how it woks", edited by P.C. Rao and William Sheffield, Universal Law Publishing Co. Pvt. Ltd., pp. 71-72. 1997

The new Salish Ain, 2001 contains provision relating to appointment of arbitrators by the District Judge in case of arbitration other than International Commercial Arbitrations; and by the Hon'ble Chief Justice of the Hon'ble Supreme Court of Bangladesh or by any other Judge of the Hon'ble Supreme Court designated by the Hon'ble Chief Justice in case of International Commercial Arbitrations when the parties are not in a position to agree on a procedure for appointment of arbitrators.[27]

Section 38 (4) provides that the arbitral award must contain reasons unless the parties have agreed that no reason are to be given whereas, under Arbitration Act, 1940 it was a mandatory provision requiring the arbitrator to record reasons for his award and the court could not interfere with the findings of the arbitrators on the ground of non- provision of reasons. The new law also restricts the scope of judicial scrutiny of the award.

The Civil Procedure Code (Amendment) Act of 2003 also contains provision for the litigants to go for arbitration at any stages of the suit. Section 89B provides that if the parties are willing to settle the disputes through 'Arbitration' the court shall make reference to the Salish Ain 2001 (Arbitration Act, 2001). Section 89B provides:

(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 withdrawal; 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 proceeding referred to above does not take place or an arbitral award is not given, the parties shall be entitled to re-institute the suit permitted to be withdrawal under this sub-section.

27. Section 12 of Salish Ain, 2001.

(2) An application under sub-section (1) shall be deemed to be an arbitration agreement under section 9[28] of the Salish Ain 2001 (Act No.1 of 2001) (Arbitration Act, 2001)

This is a court annexed alternative mechanism to avail the provision of arbitration.

The new Act, for the first time provides settlement within the tribunal proceedings. Section 22 of the Act provides:

Settlement other than arbitration-

(1) It shall not be incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of dispute otherwise than by arbitration and, with the agreement of all the parties, the tribunal may use mediation, conciliation or any other procedures at the time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 38 and shall state that it is an arbitral award on agreed terms.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award made in respect of the dispute.

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28. Form of arbitration agreement:-

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in form of a separate agreement.

(2) An arbitration agreement shall be in writing and an arbitration agreement shall be deemed to be in writing if it is contained in-

(a) a document signed by the parties;

(b) and exchange of letters, telex, telegrams, Fax, E-mail or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

Arbitration is one of the variants of ADR and within the Arbitration mechanism the new law encourages adoption of mediation or conciliation or any other procedure to facilitate settlement.

The advantages of arbitration are:

(a) the arbitration allows the parties to keep private the details of the dispute;

(b) the parties can choose their own rules or procedure;

(c) there is greater scope for minimizing acrimony;

(d) the costs can be kept low;

(e) the times and places of hearing can be chosen according to convenience;

(f) there will be saving of time; and

(g) the ability of the parties to choose their own judge permits and choice of an expert in the field who is more able to view the dispute in its commercial setting.[29]

ADR in Artha Rin Adalat Ain

Artha Rin Adalat Ain deals with the realization of loan money. Those suits which are concerned with the realization of 'Loan' (Rin)[30] as defined in the Act and as disbursed by the banks and

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29. Banerji, Milon K, Arbitration Verses Litigation, in "Alternative Dispute Resolution: what it is and how it woks", edited by P.C. Rao and William Sheffield, Universal Law Publishing Co. Pvt. Ltd., pp. 58-67 at p. 61, 1997

30. Section 2 (C) of Artha Rin Adalat Ain, 2003 states:

Rin (Loan) means:-

(i) Advance, debt, cash loan, over draft, banking credit, purchased or Discount bill of any amount or emoluments or facilities received by the financial institutions called in any name according to the dictates of Islamic Shariah Council;

(ii) Guarantee, indemnity, debenture or any financial arrangement which is accepted by any institution as liability or any guarantee issued on behalf of any debtor.

(iii) Any loan given to any employee or officer by a financial institutions,

(iv) Loan mentioned at serial No. i to iii and the interest penal interest, profit or rent as the case be as legally levied on the investment of financial institutions as run according to dictates of Islamic Shariah.

financial institution can be filed in this court. Artha Rin Adalat Ain, 1990 has been repealed and replaced by Artha Rin Adalat Ain, 2003 (Act No.8 of 2003).

This Act has incorporated the ADR mechanism in Part V in sections 21 and 22. The terms 'settlement conference' in section 21 and 'arbitration' in section 22 have been used to denote different mediation process.

Section 21(i) provides:

> Notwithstanding any provision under chapter-4 relating to trial or hearing of the suit, if the court, after submission of written statement by the defendant deems it proper, it may, subject to the provisions of section 24[31] of the Act convene a Settlement conference for settlement of dispute keeping pending all subsequent proceedings of the suit; and the Court may direct the parties, their engaged lawyers and their representative to remain present in the said conference.

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31. Section 24

(i) If a financial institution agrees to solve disputes through Settlement Conference or arbitration as provided under Section 21 and 22 and in order to materializing the said objectives, the financial institution may delegate powers to the central, regional or local level competent officers for the exercise of delegated power resolving in the meeting of Board of Directors may issue appropriate order of circular accordingly.

(ii) When the financial institution issuing such order or circular according to sub-section (i), it shall clearly indicate the extent of power, limitation of the delegated power, the procedure and principle exercising such power.

(iii) Under the provision of sub-section (i), the financial institution shall send a copy of such order or to the concerned Artha Rin Adalat of the said area.

(iv) After arriving at a solution or Settlement under this chapter through Settlement Conference or alternative arbitration procedure confirm that the aforesaid solution and settlement has been completed under the provision of sub-section (ii) and the same has duly been approved by the Managing Director or the Chief Executive of the related financial institution.

Under this mechanism the presiding judge after filing in the suit of the written statement may call upon the parties to 'settlement conference'. However, the presiding judge may call only when the bank and financial institutions agree to resolve disputes through Settlement Conference or Arbitration. In other words, subject to the initiative of the defendant, it is the willingness of the bank and financial institutions which can set the mediation mechanism in motion. The Court then, will adjourn the proceeding and call upon the parties to bring their lawyers or representative to the 'settlement conference' The Judge will preside over the 'settlement conference' which will take place in camera.[32] The presiding judge will supervise the 'settlement conference' and try to help the parties to the dispute or disputes to arrive at a mutual settlement. However, the Judge cannot exert pressure upon the parties according to his terms and conditions.

The initiative taken for settling the dispute through Settlement Conference should be completed within 60 days of the passing of order of the Court or within the extended time of next 30 days. The Settlement Conference puts the parties on pressure to resolve the disputes within a specified time or else the suit resumes from its previous position. In order to maintain the confidentiality of the parties and to prevent any party to take advantage of any disclosure, admission or accommodation to ensure fairness and avoid

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32. Section 21: (ii) The Judge of the Artha Rin Adalat shall preside over such conference and shall determine the venue, procedure and functions of the Settlement Conference, and the Settlement Conference as scheduled to be held under this procedure, shall take place in camera.

    (ii) The Court shall explain the points of disputes before the parties, their engaged lawyers and the representatives and shall streamline his endeavors in arriving at a settlement; but in his such efforts, the Court shall not exert any influence upon the parties to accept his own proposal.

prejudging of issues for trial the same court is not allowed to deal with the suit.[33]

In Artha Rin Adalat Ain, 2003, the settlement of dispute is either done through Settlement Conference or Arbitration. Section 22 may be applied when there is no order passed under section 21 for Settlement Conference. The two are mutually exclusive. Section 22 of the said Act provides:

(i) In case no other order has been passed for settlement of dispute through Settlement Conference under section 21, after the submission of written statement by the defendant in the suit, the Court, subject to the provision of section 24, keeping pending all subsequent proceedings of the suit, refer the case to the engaged lawyers or where no lawyers have been engaged, to the parties for the settlement of dispute by arbitration.

Provided that, if the parties pray to the court by filing application that they are interested to settle the case through arbitration, it shall be binding for the court to refer the case to try to settle through arbitration under this section..

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33. Section 21 (vi) The initiative as taken for settling the dispute through Settlement Conference, if failed and the Judge of the aforesaid Court if not transferred in the mean time, next hearing of the suit shall not be made; the suit shall be transferred for hearing to any other Court having jurisdiction and the next hearing of the suit shall be resumed from its previous position in a such a manner as if no efforts were taken for Settlement of the disputes through Settlement conference.

(vii) If the suit could not be transferred to a Court having proper jurisdiction according to sub-section (vi) for any other reasons, the District Judge may appoint any other Judge to that Court under his jurisdiction on ad-hoc basis for making hearing of the suit.

(viii) The process of Settlement Conference under this Section shall be held in camera and any suggestions, advice or counseling amongst the parties, their lawyers and the representatives as adduced, an admission, deposition or comment should be considered to be strictly confidential and at later stage the aforesaid matters cannot be cited or shall not be accepted to be evidence.

In this arbitration procedure the court does not supervise, control or advice the lawyers and arbitrator. Under this section the court only gives order to settle the matter through arbitration within 60 days of passing of the order. The court may extend another 30 days on the basis of written application made by the parties or the court's own initiatives. However, if the parties do not communicate within 10 days of passing of the order under section 22 (i), the court will cancell such order and the suit shall resume as per provisions of the Code of Civil Procedure so far these are not inconsistent with the Artha Rin Adalat Ain, 2003.

There is a difference between the mediation procedure under section 21 and 22 of the Artha Rin Adalat Ain In section 21 the court supervise a settlement conference however in section 22 the court sends the issue or issues in a suit to be settled through arbitration. The banks and financial institutions tend to approve alternative dispute resolution through settlement conference because it is done under the Courts supervision which has the power to streamline the issues to be arrived at a settlement. The alternative mechanism of settlement through arbitration under section 22 appears to be avoided by the banks and financial institution because of the pressure that may be subjected to the yield to the wishes and expectations of the defendants the unfamiliarity of the arbitration proceedings by absence of any issue affecting the interest of banks or financial institution particularly in view of one sided matter of the Artha Rin suit where the defendant cannot revise counter claim or set off..

Conclusion

The introduction of built-in ADR mechanism is one welcome step taken in the recent times by the Parliament. Mediation, conciliation and arbitration are not new phenomenon in our society but never widely used for formal civil process. In the Islamic law of divorce arbitration method is detected in the Quranic injunctions and this has been incorporated in the Muslim Family Laws Ordinance, 1961 in respect of extra judicial conciliation. In village society, the traditional arbitration council, the 'panachayats' (now Shalish) is well accepted as resolution mechanism of family, minor civil

and criminal disputes. These alternative methods are used outside the formal court system.

This ADR mechanism has generated great expectations and hopes amongst the litigant public for a more satisfactory, acceptable, cheap and quick resolution of their disputes. The Court is the parental institution for resolution of disputes and when ADR models are implemented under the court supervision it is likely to be widely acceptable to the litigant public as it would ensure integrity, impartiality and authenticity of the mechanism. It creates among the parties a complex, interdependent relationship, relative equality of bargaining power, and strong incentives to work out their own relationship with minimal reliance upon others. On the other hand, parties cannot agree to mediate until they understand the problems and 'understanding of the problem' or 'new understanding of the problem' may develop at all stages of the mediation. Mediation is always subject to termination, therefore there is a risk that any of the parties may walk out of the mediation process. So the mediator must work out his best possible ways and negotiate various goals, strategies and techniques for potential mediation.

ADR can be used in almost all contentious matters which are capable of being resolved in litigation or by agreement between the parties. However, ADR mediation may not be appropriate in respect of every dispute and it cannot be invoked unless the parties are genuinely interested to resolve their dispute in this way. The parties in a suit under the provisions of the Code of Civil Procedure may be less interested in mediation because there is nothing for either or both of them to gain under the process particularly when ego sentiment or zeal push the parties to litigation. In Artha Rin suit the defendant is eager to go through the settlement conference because he might get substantial financial benefit in the shape of waiver of interest and extension of time for payment under the process and that too under relaxed terms and conditions because of the presence of the Artha Rin Judge overseeing the settlement conference. The initiative and personality of the particular Artha Rin Judge would have definite effect upon the outcome of such settlement conference. There may be something for the banks and

financial institutions under this process in that some payment may be received or forthcoming much earlier than through formal execution process under a decree. The same prospect or motivation may not be there in respect of litigation in civil courts other than in Artha Rin Adalat. Awareness amongst the litigants about the benefit of ADR, the development of the culture of accommodation, conciliation, moderation, of the presiding judge, social movement towards recognition and acceptability amongst greater mass of litigants through media are the key factors for the success of ADR in this country.

The built-in ADR mechanism is a significant legislative development in this country as a compliment to the formal legal system. The lawyers, litigants and business community need to develop the culture and attitude of making great use of ADR and popularize the advantages that it has over the formal legal system. Even, in case ADR fails, it would narrow the issues of the contentious matter between the parties and therefore a success in failure, so to say.