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REPORT OF THE RESEARCH PROJECT ON

Alternative Dispute Resolution (ADR) Mechanism and Legal Aid in the Settlement of Disputes: A Case Study of State of West Bengal

Submitted by:

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Submitted to:

Department of Justice
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Under the Scheme of Action Research and Studies on Judicial Reforms

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Table of Contents

Executive Summary

Judiciary across the globe is finding it impossible, not just difficult, to handle plethora of cases filed before it. Lack of experienced judges, inadequate facilities, lack of expertise in wide variety of subject matter of disputes, and procedural hurdles coupled with the delaying tactics of legal practitioners for financial gains have paralysed judiciary. State of West Bengal is witnessing this problem since a long period of time. Though Alternative Dispute Resolution (ADR) mechanisms are becoming popular to share the burden of courts and reduce backlogs in many jurisdictions, they are not performing at the expected level in West Bengal. Hence, this is the time for addressing the roots of problem to find out the reasons behind the lack of success of ADR in West Bengal and to take corrective measures. Otherwise, it may be too late to restore the fading faith of people in the justice delivery system.

Interestingly, the development of ADR during the colonial period started in the province of Bengal. The initial developments of ADR happened only in terms of arbitration, that too, operating through the court intervention as the enforcement of the award required a decree of the court. The scenario changed after the Arbitration and Conciliation Act 1996, which provided independent status to the award of the arbitrator in terms of enforcement. Also conciliation got statutory recognition under the Act. Meanwhile, Lok Adalat was also developed as an ADR mechanism and recognised under Legal Services Authorities Act 1987. Finally, the 1999 amendment of Code of Civil Procedure also gave recognition to court annexed mediation and negotiation. In addition, the concept of legal aid also developed simultaneously with an objective to provide people access to justice.

Calcutta High Court has played a significant role in the development of arbitration as an ADR mechanism in India. It has often upheld the requirement of preventing unnecessary court intervention in the enforcement of arbitral awards. In the absence of such a self-imposed restriction by the West Bengal judiciary, every arbitral award would have become subject matter of challenge and reappreciation before the courts of law. This would have completely taken away the confidence of people in arbitration, since it would merely be a waste of time and resources for them. At the same time, the Calcutta High Court has not hesitated to intervene in those arbitral

awards, which would have resulted in miscarriage of justice. Failure to observe principles of natural justice, bias of the arbitrators, error apparent on face of the record, absurdity and misconduct of arbitrators, total absence or non-consideration of evidence etc. are the major grounds on which the courts have intervened to set right the wrong committed by the arbitrators. Hence, it has been a balanced approach of the Calcutta High Court between upholding the sanctity of arbitration and preventing miscarriage of justice. Of late, West Bengal judiciary has also taken steps to refer cases to other modes of ADR, especially Lok Adalat and mediation.

While the efforts are made by the West Bengal judiciary to promote ADR, it has been found that the practical scenario of ADR is different in West Bengal. The field study conducted in the sample districts of West Bengal has led us to the following conclusions on the status of ADR:

- Though Lok Adalat is widely known in West Bengal, other ADR mechanisms are not popular to the expected level. Urban areas like Kolkata and North 24 Parganas have some exposure to arbitration and some rural areas have some exposure to mediation, in addition to Lok Adalat. Conciliation and negotiation have got least significance.

- Except in Kolkata and North 24 Parganas, litigants are mostly uninformed about ADR mechanisms. The lawyers do not take active steps to explain the clients about the availability of ADR mechanisms, primarily due to financial implications. Some judges have made efforts to inform the parties about the available means of ADR, however, in unclear terms.

- Orthodox mindset of the litigants motivates them to resort to court proceedings rather than ADR mechanisms. Even though the court directs for ADR mechanism under Section 89 of Code of Civil Procedure, majority of the cases are not settled through ADR. These cases revert back to courts for adjudication, making ADR a waste of time and resources.

- The ignorant litigants believe that anything in nexus with their legal disputes is akin to litigation. In the absence of proper guidance, they misjudge ADR as another legal formality and run away from it in apprehension.

- Arbitral awards are often challenged before the courts of law resulting in delay and additional costs. Many a times, this is due to the misleading lawyers' community.

- Legal aid clinics are not functioning effectively, despite the efforts of State and District Legal Services Authorities in West Bengal. Hence, legal aid as a tool for promoting ADR among marginalised sections of the society is not performing well.

- Element of bias, irregular appointment of ADR administrators and problems in enforcement of outcomes of ADR proceedings are the major obstacles in popularising ADR in West Bengal.

- The litigants who are aware of ADR proceedings are also hesitating to resort to ADR proceedings due to unsuccessful precedents and incompetency of ADR administrators.

- Cumulative effect of all the above factors is to have a very low success rate of ADR in West Bengal. Lawyers and incompetent ADR administrators have to take much of the blames in this regard.

In light of the above circumstances in West Bengal, it is suggested that: (a) Capacity building of ADR administrators must be the first task to be accomplished to bring confidence in the minds of people. (b) Another significant stakeholders in guiding the litigants to ADR mechanisms, the lawyers' community, need to be made aware of their responsibility towards popularising ADR. (c) Separate set of non-litigating lawyers needs to be created to successfully implement ADR mechanisms. (d) Governments need to provide adequate support in terms of infrastructure and adequate payments to ADR administrators. (e) A multi-door courthouse system has to be introduced in its truest sense and not as per the current understanding under Section 89 of Code of Civil Procedure. (f) Mediation and negotiation need legislative backup to clarify the mechanisms and to gain trust of the people. (g) A mediation friendly atmosphere, just like Bangalore Mediation Centre, needs to be created in West Bengal. (h) Online dispute resolution or a hybrid of online and offline dispute resolution mechanism need to be developed to cut down the cost and time. (i) West Bengal needs

to follow the examples of other states in introducing Mobile Lok Adalats especially in the regions where financial capabilities are limited or transportation facilities are not adequate. (j) Legal aid should not only be viewed in terms of providing free legal services to marginalised sections of the society, but it should be developed as a tool to promote ADR; and (k) Finally, awareness should be created among the people about the usefulness of ADR over the court litigation to help them to come out of their traditional mindset.

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CHAPTER I - INTRODUCTION

1.1 Background of the Research

Justice Warren Burger aptly remarks, “the notion that most people want black-robed judges, well dressed lawyers and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible.” Most of the states in the world have responded to this need of the people by setting up strong forum of ADR. However, the issue doesn’t seem to be addressed satisfactorily in India, which still primarily banks on the judicial settlement of disputes. This has paved way for congestion in courts, ultimately leading to the unwanted delay in the dispensation of justice. The state of West Bengal is not an exception to this general norm, and the state judiciary is constantly under the pressure of delivering more than what is practically possible. Thus there is a huge backlog of cases pending before the West Bengal judiciary. However at no point of time the inflow of cases can be stopped nor should it be, since the doors of justice can never be closed. Therefore, there is a need to increase the outflow, which requires some additional outlets like ADR.

In the last four decades, ADR has become more popular in practice than it was anticipated. The courts and the government agencies across the world have supported the use of ADR through establishment of various dispute resolution

organizations. The acing corporate culture in India has had law firms establishing ADR departments alongside their litigation departments. As simple as the term "ADR" may sound, it has been etymologically criticized by various legal scholars and practitioners. There have been reservations about the usage of term 'alternative' in ADR as it, seemingly, suggests that other modes of dispute resolution are subservient to litigation. However, the term gained popularity over a period of time and with its evolving connotation.

The efforts to popularize ADR mechanisms are made through the Arbitration and Conciliation Act 1996 and Legal Services Authorities Act 1987. The legal aid and Lok Adalats under the Legal Services Authorities Act 1987 are increasingly dealing with civil cases, matrimonial cases, criminal cases excluding non-compoundable offenses, labour matters as well as matters pertaining to motor accident claims. The Legal Aid Society of National University of Juridical Sciences has been actively working in the direction of providing free legal aid to settle the disputes by using various ADR mechanisms within West Bengal. The West Bengal judiciary has also time and again stressed on the importance of ADR in the settlement of the disputes. Despite these efforts, the masses have not yet embraced the ADR whole-heartedly due to their

scepticism about the effectiveness of ADR coupled with the over-reliance on the traditional court system.[1]

In addition to these factors, the studies[2] reveal that lack of initiative from other significant players also adds on to make ADR and legal aid less popular in West Bengal. In most of the developed countries, the Bar plays a more proactive role in not only popularising ADR but also building confidence among the people. Their Bar is divided into litigating and non-litigating lawyers, with the high percentage of lawyers in the latter category to settle the disputes amicably through ADR. [3] The absence of such a system in West Bengal compels the ADR to be administered primarily through the litigating lawyers, who are the busy practitioners having cases in courts almost on every day. It is pertinent to note here that an effort made by the West Bengal government to provide a legal framework to ADR in the form of Salesi Bill[4] also could not conceptualize into

[1] See Chandrani Banerjee, 'Verdit: To Hang', *Outlook India*, 9 March 2009. Justice Krishna Iyer, while inaugurating an ADR centre at his residence and expressing concerns about the popularity of ADR, remarked that there shall be a "National Movement for ADR". See <http://www.adrcentre.in/event_3.html>

[2] References can be made to Dilip. B. Bhosale, 'An Assessment of A.D.R. in India', *Nyaya Deep*, Vol. VII, Issue 4, October 2005, pp. 57 - 72 at p. 70; V. Nageswara Rao, 'ADR in India: In Retrospect and Prospect', *ICFAI Journal of Alternative Dispute Resolution*, Vol. IV, 2005, p. 5; Y. K. Sabharwal, 'Alternative Dispute Resolution' *Nyaya Deep*, Vol. VI, 2005, p. 55; R.D. Rajan, *A Primer on Alternative Dispute Resolution* (Tirunelveli: Barathi Law Publications, 2005) p. 593.

[3] The percentage of non-litigating lawyers in the developed world is much higher than the developing countries like India. They are well acquainted with the ADR techniques due to the specialized training. See Dilip. B. Bhosale, 'An Assessment of A.D.R. in India, *Nyaya Deep*, Vol. VII, Issue 4, October 2005, pp. 57 - 72 at p. 68.

[4] 'Salesi' is an umpire. The techniques of settling the disputes through Salesi is said to be prevalent during the era of undivided Bengal, which is still followed in Bangladesh. The Bill was much contested

law. In addition, the legal education in West Bengal (or even in whole of India) is focused more in terms of producing hardcore litigation lawyers rather than administrators of ADR mechanisms. Thus the ADR has taken the backseat with no proper training, and little or no time available to the administrators.

One of the major reasons for ADR taking the backseat seems to be the poor quality legal aid being provided to the litigants. Since the lawyers are specialised in court based litigation, their knowledge of various ADR mechanisms itself is questionable. Even if they are aware of some ADR mechanisms, they lack requisite skills to either administer or assist in ADR mechanisms. Hence, when a client approaches a lawyer for consultation, the chances of proceeding towards ADR as a means of resolution of dispute is near zero.

In the backdrop of above concerns, it is absolutely essential to revisit our ADR and legal aid mechanisms to develop strong litigant friendly system in the state of West Bengal, which may also be a model to be followed in rest of India.

1.2 Research Objectives

The research project is undertaken to probe into the status of ADR in the state of West Bengal with an objective to improve it. With a focused study of

and could not be passed in the state legislature. See Jasmine Joseph, 'Alternatives to Alternatives: Critical Review of Claims of ADR', *NUJS Working Paper Series NUJS/WP/2011/01*, p. 5, available at <http://www.nujs.edu/workingpapers/alternate-to-alternatives-critical-review-of-the-claims-of-adr.pdf>

various types of ADR mechanisms used in the state of West Bengal, the research aims to highlight the existing concerns. More inclusive role of Bar, Bench, Government and legal educational institutions in making the ADR a success in West Bengal is probed as a part of the research. The study also explores the possibility of introducing and developing an institutional framework for ADR in West Bengal along with a section of dedicated non-litigating lawyers. To be more precise, the research project commenced with the following major objectives:

1. Analysing the ADR and legal aid developments and trends in the state of West Bengal especially by referring to their status in Urban, Semi-urban and Rural areas.

2. Probing into the reasons behind the people's scepticism in whole-heartedly embracing ADR mechanisms, which is evident from the increasing number of cases going to courts and pendency of more than 26.95 lakh cases at various courts in West Bengal.[5]

3. Analysing the present and past efforts made by various stakeholders to popularize ADR in West Bengal to find out the success rates of those efforts, and the possible improvements in the future efforts.

[5] See 'District courts: 2.81 crore cases pending, 5,000 judges short across India', Indian Express, 15 January 2017, available at <http://indianexpress.com/article/india/district-courts-2-81-crore-cases-pending-5000-judges-short-across-india-4475043/>

4. Looking into the better models available in other jurisdictions, especially focusing on the idea of developing a section of non-litigating lawyers to administer the ADR mechanisms, which is popular in the western parts of the world.

Upon the achievement of above objectives, it was visualized that the dispute settlement mechanism in West Bengal may become cheap and effective. Creation of non-litigating lawyers' based ADR institutions would help in achieving this goal. This would also build confidence of people in resorting to ADR mechanisms. The ultimate outcome of all these efforts is expected to yield in reducing the burden of courts of law in West Bengal with a large portion of disputes being settled through ADR mechanisms.

1.3 Scope of the Research

The focus of this research work is on the functioning of various ADR mechanisms in the state of West Bengal. It encompasses arbitration, mediation, conciliation, negotiation and *Lok Adalat* as the primary means of dispute settlement mechanisms. It is pertinent to note here that only formal means of ADR mechanisms are probed into. Informal mechanisms like religion based or village head based ADR mechanisms are not the primary subject matter of study. Though legal aid is a part of the study, it is confined to find how the legal aid in West Bengal facilitates or fails to facilitate the resort to ADR mechanisms.

Hence, the purpose of this research is not to study the concerns in access to legal aid per se but to analyse its role in the context of promoting ADR mechanisms.

1.4 Research Methodology

A combination of doctrinal and empirical methods of research is used for the successful completion of the project. The doctrinal method involved the visits to various law libraries within and outside West Bengal to find relevant data on the research area. The visits are made to West Bengal State Legal Services Authority, Calcutta High Court, district and lower courts functioning in the selected sample districts to collect substantial data. The empirical part of the research involved the interactions with the judges, lawyers, office bearers of West Bengal Legal Services Authority, others involved in legal aid and the general public, especially the present and past disputants. Substantial portion of primary data is collected through interviews and questionnaires.

Analytical, critical and comparative tools are used for arriving at conclusions. Analytical part includes the analysis of trends in the West Bengal on the use of ADR for dispute settlement. It would look into the perspectives of administrators of ADR, lawyers, disputing parties and general public. The critical part concentrates on the specific reasons for the failure of ADR to deliver the expected in the state of West Bengal. It also probes into the sufficiency of efforts made at various levels, including Bar, Bench, Government and legal

institutions in West Bengal. Finally, the comparative part tries to find a better model by looking into the jurisdictions having more efficient ADR mechanisms.

Sampling

Since West Bengal consists of 19 districts with a huge number of populations, it was found to be impossible to cover all areas under the present study. Due to this inherent limitation, sample survey method was adopted for the research. There are two criteria used for selection of the sample research areas: (a) Urban, Semi-urban and Rural areas of West Bengal, and (b) Sample areas in the northern, central and southern parts of West Bengal. The subjects of the sample are selected by considering the stakeholders principle. This involves the administrators of ADR and judges, lawyers, and disputants, both resorting to ADR and court-based resolution.

Based on the above-mentioned criteria for the selection of sample areas, the field research is conducted in following three areas of West Bengal.

i. Jalpaiguri and Darjeeling (Part of the North Bengal with Semi-urban and Rural areas)

ii. Burdwan (Part of Central Bengal covering Semi-urban and Rural areas)

iii. Kolkata and North 24 Parganas (Part of Sothern Bengal and Capital city of West Bengal consisting of majorly Urban population)

In each of the above areas, field research is conducted with the help of questionnaire and interview methods. Approximately twenty five lawyers, twenty five litigants resorting to ADR and twenty five litigants resorting to court based litigation (not resorting to ADR) are consulted in each of the above areas for getting their feedbacks. Since we found that the ADR administrators in West Bengal are very limited in number and judges are very busy with their schedule, we could collect data from around ten ADR administrators and judges from each of the above areas.

Sources and Processing of Data

The research is based on both primary and secondary sources. Legislation, judicial decisions highlighting the significance of ADR and legal aid, and field data collected by interviews and responses to questionnaire by the stakeholders are the primary sources used in the project. The secondary sources include text books, commentaries, articles published in journals and edited books, newspaper reports and online materials. Extensive review of literature has been done to supplement and corroborate the evidences that have been gathered during the course of the field work.

After the collection of both primary and secondary data, segregation of data was done on the basis of chaperization. Secondary data is extensively used for sketching the relevance of ADR in India and West Bengal. The decided cases

from West Bengal judiciary on the aspect of ADR are analysed to find out the judicial trend in popularising ADR. The field data collected through the questionnaire and interview are first segregated on the basis of geographical region, secondly, on the basis of stakeholders, and finally, on the basis of inter-related issues reflected in the schedule and questionnaire. The scheme of the research report is based on the above process of segregation.

1.5 Scheme of the Research Report

The research report is divided into following six chapters.

Chapter I, being introduction, provides the background of the research in detail. It highlights the problems in practical implementation of ADR as a major means of dispute settlement. It outlines the objectives of this research in terms of popularising and better implementing ADR in the state of West Bengal. It also delineates the area of research by specifying the aspects that are covered, and more importantly, those aspects which are not covered under the present study. Research methodology in terms of collection of data, segregation of data and processing of data are also elaborately explained in this chapter.

Chapter II is devoted for discussing different modes of ADR, their significance in the settlement of disputes and their historical development in India. It would give a brief description of ADR during pre-independence era and subsequent developments into Arbitration and Conciliation Act 1996.

Introduction of court annexed ADR mechanisms in 1999 through the amendment in Code of Civil Procedure and its effect are also discussed in this chapter. Finally, the chapter concludes with a discussion on inter-relationship between ADR and legal aid by probing into the role of legal aid in promoting ADR. The analysis of Legal Services Authorities Act 1987 forms the focal point of discussion in this part.

Chapter III is on probing into the judicial approach to ADR in West Bengal. This invariably involves discussions on various cases decided by the West Bengal judiciary over the period of time. This chapter first analyses the pre-independence cases to find the roots of ADR awareness in West Bengal. It then proceeds to look into the subsequent cases to find out the development of judicial trend in popularising ADR in West Bengal. The focal point of discussion in this chapter would be on the current trends as reflected in the recent decisions of Calcutta High Court.

Chapters IV, V and VI are primarily based on the field study conducted under the research project. The analysis of position in Kolkata and North 24 Parganas, Jalpaiguri and Darjeeling, and Burdwan is made separately in these three chapters respectively. They outline the ground realties of ADR in West Bengal by analysing the feedbacks of different stakeholders in sample areas. These stakeholders include the ADR administrators and judges, practitioners,

litigants who have resorted to ADR and litigants who have resorted to court based litigation. In addition, the position of legal aid as a means to promote ADR is also discussed in these chapters.

Chapter VII sums up the project report to outline the conclusions derived out of the research project. It comes to the obvious conclusion that the situation of ADR in West Bengal demands immediate steps for improvement. Hence, it probes into the availability of better models of ADR, which are working in other states. Finally, the chapter ends with suggestions for strengthening ADR with an objective to reduce the increasing burden on the courts of law.

CHAPTER II: CONCEPT OF ADR, ITS SIGNIFICANCE AND ROLE OF LEGAL AID IN PROMOTION OF ADR

2.1 Introduction

The gravest effect of court delay not only dilutes the very essence of justice but has an adverse consequence on the emotional, economic and societal behavior of a litigant. Delay defeats the parties of all hopes and they feel unsecured in the process of seeking justice. This in turn increases and encourages corruption, falsehood, perjury, forgery and so on. Delay, unpredictability and cost are considered as three main enemies of efficient administration of justice.[1] Unfortunately, they are deeply rooted in the Indian judicial system. The litigants are always interested in getting their disputes resolved as early as possible through a process which is cheap, flexible and not based on rigid formula of legal principles or technicalities. In simple words, they need substantive justice and not procedural justice. This has led to the development of an alternative to the court system popularly known as Alternative Dispute Resolution (ADR) mechanism.[2] The perception of ADR has become increasingly significant throughout the world in the resolution of different kinds of disputes. This is due

[1] Arun Mohan, *Justice, Courts and Delays,* Vol. 1, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) p. 19.

[2] John W. Bagby, *E-commerce Law: Issues for Business,* First edition (Ohio: West Legal Studies in Business, 2003) p. 38.

to the fact that ADR is viewed as litigant friendly system in any kind of society or economic setup.[3]

ADR has not just been an alternative to court system going by its nomenclature. In fact, it has broadened the road of access to justice by manifold. With just 12 judges per million population, India stands at the bottom of the list in terms of speedy and quality administration of justice.[4] Recent decades have been clouded with litigation explosion, which is a threatening malignancy in society. India's litigation map shows tremendous increase in number of cases especially after the 1990s. With the courts as the major mechanism for settlement of disputes, our society is becoming less cooperative and more combative in nature. Thus, ADR as a mechanism to supplement the efforts by the courts needs special focus and attention.

2.2 Concept and Types of ADR

Just like the diversity in causes of disputes, the settlement models are also varied. Alternative Dispute Resolution encompasses a wide array of practices, which are directed towards cost effective and quick resolution of disputes. ADR, as the name suggests, is an alternative to the traditional process of dispute

[3] Georgios Zekos, 'The Role of Courts and ADR in the Rule of Law', *Icfai University Journal of Alternative Dispute Resolution,* Vol. VII, No. 3, 2008, pp. 11 - 36 at p. 11.

[4] See Maneesh Chhibber, 'Do we need more judges? CJI Thakur's plea to the govt raises key questions', available at <http://indianexpress.com/article/india/india-news-india/india-judiciary-cji-t-s-thakur-supreme-court-judges-pending-cases-2778419/>

resolution through courts[5]. It consists of set of practices and techniques to resolve disputes outside the courts. Since it actively involves parties themselves to settle their disputes, it results in the amicable settlement of disputes, which is not possible generally through courts. Hence, these practices are escape routes from tiresome adjudication process. Many of such practices have evolved to settle the disputes with minimum adverse impact on the relationship between the parties. Mahatma Gandhi has said "I realized that the true function of a lawyer was to unite parties…" Hence, role of lawyers in promoting non-adversarial dispute settlement mechanisms is undoubtedly very significant. The ADR techniques mainly include arbitration, conciliation, mediation and negotiation. In India, Lok Adalat stands as another additional form of ADR mechanism, which combines different techniques like conciliation, mediation and negotiation.

Arbitration is a process for settlement of disputes fairly and equitably through a person or persons or an institutional body without recourse to litigation by the disputing parties pursuant to an agreement.[6] It may be ad-hoc, contractual, institutional or statutory[7]. A neutral third person chosen by the parties to the dispute settles the disputes between the parties in arbitration. Though it resembles the court room based settlement, it involves less procedure and

[5] D. P. Mittal, *Law of Arbitration ADR and Contract*, Second edition, (New Delhi; Taxman Allied Services (P) Ltd, 2001) p. 8.

[6] H. K. Saharay, *Law of Arbitration and Conciliation,* (Kolkata: Eastern Law House, 2001) p. 3; Phillip Capper, *International Arbitration: A Handbook*, Third edition, (London: Lovells, 2004) p. 2.

[7] Nomita Aggarwal, 'Alternative Dispute Resolution: Concept and Concerns', *Nyaya Deep*, Vol. VII, Issue 1, January 2006, pp. 68 - 81 at p. 73.

parties' choice of arbitrator. It exists with the established less cumbersome process and it is quite useful in resolving different kinds of disputes including international commercial disputes. At present, arbitration is the only legally binding and enforceable alternative to ordinary court proceedings.[8] The arbitration cannot oust the jurisdiction of courts completely. Thus, Arbitration is an alternative process to litigation, but it does not replace the ordinary judicial machinery in all its aspects.

Conciliation is a private, informal process in which a neutral third person helps disputing parties to reach an agreement.[9] It is a process whereby the parties, together with the assistance of the neutral third person or persons, systematically isolate the issues involved in the dispute, develop options, consider alternatives and reach a consensual settlement that will accommodate their needs. Usually, the conciliator in this process would independently investigate into the dispute and draft his report indicating the method of settlement of disputes. Then it is left open to the parties themselves to come to a final settlement in line with the report of the conciliator, with or without any changes to be agreed by the parties. Hence, unlike arbitration, the conciliator's report would not be binding on the parties.

[8] G. K. Kwatra, *Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes with Supplement on Indian Arbitration Law,* (New Delhi: Lexis Nexis Butterworths, 2004) p. 2.

[9] Nomita Aggarwal, 'Alternative Dispute Resolution: Concept and Concerns', *Nyaya Deep*, Vol. VII, Issue 1, January 2006, pp. 68 - 81 at p. 73.

Mediation involves the amicable settlement of disputes between the parties with the help of a mediator. The task of the mediator is to bring the parties together to the process of amicable settlement of their disputes. Mediator would influence the parties to cut down their demands with a view to reach a mutually acceptable solution. Hence, the mediator plays the role of a facilitator in attaining cooperation between the parties to the dispute. Mediation lays emphasis on the parties' own responsibilities for making decisions that affect their lives instead of a third party judging the fate of parties to the dispute. Thus, mediation can be termed as assisted negotiation,[10] wherein the mediator, by virtue of his influence, brings the parties to negotiating table and assists in the settlement of their disputes.[11] This party autonomy in the mediation makes it more popular among the informed litigants.

Negotiation closely resembles mediation. However, it is more often referred to as a method wherein the parties to the dispute themselves would settle their disputes. The negotiation process provides the parties an opportunity to exchange ideas, identify the irritant points of differences, find a solution, and get commitment from each other to reach an agreement. Bargaining is a common feature of the negotiation process. Even if a third party negotiator is involved in the process of negotiation, his role would be limited to inducing the parties to the

[10] Stephen J. Ware, *Alternative Dispute Resolution*, (St. Paul: West Group, 2001) p. 6.

[11] Abraham P. Ordover, G. Michael Flores and Andrea Doneff, *Alternatives to Litigation: Mediation, Arbitration and the Art of Dispute Resolution*, (Notre Dame: National Institute for Trial Advocacy, 1993) p. 6.

process of negotiation. Alternatively, there may be communication between two or more agents of parties to try and come to a mutually acceptable solution by way of bargaining. Thus, it mainly involves communication for the purpose of persuasion.[12] Hence, mediators would have higher level of involvement in the settlement of disputes when compared to that of negotiators. It is significant to note here that mediation and negotiation provide better and satisfactory solution to certain kind of disputes such as family disputes, disputes with neighbours, matrimonial disputes, industrial disputes and several petty disputes.

Lok Adalat is a unique system developed in India. It means people's court. It is a forum where voluntary effort at bringing about settlement of disputes between the parties is made through conciliatory and persuasive means. It encompasses negotiation, mediation and conciliation as tools to settle disputes between the parties. Lok Adalats have been given the powers of civil court under the Code Civil Procedure. The summary procedure employed in Lok Adalats help in the seedy disposal of cases by the team of experts involved in Lok Adalats. One of the advantages of Lok Adalat is that a number of disputes between different parties can be settled at one go without wasting much time. Revolutionary changes are also happening in the administration of Lok Adalats with the introduction of mobile Lok Adalat systems to bring justice to the doorsteps of needy and poor.

[12] Stephen Goldberg, Frank Sander and Nancy Rogers, *Dispute Resolution: Negotiation, Mediation and Other Process*, Second edition, (London: Little, Brown and Company, 1992) p. 17.

Lok Adalats have got statutory recognition under the Legal Services Authorities Act 1987 and the award made by the Lok Adalat is deemed to be a decree of civil court. The award is final and binding on the parties.[13] Parties may refer any dispute during pre-litigation stage or during the pendency before the court of law to Lok Adalats for amicable settlement. The reference to Lok Adalats may be made by State Legal Services Authority or District Legal Services Authority upon the receipt of any application. There are also permanent Lok Adalats operating for the settlement of cases relating to Public Utility Services like transport services, postal services, telegraph services etc.[14] Added to this, national level Lok Adalats are held on every month on a fixed day relating to different subject matters. A huge number of cases are disposed off during national Lok Adalats.

2.3 Significance of ADR

The significance ADR exists in the multi-facet advantages of it over the judicial settlement of disputes. They may be summarized as follows.

(a) *Speedy and Economic Disposal of Cases*

[13] See <http://nalsa.gov.in/lok-adalat>

[14] They operate under Sec 22-B of Legal Services Authorities Act 1987.

Abraham Lincoln has rightly said "discourage litigation…. A nominal winner is often the real loser-in fees, expenses and waste of time."[15] The court proceedings do not offer a satisfactory method for settlement of disputes as it involves inevitable delays due to its lengthy procedures and technicalities.[16] ADR, on the other hand, provides an economic, expeditious and informal remedy for disputes. This economic and speedy relief is very significant because the delay in the dispensation of justice might itself result in injustice to the litigants quite often. For example, in the cases of motor accident claims, the victims may require the compensation to be paid without delay in order to meet medical and other expenses. Any inordinate delay in such cases would defeat the very purpose of the compensation. In these matters, ADR mechanisms are of great help to the victims in obtaining speedy relief.[17] Inordinate delays, which are a part of the ordinary legal process, may also emotionally affect the parties and cause frustration, thereby eroding public trust and confidence in the legal institutions.[18] Realizing these factors, our Supreme Court in *State of Jammu & Kashmir* v. *Dev Dutt Pandit*[19] has observed that "Arbitration has to be looked up

[15] See <http://www.icadr.org/>

[16] Goda Raghuram, 'Alternative Dispute Resolution', *Nyaya Deep*, Vol. VIII, Issue 2, April 2007, pp. 17 - 24 at p. 22.

[17] Ever since Lok Adalats have been given statutory recognition in 1987, more than 8.25 crore cases have been settled. See <http://nalsa.gov.in/lok-adalat>

[18] Hiram Chodosh, Niranjan Bhatt and Firdosh Kassam, *Mediation in India: A Toolkit*, (New Delhi: United States Educational Foundation in India, 2004) p. 13.

[19] AIR 1999 SC 3196.

to with all earnestness so that the litigant has faith in the speedy process of resolving their disputes."

ADR mechanisms are also relatively inexpensive in comparison with the ordinary legal process.[20] These mechanisms, therefore, help litigants who are unable to meet the expenses involved in the ordinary process of dispute resolution through courts. When poverty is the striking problem faced by our country, ADR can really help the poorer sections of the society by being cost effective in nature. The effective use of ADR to resolve different kinds of disputes would also assist the traditional courts to cope up with the problem of mounting arrears of cases and thereby the traditional court system may also be enabled to dispose of the cases in a speedy manner.[21]

(b) *Less Technicalities*

ADR procedures are not afflicted with the rigorous rules of procedure.[22] No fixed sets of rules are employed as such, be it in mediation or negotiation or even in Lok Adalats. In case of arbitration, however, the rules of arbitration institution, which are fixed, are sometimes applied. Otherwise, the parties may meet and fix the procedures for themselves with the help of a mediator. It is

[20] <http//www.odr.info/THE%20CULTURE%20of %20 ADR%20IN%20INDIAdoc>

[21] Goda Raghuram, 'Alternative Dispute Resolution', *Nyaya Deep*, Vol. VIII, Issue 2, April 2007, pp. 17 - 24 at p. 17.

[22] William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice*, (Oxford: Oxford University Press, 2006) p. 604.

much easier with more informal procedures to avoid the confusion involved in the usually stringent procedures. This prevents the injustice being caused to an ordinary man due to his failure to understand and follow the complicated procedures. Hence, it is the substantive justice and not procedural justice that gets prominence in ADR. The ADR thus facilitates access to justice in real sense.

(c) *Scope for Parties' Autonomy*

Apart from the fixing of procedures, the parties to the disputes enjoy autonomy with respect to choice of the arbitrator, conciliator or mediator[23] and fixation of date and place of settlement. The autonomy to choose the arbitrator, conciliator or mediator can lead to the appointment of persons who are familiar with the business or have other relevant expertise and can thus play an effective role in dispute resolution. Thus, as rightly pointed by Australian Supreme Court in *Mitsubishi Motors Corporation* v. *Solar Chrysler Plymouth Inc*,[24] adaptability and access to expertise are hallmarks of ADR. The person chosen to arbitrate, conciliate or mediate would normally be an expert in the subject matter of the dispute, whereas a judge would seldom have any practical experience of the technicalities of the subject matter in question.[25]

[23] Milon K. Banerji, 'Arbitration Versus Litigation', in P. C. Rao and William Sheffield (eds), *Alternative Dispute Resolution - What it is and how it Works*, (Delhi: Universal Law Publishing Co. Ltd, 1997) pp. 58 - 67 at p. 61.

[24] 87 L Ed 2d 444 (1985) p. 459.

[25] Avatar Singh, *Law of Arbitration and Conciliation*, Eighth edition, (Lucknow: Eastern Book Company) p. 25.

The place and date of arbitration, conciliation or mediation meetings are fixed as per the convenience of all concerned. The institution of arbitration is unique in the sense that lawyers in one jurisdiction may often conduct arbitrations where the seat of arbitration is somewhere other than the country in which they are qualified.[26] Thus it is convenient for all the parties interested in the dispute. Moreover, the ADR mechanism can be used at any time depending on the willingness of the parties. It may be immediately after dispute arises or subsequently when the dispute is pending before the court. It can also be terminated at any stage by any one of the disputants.

(d) *Confidentiality of Proceedings and Awards*

ADR proceedings are conducted in private and the awards are kept confidential. In case of conciliation proceedings, Section 75 of the Arbitration and Conciliation Act 1996 specifically provides for the confidentiality of all matters relating to the proceedings. In arbitration agreements also, parties themselves, often provide for confidentiality of the proceedings and the award. The confidentiality in the ADR proceedings is very much helpful in the settlement of those disputes which the parties don't want to divulge to others.

(e) *Involvement of the Parties to the Dispute in the Settlement*

[26] Ben Horn and Roger Hopkins, *Arbitration Law Handbook*, (London: Informa, 2007) at preface.

One of the most important advantages of the ADR process is that the dispute remains under the control of the parties themselves and any settlement entered into is their own and do not represent a dictate from an outsider. The court proceedings that are traditionally practiced may not in every case provide the best approach towards the resolution of disputes. Some cases require more and more participation of the parties to the disputes rather than the mechanical and technical approach adopted by the courts. For instance, in the case of matrimonial disputes, which are sensitive in nature, involving both legal as well as emotional questions, the parties are not interested in winning or losing, but in reaching a solution. ADR mechanisms provide for more effective resolution of disputes as the parties are more involved in the process and the process is swift.[27] Since the parties are actively involved in dispute resolution process, they can reach a settlement more effectively and amicably. Thus ADR's merit also lies in the fact that the process is participatory and solution oriented.

(f) *Amicable Settlement of Disputes*

Since ADR is not adversarial and aims for all sides ending up with a solution that is acceptable to all the parties involved, it is indeed vital in maintaining or restoring relationships. The bargaining process under ADR mechanisms helps the parties to better understand the problems of each others.

[27] Radha Kalyani, 'Arbitration: Foreign Awards', *Icfai University Journal of Alternative Dispute Reolution*, Vol. VII, No. 3, 2008, pp. 5 - 6 at p. 5.

ADR thus aims primarily at the easing of differences without distorting the future relationships between the parties. In *Shakuntla Sawhney* v. *Kaushalaya Sawhney*,[28] the Supreme Court has observed that "Finest hour of justice is the hour of compromise when parties after burying the hatchet, re-unite by a reasonable and just compromise". This can be achieved only through ADR mechanisms. Therefore, the mindset of the legal professionals must change from regular adjudication procedures to alternative systems.[29]

Amicable settlement of disputes is very significant in domestic disputes, labour matters, business disputes etc. In the domestic disputes, the sanctity of family as a unit would be maintained with the help of ADR in settling internal disputes. Similarly, since industrial harmony is the most important aspect of effective functioning of any industry, neither the employers nor the workmen want to distort their future relation consequent to any dispute. Even in business relationships, the parties may wish to resolve their disputes amicably and carry on their business in the future.[30]

Despite the manifold advantages discussed above, ADR is not to be understood as a system free from any loophole. There are possibilities of

[28] (1979) 3 SCR 232.

[29] M. Jagannadha Rao, 'Law's Delays World Over - Need for a Change in Our Mindset - Towards Permanent Lok Adalats', *Nyayadeep*, Vol. 2, Issue 2, April - June 1999, pp. 23 - 30 at p. 24. Also see Vijay Kumar Aggarwal, 'Reaching the Goal of Lok Adalat', *Nyayadeep*, Vol. 2, Issue 1, January 1999, pp. 28 - 32 at p. 28.

[30] Henry J. Brown and Arthur L. Marriott Q. C, *ADR Principles and Practice*, Second edition, (London: Sweet & Maxwell, 1999) p. 13.

injustice to poor and oppressed class of the society due to the influence of external factors in ADR mechanisms. These external factors may range from political to economic. In addition, the absence of doctrine of precedent in ADR system makes the decisions unpredictable, and thereby, makes the parties skeptical about obtaining any productive outcome by resorting to ADR mechanisms. However, with the creation of awareness among parties to the dispute and building a strong corruption free system of ADR, we can overcome the concern of ADR being a tool of select few to impart injustice to others. Also, the aspect of predictability of decisions would automatically come into place once the ADR administrators are well-qualified and well-experienced.

2.4 ADR in India: Development and Scope

The concept of ADR is not novel to the Indian society. It has been rightly noted by commentators that ADR processes are not new, but have rather been rediscovered as informal justice mechanisms, which have long been the dominant method of dispute resolution in many societies, indigenous communities in particular. Study of legal literature enables us to know that settlement of disputes by arbitration or other mechanisms has been practiced in India from the distant past for resolving disputes concerning family, trade or a

social group.[31] The study of ancient legal history unveils the role of private persons (arbitrators) in Panchayats, Puga[32], Sreni[33] and Kula[34].

Among many systems followed in India, Panchayat system is the most significant one. 'Pancha' means five, and accordingly, Panchayats consisted of five elderly persons in the village led by the village headman. Panchayat system is an early form of self-governance in India, which also performed the main function of dispute resolution. As the time passed on, the King started to appoint the village headman, and he started to receive advice from the headman regarding the administration. Gradually, a system of appeal was developed, wherein the parties were allowed to appeal to the King against the decisions of Panchayats. Today Panchayat system has received the constitutional sanction to resolve disputes regarding specific subject matters.[35]

ADR in British India: Statutory Developments

[31] G.K. Kwatra, *The Arbitration and Conciliation Law of India with Case Law on UNCITRAL Model Law on Arbitration*, (New Delhi: The Indian Council of Arbitration, 2003) at foreword.

[32] Board of persons belonging to different sects and tribes but residing in the same locality.

[33] Assemblies of tradesmen and artisans belonging to different tribes but connected in some way with each other.

[34] Group of persons bound by family ties.

[35] Part IX containing Articles 243 to 243-O of the Constitution of India relates to Panchayat. In order to supplement the resources of Panchayat, Seventy Third Amendment Act 1992 has added sub-clause (bb) to Article 280 (3) of the Constitution. The Amendment has also added the eleventh schedule to the Constitution, which contains twenty nine subject matters over which Panchayats can exercise powers and authorities subject to the provisions of the Constitution and the state legislature.

Though there are early instances of use of different types of ADR in India[36], legal developments in this field started in the nineteenth century. One of the first legally recognized ADR mechanisms in India is arbitration. The origin of law of arbitration in India owes to Act VIII of 1859, which codified the procedure of civil courts. Sections 312 to 325 of Act VIII of 1859 dealt with arbitration between parties to a suit while sections 326 and 327 dealt with arbitration without the intervention of the courts. These provisions were in operation when the Indian Contract Act 1872 came into force which permitted settlements of disputes by arbitration under Section 28 thereof. Act VIII of 1859 was followed by later codes relating to Civil Procedure, namely, Act X of 1877 and Act XIV of 1882. But not much change was brought about in the law relating to arbitration proceedings.[37]

In the year 1899, the British government passed Arbitration Act, which was based on the model of the English Act of 1899. The 1899 Act applied to cases where if the subject matters submitted to the arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a

[36] During the initial period of British rule in India, a number of Regulations were passed regarding arbitration. In the Presidency of Bengal, the Regulations of 1781, 1787, 1793, 1795, 1802, 1814, 1822, and 1833 dealt with arbitration proceedings. In Madras Presidency, Regulation VII of 1816 and in Bombay Presidency, Regulation VII of 1827 provided for arbitration of civil disputes.

[37] D. P. Mittal, *Law of Arbitration ADR and Contract*, Second edition, (New Delhi; Taxman Allied Services (P) Ltd, 2001) p. 21.

Presidency town.[38] Subsequently, when the Code of Civil Procedure 1908 was passed, provisions relating to arbitration were incorporated in it. It resulted in extending the arbitration facility to the other parts of British India.[39]

In 1925, the Civil Justice Committee recommended several changes in the arbitration law. On the basis of the recommendations by the Civil Justice Committee the Indian Legislature passed the Arbitration Act of 1940.[40] The 1940 Act as its preamble indicates was a consolidating and amending Act and was an exhaustive code in so far as the law relating to arbitration was concerned. Though there was a possibility of arbitration without the intervention of a court, most of the arbitration was with the intervention of a court.

The 1940 Act stipulated arbitration agreement as the prerequisite for any arbitration. The Act had the effect of making the arbitration as a part of judicial system. This is because the award of the arbitrator had to be made as decree of the court. As soon as the award is passed, it had to be filed in the court and the court had the power to modify, remit and set aside the award of the arbitrator. In addition, there was a provision for seeking the court's opinion by the arbitrator in special cases. The opinion pronounced by the court was not subject to appeal and

[38] P. C. Rao, 'The Arbitration and Conciliation Act 1996: The Context', in P. C. Rao and William Sheffield (ed.), *Alternative Dispute Resolution - What it is and How it Works?*, (Delhi: Universal Law Publishing Co. Pvt. Ltd, 1997) pp. 33 - 44 at p. 34.

[39] D. P. Mittal, *Law of Arbitration ADR and Contract*, Second edition, (New Delhi; Taxman Allied Services (P) Ltd, 2001) p. 8.

[40] *Ibid.*

it was made part of the arbitral award. These factors had the effect of taking away the benefits of arbitration, which are mentioned above. More importantly, the Act did not impose an obligation on the arbitrator to give reasons for his award. This was the major loophole, as it has kept the parties at the mercy of the arbitrator and also provided every scope for unjustifiable and irrational awards. In addition, the laws of British India were confined only to the legal recognition of arbitration, and other ADR mechanisms, which are equally important, were not covered under them.

Legal Services Authorities Act 1987

After India got independence from the British rule, earlier laws continued to operate. It was found that majority of Indian population was devoid of access to legal aid, and thereby, access to justice itself. Since 1952, efforts were made by the Government of India to address this issue at various conferences of law ministers and law commissions. In 1960, Government has drawn guidelines for legal aid schemes and various such schemes were floated in different states through legal aid boards, societies and law departments.[41] Further developments took in the form of constitutional amendment to provide foundations for equal justice and free legal aid to needy. Article 39A of the Indian Constitution[42] stipulates that "The State shall secure that the operation of the legal system

[41] See <http://nalsa.gov.in/about-us>

[42] Inserted by the Constitution (Forty-Second Amendment) Act 1976. See <http://indiacode.nic.in/coiweb/amend/amend42.htm>

promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

Despite the above developments, access to quality legal aid was still below expectation and it was found that many people were not in a position to have satisfactory solution of their disputes. A committee was constituted in 1980 under the leadership of Justice P.N. Bhagwati to oversee and supervise legal aid programmes throughout the country. Meanwhile, a new chapter was added to the justice delivery system by the introduction of Lok Adalats.[43] Further, as a legislative effort to help people in having access to quality legal aid without any financial barrier, the Legal Services Authorities Act was passed in 1987. The Act established authorities at national, state, district and Taluk levels to achieve the above objective. It also mandates the creation of legal aid funds at national, state and district levels for furthering the cause of legal aid. The Lok Adalat as an ADR mechanism has acquired statutory recognition under this Act with the mandate on the authorities under the Act to periodically organize Lok Adalats. Lok Adalat can decide civil cases, matrimonial cases, criminal cases excluding non-compoundable cases, labour matters as well as matters pertaining to motor

[43] First Lok Adalat was held in Gujrat during March 1982. See <http://www.legalserviceindia.com/articles/lok_a.htm>

accident claims.[44] The norms under the Act are further strengthened by the 2002 Amendment.

Arbitration and Conciliation Act 1996

The 1940 Act became outdated,[45] and a need was expressed by the Law Commission of India and various representative bodies of trade and industry for its amendment. Everyone felt the necessity of it being more responsive to the contemporary requirements, and to render Indian economic reforms more effectively. It was also thought that besides arbitration, other mechanisms of settlement of disputes such as mediation or conciliation should have legal recognition and the settlement agreement reached between the parties as a result of such mechanism should have the same status and effect as an arbitral award on agreed terms. With a view of making Indian ADR mechanism to be in harmony with the different legal systems of the world that have already granted legal recognition to different ADR mechanisms, Arbitration and Conciliation Act 1996 was passed. The 1996 Act is based on the UNCITRAL Model Law.[46]

[44] Nomita Aggarwal, 'Alternative Dispute Resolution: Concept and Concerns', *Nyaya Deep*, Vol. VII, Issue 1, January 2006, pp 68 - 81 at p. 69.

[45] A.C.C. Unni, 'The New Law of Arbitration and Conciliation in India', in P. C. Rao and William Sheffield (ed.), *Alternative Dispute Resolution - What it is and How it Works?*, (Delhi: Universal Law Publishing Co. Pvt. Ltd, 1997) pp. 68 - 78 at p. 69.

[46] J. S. Verma, 'International Arbitration', in P. C. Rao and William Sheffield (ed.), *Alternative Dispute Resolution - What it is and How it Works?*, (Delhi: Universal Law Publishing Co. Pvt. Ltd, 1997) pp. 13 - 23 at p. 15.

The provision of the old and the new Act are very different. The problem of possibility of arbitrary decision, which existed in the old Act, is solved in the new Act by incorporating a provision for reasoned decisions. The compliance of principles of natural justice with respect to reasoned decisions makes the arbitral procedure fair, efficient and capable of meeting needs of the people. Most importantly, the new Act has established the ADR as an independent dispute resolution system by minimizing the judicial control over it. The parties can settle their disputes and enforce their rights and duties without the help of courts. The final award is enforced in the same manner as if it is a decree of the court. The old Act's provisions relating to opinion of the courts is also relaxed in the new Act.

Another striking feature of the new Act is the statutory recognition of conciliation proceedings.[47] The settlement agreement arrived with the help of conciliation proceedings is accorded the status and effect equivalent to that of arbitral award on agreed terms rendered by an arbitral tribunal. The Act not only covers domestic arbitration[48] and conciliation but also comprehensively covers international commercial arbitration and conciliation. The 1996 Act also contains provisions for the enforcement of foreign arbitral awards.[49]

[47] Part III.

[48] Part I.

[49] Part II.

The Arbitration and Conciliation Act of 1996 is further amended in 2015 to make the proceedings quick, cheap and impartial. Since the arbitrators are made responsible for delays under the 2015 Amendment, the arbitrators would be time-bound and would not be venturing into a field wherein they are not having any expertise. Process of declaration of independence and impartiality of the arbitrators are also made more realistic in the 2015 Amendment. Hence, a sense of self-discipline and control amongst arbitrators is imbibed with this.[50]

Amendment to Code of Civil Procedure

The Code of Civil Procedure (Amendment) Act 1999 has introduced a new provision[51] in the Code in order to provide for court-annexed ADR mechanism. However, the amendment to the Code had to wait for three years for coming into force.[52] Under Section 89, court is empowered to direct the parties to choose among different ADR modes provided therein for the resolution of their dispute outside the court. This provision is based on the recommendations made by the Law Commission of India[53] and Malimath Committee[54]. The reason for

[50] Vikas Goel, 'India: Highlights of the Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015', available at <http://www.mondaq.com/india/x/448666/Arbitration+Dispute+Resolution/Highlights+Of+Amendment+To+The+Arbitration+And+Conciliation+Act+1996+Via+Arbitration+Ordinance+2015>

[51] Section 89.

[52] The amendment was put into full effect in July 2002.

[53] It was suggested by the Law Commission of India that the Court might require attendance of any party to the suit or proceedings, to appear in person with a view to make an attempt to settle the dispute between the parties amicably.

the incorporation of Section 89 is to see that those cases, which do not require the court intervention, may be settled by alternative means, thereby reducing the burden of the courts.

The constitutionality of the amendments to the Code of Civil Procedure was challenged by Salem Bar Association. The Supreme Court, while upholding the Constitutionality of the Code of Civil Procedure (Amendment) Acts of 1999 and 2002, in *Salem Advocates Bar Association, Tamil Nadu* v. *Union of India* with *Bar Association Batala and others* v. *Union of India*[55] made certain observations in respect of the importance of Section 89. The relevant portion of the observation in the judgment reads as follows.

> It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the law's delays and the limited number of judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date…[56]

[54] Malimath Committee had went a step ahead and recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the ADR methods the suit should proceed further.

[55] (2003) 1 SCC 49.

[56] *Ibid*, p. 55, (para 9).

In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case would ultimately go to trial.[57]

2.5 A Birds Eye View of Current Scenario

The congestion in courts, lack of adequate man-power and resources, rigidity of procedure and lack of participatory roles are still the problems faced by Indian judiciary. As a result, the justice dispensing system has come under great stress. The inflow of cases cannot be stopped nor should we, since the doors of justice can never be closed. Therefore there is a continued need to increase the outflow, which requires some additional outlets. ADR mechanisms with a politic framework have promised great potentiality to address the

[57] *Ibid* (para 10).

problems and stand as additional outlets in India. Undoubtedly, efforts are being made under the framework of Arbitration and Conciliation Act 1996 and Legal Services Authorities Act 1987 to popularize all forms of ADRs in India.

Arbitration has become a common feature in settling commercial disputes in India. Issues relating to import and exports, admiralty law, infrastructure, real estate and stock exchange are commonly resolved through arbitration.[58] Almost all commercial contracts incorporate a mandatory arbitration clause to settle any future dispute. Since arbitration results in binding decisions in a relatively short span of time, the business people find it very useful. There has also been increasing use of mediation and conciliation in matrimonial disputes, family issues and property disputes.

Lok Adalats have been quite successful in India in resolving huge number of pending cases.[59] Its adoption of negotiation, mediation and conciliation methods to resolve the disputes is quite unique. In addition to the authorities established under the Legal Services Authorities Act 1987, the legal aid societies in different law schools and law colleges in India are taking up the task of conducting Lok Adalats, especially in the rural India, which lacks the proper

[58] See Krishna RaoVelagapudi, 'Arbitration in India: Growing Popularity', <http://constructionclaims.weebly.com/blog/arbitration-in-india-growing-popularity>

[59] D. K. Mishra, 'Award of Lok Adalat Equivalent to a Decree', *Nyaya Deep*, Vol. VIII, Issue 3, July 2007, pp. 99 - 108 at p. 100.

dispute settlement system. The proposals are made to strengthen the Lok Adalat system in order to increase the public confidence in the system.

There is little doubt about the advantages of the ADR and its potentiality to play a pivotal role in the dispensation of justice in India. As discussed above, the resolution of disputes by ADR mechanisms is legally established by Arbitration and Conciliation Act 1996, Legal Services Authorities Act 1987 and Code of Civil Procedure 1908. Time and again the Indian courts have also stressed on the importance of ADR and referred the matters before them to settlement through ADR mechanisms under Section 89 of Code of Civil Procedure. Unfortunately, despite the fact that the Indian legal system encourages dispute settlements through ADR mechanisms, our masses have not yet embraced it whole-heartedly.

The foremost reason for ADR's unpopularity owes to government's and Bar's failure in reaching it to masses. The facts and figures show that success of ADR in USA is due to strong initiative taken by the Bar.[60] In most of the developed countries, the Bar is divided into litigating lawyers and non-litigating lawyers.[61] The percentage of non-litigating lawyers in all the developed countries

[60] Dilip. B. Bhosale, 'An Assessment of A.D.R. in India, *Nyaya Deep*, Vol. VII, Issue 4, October 2005, pp. 57 - 72 at p. 68.

[61] The non-litigating lawyers deal with cases outside the court through ADR methods.

is significantly higher than the litigating lawyers[62]. However, we don't find many non-litigating lawyers in India. This may be attributed to the lack of proper understanding of ADR mechanisms by the lawyers, who are generally devoid of any training in administering the ADR techniques.[63] The lack of institutional framework in India has also stood as a major obstacle in the popularization of ADR.[64]

The failure of the government and the Bar can also be attributed to the fact that the Indian people are so strongly rooted in traditional court based resolution system that they are reluctant to accept any change. This is evident from the number of cases flooding the courts every year, despite the knowledge of cumbersome process of the court. Moreover, the approach of the Bench towards ADR is also variegated.[65] Often, the development of ADR in different states of India depended largely on the inclination of their respective High Court's Chief Justice towards ADR. This has led to uneven introduction of ADR

[62] Dilip. B. Bhosale, 'An Assessment of A.D.R. in India, *Nyaya Deep*, Vol. VII, Issue 4, October 2005, pp. 57 - 72 at p. 68.

[63] Y. K. Sabharwal, 'Alternative Dispute Resolution', *Nyaya Deep*, Vol. VI, Issue 1, January 2005, pp 48 - 57 at p 55.

[64] R.D. Rajan, *A Primer on Alternative Dispute Resolution*, (Tirunelveli: Barathi Law Publications, 2005) p. 593.

[65] Though the judiciary has highlighted the importance of ADR in certain cases, there are also instances of distaste of the judiciary towards the ADR mechanisms as an alternative to court system. See V. Nageswara Rao, 'ADR in India: In Retrospect and Prospect', *ICFAI Journal of Alternative Dispute Resolution*, Vol. IV, No. 1, January 2005, pp. 5 - 6 at p. 5. Also see generally Susan Randall, 'Judicial Attitudes Towards Arbitration and the Resurgence of Unconsionability', *ICFAI Journal of Alternative Dispute Resolution*, Vol. V, No. 2, April 2006, pp. 68 - 95.

mechanisms in different states.[66] Though the attempts are made to create awareness in people across the country by the government and various law schools, the effect has been marginal.

Sometimes, the ADR mechanisms suffer from inherent loopholes, which again come in the way of building confidence in peoples' mind. The greatest weakness of ADR, other than arbitration, is the absence of enforceability of decisions / recommendations of conciliators, mediators or negotiators by execution.[67] This makes the people to ultimately resort to the court proceedings in the cases where parties refuse to implement the decisions / recommendations of conciliators, mediators or negotiators and consequently, the whole process of ADR would become a waste of time and money in such cases.

Despite the fact that the ADR is acknowledged worldwide as effective, swift and cheep alternative to litigation through formal courts, in India it is found that all ills that beset the courts are also attached to ADR.[68] There is no strict qualification criterion for the appointment of the arbitrator, conciliator, mediators or negotiator. This factor has kept open the chances of passing unreasonable awards or bad mediation or negotiation, resulting in further enhancement of

[66] Prathamesh D. Popat, 'ADR in India - 2009', available at <http://www.mediate.com/acrcommerial/docs/ADRinIndia(1).pdf>

[67] J. C. Goldsmith, Arnold Ingen-Housz and Gerald H. Pointon, *ADR in Business*, (Netherlands: Kluwer Law International, 2006) p. 39.

[68] K. K. Venugopal, 'Rendering Arbitration in India Swift Effective', *Nyayadeep*, Vol. VI, Issue 1, January 2005, pp. 125 - 130 at p. 125.

conflicts. There are also instances of ADR mechanisms being very expensive, sometimes much more than the ordinary court proceedings.[69] While the ordinary court proceedings may be facilitated by free legal aid, the ADR would often involve the payment to the arbitrators, conciliators, mediators or negotiators for hiring their services.[70] This factor compels the poor Indian masses from not resorting to ADR process. The speedy disposal of cases through ADR also requires sincere and dedicated persons administering it. But unfortunately in India we do not have a separate group of people who are skilled and devoted only for the resolution of disputes through ADR. Given this fact, the people who administer ADR in India are the busy legal practitioners, having cases in courts almost every day. This negates the advantage of ADR's speedy proceedings by making it quite lengthy and time consuming.

2.6 Legal Aid: An Introduction

The very essence of justice and its nobility can be witnessed when justice is actually done to the needy. Today seeking justice has been an expensive affair in spite of the sincere urge and efforts to make it cost effective. Various other factors like lengthy procedures, complex issues involved, unreasonable adjournments granted and many more have made us to be skeptical towards the

[69] Madabhushi Sridhar, *Alternative Dispute Resolution - Negotiation and Mediation*, First edition, (New Delhi: Lexis Nexis Butterworths, 2006) p. 375.

[70] Joseph Morrisey and Jack Graves, *International Sales Law and Arbitration - Problems, Cases and Commentary*, (New Delhi: Wolters Kluwer (India) Pvt. Ltd, 2009) p. 317.

Judiciary. But like in life, even in law we have some silver lining- a ray of hope, a helping hand towards the needy. Legal aid is one such scheme which guarantees to all that in cases of need for legal assistance he/she can ask for it not as a charity but as a right which is guaranteed under our sacred document- the Indian Constitution.

Lord Denning opined that "the greatest revolution in the law since post Second World War has been the evolution of the mechanism of legal aid. It means that in many cases the lawyer fees and expenses are paid for by the state: and not by the party concerned. It is a subject of such importance that I venture to look at the law above costs- as it was-as it is- and as it should be."[71] Thus, legal aid is a system of government funding for those who cannot afford to pay for advice, assistance and representation. However, legal aid is not confined only to it, rather, it also encompasses quality legal aid to help parties in amicable settlement of disputes. Justice Krishna Iyer regards legal aid as a catalyst which would enable the aggrieved masses to re-assert state responsibility[72], whereas Justice P.N. Bhagwati calls it "equal justice in action."[73] The principle of legal aid is reflected in the call of Magna Carta (clause 40) "To no one will we sell, to no one will we refuse or delay the right to justice."[74] Effective access to justice

[71] Lord Denning, *What Next in the Law,* (London: Butterworths, 1982) Reprinted 2004, p. 81.

[72] <http://www.lawyersclubindia.com/articles/Free-Legal-Aid-5166.asp>

[73] *Ibid.*

[74] <http://www.barristermagazine.com>

can be seen as the most basic human right of a system, which is facilitated by quality legal aid.

2.7 Legal Aid: Legislative Developments

The quality of civilization of a country is measured by the respect it shows for the protection, promotion, preservation and implementation of human rights.[75] After getting independence from the British rule, the concept of legal aid in India was not clear. In the first two decades of independence, the constitutional status of free aid to indigent litigants at state expense was not recognized either by the government or by the courts. It was the contributions of Justice P.N. Bhagwati (then of Bombay High Court) and Justice Trevor Harris of Calcutta, which helped in the development of schemes relating to legal aid.[76] In 1976, a new article, Article 39-A, was added in the Constitution of India as a Directive Principle by way of Forty Second Amendment. Thus, there are cases prior to 1976, which portray a different stand on the provision of free legal aid.[77] For instance, in *Janardan Reddy* v. *State of Hyderabad*[78] and in *Tara Singh* v.

[75] Ashwani Kant Gautham, *Human Rights and Justice System*, (New Delhi: A.P.H. Publishing Corporation, 2001) p. IX.

[76] Schemes were formulated by the states of Uttar Pradesh in 1952, West Bengal in 1953 and Madras in 1954. See Mamta Rao, *Public Interest Litigation- Legal Aid and Lok Adalat*, Third Edition, (Lucknow: Eastern Book Company, 2010) p. 350.

[77] Udai Raj Rai, *Fundamental Rights and their Enforcement*, (New Delhi: PHI Learning Private Ltd., 2011) p. 317.

[78] (1951) SCR 344.

The State[79], the accused were not represented by a counsel. Yet the Supreme Court was not ready to listen to the argument that convictions were vitiated due to the absence of representation by counsel. However, in *Bashira* v. *State of U.P.*[80], the Supreme Court opined that late engagement of a counsel by the Sessions Judge had resulted in miscarriage of justice. Order 33, Rule 18 of Code of Civil Procedure 1908 provided that the state and central government may make supplementary provisions as they think fit for providing free legal services to those who have been permitted to sue as indigent persons. Moreover, the Supreme Court relied on the General Rules (Criminal) promulgated by the High Court, which stipulated that the Sessions Judge was under a duty to engage a counsel for the accused if he himself was not in a position to do so. Thus, though the Supreme Court highlighted the importance of legal aid, there was no attempt to invoke any constitutional or fundamental right.

But the situation changed with the inclusion of Article 39-A to the Constitution and when a new interpretation was given to "procedure established by law" in *Maneka Gandhi* v. *Union of India*[81]. The *Maneka Gandhi* case made the "procedure established by law" in Article 21 of the Constitution as "just, fair

[79] (1951) SCR 729.

[80] (1969) 1 SCR 32.

[81] AIR 1978 SC 597.

and reasonable." This had impact in the subsequent cases in the area of legal aid as well.[82]

An important impact of Article 39-A read with Article 21 has been to reinforce the right of a person involved in a criminal proceeding to legal aid.[83] The Article has been thus used to interpret (and even expand) the right conferred by section 304 of the Code of Criminal Procedure, 1973.[84] The Supreme Court in *Kishore* v. *State of Himachal Pradesh* observed that the legal aid may be treated as a part of the right created under Article 21.[85] In a suitable case, the Supreme Court may also direct the District Judge to arrange legal aid.[86]

The Legal Services Authorities Act 1987 made drastic changes in the field of legal services. It is an Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society and to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organize Lok Adalats, and to secure that the operation of the legal system promotes justice on a basis of equal opportunity. Under this Act, the legal aid is available to indigent persons below

[82] Paramjit S. Jaswal and Nishtha Jaswal, *Human Rights and the Law*, (New Delhi: APH Publishing Corporation, 1996) p. 204.

[83] P.M. Bakshi, *The Constitution of India*, Eleventh Edition, (New Delhi: Universal Law Publishing Co., 2011) p. 102.

[84] Section 304 of the Code speaks about the legal aid to accused at State expense in certain cases.

[85] *Kishore* v. *State of Himachal Pradesh* (1991) 1SCC 286: AIR 1990 2140: 1990 Cr. LJ 2289.

[86] *Bajiban Chauhan* v. *U.P.S.R.T.C.* (1990) Supp SCC 769.

certain income limit (the financial ceiling of legal aid varies from state to state) and to women, children, members of the scheduled castes and the schedule tribes irrespective of their income.[87] Free legal aid is also available to: (a) a victim of trafficking of human being or beggar as referred to in Article 23 of the Constitution. (b) a mentally ill or otherwise disabled person. (c) a person under circumstances of undeserved want such as being a victim of mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster. (d) an industrial worker, and (e) a person in custody, including custody in a protective home within meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act 1956 or in a juvenile home within the meaning of clause (g) of section of the Juvenile Justice Act 1986 or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act 1987.[88] The legal aid under the Act includes cost of court fee, preparation of paper book and other court expenditures as well as lawyer's fee.

The Police and Criminal Evidence Act 1984 confer upon the arrestees, the right to obtain legal advice of solicitors.[89] Indigent detenue are given such facility by state assistance. Under the Indian human rights jurisprudence, which is reflected as fundamental rights under Part III of the Indian Constitution, legal

[87] Section 12.

[88] *Ibid.*

[89] Section 58.

aid is of wider amplitude with the judicial interventions.[90] Under Article 14 of the Indian Constitution, legal aid has been prescribed as an instrument for achieving equality before law. As India has an adversary system of adjudication, the assistance of a competent lawyer plays a pivotal role in determining the win-lose situation in a case. Therefore, the Constitution has Article 22(1), which provides that an arrested person has the right to consult and to be defended by a legal practitioner of his choice. In addition, right to free legal aid in criminal trial is established as part and parcel of right to life and personal liberty under Article 21 of the Constitution.

Added to the above-mentioned fundamental rights, Article 39-A, 40, 41 and 46, which come under the purview of Directive Principles of State Policy, also have direct or indirect references to the requirement of legal aid. Article 39-A directly provides for equal justice and free legal aid.[91] It emphasises that free legal service is an inalienable element of reasonable, fair and just procedure, for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. Article 40 speaks about the democratic decentralization down to the village level and the institution of Nyaya Panchayats of respectable antiquity is justice at the grass roots level, free,

[90] Paras Diwan and Peeyushi Diwan, *Human Rights and the Law,* (New Delhi: Deep & Deep Publications, 1996), p. 142.

[91] Art. 39-A: 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 or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

by the people and for the people. Article 41 obligates the State to make effective provision for securing the right to public assistance in cases of undeserved want. Article 46 directs that the State shall promote with special care the economic interests of weaker sections of the community and in particular the SCs and STs and shall protect them from social injustice and all forms of discrimination or exploitation.

2.8 Judicial Expansion of Legal Aid

The historical study of legal aid in India and in the world shows it is a handiwork of judiciary.[92] Though initially the Indian courts had taken the view that there was no duty imposed upon the State to provide an indigent accused with the counsel,[93] later decisions by various courts have made us believe in the efforts of judiciary. In *State of M.P.* v. *Shobharam,*[94] certain persons arrested under the provisions of the Criminal Procedure Code for the criminal trespass were prosecuted in the Court of Nyaya Panchayat constituted under the M.P. Panchayat Act. Under Section 63 of this Act, the legal practitioners were not allowed to appear before the Nyaya Panchayat. The Court held Section 63 *ultra vires* of the Constitution being violative of Article 22(1). Justice Hidayatulla observed, "A person arrested and put on his defence against a criminal charge

[92] Sujan Singh, *Legal Aid- Human Rights to Equality,* (New Delhi: Deep & Deep Publications Pvt. Ltd, 2011) p. 191.

[93] *Janardhan Reddy* v. *State of Hyderabad* AIR 1951 SC 217 and *Tara Singh* v. *State* AIR 1951 SC 441.

[94] AIR 1966 SC 1910.

which may result in penalty, is entitled to the right to defend himself with a aid of a counsel, and any law that takes away this right offends against the constitution". But if an accused does not request the court to be defended by a lawyer, Article 22(1) is not violated.[95] Justice V.R. Krishna Iyer, in *M.H. Hoskot* v. *State of Maharasthra*,[96] declared that the government was under a duty to provide legal services to the accused persons, and the right to legal aid is one of the ingredients of fair procedure.[97] He observed that the Indian socio-legal milieu makes free legal service at trial and higher levels an imperative processual piece of criminal justice where deprivation of life or personal liberty changes in judicial balances.[98]

Again the rights declared in *Sunil Batra* v. *Delhi Administration*[99] are worthy of appreciation in terms of expanding the horizons of legal aid. The Supreme Court held that a prisoner is entitled for legal aid in a situation to seek justice from the prison authorities and also to challenge the decision of such authorities in the court. Thus, it is in this case that the legal aid was brought

[95] *Ram Singh* v. *Union of India* AIR 1965 SC 247.

[96] A.I.R. 1978 SC 1548.

[97] Quoting Mr. Justice Brennan's well known words, "Nothing rankles more in the human hearts than a brooding sense of injustice. Illness we can put up with, but injustice makes us want to pull thing down. When only the rich can enjoy the law, as a doubtful luxury and the poor, who need it most cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe it and benefit by its impartiality and fairness."

[98] AIR 1978 SC 1548 at p. 1556.

[99] (1978) 4 SCC 494.

about in not only the judicial proceedings but also proceedings before the prison authorities which were administrative in nature.

In *Hussainara Khatoon (No.4)* v. *Home Secretary, State of Bihar*,[100] the Supreme Court quoted from the decisions of the US Supreme Court in *Gireon* v. *Weight-Right*[101] and *John Richard* v. *Raymond*[102] where it was observed that a trial without legal service being provided virtually amounts to condemning a person without trial. In *Khatri (2)* v. *State of Bihar*[103], the Supreme Court has held that the state is under a constitutional mandate (implicit in Article 21) to provide free legal aid to an indigent accused person, and that this constitutional obligation to provide legal aid does not arise only when the trial commences but also when the accused is for the first time produced before the magistrate as also when he is remanded from time to time. However this constitutional right of an indigent accused to get free legal aid may prove to be illusory unless he is promptly and duly informed about it by the court when he is produced before it.[104] Therefore, the Supreme Court has cast a duty on all magistrates and courts to inform the indigent accused about his right to get free legal aid.

[100] (1980) SCC 98.

[101] (1963) 372 US 335.

[102] (1965) 371 US 472.

[103] (1981) 1 SCC 627.

[104] K.N. Chandrasekharan Pillai in *R.V. Kelkar's Criminal Procedure*, Fifth Edition, (Lucknow: Eastern Book Company, 2008) p. 83.

In *Sukh Das* v. *Arunachal Pradesh*[105], the Supreme Court held that right of a poor person to have legal aid exists even if it is not demanded by him. In the case of *Centre for Legal Research* v. *State of Kerala*[106], the Court through Bhagwati, C.J. expressed the view that the voluntary organizations and social action groups must be encouraged and supported by the State in operating the legal aid program, but should be totally free from any governmental control. In *State of Maharashtra* v. *M.P. Vashi,* [107] the Supreme Court directed the state to provide grant-in-aid to recognized law colleges so as to enable them to function effectively to turn out well trained law graduates. In *K.K. Desai* v. *A.K. Desai*[108], the Court noted that the judicial officers are equally responsible for the non-availability of these benefits to class of litigants. It further went on to say that in each case where a woman or child is a party, it is equally the duty of judicial officer concerned to let them know that they are entitled to free legal aid.

An important point for consideration in legal aid study is – what should be the qualification of a lawyer who is assigned to defend the poor person. Can a junior lawyer be engaged in order to reduce the expenditures? This question arose in *K. Pahadiya* v. *State of Bihar*[109] and the Court directed that the prisoners should be provided legal services of a "fairly competent lawyer", since legal aid

[105] (1986) 2 SCC 401.

[106] (1986) 2 SCC 706: AIR 1986 SC 1322.

[107] (1995) 5 SCC 730.

[108] AIR 2000 Guj 232.

[109] (1981) 3 SCC 671: AIR 1981 SC 939.

in a criminal case has been declared to be a fundamental right implicit in Article 21 of the Constitution.

The striking observation on legal aid made in *Sheela Barse* v. *State of Maharashtra*[110] is the foundation of rights of the prisoners. In this case, the Supreme Court had observed that when a person is arrested and taken to the police lock-up, the police need to give intimation of the fact of such arrest to the nearest Legal Aid Committee and such Committee shall take immediate steps for the purpose of providing legal assistance to that arrested person provided he consents to accept such legal assistance. The Court further went on to observe that that particular state government has to provide necessary funds to the concerned Legal Aid Committee for carrying out this direction. But unfortunately, how many prisoners are educated or at least aware or made aware of their rights stands as a question to be debated.

Further the Supreme Court observed that in cases of arrest without warrant, the arrestee must be informed the grounds of his arrest and also make him known about his entitlement to apply for bail. The Maharashtra State Board of Legal Aid and Advice was directed to prepare pamphlet which reads the legal rights of arrested persons. The expenses relating to the number of printed copies of the pamphlet is to be borne by that particular State. The pamphlet has to be in State language, Hindi and English. Such pamphlets in all three languages are to

[110] (1983) 2 SCC 96: AIR 1983 SC 378.

be affixed in each cell in every police lock-up. The pamphlet shall be read out to the arrested person in any language which he comprehends as soon as he is brought to the police station.

2.9 Role of Legal Aid in Promoting ADR in India

When so much dignity to his rights is assigned by the judicial activism, even a prisoner cannot blame or cry shame towards the administration of justice. But despite such valuable judgments, we see the sorry state of affairs of the arrested persons. Legal aid remains much on paper than in reality in India. While free legal aid has been considered as a burden by the legal practitioners, quality legal aid has remained as a myth in India due to the litigation based mind frame of the legal service providers. One of the benchmarks of quality legal aid is the availability of choice between multiple justice dispensation systems to the litigants. This should necessarily involve different ADR mechanisms to settle the disputes amicably between the parties. However in India, the disputing parties would ultimately end up in court litigations once they approach the legal practitioners.

There are multiple factors to blame for the failure of legal aid to cater to the need of promoting ADR. To start with, the above discussed developments from legislative as well as judicial sides have focused on the aspect of free legal aid and there is very little focus on quality legal aid. Since the focus is also more oriented towards criminal cases, ADR's significance is somewhere lost in the

process of legal aid. Added to this, the legal service providers are trained in court based litigation and not in ADR mechanisms. Thus, their only means of resort to settle the disputes is the court based litigation.

Lack of funding from the government, failure of the lower judiciary to take corrective steps, indifferent attitude of Bar Associations and absence of professional liability for rendering poor quality legal aid are the few other factors standing in the way of cherishing the common man's dream of effective legal aid. In terms of funding, the State governments in India have allotted minuscule of their budget for legal aid, which is spent more in terms of workshops and conferences with limited reach. The legal aid professionals are paid very low, and therefore, one cannot expect a highly qualified person exclusively being the part of legal aid. The lower judiciary and bench have taken no action in most parts of India to provide the requisite legal aid to the needy persons, especially in terms of resorting to amicable settlement of disputes through ADR mechanisms. Most of the legal services authorities established under the Legal Services of Authorities Act consist of judges, bureaucrats or busy practitioners, who have very little time for either rendering quality legal aid to the needy or for creating awareness among people. Added to this, the absence of professional liability for poor quality legal aid maintains the status quo of depriving the litigants of more suitable options like ADR in the settlement of their disputes.

CHAPTER III - JUDICIAL APPROACH TO ADR IN WEST BENGAL

3.1 Introduction

National level efforts to popularise ADR and legal aid needs necessary support from state judiciary and legislature. Carrying forward the legacy of the Supreme Court of India, the High Courts and other courts below them have made efforts to popularise ADR in many states. With the increasing number of cases, every court in India has found the need for directing majority of these cases to settlement through ADR mechanisms. Hence, as a matter of necessity, the state judiciary has played a pivotal role in the development of ADR mechanisms in India.

The West Bengal judiciary has been proactive in popularising ADR and legal aid since long before independence. Being the first High Court to be established in India during the British regime, many learned judges have been associated with the Calcutta High Court. The legal developments in Britain, including the focus on ADR, have started to root first in West Bengal. With a history of more than 150 years[1], the Calcutta High Court has pronounced many judgments to uphold the significance of ADR in the settlement of disputes. Moreover, Justice Rankin Committee (1924) and Justice Trevor Harris

[1] *The High Court at Calcutta - 150 Years: An Overview,* (Kolkata: Indian Law Institute, 2012) p. 11.

Committee (1949) have also worked in the direction of focusing on ADR mechanisms to deal with the arrears of cases in West Bengal.[2] Hence, this chapter probes into the valuable contribution made by the West Bengal judiciary in establishing ADR as an option to settle the disputes. It would focus on the recent judicial trends in this connection.

3.2 Initial Developments

The pre-independence cases decided by the Calcutta High Court stand as testimony for early focus on ADR in West Bengal. In *Hari Sing Nehal Chand* v. *Kankinarah Co. Ltd.*[3], the dispute was on the quality of jute supplied by the appellants to the respondents. As per the agreement, the arbitration proceeding was started. Subsequently, the sellers protested against a default by the buyers and declined to be a party to further arbitration proceedings. Despite this, the arbitrator proceeded with the award against sellers, which was appealed by the sellers to the High Court for setting aside.

The High Court observed that though there was no dishonest motive of the arbitrator in giving the award, the principles of natural justice has to be followed in the arbitration proceedings. The proceedings should have been

[2] See <http://www.eduacademy.in/wp-content/uploads/2016/11/Edu-Academy-Elate-Articles-2016-11-Week-II.pdf >

[3] Appeal from Original Order NO.62 of 1920, against the order of Mr. Justice Rankin, dated 12 April 1920.

conducted in the presence of both the parties. However, the Court refused to set aside the award and decided to remit the award to the arbitrator. While highlighting the significance of arbitration, the Court observed that the very purpose of appointing an arbitrator is to get the case decided in a quick manner. The advantage of remitting an award over setting aside the award is that the arbitrator is already acquainted with the details of the dispute. If a new panel is setup to hear the matter again, it will be time-consuming and would result in unnecessary delay in delivering justice. At times, delayed justice will definitely result in denied justice to the aggrieved ones.

One of the essential principles of arbitration is that both parties must agree for subjecting themselves to arbitration. The Calcutta High Court, in *Beni Madhub Mitter* v. *Preonath Mandal and Another*[4], has observed that the express consent of both the parties is needed for reference to arbitration proceedings. In *Hurmukhroy Ram Chunder* v. *The Japan Cotton Trading Co. Ltd.*[5], the Court took a stricter view on the jurisdiction of arbitral tribunal. The arbitral award in this case had covered certain areas that were not mentioned in the arbitration clause. The Court observed that arbitration is based on the agreement between the parties. Hence, when the parties have not agreed on certain areas of their dispute, arbitral tribunal cannot assume jurisdiction. While taking a final decision

[4] (1901) ILR 28 Cal. 303.

[5] 66 Ind. Cas. 342. Appeal from Original Order No. 47 of 1920, against an order of Mr. Justice Greaves, dated 8 March 1920.

to set aside the whole award, the Court observed that the principle of severability is applicable in such cases. Since the arbitral award in this case is not severable on the basis of subject matters covered, the whole award was set aside by the Court. Same observations are made by the High Court subsequently in *Bengal Jute Mills* v. *Jewraj Heeralal*[6].

In *Jnanendra Krishna Bose* v. *Sinclair Murray & Co.*[7], the arbitration clause read "Any dispute arising on or out of this contrast shall be referred to the arbitration of the Bengal Chamber of Commerce under its rules applicable for the time being for decision, and such decision shall be accepted as final and binding on both the parties, to this contract." Under Section 19 of Indian Arbitration Act 1899, a party may apply to the court to stay any legal proceeding instituted by the other party on the subject matter covered under the arbitration clause. Going by this provision, the respondents challenged a suit instituted by the applicants against them. While the single judge agreed with the respondents' contention, on appeal, the Division Bench overturned the decision of single judge. The Division Bench observed that there is no proof to the effect that the subject matter of the suit in this case has been agreed between the parties to be referred to arbitration under the agreement. Hence, an arbitration clause between the parties would not preclude the parties to file a case on the subject matter not covered under the

[6] AIR (30) 1943 Cal. 13.

[7] AIR 1921 Cal. 255.

arbitration clause. The same logic was further applied in *Ladha Singh Bedi* v. *Raja Sree Sree Jyoti Prosad Singha Deo Bahadur*[8].

In *The Eastern Steam Navigation Co. Ltd.* v. *The Indian Coastal Navigation Co. Ltd.*[9], a case questioning the honesty of the respondent was referred to arbitration by the complainant. Since Section 34 of the Arbitration Act 1940 precludes the reference of fraud to arbitration, the respondents challenged this before the Court. The Court observed that the arbitration clause would not preclude the respondent from asking for public investigation of allegation of dishonesty before the court of law. Hence, arbitration would not foreclose all options for the parties in case of disputes between them.

In *Nanda Kishore Goswami and Another* v. *Bally Co-operative Credit Society, Ltd., represented by Chairman, Kalipada Mukherjee and Others*[10], the Court held that arbitration under Co-operative Societies Act would not be subject to court interventions in terms of appointment of arbitrators or removal of arbitrators. Further, the court cannot modify an award and there is also no need of filing an award before the court to obtain a judgment or decree before enforcing the award. For the purpose of time period of arbitration, the Court also observed that the arbitrator cannot be presumed to enter on the reference soon

[8] AIR 1940 Cal. 105.

[9] AIR (30) 1943 Cal. 238.

[10] AIR (30) 1943 Cal. 225.

after the appointment. He is said to have entered on the reference only after he begins his work in the presence of parties after giving notice to them.

The Calcutta High Court has further contributed to fine-tune the norms of arbitration in *Subal Chandra Bhur* v. *Md. Ibrahim and Another*[11]. The partnership firm in this case had an arbitration clause, which was very wide in terms. When a dispute arose between the four partners, arbitration proceeding was started to resolve. However, despite 14 sittings, the arbitration could not result in any solution. The defendant moved to the court to get an order for the dissolution of partnership. The petitioner sought time for filing an affidavit in opposition to the claims of defendant. Subsequently, the petitioner argued before the Court that the arbitration clause between the partners of the firm has precluded the defendant from filing a case before the court of law. However, the Court held that the fact that the petitioner had sought time to file affidavit clearly indicates his taking steps in the direction of participating in court proceedings. Hence, the arbitration clause cannot be put forward for staying the court proceedings.

The above cases clearly reflect the fact that the initial developments of ADR are focused only in terms of arbitration. There was no discussion on conciliation, mediation and negotiation, which are the later developments.

[11] AIR 1943 Cal. 484.

3.3 Post Independence Developments

In *Haji Ebrahim Kassam Cochinwalla* v. *Northern Indian Oil Industries*[12], the arbitral award was challenged on the ground that the arbitrator misconducted himself by not seeking the opinion of the court as a 'special case' and passed the award without sufficient evidence. However the Court rejected this contention and held that whether or not an arbitral award has been passed after a correct appraisal of the evidence is not for the court to decide. Thus, the Court protected the sanctity of arbitration and prevented a situation of every arbitral award being challenged before the court of law on the ground of improper appraisal of evidence.

The Calcutta High Court has also proceeded carefully with respect to setting aside of arbitral award. In *Surendranath Paul* v. *Union of India*[13], despite the respondent had failed to appoint the arbitrator promptly within the stipulated time, the petitioner's case before the court was stayed. The Court observed that the conduct of the respondent was not such as to show that its intention was to abandon the arbitration agreement. Hence, the parties need to settle the case through arbitration according to their agreement. Similarly in *Life Insurance Corporation of India* v. *M.L. Dalmia and Co. Ltd.*[14], the Court rejected the

[12] AIR 1951 Cal. 230.

[13] AIR 1965 Cal. 183.

[14] AIR 1972 Cal. 295.

arguments that the sum directed under the arbitral award fell outside the arbitration clause in the contract and also the contention that the arbitration clause merely empowered the arbitrator to fix the amount to be paid and not to direct the respondents to pay the amount. Accordingly, the Court refused to set aside the arbitral award. This ratio was again reiterated in *Sankarlal Majumdar* v. *State of West Bengal*[15]. However, this doesn't mean that if the arbitrator departs from the prescribed conduct in passing the award, the court would not set aside the award.[16]

In *Jiwani Engineering Works (P.) Ltd.* v. *Union of India*[17], the Court observed that the arbitrators, just like ordinary courts of law, are entitled to award interest *pendente lite* from the date of entering upon reference till the date of award. Further, in *Eastern and North East Frontier Railway Corporation* v. *B. Guha and Co.*[18], the Court observed that it is a well-settled proposition of law that the court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record to find out whether or not the arbitrator had committed any error of law. It held that an Arbitrator has the authority to award interest from the date of award to the date of decree. Although, in the instant case, the award does not mention the basis of

[15] AIR 1994 Cal. 55.

[16] *Ramnath Agarwalla* v. *Goenka & Co. and Ors.* AIR 1973 Cal. 253.

[17] AIR 1981 Cal. 101.

[18] AIR 1986 Cal. 146.

determination of the interest and the period for which it has been awarded, it is not for the Court to determine this issue since it is not sitting in appeal on the conclusion of the Arbitrator. Even if the contention in this case that the arbitrator has committed an error in awarding interest is accepted, unless such error is appearing on the face of the award, it cannot be looked into by the court exercising a limited jurisdiction.

In *WB Industrial Infrastructure Development Corporation* v. *Star Engineering Co.*[19], the Court held that Evidence Act is not applicable to arbitration proceedings. The arbitrator has to act in conformity with the principles of natural justice. The arbitrator is the sole judge of the law and of the facts. If he had taken the decision on the basis of whatever evidence was on record and had allowed the claim, his award cannot be challenged on the basis of inadequacy or inadmissibility or impropriety of evidence, particularly when both the parties had the full opportunity to argue their respective cases and adduce evidence. The Court can only intervene in case of total absence of evidence or non-consideration of a material evidence in determination of the award.

The above decisions before the passing of Arbitration and Conciliation Act 1996 have minimised the court interventions in arbitration and brought stability to arbitration as an alternative recourse to parties to the dispute. But this

[19] AIR 1987 Cal. 126.

should not be construed as reluctance of the Calcutta High Court to interfere in case of necessity. In cases like *Sachidananda Das* v. *State of West Bengal and Ors.*[20], *State of West Bengal* v. *Usha Ranjan Sarkar*[21], and *Hoogly River Bridge Commissioners* v. *Bhagirathi Bridge Construction Co. Ltd.*[22], the Calcutta High Court has intervened in the arbitration on the grounds of bias of arbitrator, absurdity and misconduct of arbitrators respectively.

3.4 After the Arbitration and Conciliation Act 1996

With the passing of the new Arbitration and Conciliation Act 1996 to substitute the 1940 Act, the first question that came before the Calcutta High Court is about the status of application of either of the Acts with respect to contracts entered before the 1996 Act. In *Union of India and Ors.* v. *Monoranjan Mondol and Ors.*[23], the Court clarified this issue by holding that the application of the respective Act depends on commencement of proceedings. If the arbitration proceedings have commenced before the coming into force of 1996 Act[24], the 1940 Act would be applicable. Otherwise, the 1996 Act would be applicable. This was reaffirmed by the Court in *Maheshwari Steel Pvt. Ltd.* v.

[20] AIR 1991 Cal. 224.

[21] APO No. 474 of 1993.

[22] AIR 1995 Cal. 274.

[23] AIR 2000 Cal. 148.

[24] 25 January 1996.

Aravadi Steel Pvt. Ltd.[25], while dismissing an application under Section 34 of the Arbitration and Conciliation Act 1940.

In *Sudhendu Kumar Dutta* v. *Arati Dhar*[26], there were two agreements between the parties regarding the purchase and handing over the possession of a property. While the first agreement contained an arbitration clause, the second did not. When a dispute arose under the second agreement, the matter was referred to arbitration and the arbitrator passed the award. However, upon challenge, the Calcutta High Court held that the arbitral award was without jurisdiction. Hence the specific requirement of consent of both the parties for arbitration is stressed by the Court in this case.

In *Union of India* v. *Pam Development Pvt. Limited*[27], the Court held that under Section 16 of the Arbitration and Conciliation Act, the arbitral tribunal is competent to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. Any plea that arbitral tribunal does not have jurisdiction shall be raised not later than submission of the statement of defence. Plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as matter alleged to be beyond scope of its authority is raised during the arbitral proceedings. In

[25] (2002) ILR 1 Cal. 199.

[26] 2003 (3) ARBLR 621.

[27] 2004 (2) ARBLR 480.

addition, the Court held that it is not open to the court to re-appreciate reasonableness of reasons provided in an arbitral award.

In *Orissa Manganese and Minerals Ltd.* v. *Synergy Ispat Pvt. Ltd.*[28], the Court held that if any party, bound by an arbitration agreement, moves to Trial Judge for an interlocutory injunction, the Trial Judge cannot decide the entire dispute himself by without leaving anything to the decision of arbitrator. Only where prima facie case is so strong and further without interim protection there would be irreparable loss and injury to the party asking, interlocutory relief that may have effect of finality, may be granted pending disposal of arbitration proceedings. Hence, the Court in this case has tried to establish a distinguishing line between the jurisdiction of ordinary courts and arbitrators.

The Calcutta High Court has also applied the principle of severability to uphold the validity of arbitration clause in the contract. In *Great Eastern Energy Corporation Ltd.* v. *Jain Irrigation System Ltd.*[29], the respondents argued that they had no obligation towards the petitioners after the expiry of the due date of the bid and therefore, the arbitration clause stipulated therein also ceases to have effect. However, while rejecting this argument, the Court held that the argument of respondents that the validity of arbitration clause in the agreement was co-terminus with the validity of the agreement itself would be going against the

[28] 2012 (4) Cal. LT 52.

[29] A.P. No. 265 of 2011.

principle of severability of the arbitration clause from the substantive contract. Hence, the arbitration clause is given a distinct identity in the contract.

In *State of West Bengal* v. *Afcons Pauling (India) Ltd.*[30], the Court observed that the arbitrator is not a conciliator and hence, the discretionary element in arbitration is minimal. Arbitral tribunal is bound and obliged to decide disputes as per contract and in accordance with law, giving its reasons for its award in respect of each item of claim. It further observed that even though it cannot re-appreciate the evidence, it can see if there was enough evidence considered by the tribunal to come up with the award. However, the Court did not go forward to decide the case on its own. Instead, it remitted back the dispute to the arbitral tribunal for fresh adjudication in this case.

In *Jaichandlal Ashok Kumar and Company Private Limited and Another* v. *Nawab Yossef and Another*[31], it was observed that the court has complete power to consider the legality of the award but it cannot go beyond the award and substitute its own reasoning. Applying this logic, the Court held that the scope of judicial scrutiny of the fact that the claimants were not at fault in this case is very limited. Since the award *prima facie* does not show any miscarriage of justice, it was upheld and the appeal was dismissed.

[30] 2013 IndLaw Cal 623.

[31] 2013 IndLaw Cal. 651.

There is no doubt that the courts have got jurisdiction to interfere with the arbitral award on being contrary to public policy. However, the burden of proof in such cases is very high. Mere assertion of award being contrary to public policy without proper reasoning would not hold good. This was observed by the Court in *Madhav Structural Engineering Limited and Another* v. *Srei International Finance Limited and Another*.[32] In *National Buildings Construction Corporation Ltd.* v. *Amiya Industries Ltd.*[33], the Court also held that it would not interfere with the amount of compensation awarded by the arbitrator unless there is *pima facie* error on the calculation.

P. C. Roy and Company India Private Limited v. *Union of India*[34] is one of the landmark judgements of Calcutta High Court to uphold the sanctity of arbitration. In this case, the Court observed that if more than one view is possible in case of any legal or factual issue, arbitrator's view must be upheld; otherwise entire process would be nugatory. Since the parties to the dispute in their wisdom have decided to resolve controversy before a forum outside the court, verdict of that forum must be preserved unless it would offend basic concept of law of the land or is so perverse or *de hors* the scope of reference. Hence, the court cannot sit in appeal over conclusion of the arbitrator by re-examining and

[32] A.P. No. 273 of 2006.

[33] APO No. 171 of 2012.

[34] 2014 IndLaw Cal. 502.

re-appraising evidence considered by the arbitrator and hold that conclusion reached by the arbitrator is wrong.[35]

In *Jayasree Biswas* v. *Indian Overseas Bank and Others*[36], the Court condemned the act of dragging the respondents to the writ court in the presence of arbitration clause. The same logic was also followed in *Amit Kumar Choudhry* v. *State of West Bengal and Ors*[37]. Availability of remedy through arbitration was once again upheld by the Court in these cases. In *Niranjan Lal Todi* v. *Nandlal Todi and Others*[38], the Court condemned the act of stalling the arbitral reference during their pendency by filing petitions. In light of this, it also dismissed the petition seeking the termination of the mandate of the named arbitrator on the ground that the award was not rendered within the period envisaged in the arbitration agreement. Thus, dishonest activities to avoid or delay the arbitration are considered seriously by the High Court.

With respect to the court appointed arbitrator, the High Court has taken the stand of not allowing the challenge by any of the parties.[39] Similarly challenging an arbitral award after the lapse of period of limitation is held to be

[35] Same conclusion is also reached by the *Court in Swan Gold Mining Ltd.* v. *Hindustan Copper Ltd.* 2012 IndLaw Cal. 57.

[36] 2014 IndLaw Cal. 91.

[37] W.P. No. 23547 (W) of 2012.

[38] 2014 (3) Cal LT 314.

[39] *Union of India* v. *Panihati Rubber Ltd. and Another* 2014 IndLaw Cal. 817.

not condonable.[40] This has helped in bringing finality to the arbitral awards. The Court has also taken steps to prevent delays in arbitration proceedings. In *Gammon Encee Consortium JV* v. *Rites Ltd.*[41], the Court observed that arbitration by definition is consensual in nature, and it is open to the parties to an agreement governed by an arbitration clause to provide for the circumstances and the manner of its operation. However, the courts are not powerless to address the malady of delay in the conduct of arbitral references. Hence, in this case the Court terminated the mandate of previous arbitrator who has not decided the case for more than five years.

Though the High Court has often restrained the courts from interfering with the arbitral awards, it has also held that principles of natural justice cannot be denied in the arbitral proceedings. In *Dhariwal Infrastructure Ltd.* v. *Naresh Dhanraj Jain*[42], the Court held that the opportunity of hearing has to be given to both the parties to the dispute. Similarly, in *Yash Traders* v. *Inspiration Cloths and Ors.*[43], the significance of speaking orders has been upheld by the Court. This is crucial for preventing the miscarriage of justice in the arbitral proceedings.

[40] *National Agricultural Cooperative Marketing Federation of India Limited* v. *R. Piyarelall Import and Export Limited* 2015 (4) Cal. LT 100; see also *Starlight Real Estate (Ascot) Mauritius Ltd.* v. *Jagrati Trade Services Pvt. Ltd.* 2015 IndLaw Cal. 256.

[41] 2015 IndLaw Cal. 758.

[42] 2015 IndLaw Cal. 1125.

[43] 2015 IndLaw Cal. 1124.

With the passing of 2015 Amendment Act, interim orders after the constitution of arbitral tribunal cannot be passed by the courts unless there are grounds sufficient to prove that the remedies under Section 17[44] of the Act shall not be effective in the concerned matter. The Court in *Tufan Chatterjee* v. *Rangan Dhar*[45] has addressed this issue to hold that the 2015 amendment denudes the court of powers to intervene in the arbitral proceedings after the commencement of the proceedings. In *Sudarshan Vyapar Pvt. Ltd.* v.

[44] Sec. 17: (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal –

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.

[45] AIR 2016 Cal. 213.

Madhusudan Guha and Ors.[46], the Court observed that in the presence of arbitration agreement between the parties, the jurisdiction of consumer fora under the Consumer Protection Act is also ousted.

In addition to above, the Supreme Court's verdict in *Afcons Infrastructure Ltd. and Another* v. *Cherian Varkey Contruction Pvt. Ltd. and Ors.*[47] has been followed by the Calcutta High Court in subsequent cases. The Supreme Court in the above case has given a non-exhaustive list of cases that are suitable and not suitable for ADR reference under Section 89 of Code of Civil Procedure. Following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

[46] 2013 (1) Cal LT 546.

[47] (2010) 8 SCC 24.

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.[48]

The Court held that all other suits and cases of civil nature in particular the following categories of cases (even during pendency before civil courts or other special Tribunals/Forums) are normally suitable for ADR processes:

(i) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts (including all money claims);

- disputes relating to specific performance;

- disputes between suppliers and customers;

- disputes between bankers and customers;

[48] *Ibid*, para 18.

- disputes between developers/builders and customers;

- disputes between landlords and tenants/licensor and licensees;

- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;

- disputes relating to partition/division among family members/co-parceners/co-owners;

- disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);

- disputes between employers and employees;

- disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes including - disputes where a trader/supplier/ manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.[49]

Extensive references of above categories of cases by the West Bengal judiciary to ADR mechanisms have been found especially after the incorporation of Section 89 of Code of Civil Procedure. In *Sri. Binay Chatterjee and Ors.* v. *Kananbala Chatterjee and Ors.*[50], the Court observed that in suitable cases the trial court may, before or after the framing of issues, refer the parties to mediation to resolve their issues. This would be a more convenient approach in the interest of parties to the disputes. This trend of reference to nonadversarial dispute settlement mechanisms is seen more often in matrimonial disputes.[51] Thus with the insertion of Section 89 to Code of Civil Procedure, the Calcutta High Court has also stressed on the significance of mediation and negotiation as alternative modes of dispute settlement. The following table shows the number of cases referred for mediation by the trial judges in West Bengal during 2012 to August 2016:

[49] *Ibid*, para 19.

[50] C.O. 3378 of 2005.

[51] *Falguni Mitra* v. *Dr. Soma Mitra* 17 June 2015, available at <https://indiankanoon.org/doc/104541044/>

Statistical Information on Court Annexed Mediations in West Bengal[52]

Year	Total no. of cases referred for mediation by the referral Judges	Cases settled through Mediation	Cases not settled
2012	78	5	9
2013	854	291	317
2014	842	144	410
2015	1046	55	451
2016 (Up to August)	306	42	211

Table - 1

The above discussions clearly demonstrate the efforts of West Bengal judiciary towards popularising ADR mechanisms in West Bengal. The trends show more focus on arbitration as an alternative dispute resolution mechanism especially due to its early recognition in terms of codified law. Also the binding nature of arbitration may be another reason behind providing extra attention to arbitration. The verdicts on arbitration reflect the intention of the judiciary to reduce the court intervention and accord finality to arbitral awards to bring

[52] West Bengal Legal Service Authority, 'Mediation', available at, <http://www.wbslsa.org/mediation.html>

confidence in the minds of people to resort to arbitration. In the absence of such limitation, every arbitral award may get back to the court for final determination. This would make the resort to arbitration meaningless and waste of time. In addition to its efforts to minimise the court intervention in arbitration, the judiciary is also trying to promote other modes of ADR by referring suitable cases to mediation and negotiation. References to Lok Adalats to settle the disputes are also found frequently in West Bengal.

CHAPTER IV - GROUND REALITIES: KOLKATA AND NORTH 24 PARGANAS

4.1 Introduction

Disputes arise in a society due to social interactions among individuals with differing needs. Different kind of disputes would require different approaches for settlement, and this has to be understood by the stakeholders. Thus after analysing the judicial approach to ADR in West Bengal, it is pertinent to know about the view points of other stakeholders. In order to gauge the ground reality of implementation status of ADR across the state of West Bengal, the research team has conducted a field study which brought out some startling facts pertaining to the subject matter. Before analysing the data that was collected from the districts within the scope of this project, it must be made clear that the observations and inferences stated in this chapter are purely based on the data collected through the field visits to various government offices as well as non-government organisations and interactions with experts on this issue.

The mode of data collection included questionnaires and interviews. The questionnaires and schedule of interview were distributed to the stakeholders to record their responses. In the cases wherein they were not in a position to understand or fill-up the questionnaires or schedules, the research team has explained the questions to them and noted down their responses. In addition, oral

interviews are also conducted to get their feedbacks. As the sample areas of field study are (a) Kolkata and North 24 Parganas, (b) Jalpaiguri and Darjeeling and (c) Burdwan, this chapter and subsequent two chapters would also be analysing the practical position on the basis of feedbacks that we have got in these areas. The analysis is based on the responses of approximately twenty five practitioners, twenty five litigants resorting to ADR, twenty five litigants resorting to court based litigation (not resorting to ADR) and ten ADR administrators and judges from each of the above areas. Since there is difference of opinion between the practitioners, ADR administrators and judges on the one hand and litigants on the other hand, the analysis would first deal with the former group and subsequently with the latter group, and highlight the difference of opinion, if any.

In Kolkata, The West Bengal State Legal Services Authority was constituted under the Legal Services Authorities Act 1987 to ensure free and competent legal aid to the disadvantaged sections of society. It was constituted on 23 April 1998 and started functioning in August 1998. It has a number of certified mediators, arbitrators and a score of practitioners in the field of alternative dispute resolution operating from Kolkata. In addition, DLSA Kolkata and North 24 Parganas are also operating in these areas.

4.2 Views of Practitioners, ADR Administrators and Judges

The interactions with the judicial officers and practitioners revealed that amongst all the modes of alternative dispute resolution, the most frequently resorted to is Lok Adalat followed by arbitration, mediation, negotiation and conciliation. The issues resolved through Lok Adalats mostly pertain to matrimonial disputes, family affairs and personal laws which roughly constitute 25-50% of these disputes. Commercial issues including banking, real estate and revenue matters are mostly referred to arbitration. Thus arbitration is working effectively for commercial entities and almost 90% of the cases are resolved through arbitration. The use of mediation, negotiation and conciliation is comparatively less and approximately 0-25% of cases referred to these mechanisms are fully resolved. Some practitioners even said that negotiation is not thought as a part of ADR and is considered preliminary to litigation.

The following chart shows the popularity index of all the ADR mechanisms in Kolkata and North 24 Parganas from the perspective of ADR administrators and practitioners:

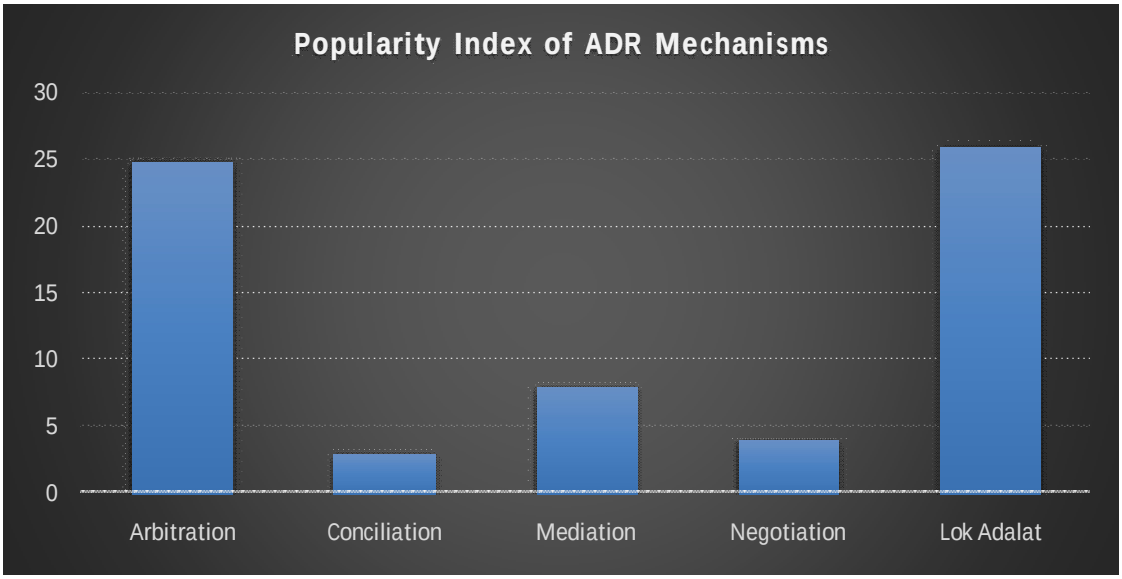

Chart - 1

When questioned on the consistency of the cases that are referred under each of the five categories of ADR, the responses of the practitioners showed immense variation. While 36% of the practitioners said that the total number of cases referred under arbitration range between 0-25%, just 4% believed this range to be 75-100%. However, the maximum of 40% people said that nearly 50% of the cases are referred to arbitration. In the case of Lok Adalats, the second most important tool of ADR in Kolkata and North 24 Parganas, majority of the practitioners said that 25-50% of the cases are sent to Lok Adalat by the courts. Conciliation, which is one of the least applied modes of ADR in Kolkata

and North 24 Parganas had merely 0-25% cases referred under it each year. With regard to mediation, which is, surprisingly, not as resorted to as arbitration and Lok Adalat in Kolkata and North 24 Parganas, majority of practitioners said that the total number of cases that are mediated range between 0-25% only. Negotiation is the third most popular mode of ADR used in Kolkata and North 24 Parganas. According to this study, nearly 50% of the cases are put through negotiation ensuring the prevention of unnecessary intervention by the court.

Although ADR has been a more widely used tool of dispute resolution in Kolkata and North 24 Parganas, a significant number of people still choose not to resort to it and go for the conventional court proceedings. When questioned as to what are the reasons which keep the people away from resorting to these methods, the practitioners largely went by the option that people think that they ultimately have to approach the court and thus, such procedures are a waste of their time and resources. The following graph depicts the responses more aptly:

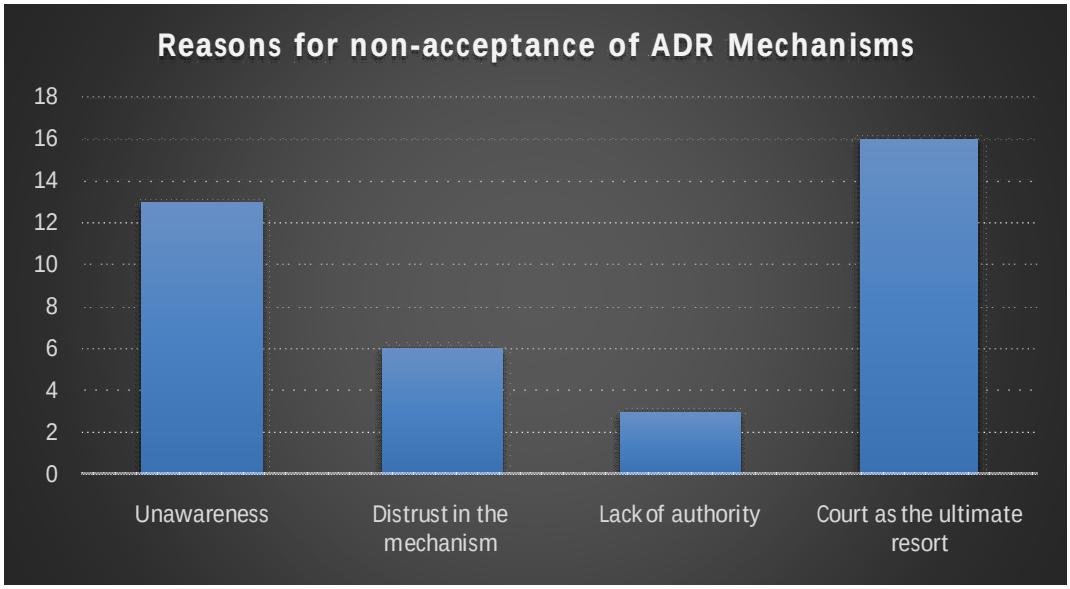

Chart - 2

It was questioned for the practitioners that how often they engage in any legal aid clinic each year. Interestingly, most of them almost never did. Merely 16% of the practitioners who participated in the study engaged into legal aid clinics 5-10 times in a year. The chart below shows the statistics of the responses:

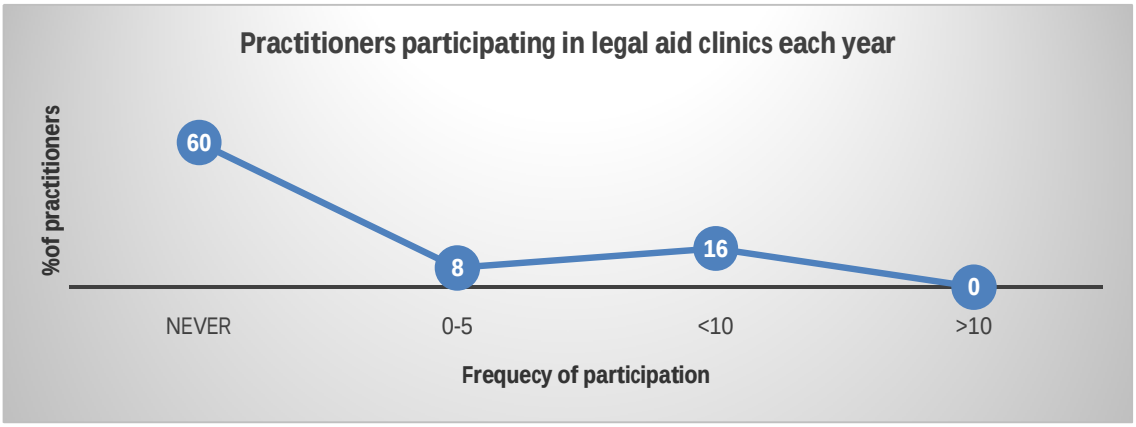

Chart - 3

One of the significant factors influencing speedy disposal of cases is the stage at which a case is referred to any of the ADR mechanisms. Although the most ideal stage should be the preliminary stage of a trial, the practitioners opined that the cases can also be referred either during the trial proceedings (40%) or in case of prolonged trials (40%). With regard to the nature of trials that should be ideally referred to ADR, the most popular category was that of matrimonial cases followed by industrial disputes. The following graph depicts the most preferred category of disputes that are or should be referred to ADR mechanisms in Kolkata and North 24 Parganas:

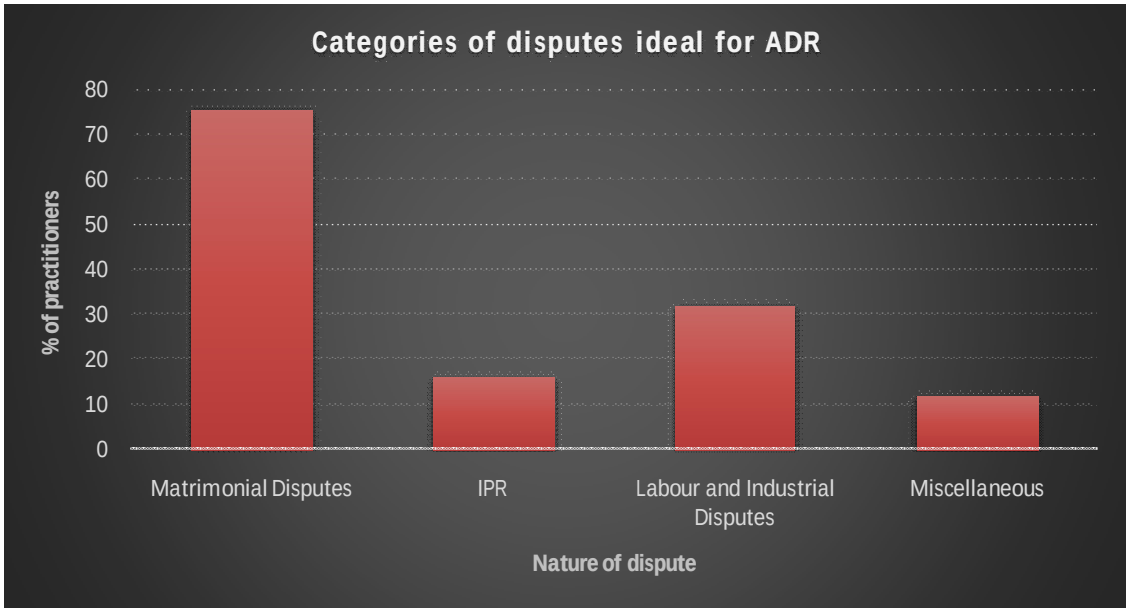

Chart - 4

There are several impediments found in the way of effective implementation of ADR mechanisms. One of these was the tendency of the former judges, who act as arbitrators, to prolong arbitration. Majority of the practitioners said that they have experienced this more than 10 times during their experience, while minuscule of them said that they had never faced any hurdle of this nature from any of the former judges. When questioned about the major hurdles that a practitioner has faced during any of the ADR proceeding, multiple factors surfaced. They included the element of bias in the panel, difficulty in enforcement of appealable awards and irregular mode of appointment of arbitrators. This can be shown by the pie chart below:

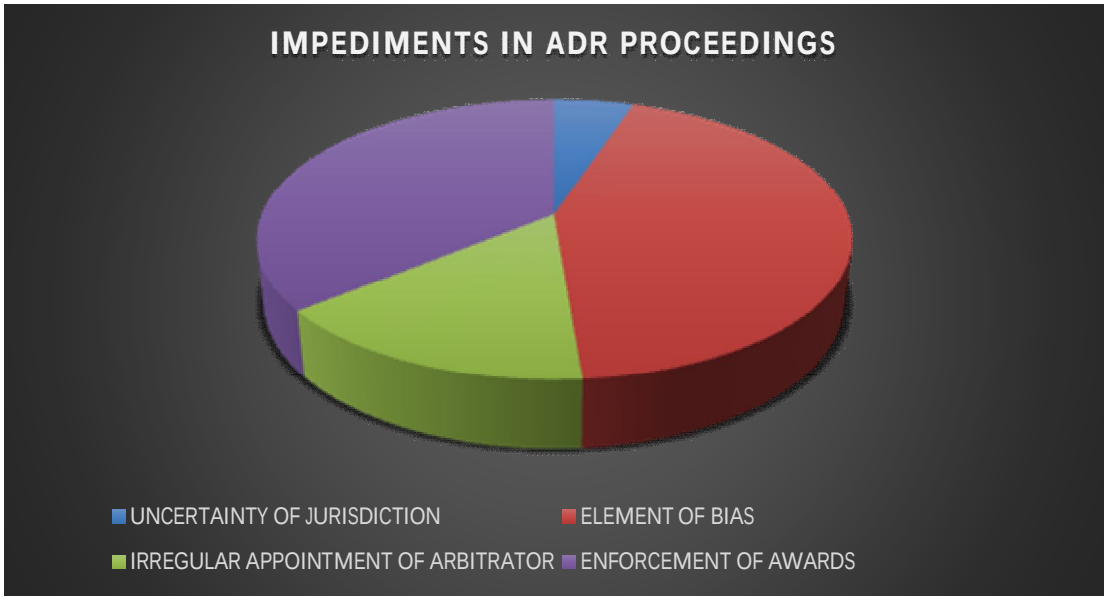

Chart - 5

Sometimes, even though the parties are completely aware of the ADR mechanisms at their disposal, they choose to move to the court regardless of the triviality of their issue. When questioned as to why does this happen, the petitioners and ADR administrators were of the opinion that the parties are weary of unsuccessful precedents. They also assume that the ADR decisions lack court-like authority. The chart below depicts the opinion of the ADR practitioners on the factors which discourage even informed parties to resort to the ADR proceedings:

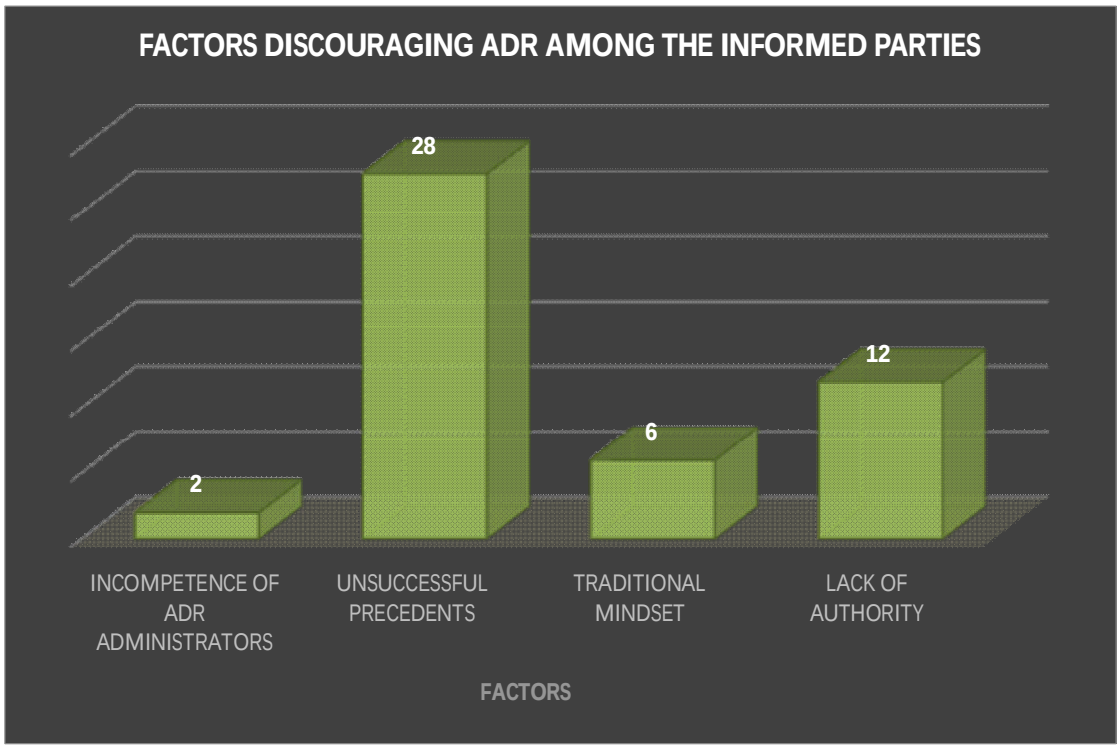

Chart - 6

As mentioned earlier, one of the major hurdles in the implementation of ADR mechanisms is the challenges to the award before the court of law. The practitioners were of the opinion that 50-75% of such awards are challenged before the courts delaying the resolution of a dispute through ADR. The awareness of ADR mechanisms among the residents of Kolkata and North 24 Parganas was said to be nearly 50%. Almost half of the litigants approaching the court are aware of the ADR mechanisms and either resort or do not resort to them as a matter of choice.

The practitioners who participated in this study had a decent amount of experience in the fields of mediation and conciliation. While 16% of the total participants had engaged in such proceedings for more than 10 times in a year, 36% had participated in them between 1-5 times in a year. However, a good 32% of the 25 practitioners interviewed had no experience of mediation or conciliation and were speaking by the experience of their colleagues. The numbers were comparatively discouraging for Lok Adalats since 36% of the practitioners had never participated in any of the Lok Adalat proceedings and merely 2% had witnessed the proceedings more than 10 times in a year. When questioned about the success rate of ADR mechanisms in West Bengal, the practitioners and ADR administrators said that even though the District Legal Services Authority (DLSA) in collaboration with the West Bengal State Legal Services Authority (WBSLSA) has been putting in untiring efforts in promoting awareness and implementation of the ADR mechanisms, it has not shown the desired results yet. The following chart depicts the response of the practitioners and ADR administrators on the success rate of ADR in Kolkata and North 24 Parganas:

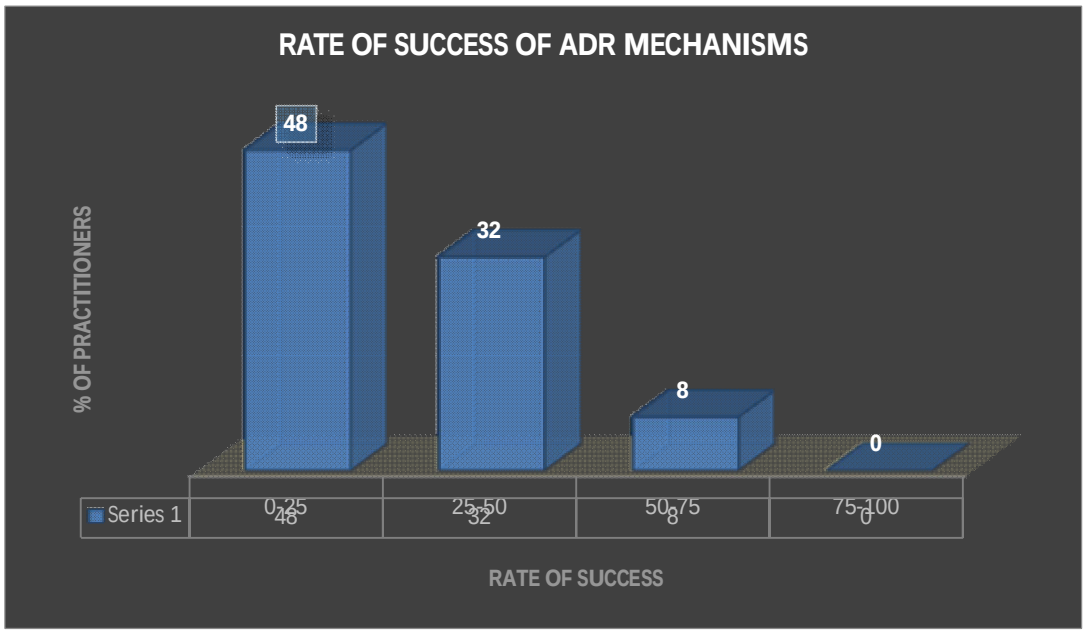

Chart - 7

Considering the pendency of cases in the courts and the number of cases being disposed of by Lok Adalats every year, it was asked from the individuals instrumental in ADR mechanisms as to the need of a community of non-litigating lawyers which would deal specifically with the cases under Section 89 of the Code of Civil Procedure (CPC). The opinions were divided. While the practitioners felt that implementing this principle would reduce the burden of the practitioners, the administrators were of the opinion that this might compromise the interest of the litigants opting for mediation and Lok Adalat because it is not so much as the training of the lawyers as their experience which helps the

litigants to get speedy justice. The judges thought it was a good proposition but should happen in the presence of litigating lawyers as this would ensure more impartiality, reliability and legal credibility to the case.

Both the practitioners and the judges believed that in order to ensure a successful use of ADR mechanisms, disputes should be referred at the pre-trial stage. However, if that could not be done then, subject to the discretion of the judge, if a trial has been in the court for an inordinately long time, it should be referred to ADR under Section 89 of the CPC. Although, the modes of ADR are fairly known to the population of Kolkata and North 24 Parganas, it is not proving to be as effective as it should be. The overall interaction of the research team with the administrators, practitioners and the judges revealed that while the concept of ADR is catching up, ironically, its pace is relatively moderate considering the pendency of cases in the courts. The success rate of the cases referred to ADR mechanisms in Kolkata and North 24 Parganas is approximately 25-50%. According to the practitioners, the main reasons of inefficacy of ADR in Kolkata and North 24 Parganas are element of bias in the panellists and an irregular mode of appointment of the arbitrators. However, the judges and the administrators believe that it is the unprofessional attitude of the lawyers' community in that they intentionally drag the proceedings which makes the parties lose faith in ADR and they are discouraged to resort to it. The other reasons brought out were lack of authority of the ADR administrators unlike

courts and unsuccessful precedents of ADR. Apart from this, the traditional mindset of the litigants that all cases are challengeable before the courts, pulls them further away from ADR mechanisms. Precisely, the litigants would rather have an impartial court whose faults are predictable than an ADR mechanism which, they think, is a waste of their resources.

4.3 Views of Litigants

To start with, just like the former group, a question on popularity of ADR is asked with the litigants who have resorted to ADR as well as those who have not resorted to ADR. The result was more or less same with the exception of mediation. Along with arbitration and Lok Adalat, they have shown their awareness about mediation as a means of dispute settlement mechanism. Following chart shows the popularity index of all the ADR mechanisms in Kolkata and North 24 Parganas from the perspective of litigant group:

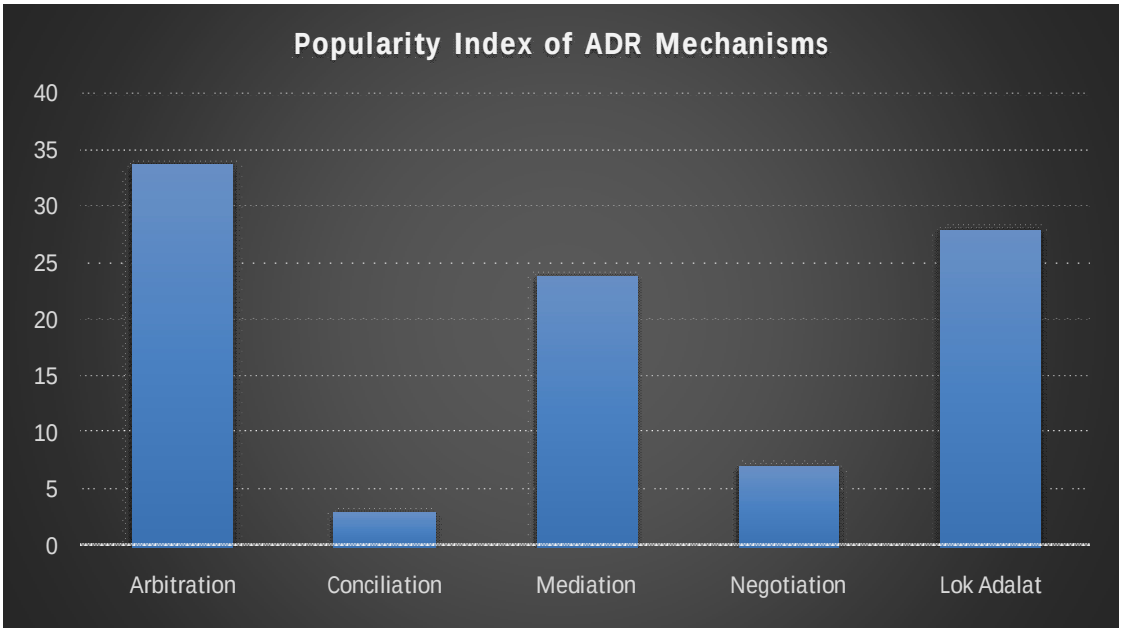

Chart - 8

However, this awareness was not entirely through legal counselling. While 21% of the litigants said that they were explained the legal significance of ADR mechanisms by counsels, 67% said that it was in unclear terms. 42% of the litigants also said that they have been explained the concept and use of ADR by a judge during the proceedings, however, in unclear terms. A maximum of 42% of litigants had resorted to Lok Adalats as their mode of dispute resolution. 38% of litigants have resorted to arbitration and 25% have undergone mediation. Negotiation and conciliation have been used by only 4% each of the litigants.

The following pie chart shows the statistics of litigants who have resorted to different ADR mechanisms:

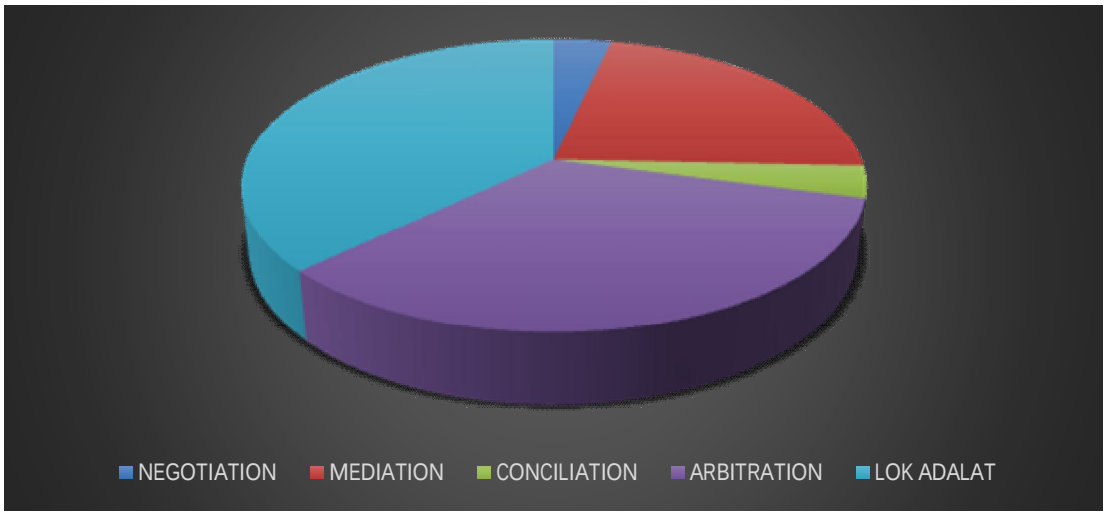

Chart - 9

When questioned whether ADR administrators have been able to successfully resolve the disputes of the litigants, 49% of litigants said that their disputes were resolved to an extent, while 38% said that their disputes were disposed of in their entirety. However 13% of these litigants said that they found ADR to be a waste of their time and resources and had to resort to the regular court proceedings, ultimately. The next question brings out the role of a judge in ensuring awareness and implementation of ADR in legal disputes. When questioned as to what encouraged the parties to settle their disputes through ADR, a staggering 67% stated that they did this on the directive of the judge.

However, 33% stated that they were anxious for a speedy disposal of their dispute and were aware of the importance of ADR in this regard. The following chart shows the subject matters that the litigants preferred for reference to ADR for settlement:

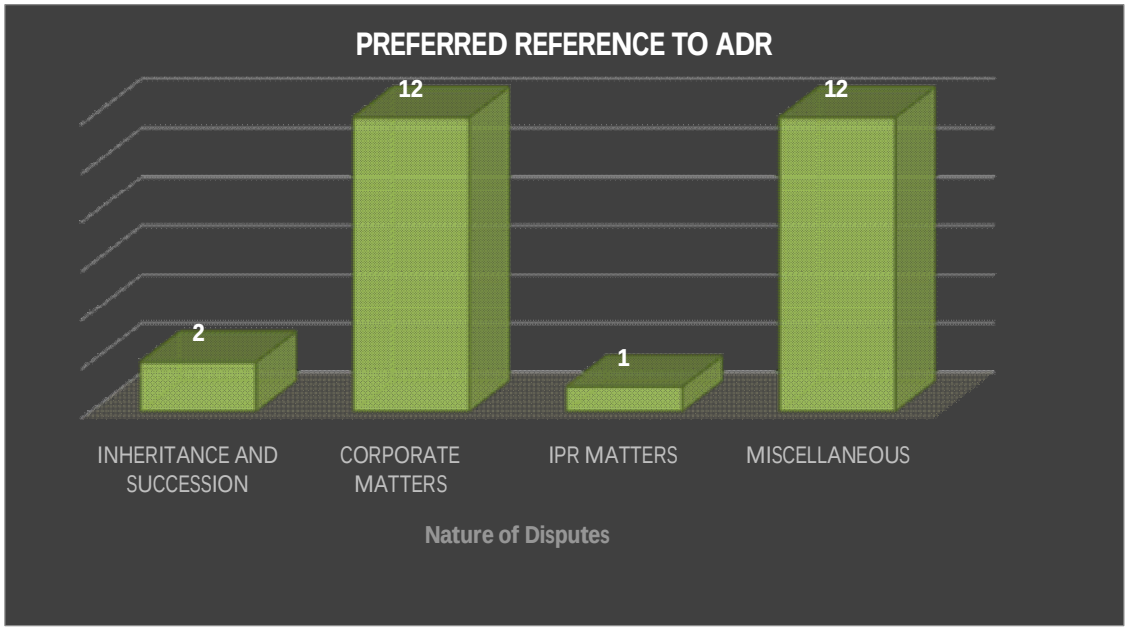

Chart - 10

The above chart reflects corporate matters as the most frequently referred matters for ADR. In the field of miscellaneous matters, it has been observed that the majority of the cases relate to motor vehicle accidents and insurance aspects. When a question on the subject matter of disputes of those litigants who have not resorted to ADR mechanisms is asked, the majority of litigants have mentioned

inheritance and succession as their matters. Hence, issues of inheritance and succession are least referred matters to ADR in Kolkata and North 24 Parganas.

In order to understand the stages at which a particular case was referred to ADR by the court, the litigants were questioned as to how long it took before their matters were referred to any of the ADR mechanisms. For most of the litigants the matter was immediately referred to ADR while for another 29%, their cases were referred within a period of 2 years. However, 8% of the cases were referred to ADR after 10 years of it being in the court. It is such cases which pile and add up to the issue of judicial backlogs.

A peculiar factor surfaced when the litigants were asked as to how long did it take for their dispute to resolve through ADR; a shocking 42% said that their issue could not be resolved through ADR and 4% litigants said that it took them more than 5 years even with the help of ADR to resolve their dispute. Considering that ADR mechanisms are meant for speedy disposal of civil disputes of trivial nature, these figures are a huge setback. Nearly 50% of the litigants said that they found the ADR mechanism ineffective either in the middle of the proceedings or towards the end. 88% of the total litigants who resorted to ADR mechanisms were neither aware of any legal aid clinics operating in their region nor ever tried to approach one for appropriate legal guidance. The

litigants who had never resorted to ADR mechanisms for their dispute resolution had, actually, never been explained its significance by their counsel or any judge.

More than 71% of the litigants who had either never resorted to ADR mechanisms or had switched to the usual court proceedings had to spend more than Rs. 1,00,000 on their dispute settlement. Another 19% have spent between Rs. 10,000 and 1,00,000, and only remaining 10% have spent between Rs. 1,000 and 10,000. When the litigants who have not resorted to ADR mechanisms are asked about the reasons for not opting ADR mechanisms, majority of them have reflected their traditional mind-set of believing only in court proceedings. Following chart shows the responses gathered from litigants in this regard:

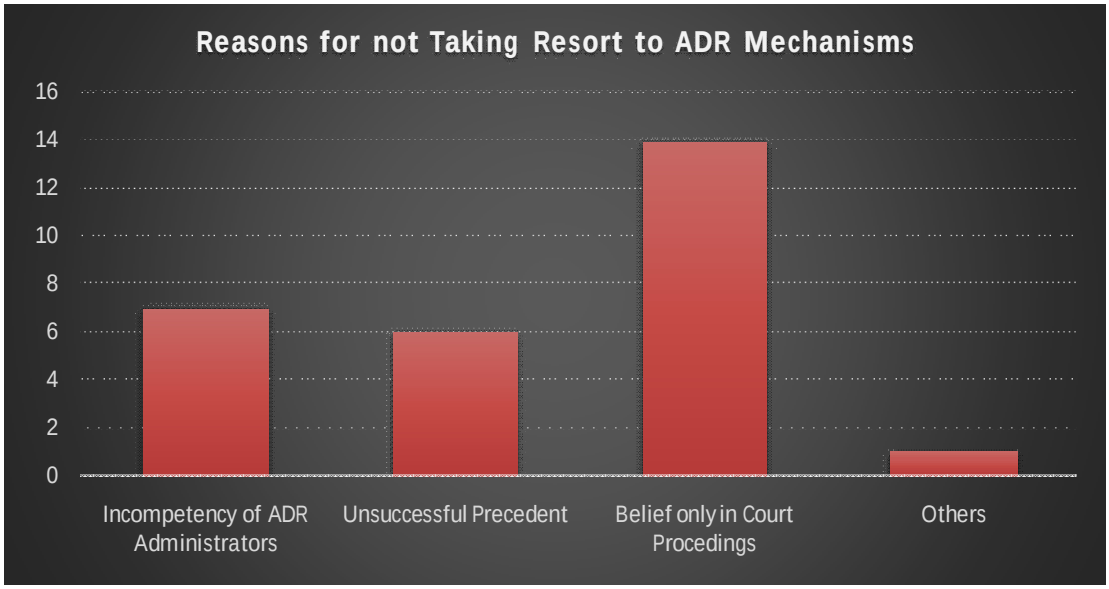

Chart - 11

Based on the interactions with the litigants who resorted to ADR, it can be observed that these mechanisms are not functioning to their fullest potential, which calls for a more problem-specific-solution-oriented approach of the judiciary. Mere reference of cases to ADR is not enough. The ADR mechanisms are both speedy and cost-effective and thus, the judicial organisations need to ensure an effective implementation of these mechanisms in order to both, acquire the trust of the litigants in ADR mechanisms and reduce the burden on the courts. The awareness that our courts are over-burdened with cases and that resorting to ADR would not only be beneficial to the courts but would also serve speedy justice to the parties, can be conveyed to the parties only through the legal fraternity.

CHAPTER V - GROUND REALITIES: JALPAIGURI AND DARJEELING

5.1 Introduction

Office of DLSA, Jalpaiguri is situated at the Nawab Bari Court complex of Jalpaiguri town. It was inaugurated in 1998 and has been effectively functional in providing legal aid to the poor and needy persons of the district. On visiting the DLSA, Jalpaiguri we could observe that the environment was generally people-friendly and it was easy for any person to approach the Secretary, DLSA to seek any kind of guidance on legal aid and Lok Adalats. It was informed that the DLSA, Jalpaiguri entitles the female population of the district to free legal aid irrespective of its income. While the male population has to meet certain criteria to avail such legal aid, it is generally provided to everyone free of cost.

Apart from providing legal aid, DLSA, Jalpaiguri also organizes legal awareness camps and seminars in different parts of Jalpaiguri to spread awareness amongst the people of their rights and about the new legislation and changes in law. In cooperation with the various local NGOs and private organizations, the DLSA, Jalpaiguri has successfully set up legal clinics in different parts of the District for quality legal service to the remotest of the population. Such clinics are manned by trained para legal volunteers. Secretary

DLSA, Jalpaiguri visits different juvenile and shelter homes and correctional homes to monitor their functioning and acts appropriately upon the complaints particularly from the senior citizens and juvenile inmates about the violation of their legal rights within the shelter homes. Disputes are also settled at pre-litigation level, the proceedings of which are often held in the chamber of the Secretary, DLSA.

Darjeeling is a small establishment when it comes to legal affairs. The office of the DLSA, Darjeeling was set up in 1998 and has been functioning in the court building. DLSA, Darjeeling has 3 certified mediators and a score of practitioners of cases referred to ADR mechanisms. The administrative staff of the DLSA, Darjeeling is diligent and accessible to the common people who wish to resort to mediation and Lok Adalat for speedy redressal of their grievances. However, the management of records of the litigants seeking ADR mechanisms as a solution of their legal issues is primitive. Despite being a literate region, there is barely any use of digital modes of storage of the records of the litigants approaching the DLSA.

5.2 Views of Practitioners, ADR Administrators and Judges

To start with, mediation and Lok Adalat share the privilege of being in the top of popularity list in Jalpaiguri and Darjeeling areas. The practitioners involved in it have an elaborate experience in this field and are engaged as many

as ten (and above) times in mediation and Lok Adalats per year. Maximum cases are referred to ADR mechanisms during the pre-trail stage, however, they are also referred to ADR in case of prolonged trial proceedings. Given below is a graphical representation of popularity of different ADR mechanisms in Jalpaiguri and Darjeeling:

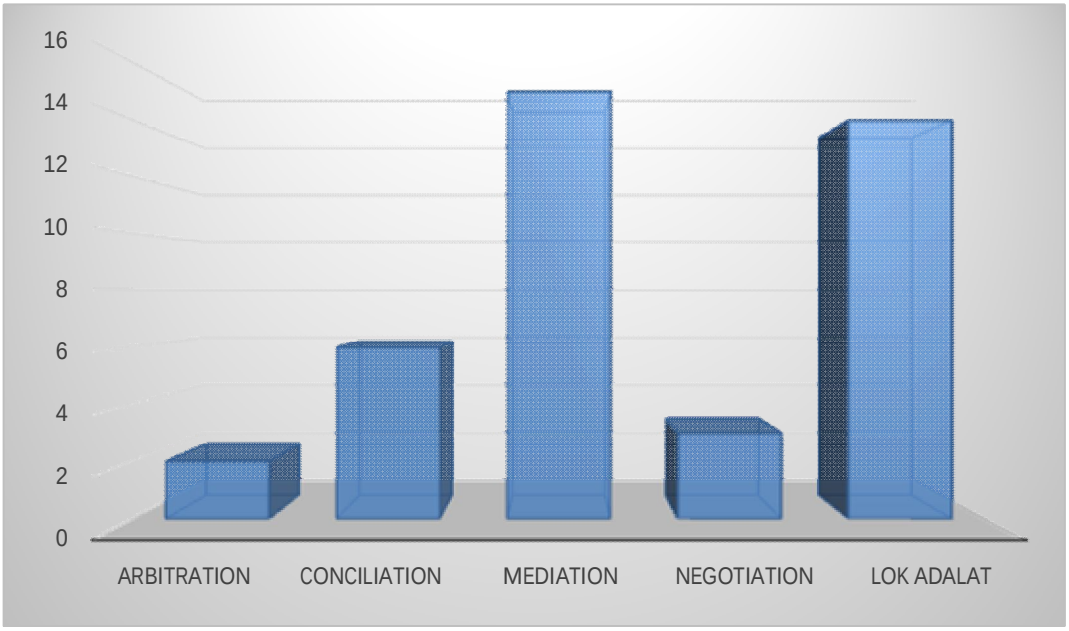

Chart - 12

Thus the most popular modes of ADR as depicted above are mediation and Lok Adalat. Though conciliation is found to a certain extent, arbitration and negotiation have not found a strong ground in the legal setup of Jalpaiguri and Darjeeling. When the practitioners were asked about the reasons for less popularity of ADR mechanisms, the biggest reason that surfaced was the

unawareness of the people. Majority of the practitioners said that since people are not aware of these mechanisms, they refuse to resort to them. Some practitioners also believed that their clients choose the courts over ADR mechanisms because they consider that courts are the ultimate solution to their legal problems. Following chart can be referred for understanding the status of responses in this regard:

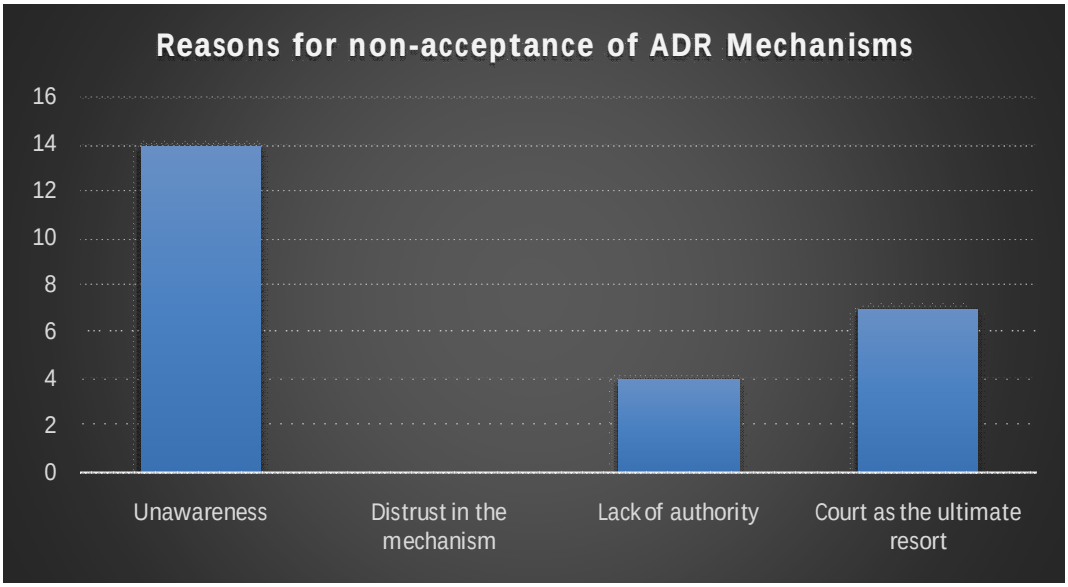

Chart - 13

When a similar question on non-acceptance of ADR is asked with the administrators, they observed that this owes to the lack of awareness of the people and the callousness of the advocates. The DLSAs, according to them, have made efforts to popularise ADR by using easily comprehendible modes. However, if one tries to explain to the people the meaning of negotiation and what it entails, the only thing they grasp is that it is merely a settlement oriented

conversation with no legal enforcement whatsoever. Comparatively, Arbitration, mediation and Lok Adalat engage judges and advocates who, in the opinion of the people, are responsible for dispute resolution. Thus, even though the people of Jalpaiguri and Darjeeling have begun resorting to ADR mechanisms, they are doing it under the conventional notions of dispute resolutions.

Of the total number of practitioners who responded, 40% had never engaged in any legal aid clinics throughout their experience and another 40% had experienced the legal aid clinics at least between 0-5 times. 10% of the counsels have tremendous experience in conducting legal aid clinics and had engaged in it over ten times a year. Engaging in legal aid clinics not only facilitates the parties but also encourages the counsels to impart their legal services to the needy with a sense of altruism. 50% of the total number of practitioners had never participated in any mediation or conciliation proceedings while 30% had participated in them less than 5 times in a year. Merely 10% of the practitioners had participated in such proceedings over ten times in a year. The lack of experience of the practitioners reflects in the lack of awareness of the litigants who avail the legal services of such clients. Only 50% of the participating practitioners had been a part of Lok Adalats between 1-5 times in a year.

While the ADR centre in Jalpaiguri is comparatively advanced and equipped, the number of cases referred under Section 89 of the CPC is relatively

less. In Jalpaiguri and Darjeeling, majority of practitioners are of the view that more than 50% of cases considered for ADR are referred for Lok Adalat and between 25%-50% of cases are referred to mediation. They were of the view that a minuscule of disputes is referred to arbitration, conciliation and negotiation. While most of those cases referred to ADR are at a pre-litigation stage, the lawyers believed that cases can be referred at any stage of the proceeding as long as the consent and the willingness of the parties are involved.

The majority of the participants viewed that the cases suitable for reference under Section 89 of Code of Civil Procedure in Jalpaiguri and Darjeeling are mostly matrimonial disputes, which is followed by industrial and labour disputes and disputes relating to land and partition. Matrimonial disputes, owing to their triviality, most of the times, have been considered by the practitioners as the most preferred types of disputes for reference. The following chart depicts the status of their responses:

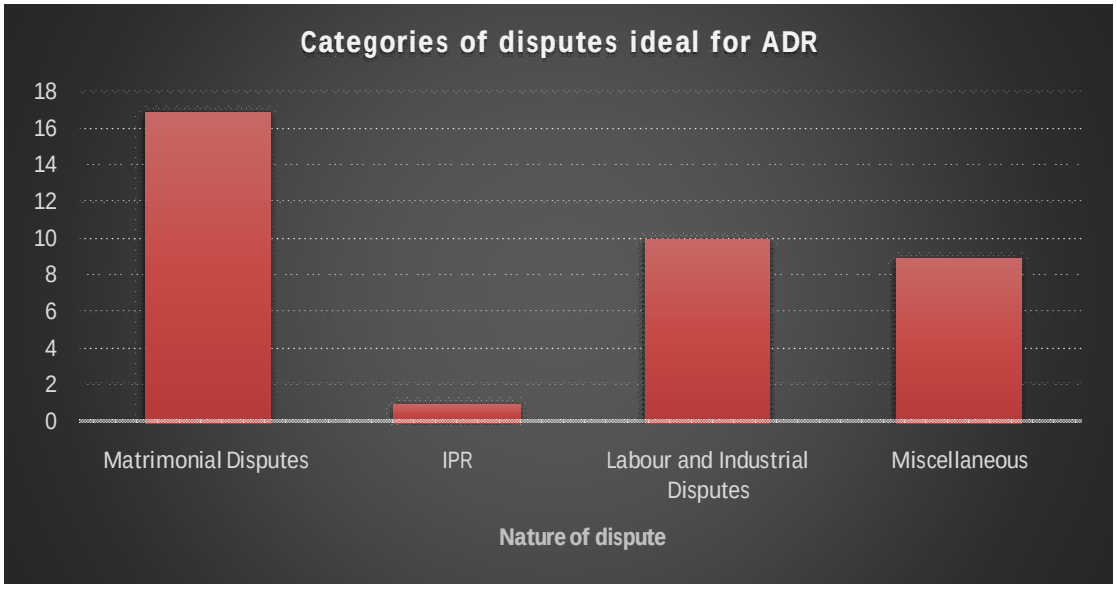

Chart - 14

When questioned as to what is the ideal stage of referring a case under Section 89, the opinions were divided. While 50% of the practitioners said that a case must be referred at the time of the filing of the summons, 25% each said that a case can be referred in the instance of prolonged trial proceedings and pre-trial proceedings. The opinion of the judges and the administrators in this regard is that a case must be referred to ADR under Section 89 before the trial begins in the court. This would prove effective in terms of resources and time of the court as well as the litigants.

When questioned as to how far the tendency of a judge acting as an ADR administrator to prolong a proceeding has affected the resolution of any dispute,

50% of practitioners said it has never affected any proceeding while another 50% said that it has affected the dispute resolution. The general opinion of the practitioners is that the judge tries to play a proactive role during ADR proceedings with a judicial frame of mind, which may delay the proceedings. However, none of the practitioners objectively held this to be a major setback in implementation of ADR mechanisms in Jalpaiguri and Darjeeling. Hence, it becomes pertinent to know other factors that could possibly be impeding ADR proceedings in Jalpaiguri and Darjeeling. The following chart records the opinions of the practitioners pertaining to this aspect:

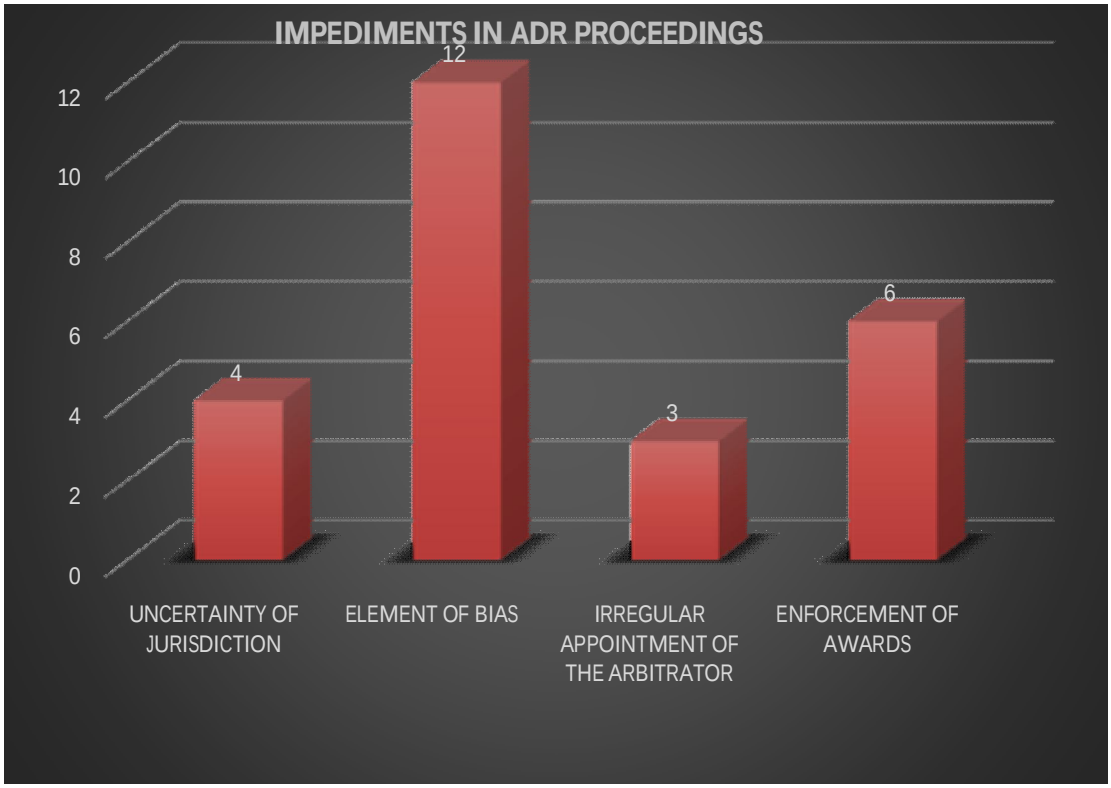

Chart - 15

So the practitioners perceive the element of bias as the major impediment in ADR proceedings. While problem of enforcement and other factors are also mentioned, another major impediment found in Darjeeling is the natural constraints like the place of residence of the parties to the dispute. Often, the parties come from distant and small villages situated outside the city, which makes it difficult for the administration to approach them and vice-versa, thereby adversely affecting the speedy disposal of their disputes. Yet another peculiar problem that surfaced was the filing of fake and politically motivated disputes, which pointlessly burden the dispute resolution systems.

Further, when the practitioners were questioned about the attitude of well-informed parties not resorting to ADR, they were of the opinion that multiple factors are responsible for this. While traditional mind-set and incompetency of administrators featured as main factors, lack of authority and unsuccessful precedents were also considered as factors discouraging the parties. Following is a graphical representation of this response:

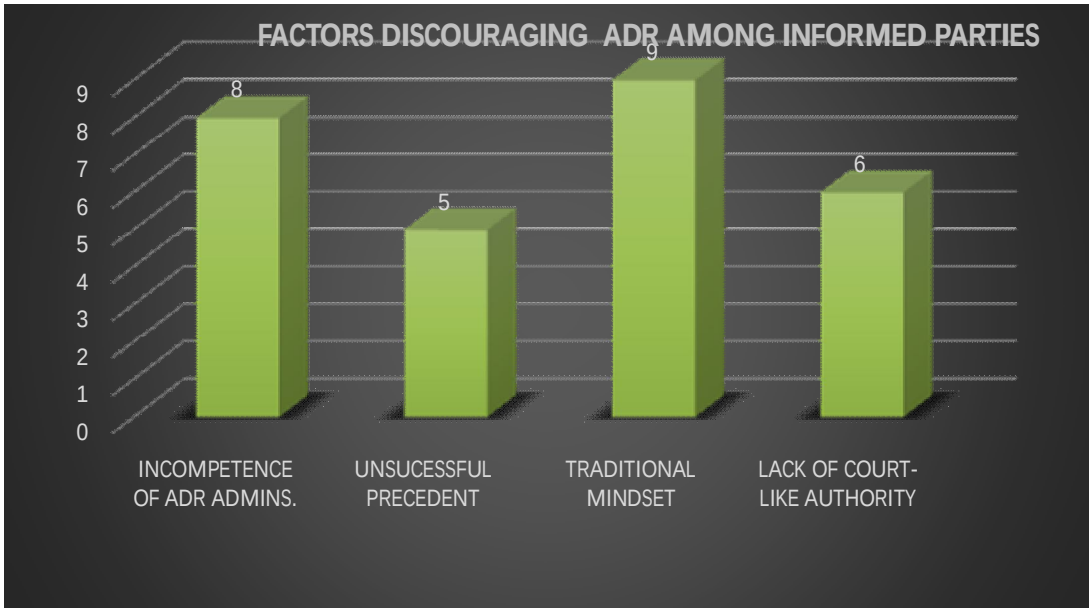

Chart - 16

All cases referred under Section 89 are not always successfully decided. A certain fraction of cases is, sometimes, referred back to the court. According to 40% of the practitioners, 0-25% of the total cases referred back to the court; 20% of them say that nearly half the cases are referred back the court while only 10% say that almost a third of all the cases referred under Section 89 are sent back to the court. This usually happens when a case is not considered timely for referral under Section 89.

As mentioned above great majority of practitioners opine that the informed parties do not trust the competence of the ADR administrators to ensure a fair conduct of the ADR proceedings. Due to this, the outcomes of ADR proceedings are immediately challenged before the court. In the opinion of most

of the practitioners, from a quarter to a half of the decisions made are challenged before the court. For example, while the success rate of the cases referred to Lok Adalats is 50-75%, around 25-50% of the awards have been challenged. As expressed by one of the judges as well as a practitioner, the litigants do not take the arbitral award or other decisions under ADR as seriously as a judicial verdict. They approach an arbitral tribunal or other alternative forum with a pre-conceived notion of winning the case and challenge the award/decision despite being on a lower pedestal than the winning side.

Considering the pendency of cases in the district court and the number of cases being disposed of by the Lok Adalats every year, it was asked from the individuals instrumental in ADR mechanisms as to whether there is a need of a community of non-litigating lawyers which would deal specifically in the cases under Section 89 of the Code of Civil Procedure (CPC). While the practitioners felt that implementing this principle would reduce the burden of the practitioners, the administrators were of the opinion that this might compromise the interest of the litigants opting for mediation and Lok Adalat because it is not so much as the training of the lawyers as their experience which helps the litigants to get speedy justice. However, the judicial magistrates opined that creating a separate non-litigating community of lawyers would create unnecessary friction between them and the litigating community which might jeopardize the interest of the litigants, the objective of mediation and Lok Adalat and the principle of justice.

Owing to the inexperience of both, the lawyers as well as the litigants, the success rate of ADR in Jalpaiguri and Darjeeling is extremely low. The following graph reflects the opinion of the practitioners and administrators with regard to the extent to which ADR mechanisms have been successful in Jalpaiguri and Darjeeling:

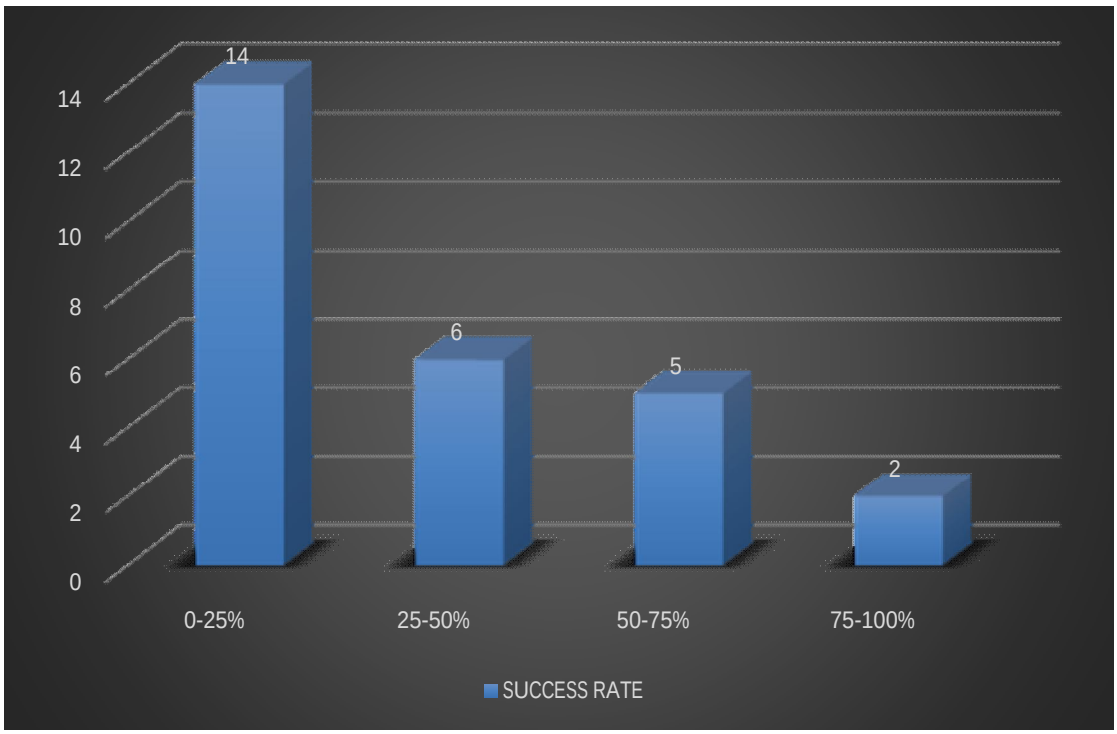

Chart - 17

One of the issues which were commonly prevalent in these places was the antagonism posed by the lawyers' community to the system of ADR. Interactions with the lawyers, ADR administrators as well as the judicial magistrates revealed that often, the lawyers are the people who discourage or misguide their clients

with regard to the role of the ADR mechanisms. Seemingly, they do this to protect their financial and reputational interests. Therefore, there could be seen a stark opposition in the opinions particularly of the lawyer and the judges when asked about the need of a set of non-litigating lawyers to encourage and practice ADR mechanisms across the State of West Bengal. While the former community believes that this will negatively affect the profession, the latter thinks it would help strengthen faith of the people in the justice delivery system.

The practitioners feel that although the DLSA and legal aid centres of these places have been working hard to spread awareness and encourage implementation of the ADR mechanisms, there are certain measures which, if taken, can instantly boost their effectiveness. This includes extensive training of the stakeholders, incentivising the lawyers to participate in the execution of ADR mechanisms, appraisal of the arbitrators/advocates working with the ADR centres and providing a stronger authority to the Lok Adalats.

5.3 Views of Litigants

In order to corroborate the views of practitioners and administrators of ADR on the popularity of the ADR mechanisms in Jalpaiguri and Darjeeling, same question has been asked with the litigants to test their awareness. Though the literacy rate of Darjeeling is nearly 80%[1], the population lacks legal

[1] See <http://www.census2011.co.in/>

awareness in general. Just like in case of practitioners, the litigants also showed low level of awareness in terms of ADR mechanisms. Only Lok Adalat and mediation have been known to limited number of litigants. Following chart demonstrates poor popularity of ADR mechanisms in Jalpaiguri and Darjeeling:

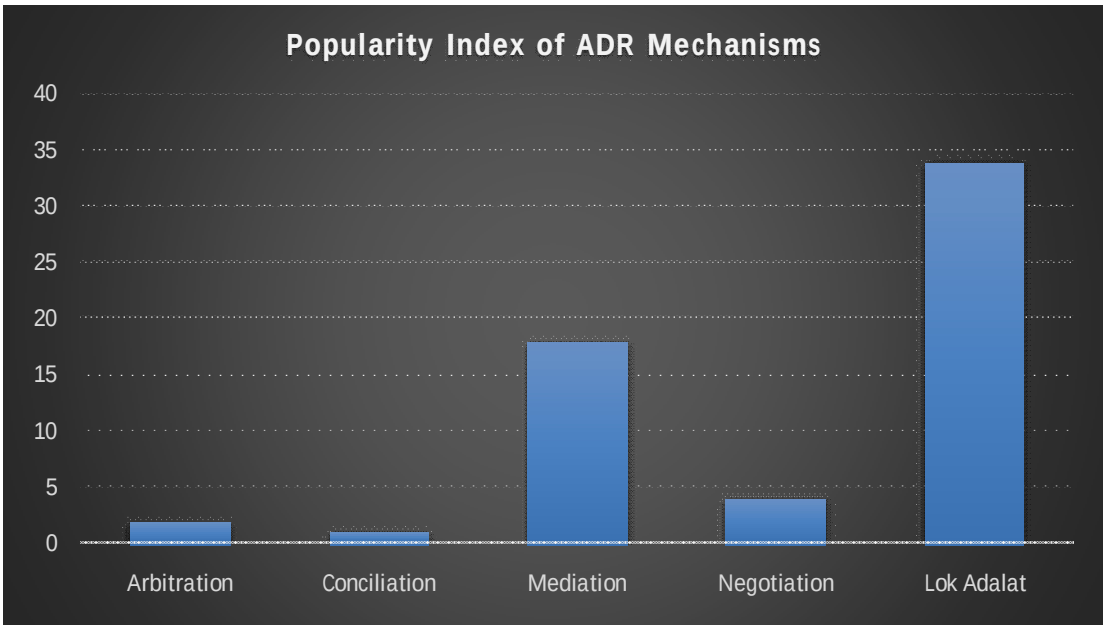

Chart - 18

Majority of the litigants blamed the practitioners for not informing them about the availability of various alternative means of dispute resolution mechanisms. Some even mentioned that the judges have not often directed them to use ADR mechanisms. Even if the judges have asked the litigants to go for ADR mechanisms, they have not adequately explained the parties about those mechanisms. Amongst the litigants resorting to ADR mechanisms, nearly 68%

have been part of Lok Adalats and 32% have resorted to mediation. Arbitration, negotiation and conciliation have not been resorted by any of them. The statistics of litigants who have resorted to different ADR mechanisms is shown in the following pie chart:

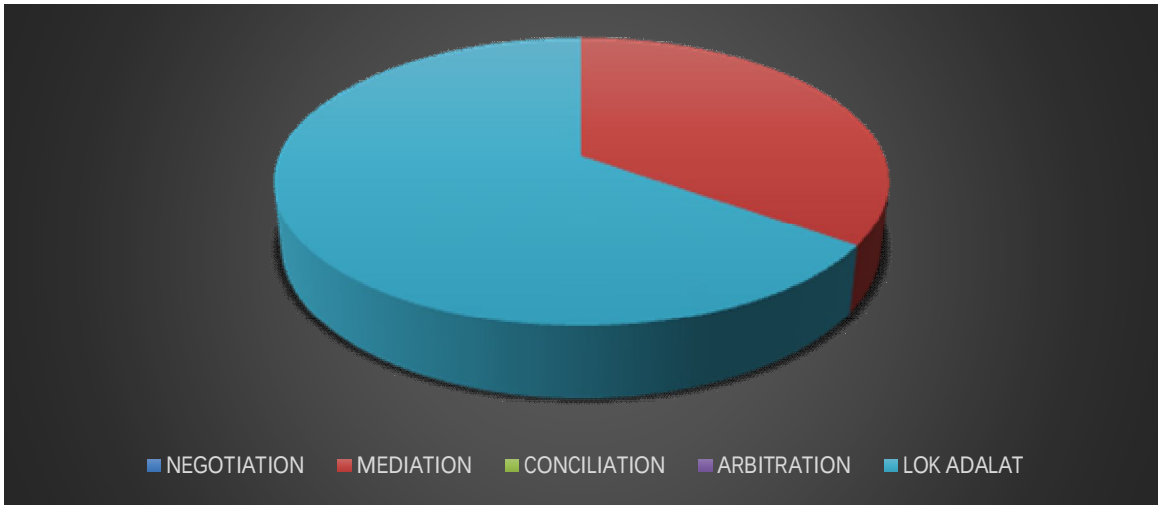

Chart - 19

Lok Adalat being the most popular mode of ADR in Jalpaiguri and Darjeeling, references to ADR have been made during the early stages of proceedings in majority of cases. However, with respect to the outcome of ADR proceedings, majority of the litigants could not find satisfactory solutions and they had to ultimately resort to court. Only near about 33% of litigants mentioned that their cases were solved through ADR. The following chart shows

the subject matters that the litigants preferred for reference to ADR for settlement:

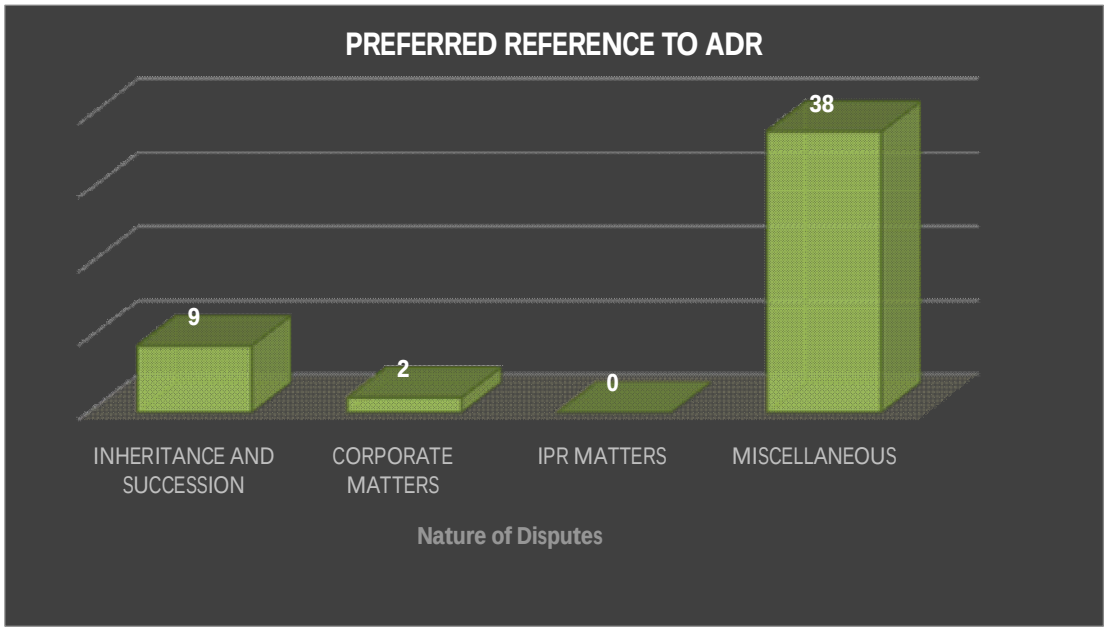

Chart - 20

The majority of the litigants, as reflected in the above chart, favoured matrimonial and family disputes to be referred for ADR. Some even referred to accident cases and property disputes to be referred to ADR. While minuscule of the responses indicated corporate matters, none indicated IPR matters. This clearly is the reflection of rural setup of these areas. Many of the litigants might not even have an idea of different issues in corporate and IPR matters.

Amongst the litigants who resorted to court proceedings as against ADR mechanisms, 22% have spent more than Rs. 1,00,000, 31% have spent between

Rs. 10,000 and 1,00,000, and the remaining 47% have spent between Rs. 1,000 and 10,000. Here again the traditional mind-set of the people to prefer the court proceedings is seen in the responses of litigants regarding the reason/s for not resorting to ADR mechanisms. The following chart depicts their responses in this regard:

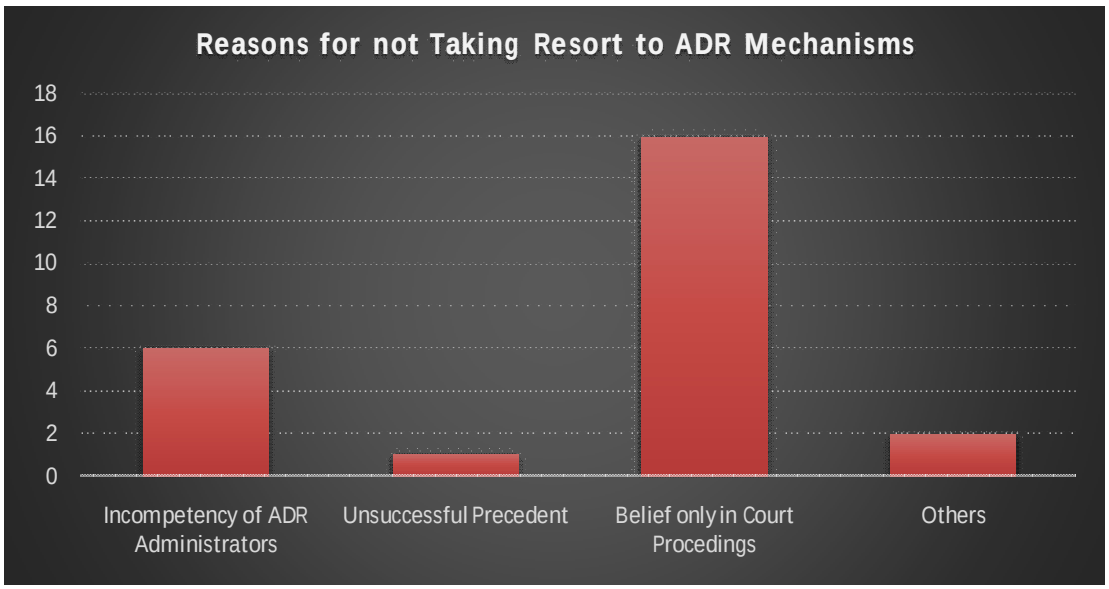

Chart - 21

Generally, the judges here have not taken proactive steps to indicate suitable alternative mechanisms to the litigants. Financial interests of practitioners has also desisted them from creating awareness among their clients. While in majority of the cases where the reference to ADR has been made, the

judges have made it immediately after the filing of the case, small number of cases was referred within a span of 2 years.

Almost every litigant interacted had no idea about the legal aid clinics operating in their region and they did not approach there for guidance. Even those who knew about the legal aid clinics have never approached due to their perception of poor quality services being rendered. In light of these factors, it is clear that the position of ADR in Jalpaiguri and Darjeeling is on shaky grounds. The traditional court based dispute settlement mechanism remains strongly rooted, with a very little scope for penetration by ADR mechanisms, unless more concrete steps are taken.

CHAPTER VI - GROUND REALITIES: BURDWAN

6.1 Introduction

The District legal Services Authority, Burdwan under the Chairmanship of District Judge, Burdwan has been setup in the year 1998 and the same is functioning in the court Building. The Sub Divisional Legal Services Committees under the Chairmanship of the senior most judicial officers of each station of Katwa, Kalna, Durgapur and Asansol in the District are being set up and are functioning in the respective court Buildings. The total number of legal awareness camps set up by the DLSA, Burdwan during 2015-16 was 309 with a total of 54 para-legal volunteers.[1]

The newly appointed Secretary of the DLSA, Burdwan has a reputation of popularising ADR and ensuring its implementation more than ever before. The DLSA organises an average of 6-8 legal aid and awareness camps per month. The most convenient way of reaching the rural crowd is to set up such camps in local fairs (*melas*) which is, generally, crowded with such people who would have little or no knowledge of ADR mechanisms. Conciliation proceedings are organised every week on a Thursday, though, it lacks regularity and attendance.

[1] Annual report by DLSA, Burdwan available at <http://ecourts.gov.in/sites/default/files/WBSITE%20material%20dlsa%20burdwan.pdf>

The office of the Secretary had a computer system meant for the storage of all the data. However, this data did not include the details of the parties who resort to methods like mediation and Lok Adalat. Interaction with the Secretary, DLSA, Burdwan was informative and extremely helpful in not only getting his opinion on the existing status of ADR in Burdwan but also in acquiring relevant data from his office to substantiate his opinions. The following section would start with his opinion and subsequently move forward with the analysis of views expressed by practitioners and ADR administrators.

6.2 Views of Practitioners, ADR Administrators and Judges

The Secretary, DLSA stated that among all the five mechanisms of ADR, the most popularly resorted to is conciliation followed by Lok Adalat. The other three mechanisms are not as efficient as they should be, thereby, contributing little to the efficacy of dispute resolution through extra-judicial methods. In his opinion, 40-50% of the cases are resolved through Lok Adalats followed by conciliation which accounts for 25-30% of the cases. According to him, most of the people in the district are aware of the ADR mechanisms as an option for dispute resolution. He said that in order to share the burden of the courts, it is advisable to refer a case to ADR in its pre-trial stage. However, as an ADR administrator he felt that the disinterest of the lawyers in ADR is what is keeping the institution away from functioning to its prime. Since the advocates do not

offer requisite advice to their clients, a certain level of distrust inculcates in the clients as well. Cumulatively, the two factors cause a major hindrance in the speedy disposal of a case through ADR mechanisms.

Even though the rate of awareness of ADR mechanisms is significant in the district of Burdwan, they are still discouraged to take recourse to ADR owing to their distrust in the ADR practitioners. Unfortunately, the involvement of a practitioner in ADR is inferred as a consequence of his inexperience or unsuccessful experience in the field of regular litigation. In the opinion of the Secretary, the general mind-set of even the well-informed parties will take time to reform but will eventually fall in place. The ADR centre has had concrete monetary support from the government and funds have never posed any problems in the operation of the ADR centre. He also emphasised on the importance of the private operated ADR and said that focussing merely court operated ADR might not be sufficient since the latter would lack the amount of flexibility which could be provided by a private ADR institution. Highlighting his contributions to the promotion of ADR in Burdwan he stated that the DLSA is actively involved in organising legal aid camps and deputes para-legal volunteers to carry out ADR and legal aid awareness programs.

Moving forward with the practitioners and ADR administrators, it was found that ADR is quite well-known to them. While Lok Adalat is most widely

known ADR, they had a fair bit of knowledge about other modes of ADR as well. Following chart shows that responses that we have received from them:

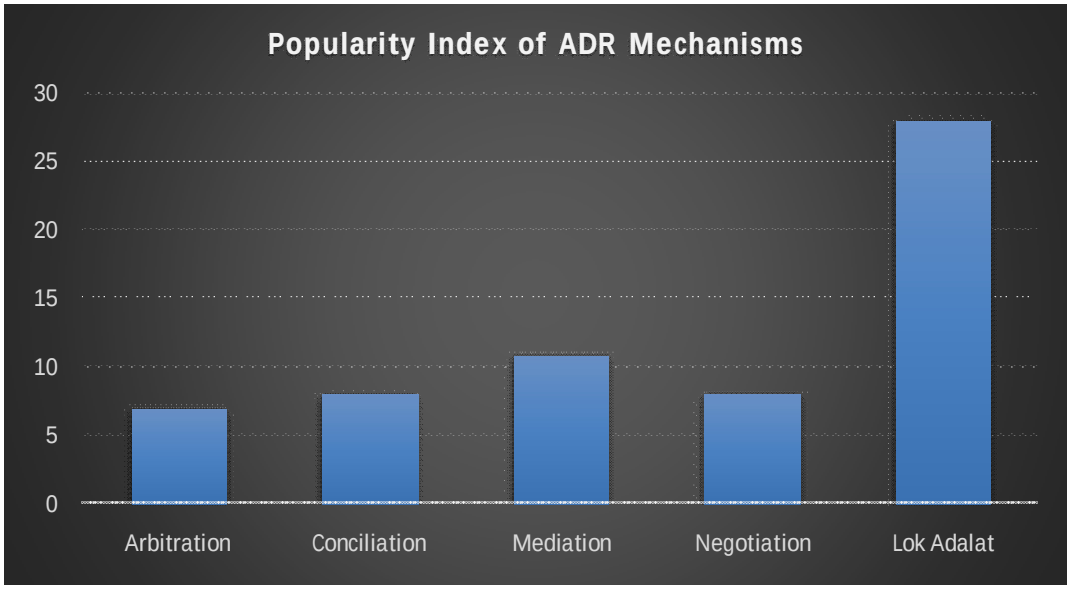

Chart - 22

Though the awareness of ADR can be seen in the responses of practitioners and administrators, yet the use of it is not optimum when it comes to dispute resolution. An average of 25-50% cases are referred to Lok Adalat, and less than 25% of cases are referred to other ADR mechanisms. The rate of disposal of cases through ADR mechanisms is also found to be less than 25%. The district court has just two trained mediators and no arbitrators owing to the negligible amount of arbitration disputes in the district.

Each of the practitioners has an experience of an average of 5 Lok Adalats per year. Nearly all of them attributed their limited exposure or general disinterest in it to their daily work load. In their opinion, lawyers must not be made to freelance with ADR, especially mediation and Lok Adalats. They believe that some incentive on the Government's part will encourage them to take ADR more seriously. One of the biggest reasons why the practitioners do not advise their clients to resort to ADR is the consequential loss of clientele which is against their monetary interests. A small incentive will be a compensation to this loss and a reinforcement of ADR as a more effective method of dispute resolution.

Apart from the lack of incentives for the practitioners, multiple other factors affect the efficacy and implementation of ADR mechanisms in Burdwan. The practitioners primarily believed that the unawareness of the litigants as well as not having trust in ADR mechanisms as the major reasons for non-acceptance of them in Burdwan. The following chart highlights the responses given by the practitioners in this regard.

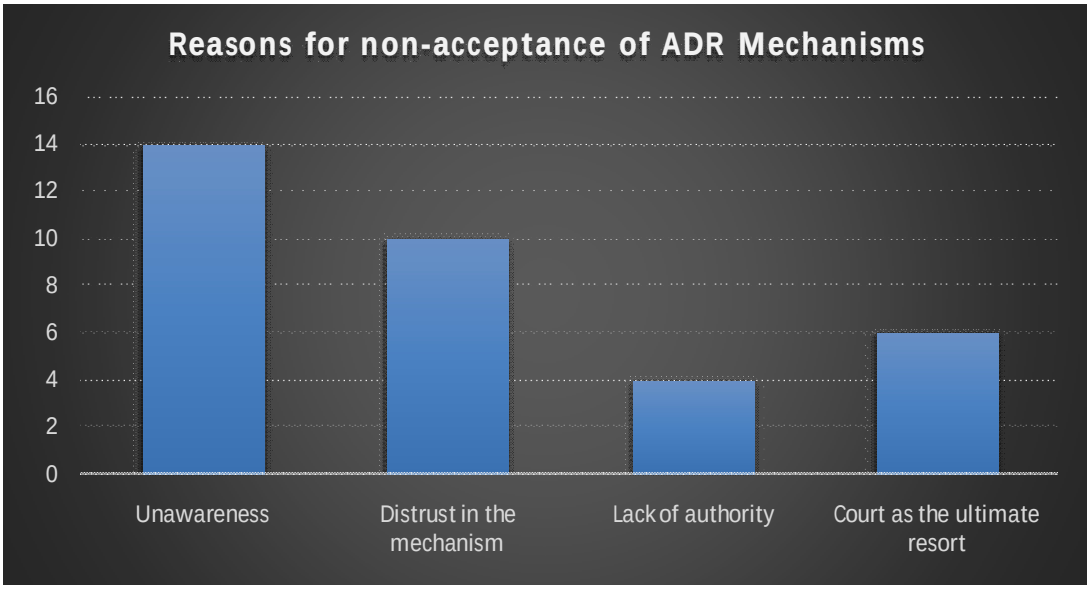

Chart - 23

Owing to the unawareness and distrust in the ADR mechanisms, nearly 75% of the outcomes of ADR proceedings are challenged before the courts. Hence, unless the court makes a final determination of dispute, parties finding a solution is a rarity in Burdwan. The practitioners and administrators opined that nearly all kind of civil disputes can be referred to ADR mechanisms under section 89 of the CPC. Their response in this regard has focused on matrimonial disputes and financial disputes for reference to ADR. However, they viewed that the disputes involving questions of law and expert opinions must be refrained from being referred to ADR since they require elaborate discourse and are likely

to set a precedent for the future. Following chart is the reflection of responses by the stakeholders:

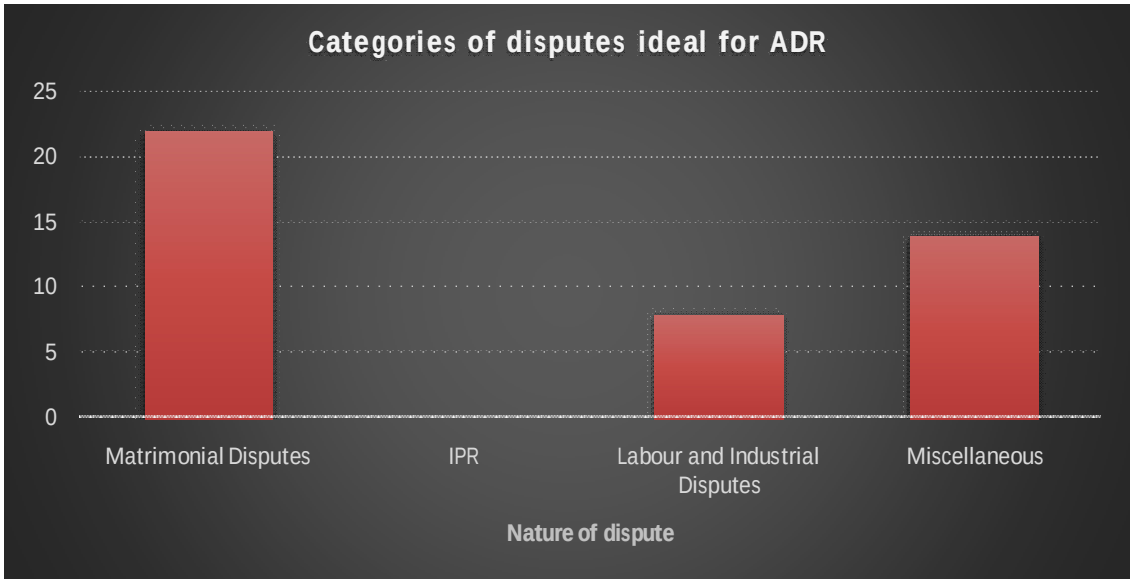

Chart - 24

The practitioners who participated in this study had a decent exposure to the legal aid clinics. Nearly 53% of the total practitioners had participated at least five times in legal aid clinics, around the year. Some 7% had participated in them at least 10 times and another 13% over 10 times in a year. This data is graphically represented in the following manner:

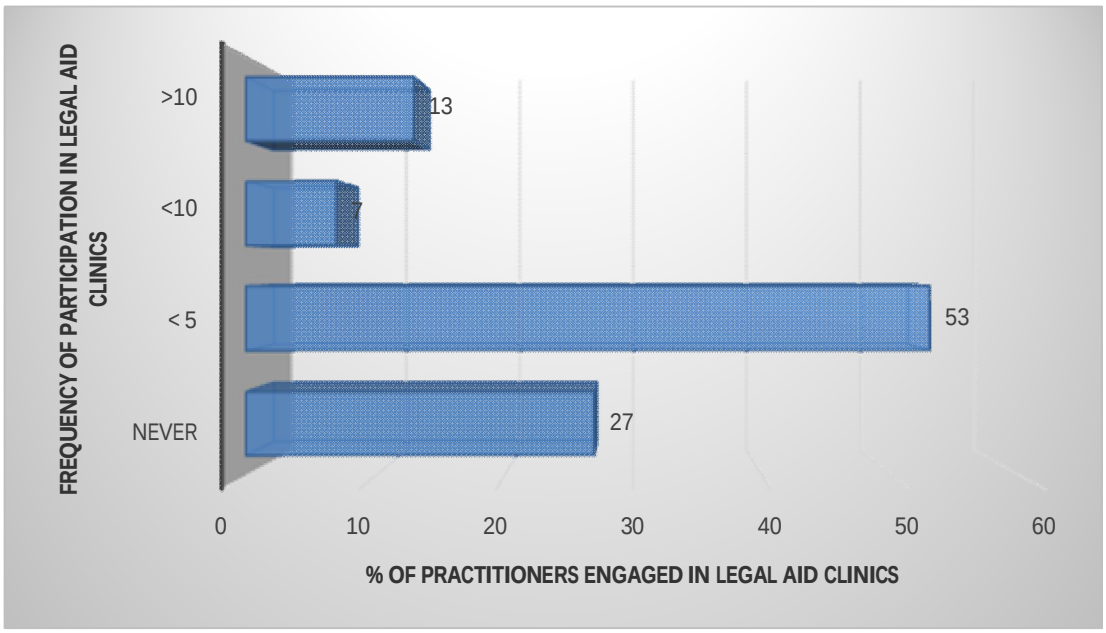

Chart - 25

In order to assess the efficacy of the ADR mechanisms, the practitioners are asked about the average number of cases referred back to the court after reference to ADR under Section 89 of Code of Civil Procedure. While 71% of the practitioners said that almost 25% of the cases are referred back to the court, the remaining 29% opined that the percentage of such cases is between 25-50%. Factors like non-cooperation of the parties, absenting themselves from the proceedings and negative attitude of the counsels influence these numbers. When questioned as to what is the most appropriate stage of referring a case under Section 89, a majority of 92% mentioned pre-trial or early trial proceedings. The

remaining 8% said that a case may ideally be referred under Section 89 in case of prolonged trial proceedings.

Speaking of the impediments that are faced in the ADR proceedings, major hurdles that are faced in ADR proceedings are mainly the irregular mode of appointment of the ADR administrators and element of bias of ADR administrators. Although it is mentioned in the Arbitration and Conciliation Act 1996 as well as the Amendment Act of 2015 that the selection of the Arbitrator has to be agreed upon by both the parties and the arbitrator should not be someone with any kind of associated interest with either party or subject matter, the ground reality seems to be different. This being the case, the parties do not come to a consensus and proceedings are stalled until a consensus is achieved. In case of a failure, the case is referred back to the court and back again under Section 89, to the appropriate ADR mechanism. Although, this system of repeated efforts to solve the disputes through ADR mechanisms has proven beneficial many a time, often, it can be the reason of unnecessary adjournment of the legal proceedings. The following graph represents this data:

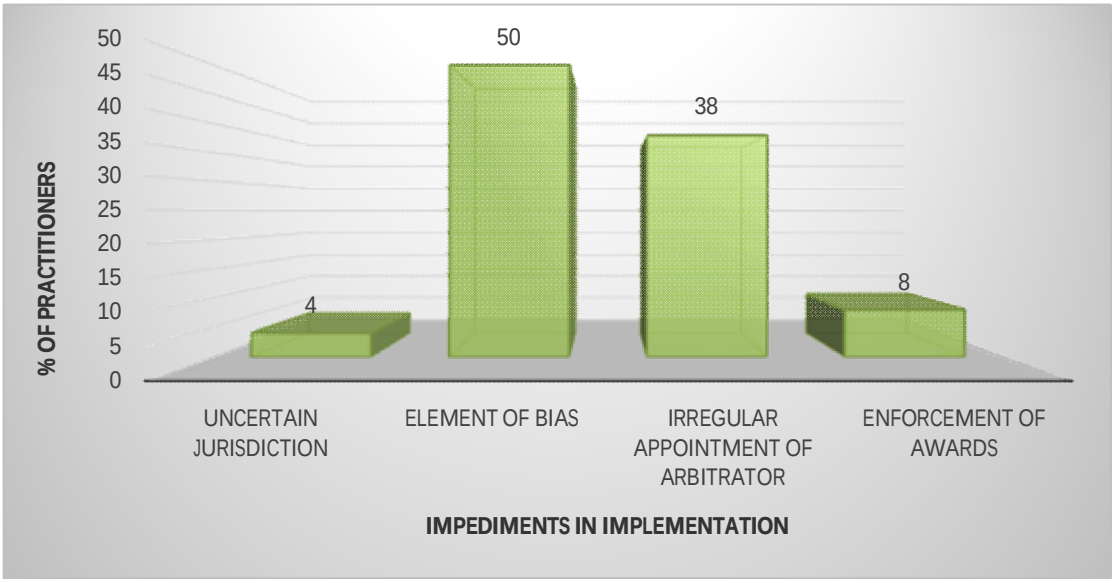

Chart - 26

The DLSA, Burdwan has been extremely instrumental in spreading awareness on the significance and utility of the ADR mechanisms, yet, sometimes, even the most well-informed parties refrain from resorting to these mechanisms. When question for the reasons that could be responsible for such a restraint was asked to practitioners and ADR administrators, the most common answers recorded were the traditional mind-set of the litigants towards the court proceedings as well as the incompetence of ADR administrators/practitioners. Often, the litigants are led to believe that ADR and legal aid function independently of the court and may not resolve their legal disputes effectively and entirely. Thus, even the parties well aware of the existence of such mechanisms, seek resolution through court proceedings. Some of the participants

also believed that the lack of court-like authority is also responsible for discouraging the litigants to opt for ADR mechanisms. The following chart represents this response:

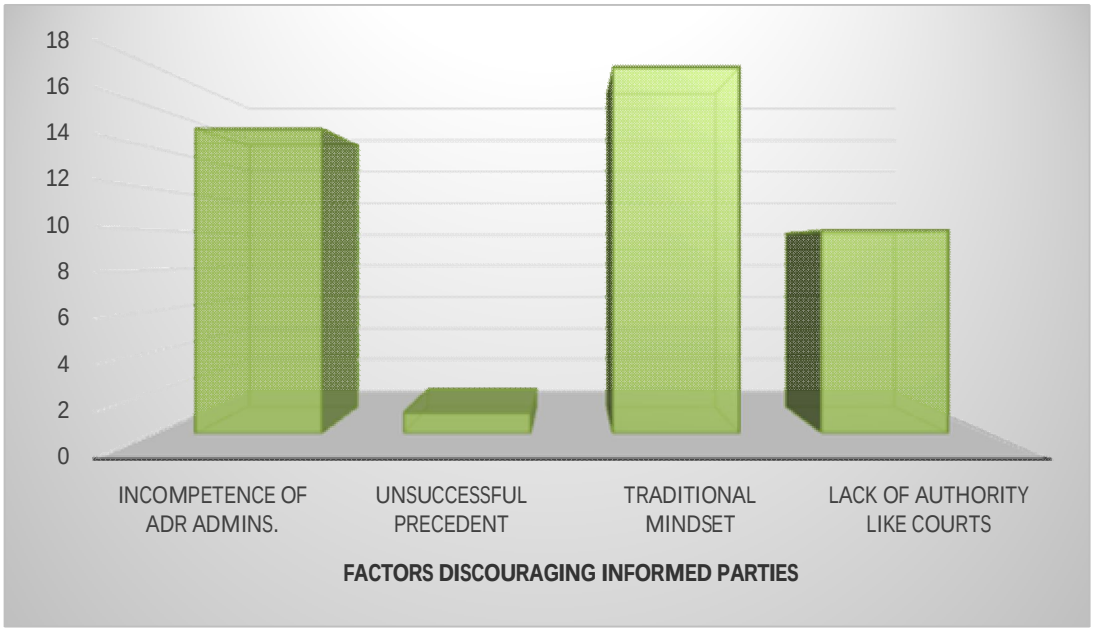

Chart - 27

When questioned on the success rate of ADR mechanisms in the district of Burdwan, a majority of 71% said that the rate of success lies between 0-25%. Among the rest, 24% opined that the success is between 25-50% and minuscule of 5% observed it to be between 50-75%. The following chart depicts the responses in this regard.

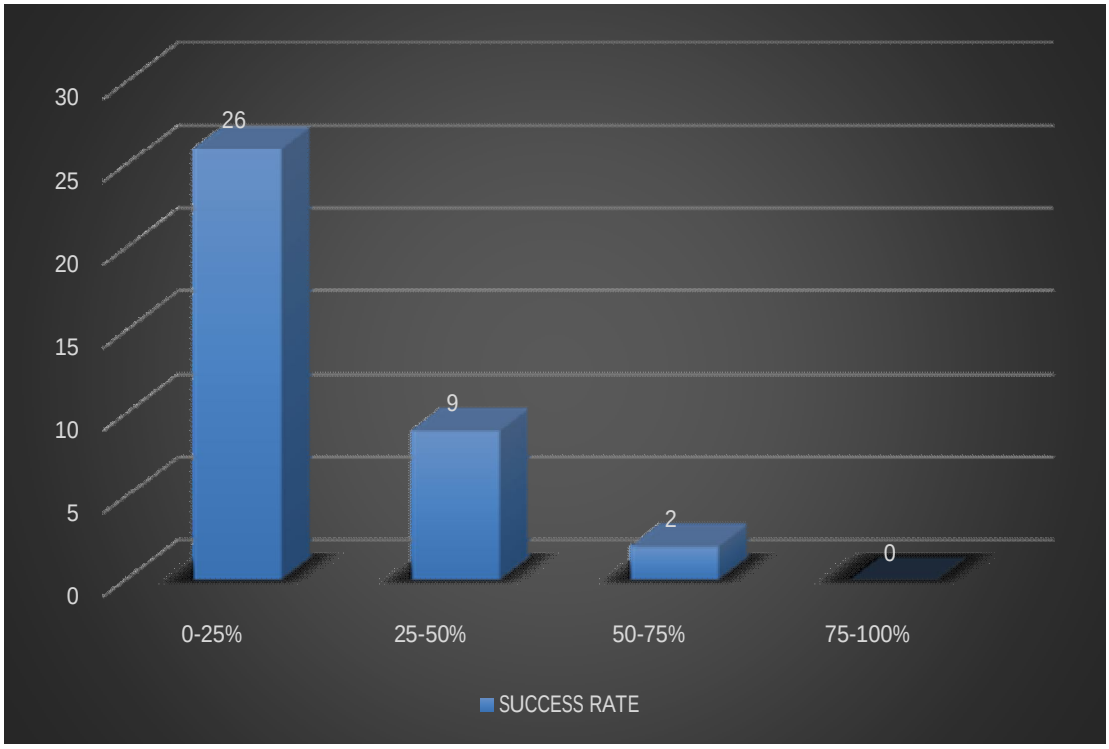

Chart - 28

Thus, with very less number of trained ADR professionals available in Burdwan, even the best efforts of the DLSA have not been useful in making ADR a success. The lack of manpower reflects a slack in the system which is keeping away the litigating parties from trusting the system entirely. The ebbed enthusiasm of the lawyers seemed like another factor responsible for ineffective implementation of ADR mechanisms in Burdwan.

The interactions with judicial magistrates and the judges of the District Court of Burdwan were relatively eventful in terms of gathering their

perspectives on ADR mechanisms. According to the judges, civil suits of any kind can be referred under Section 89 of the Code of Civil Procedure. This includes the motor vehicles suits, money recovery cases by banks, compoundable criminal cases under Section 320 of the Indian Penal Code, land disputes involving eviction and possession, etc. In their opinion, the general guidelines under Section 89 of Code of Civil Procedure are sufficient and any case falling outside its purview, most certainly, requires the attention of the court. Also, evidence-based cases should ideally be not referred under Section 89 of Code of Civil Procedure. In the opinion of the judges, Lok Adalat and negotiation are quite popular modes of ADR in Burdwan.

The judges have stressed on the importance of making Lok Adalat more effective to prevent it from being a waste of time and government resources. The para-legal volunteers engaged with the DLSA are generally not qualified or trained enough to penetrate the minds of the uniformed population and convince it to resort to ADR for any legal problem. Capacity building at the level of para-legal volunteers would go a long way in popularising ADR was the view of majority of judges.

6.3 Views of Litigants

When we probed into the awareness of litigants about the ADR mechanisms, we found that the only popular ADR mechanism in Burdwan is

Lok Adalat. The other less popularly known mechanism is Arbitration. Since Burdwan is not an industrial settlement, it is understandable that arbitration is not that much popular. However, it is surprising to see the deplorable condition of negotiation, mediation and conciliation in Burdwan. The graph below represents the responses of litigants:

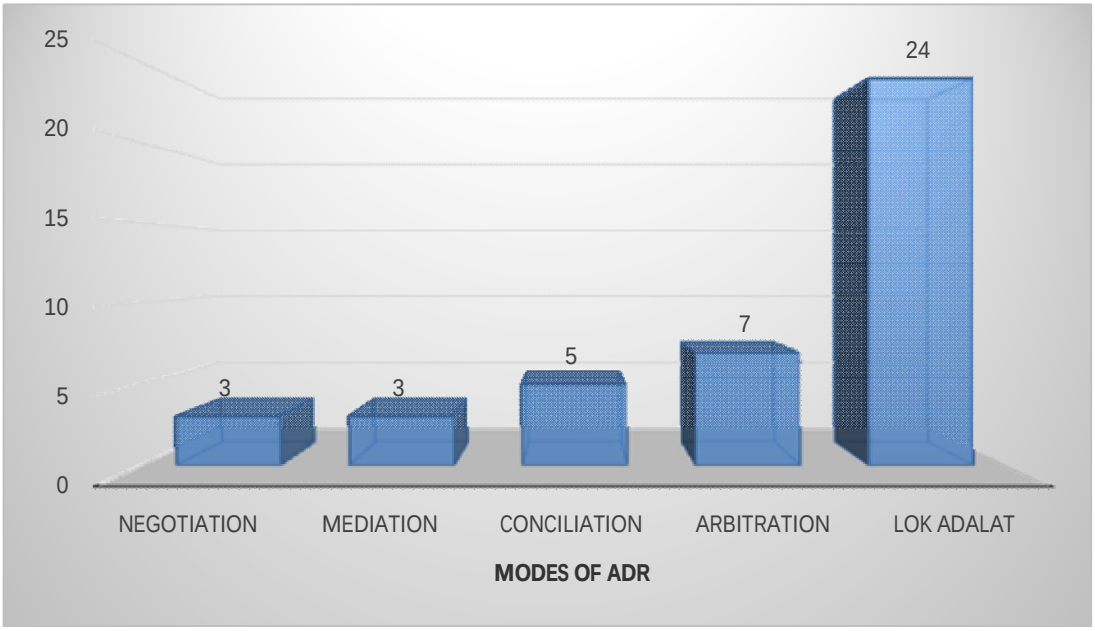

Chart - 29

As mentioned before, advocates play a pivotal role in the effective implementation of ADR mechanisms, 40% the litigants were never explained by their counsels, the specifics and benefits of ADR mechanisms. Even though the remaining litigants heard about the ADR from their councils, they were not

properly explained. Almost 50% of litigants said that they learnt about any ADR mechanism from the judge presiding over their case, however, again in unclear terms. Some of the litigants expressed that what they were being told was way too technical for them to comprehend. In many of the cases, even the litigants acknowledged that they were not interested in what they were being told about ADR either by a judge or by a lawyer. This owes to the much repetitive factor of a traditional mind-set against this system. Following chart shows the reasons given by the litigants for not resorting to ADR mechanisms:

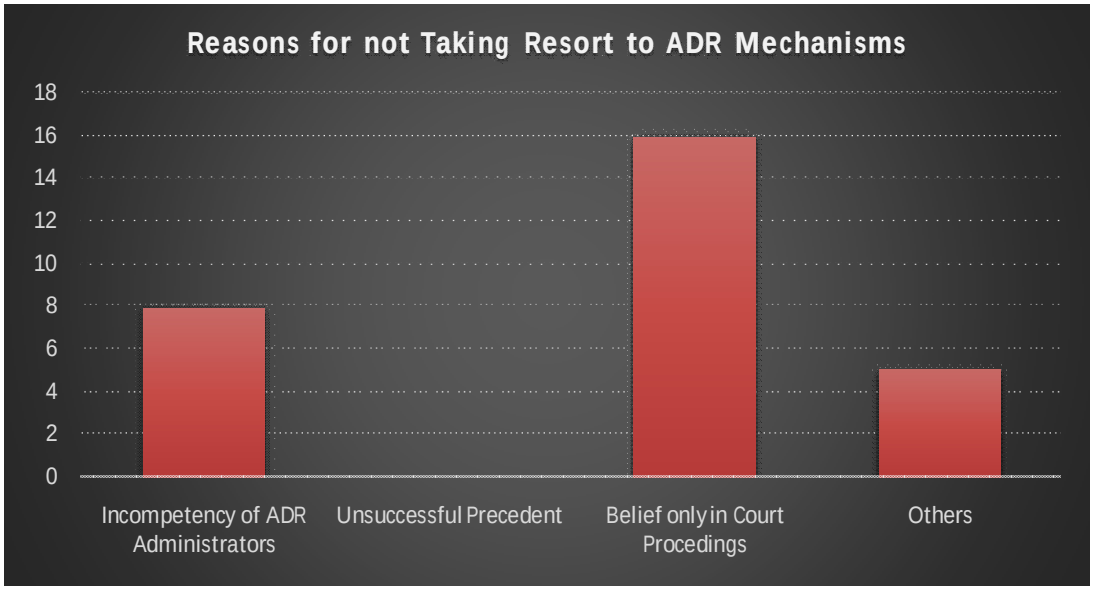

Chart - 30

73% of litigants not resorting to ADR mechanisms have spent between Rs. 1,000 and 10,000, 18% have spent between 10,000 and 1,00,000, and 9% have spent more than Rs. 1,00,000 for court litigations. Though the spending on court litigations in Burdwan is comparatively less, considering the economic conditions in the district, spending between Rs. 1,000 and 10,000 is not a small sum. When we asked the litigants who have not resorted to ADR mechanisms about their interest in ADR for their future disputes, except one litigant everyone else showed interest either in terms of concrete yes or in terms of dependence on nature of disputes. This clearly shows that a proactive guidance of these litigants would certainly help in diverting many of these cases to ADR mechanisms. Following chart reflects the views expressed by the litigants in this regard:

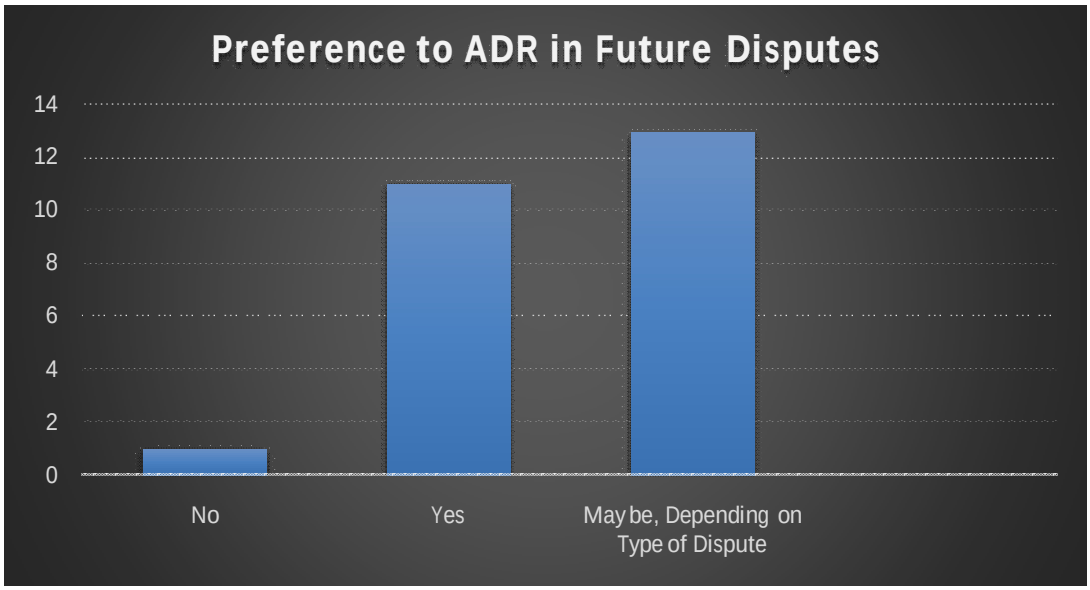

Chart - 31

This response shows the uncertainty people possess with regard to the functioning of ADR mechanisms and the extent of guidance which still needs to be imparted to them. Most of the litigants who participated in this study, who did not resort to ADR, got their matters settled within 2 years (50%) but a good 20% of them had their matters disposed of in more than 10 years. Even in cases of matrimonial and property disputes, the settlement has taken a long period of time. This could have been simply avoided by resorting to ADR mechanisms.

As mentioned above, Lok Adalat is very popular in Burdwan District. This is also reflected in the experiences of the litigants resorting to ADR. While more than 80% of them have resorted to Lok Adalat, minuscule of them has the experience of other modes of ADR. Following chart can be referred for understanding the position of parties resorting to various ADR mechanisms:

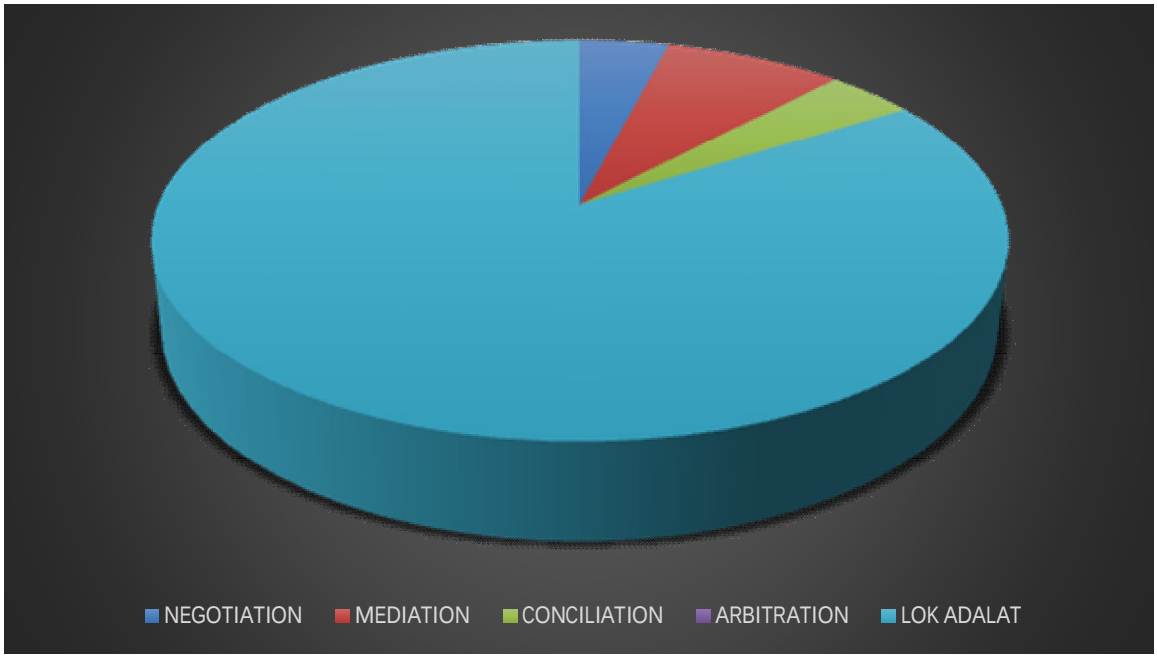

Chart - 32

Majority of the cases that have been referred to ADR mechanisms in Burdwan relate to motor vehicle accident claims, property disputes and matrimonial disputes. Just like Jalpaiguri and Darjeeling, corporate and IPR disputes are not found in Burdwan. Though a good 52% of litigants mentioned that the resort to ADR mechanism was helpful to them in completely resolving the disputes, still a good percentage of remaining litigants could not find it useful. They also believe that the court system is much better in the absence of qualified ADR administrators.

Their experience of availing legal advice from the legal aid clinics had not been successful either. On comparing their experience with a lawyer and a legal aid clinic, they said that a lot of times they were misadvised and were not updated with revisions and new developments in law which they learnt only through their lawyer. The litigants raised their concerns regarding the authenticity of the qualifications of the lawyers engaged with legal aid services. Hence, it is time to reflect on the mechanisms to develop resources for better administration of ADR and legal aid in Burdwan.

CHAPTER VII: CONCLUSIONS AND SUGGESTIONS

"*discourage litigation…. A nominal winner is often the real loser-in fees, expenses and waste of time.*"

\- Abraham Lincoln[1]

Alternative modes of dispute resolution are not something unknown in India. Historically, they have been practiced widely in India in different informal ways. The modern concept of ADR has developed in the United States and subsequently, spread in different parts of the world. Though the modern concept of ADR was introduced in India during the British regime, it was mostly confined to arbitration. It was only during late second half of the twentieth century that other ADR mechanisms started to get recognition in India. Hence, history of ADR in India is relatively short.

The judiciary in India is undoubtedly under tremendous pressure since quite a prolonged period of time. Though the ADR mechanisms are trying to penetrate into the so called exclusive domain of the judiciary, of course to assist and prevent its scrambling, they are yet to make significant impact in the state of West Bengal. Although this may be a situation in many other states in India, the

[1] See <http://www.icadr.org/>

major findings of the present research are on state of West Bengal due to the limited scope of this research.

7.1 Findings of the Research

Utility of ADR in the resolution of wide variety of disputes is unquestionable. While arbitration may resemble court like litigation, still it has the advantage of saving time and money, if administered properly. Conciliation, mediation and negotiation have the advantage of amicable settlement of the disputes between the parties, which help in maintaining good relations between the parties after the resolution of differences or conflicts. Hence, they are best suited for disputes relating to property, corporate disputes, labour disputes, family disputes, matrimonial disputes, accident claims and so on.

While most of the above types of ADR are borrowed from other jurisdictions, Lok Adalat is invented in India. It has its roots in the ancient Panchayat system. Combination of different nonadversarial dispute settlement mechanisms in Lok Adalats is praiseworthy, since it may help in resolving the disputes by one or the other method. Various authorities established under the Legal Services Authorities Act 1987 have got huge potentiality to make Lok Adalats a grand success at grassroots level. The national Lok Adalats, held monthly on different issues, are capable of providing speedy and satisfactory justice to people due to their concentration on disputes in focused areas.

The development and codification of ADR during British regime started in province of Bengal. However, the codification was confined to arbitration, and in practical terms, the arbitration was primarily operating through the court intervention. Hence, it was almost considered as part of the judicial system rather than as an alternative mechanism. With the passing of Legal Services Authorities Act 1987, Lok Adalat became the second ADR mechanism to receive statutory recognition. It was only in 1996 that conciliation also got statutory recognition in Arbitration and Conciliation Act 1996.

With the increasing awareness about the ADR mechanisms, the Code of Civil Procedure was amended in 1999 to provide for court annexed ADR mechanisms. When this amendment was challenged, the Supreme Court came to the rescue of ADR mechanisms in the famous *Salem Bar Association* case[2]. Thus mediation and negotiation, though unlike arbitration, conciliation and Lok Adalat, have got limited statutory recognition in India.

The concept of legal aid has two angles to it. On the one hand it has the economic implications and on the other hand it has quality perspectives. From the economic angle, it needs to be free/cheap to ensure justice to even deprived class of society. From the quality perspectives, it needs to be of good quality to ensure justice. Access to justice is really a challenge in India where poverty,

[2] *Salem Advocates Bar Association, Tamil Nadu* v. *Union of India* with *Bar Association Batala and others* v. *Union of India* (2003) 1 SCC 49.

destitution and illiteracy are widely prevalent. The law, which is an instrument of social equality, must not only speak justice but also behave justly to do justice. This can be done only by the infusion of quality legal aid in arteries of legal system, which essentially means providing right advice to the parties to adopt suitable dispute settlement mechanisms, including ADR. Hence, legal aid plays a very significant role in the promotion of ADR.

West Bengal judiciary has a long tradition of upholding the significance of ADR in the settlement of disputes. Before independence, Justice Rankin and Justice Trevor Harris of Calcutta High Court have contributed extensively in this regard. As the initial development of ADR happened only in terms of arbitration, we see many decisions of Calcutta High Court clarifying the norms of arbitration and strengthening it to be acceptable by the people for settling their disputes. Thus in *Hari Sing Nehal Chand* v. *Kankinarah Co. Ltd.*[3], the High Court held that the principles of natural justice have to be followed in arbitration proceedings. But the Court preferred to remit the arbitral award to the arbitrator instead of setting aside the order with a view that since the arbitrator is already acquainted with the details of dispute, this would help in speedy disposal of the case.

[3] Appeal from Original Order NO.62 of 1920, against the order of Mr. Justice Rankin, dated the 12 April 1920.

Since the arbitration is based on the consent of parties to the dispute, the Calcutta High Court has highlighted its significance in the better resolution of disputes. However, it has also observed in many cases that in the absence of consent of one of the parties, other cannot impose the arbitration on the former. Since consent is so significant in arbitration, the arbitrators are also prohibited from going beyond the terms of arbitration clause. Moreover, an arbitration clause between the parties in one agreement would not be applicable to any other agreement between the same parties.

With an intention to protect the sanctity of arbitration for infusing confidence in the mind of litigants, the Calcutta High Court has taken a cautious approach in intervening with the arbitral awards. It has often observed that whether or not an arbitral award has been passed after a correct appraisal of the evidence is not for the court to decide. For example, in *Eastern and North East Frontier Railway Corporation* v. *B. Guha and Co.*[4], the Court held that the courts have no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record to find out whether or not the arbitrator had committed any error of law.

In order to further strengthen the arbitration as a dispute settlement mechanism, the Calcutta High Court has observed that any plea of absence of

[4] AIR 1986 Cal. 146.

jurisdiction of arbitrator has to be taken before submission of statement of defence. It cannot be a *post facto* argument to defeat the whole process of arbitration to make it redundant. The Court has also held that the arbitration clause in an agreement stands independent of the substance of agreement, and therefore, it may still hold good even in case other provisions of contract are not valid.

In *P. C. Roy and Company India Private Limited* v. *Union of India*[5], the Court, while carrying forward the legacy of upholding the sanctity of arbitration, held that if more than one view is possible in case of any legal or factual issue, arbitrator's view must be upheld; otherwise entire process would be nugatory. There are also cases in which the Calcutta High Court has condemned the attitude of parties to move to the writ courts in the presence of arbitration clause. It has also restricted the resort to other alternative fora like lower courts and consumer fora when the parties had arbitration agreement.

Despite the fact that the West Bengal judiciary has been reluctant to interfere with arbitration to protect its sanctity, it is not to be construed that it remained as a silent spectator in case of miscarriage of justice. Any arbitrariness in the arbitration proceedings is seriously considered by the judiciary and it has interfered to set right the wrong. Failure of the arbitrators to comply with the

[5] 2014 IndLaw Cal. 502.

principles of natural justice has often resulted in court interventions. Though the Evidence Act is not applicable to arbitration, the requirement of hearing of both parties is held mandatory. In many cases, the Calcutta High Court has intervened in the arbitration on the grounds of bias of arbitrator, absurdity and misconduct of arbitrators. The requirement of speaking orders has also been insisted by the High Court in many cases.

In the situations of error apparent on face of the record, the judiciary has not hesitated to intervene. Despite its reluctance to re-appreciate the evidence considered by the arbitrators, the judiciary has intervened in case of total absence of evidence or non-consideration of a material evidence in determination of the award. Similarly, when the award is passed without jurisdiction or contrary to public policy, the judiciary has intervened to set it aside. Thus, with this limited judicial intervention, norms of arbitration are fine-tuned to prevent miscarriage of justice.

Though the other modes of ADR are recent in origin, there has been significant number of references of cases to these modes in West Bengal. The statistics show that more than one thousand cases are referred to mediation every year in West Bengal. Though the success rate of mediation seems very low, there is certainly a hope for the future if effective steps are taken to improve the

situation. Huge number of cases are also referred to Lok Adalat for amicable settlement.

The empirical research in the three sample areas has showed contrasting results on the status of ADR in West Bengal. Views expressed by the ADR providers and the litigants were also different to a certain extent. In Kolkata and North 24 Parganas, Lok Adalat and arbitration are popular with the practitioners. The popularity of arbitration not only owes to the industrial settlement in and around the area but also the jurisdiction of the High Court as the appellate authority on the matters pertaining to Arbitration. However, in terms of reference by the courts, arbitration edges over Lok Adalat in Kolkata and North 24 Parganas. The litigants on the other hand, have shown good amount of awareness of mediation along with arbitration and Lok Adalat. While 42% of the litigants have practical experience of Lok Adalats, 38% and 25% have undergone arbitration and mediation respectively.

In Jalpaiguri and Darjeeling, mediation topped the list of popularity among practitioners, which was closely followed by Lok Adalats. The litigants view on this was also that mediation and Lok Adalat are most popular, but with the interchange of their positions in the list of popularity. Around 68% of litigants have been part of Lok Adalats and another 32% have resorted to mediation. In Burdwan, Lok Adalat topped the list of popularity by distance

among both the practitioners and litigants. More than 80% of the litigants resorting to ADR have been part of Lok Adalats.

The modes of conciliation and negotiation barely find any application across all three sample areas. According to the practitioners, people already question the legality of the popular ADR mechanisms. While most of the cases referred to arbitration are appealed against in the High Court, methods like conciliation and negotiation are thought to have lesser legal importance. In light of this fact, when people are told about conciliation or negotiation which practically involves just an amicable settlement through conversation between the two parties in the presence of their counsels, they refuse to believe in the legality of the method. When it comes to legal matters, litigants are both inhibitive and cautious and compare such extra-judicial methods to regular court procedures and often find them a less authoritative than a regular court proceeding.

Though good number of cases are going through the process of ADR in Kolkata and North 24 Parganas, it is not at the expected level. This is reflected in the increasing number of cases before the ordinary courts. The practitioners and ADR administrators believed that this is due to the people's mindset that court is the ultimate resort to settle their disputes as well as unawareness of ADR's utility. But when the litigants were asked about less popularity of ADR, they

mentioned that either their lawyers did not tell them or they were abruptly told in unclear terms. Similar responses were found in Jalpaiguri and Darjeeling as well as Burdwan. While the practitioners mentioned the unawareness of the litigants and distrust of people in ADR as reasons for lack of popularity, the litigants blamed both lawyers and judges for not informing them.

The practitioners in all three sample areas have got very little experience of legal aid clinics. Majority of the practitioners have either never been part of legal aid clinics or have been part of such clinics less than five times. Due to their busy court schedule, they feel that they couldn't find time for it. Hence, the role of the practitioners to reach the poor sections of the society and to help them in settling their disputes through ADR mechanisms has been minimal.

The category of cases that are referred or preferred to be referred to ADR in Kolkata and North 24 Parganas are corporate matters, matrimonial disputes and motor vehicle accident claims. In Jalpaiguri and Darjeeling, preference was given to matrimonial and other family disputes for reference to ADR. Similar observations are also found in Burdwan with the addition of motor vehicle accident disputes.

The implementation of ADR in West Bengal comes with a lot of impediments. The biggest impediment that was commonly found in all three sample areas was the element of bias. This applies more on arbitration issues in

which the arbitrator has a pre-determined inclination towards one party for various possible reasons but largely, monetary and professional interests. This not only discourages the parties to trust the fairness of the system but also encourages them to constantly challenge the legality of the award/outcome of ADR proceedings. Lack of enforcement and irregular appointment of ADR administrators also surfaced as other two major factors impeding the progress of ADR in West Bengal.

There are times when even the well-informed parties refrain from using ADR mechanisms as their means of dispute resolution. In the field study we found that unsuccessful precedents are the main reason for this in Kolkata and North 24 Parganas. This may be due to the frequent challenge of arbitral awards before the High Court resulting in unnecessary delay and cost in terms of enforcement. Stakeholders in this region particularly stated that often the appointment of an arbitrator is made through discrepant process and it results in dissatisfactory outcome forcing the parties to move the court. In the other two sample areas, most dominant factors that discourage the informed parties to resort to ADR are incompetence of ADR administrators and traditional mind set of the parties.

Given all limitations and impediments in West Bengal regarding the implementation of ADR, the success rate is also very low. In Kolkata and North

24 Parganas as well as Jalpaiguri and Darjeeling, approximately 50% of the practitioners believed that the success rate of ADR is less than 25%. This belief is shared by more than 70% of practitioners in Burdwan. Even the remaining set of practitioners in all three sample districts placed the success rate of ADR only between 25% and 50%. Hence, even after the reference of the cases to ADR mechanisms, they find their way back to the courts for final settlement.

Based on the above findings of the research, following inferences can be drawn on the status of ADR in the state of West Bengal:

- Though Lok Adalat is widely known in West Bengal, other ADR mechanisms are not popular to the expected level. Urban areas like Kolkata and North 24 Parganas have some exposure to arbitration and rural areas have some exposure to mediation, in addition to Lok Adalat. Conciliation and negotiation have got least significance.

- Except in Kolkata and North 24 Parganas, litigants are mostly uninformed about ADR mechanisms. The lawyers do not take active steps to explain the clients about the availability of ADR mechanisms, primarily due to financial implications. Some judges have made efforts to inform the parties about the available means of ADR, however, in unclear terms.

- Orthodox mindset of the litigants motivates them to resort to court proceedings rather than ADR mechanisms. Even though the court directs

for ADR mechanism under Section 89 of Code of Civil Procedure, majority of the cases are not settled through ADR.

- The ignorant litigants believe that anything in nexus with their legal disputes is akin to litigation. In the absence of proper guidance, they misjudge ADR as another legal formality and run away from it in apprehension.

- Arbitral awards are often challenged before the courts of law resulting in delay and additional costs. Many a times, this is due to the misleading lawyers' community.

- Legal aid clinics are not functioning effectively, despite the efforts of State and District Legal Services Authorities in West Bengal. Hence, legal aid as a tool for promoting ADR among marginalised sections of the society is not performing well.

- Element of bias, irregular appointment of ADR administrators and problems in enforcement of outcomes of ADR proceedings are the major obstacles in popularising ADR in West Bengal.

- The litigants who are aware of ADR proceedings are also hesitating to resort to ADR proceedings due to unsuccessful precedents and incompetency of ADR administrators.

- Cumulative effect of all the above factors is to have a very low success rate of ADR in West Bengal. Lawyers and incompetent ADR administrators have to take much of the blames in this regard.

7.2 Suggestions

There is no doubt that ADR has got huge potentiality to reduce burden of Courts and render effective justice to the people in West Bengal. While on paper all the stakeholders of this research agree with this fact, practical scenario is found different. In light of this, the research team makes following suggestions to improve the status of ADR in West Bengal.

Capacity Building of ADR Administrators

One of the major findings of this research is that West Bengal has very limited number of ADR administrators. Most of them, being the retired judges, are carried away by their longstanding courtroom experiences. Some even believe that the ADR has become a kind of retirement package for the judges. It would be difficult for the judges to come out of their courtroom mindset to adapt themselves to informal or less formal methods of dispute settlement like ADRs. Moreover, they would be having very little experience of mediation or negotiation, which require special set of skills. They may be good in terms of legal interpretations, but not in understanding the needs of parties and bargaining for amicable settlement.

Due to this, the first step in popularising ADR in West Bengal is to keep away the ADR from heavy judicial influences. We need more well-trained and skilled arbitrators, mediators and negotiators to make ADR successful. People's confidence in the ADR mechanisms can only be gained through their success and not by mere slogans or by any other means. Inculcating the ADR skills cannot happen by way of having few workshops or conferences, rather it requires rigorous practical training. Most of the law clinics in Western countries have emphasised on this aspect to build the capacity of ADR administrators. It is pertinent to note here that ADR might become an unruly horse if the administrator is incompetent. Hence, capacity building of the administrators is most significant to avoid such a situation.

Creating Awareness among Lawyers' Community

The next step in making ADR a grand success in West Bengal should be creating awareness among the lawyers. Just like medical profession, legal profession is a noble profession. Unfortunately, the current state of affairs has made it a business. It is true that the lawyers need to earn their livelihood, but it should not be at the cost of others. People with problems approach lawyers with a hope that they will get a satisfactory relief within a reasonable period of time. Since they leave their fate to the best judgment of the lawyer, the lawyer has an obligation to advise the client to the best of his ability. Hence, in this process he

has a duty to make his client aware of multiple options available to settle the disputes.

Apart from creating awareness about the ethical aspects of legal profession, there is also a need to create awareness among lawyers about different forms of ADRs and their utility. As evident from this research, it is wrong to assume that most of the lawyers are aware of different ADR mechanisms. Often, lawyers do not inform their clients to resort to ADR mechanisms due to their own ignorance. The current system of legal education in India is court litigation centric. Only having one or two papers on ADR in the legal curriculum would not help in making the products of this system well-acquainted with ADR mechanisms. Therefore, awareness about ADR mechanisms needs to be inculcated at the graduation level by introducing more subjects on different types of ADR mechanisms. As the spirit of ADR should be rooted in the hearts of the legal service providers to make it a success, it can only be achieved at the level of learning. Such an endeavour at the stage of learning would entirely change the perception of ADR among the practitioners as well as ADR administrators.

Creating a Separate Set of Non-Litigating Lawyers for ADR

Creating a separate set of non-litigating lawyers is another significant step to be taken for promoting ADR. One of the major problems of practitioners in

West Bengal is their busy schedule. Due to this, most of the experienced lawyers have no time for ADR. Even if they advise their clients to resort to ADR for settlement of their disputes, the lawyers fail to have effective involvement in it. The methods like negotiation, mediation and conciliation require lot of patience and quality time of the lawyers. In light of this, it is advisable to have a separate set of non-litigating lawyers to help litigants to reach amicable settlement of their disputes. This has already been tried in many developed countries, wherein, the non-litigating lawyers helping in ADR have even outnumbered the litigating lawyers.

Government Support and Incentives

Bringing in an effective system of ADR in West Bengal requires adequate government support in terms of finances and infrastructure for administration. Most of the District Legal Services Authorities and ADR centres are facing financial crunch and inadequacies in terms of infrastructure and staff. These bodies are having judges and busy practitioners as part of them. Other regular staffs, if existing, are appointed only for clerical works, and thereby, they possess no legal knowledge. Hence, in an effort to establish ADR as an independent institution, adequate governmental support is required. It is also pertinent to note that having one or two ADR centres in a District would not help the parties from

faraway places. Therefore, ADR centres with adequate facilities need to be established in different places depending on the requirement.

Until the time when ADR becomes popular and self-sustaining, the ADR service providers need to be remunerated adequately. In the absence of any incentive, getting the qualified and experienced persons to administer ADR mechanisms would be difficult. Moreover, in the absence of any remuneration, the parties resorting to ADR may be extorted by the administrators for financial gains. This would leave a dark spot on the administration of ADR.

Establishing Multi-Door Court House System

The concept of multi-door court house system is very much prevalent in the Western societies. In this system, every litigant approaching the court would be provided with the best among multiple options available for settling his dispute. It may be court proceedings or any of the alternative resolution mechanisms like arbitration, conciliation, mediation or negotiation. However, it is not to be misconstrued with the reference to ADR under Section 89 of Code of Civil Procedure. This is because the reference under Section 89 of Code of Civil Procedure is made by the judge, once the case comes before him. As witnessed in the findings of this research, judge is not an expert in ADR and he has very little time to explain the litigants about the ADR mechanisms. Hence, such

references often fail to take parties into confidence, resulting in unsuccessful ADR proceedings.

In a true system of multi-door court system, the channelling of the cases for different modes of settlement is done by an expert in all modes of dispute settlement. He would be an officer of the court receiving all the cases of litigants and directing the parties to go for suitable settlement mechanism on the basis of the nature of the dispute. Unlike judges, he would be having sufficient time to explain the parties about the nature of suggested proceedings. This infuses confidence in the mind of litigants to accept the mechanism, which goes a long way in getting their cooperation leading to the amicable settlement of disputes.

Having a Legislative Backup to Mediation and Negotiation

Mediation and negotiation have got tremendous potentiality to settle bulk of the disputes approaching the courts. They, being nonadversarial in nature are helpful in maintaining good relations between the parties after the settlement of their disputes. However, they have taken a complete backseat in West Bengal. One of the reasons behind this may be the absence of legislative backup for them. Hence, it is better to have a legislative backup to mediation and negotiation just like arbitration, conciliation and Lok Adalat.

The legislative backup to mediation and negotiation must provide for a concrete set of generic guidelines to be followed by the mediators and

negotiators. This would bring-in predictability under these mechanisms, and thereby, attract the attention and trust of people. Since in the mediation and negotiation, parties themselves are arriving at a final conclusion, challenging such final conclusions needs to be eliminated by the legislation.

Creating a Mediation Friendly Atmosphere

Creating a mediation friendly atmosphere is key to its success. One of the classic examples of such an effort can be seen in Karnataka in the form of Bangalore Mediation Centre. Since its establishment in 2007, Bangalore Mediation Centre has set a new trend in mediation. The fact that between 2007 and 2015, it has got about 51,000 cases referred and out of which more than 39,000 cases are amicably settled, with a success rate of more than 75%, speaks for its credential. Interestingly, even the Supreme Court of India has referred cases to Bangalore Mediation Centre.

The credit of success of Bangalore Mediation Centre goes to High Court of Karnataka, which has created a mediation friendly atmosphere in Bangalore Mediation Centre. Notification No. LAW 291 LAC 2005 and Notification No. LAW 292 LAC 2005, passed by the Karnataka High Court have infused blood in court-annexed mediation. While the former mentions that conciliation or mediation may be preferred when the relationship between the parties needs to be preserved and the later brings in clarity with respect to appointment of

mediators, their qualifications, confidentiality, enforceability etc. Similar efforts from West Bengal judiciary are required to make mediation a success.

In an effort to popularise mediation and create a friendly atmosphere, we at NUJS are organising Indian Median Week towards the end of this year as one of the deliverables of this project. This is intended to be a mega event to create awareness about mediation amongst Bengali population. With the assistance of Calcutta High Court, State Legal Services Authority, ADR centres, ADR administrators and experts in the field of mediation, we expect this week long programme to be successful in building a strong mediation culture in West Bengal. Meanwhile, we are also planning mediation camps in different parts of West Bengal to get representation from all parts of West Bengal for the Indian Mediation Week.

Promoting Online Dispute Resolution

In light of shortage of well-qualified ADR administrators in West Bengal, one of the methods to avail best ADR services may be through online dispute resolution mechanism. Understandably, it is not easy in remote places, however, should be workable in urban and semi-urban regions of West Bengal. Governmental support in building infrastructure is crucial in this regard. Added to this, creating awareness that online dispute settlement is no way inferior to

other modes of dispute settlement in the presence of parties is very significant to win the trust of parties.

As an experimental setup, we have started a combined mechanism of online and offline mediation at NUJS in the form of ODRways. Since ODRways is focused more in terms of helping the litigants to settle their trivial disputes, many of the litigants may not be well-versed with online system. Hence, a combination of online and offline system is found suitable to help the parties. The ODRways provides an online platform for finding a mediator qualified in the area of dispute. Subsequently, the parties may prefer the settlement through online or offline mediation depending on their convenience.

Adopting the System of Mobile Lok Adalat

Lok Adalat has been the popular mode of ADR in West Bengal. However, as evidenced in this research many people have found it inconvenient to travel long distance to attend Lok Adalats. This may be due to their financial constraints, problems in transportation system or time constraints. Many litigants in Darjeeling have expressed this view. The system of mobile Lok Adalat, which is run by a dedicated team of experts visiting different places in mobile legal services - cum - Lok Adalat vans or buses, helps such litigants to have access to Lok Adalat to settle their disputes.

This system is already successfully implemented in Karnataka, Kerala, Andhra Pradesh, Telengana, Puducherry, Tripura, Himachal Pradesh, Meghalaya etc. Adopting a similar system in West Bengal, especially in rural areas, would bring justice to the doorsteps of poor and marginalised sections of the society.

Developing Legal Aid as a Tool to Promote ADR

Our current perception of legal aid as only a kind of financial support by providing it free of cost has to change. What is more significant in legal aid is its quality. The guidelines on legal aid services pronounced by our Supreme Court constitute positive steps towards the attainment of status of a welfare state. However, they only stand as edifice of mammoth structure of effective legal aid in India, which require proper construction and development by other stakeholders to complete the task. Litigants would seek legal aid for settling their disputes quickly, amicably and cost effectively. Hence, channelizing legal aid to promote ADR attains significance.

The service providers involved in legal aid needs to be paid adequately to get quality service providers. Otherwise only junior lawyers or entry level professionals, with no expertise in ADR, would be found in legal aid services. This would compromise the quality of legal aid provided to the needy. Since, the role of para-legal volunteers in this regard would also be critical, efforts need to be made for training them adequately. These efforts would certainly help in

bringing justice to the desired litigants, and thereby, guaranteeing that the provisions of legal aid in our Constitution would not remain angelic articles without real significance.

Creating Awareness among People

Evidently, most of the impediments in the way of effective implementation of ADR mechanisms engender from the ignorance and the misconceptions of the litigants about ADR mechanisms. With the strengthening of ADR mechanisms by taking above-mentioned steps and consequential increase in its success rate, ADR would automatically become a talk of every household in West Bengal. However, to make everyone aware of the nuances of each of these ADR mechanisms, it is pertinent to have frequent ADR awareness campaigns in different places. Just like the proposed Indian Mediation Week, similar efforts should also be made with respect to other ADR mechanisms.

Apart from revising law curriculum to incorporate more papers on different modes of ADR, general awareness of ADR can be introduced in other disciplines of study as well. As this research revealed, more specifically in Darjeeling (which has a literacy rate of more than 80%), even the educated sections of society are ignorant of ADR mechanisms. The general awareness of ADR among people would help them to have confidence in the ADR system.

Litigants would also be able to make informed choice of suitable ADR mechanism/s under those circumstances.

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ANNEXURE - I: QUESTIONNAIRE FOR ADR ADMINISTRATORS

ALTERNATE DISPUTE RESOLUTION (ADR) MECHANISM AND LEGAL AID IN THE SETTLEMENT OF DISPUTES: A CASE STUDY OF WEST BENGAL

2015 - 17

Questionnaire for ADR Administrators

NAME: _____

DESIGNATION & ORGANISATION: _____

DISTRICT:_____

PHONE NUMBER: _____

EMAIL ADDRESS:_____

For a better analysis of various dynamics of the Alternative Dispute Resolution Mechanism in the State of West Bengal and the complexities involved; this empirical study is designed by the Ministry of Law & Justice (Govt. of India) in collaboration with the WB National University of Juridical Sciences, Kolkata. This study is being conducted among different groups, who are related to it directly or indirectly. On continuation of that, the perspectives of the legal ADR administrators are also essential.

Nota bene:

- Requesting you to kindly take out time to fill up the following questionnaire.
- Kindly return it back to Ms. Amrisha Tripathi or anyone who approaches you with authority.
- Anonymity, being cardinal, kindly give your details and we assure it to keep confidential.
- Any information collected herein will be the exclusive property of the institution conducting it. Any unauthorized dissemination is strictly prohibited and the format of this questionnaire is copyrighted.
- The questionnaire is divided into two parts. Part I carries questions, which are objective in nature; while Part II questions are subjective. Kindly follow the instructions enumerated in those parts.

PART- I

PART-I

Instructions to fill up Part-I

- **Please tick the relevant option while answering the following *objective* questions**
- **Where you feel *more than one option* is applicable, please list out your selections in an *order of preference*; For example: against your first choice write (i), against your second choice write (ii), against your third (iii), so on and so forth.**

……..

1. How often you participate in ADR mechanisms in a year?

	Never	0-5 times	5-10 times	More than 10 times
Arbitration				
Conciliation				
Mediation				

Negotiation				
Lok Adalats				

2. In which role, you feel you would be able to better resolve disputes of the parties?

Arbitrator	Conciliator	Mediator	Negotiator	None

3. According to you, what is the most preferred mode of alternative dispute resolution mechanisms in the State of West Bengal?

Arbitration	Conciliation	Mediation	Negotiation	Lok Adalats

4. What percentages of litigants are aware of ADR mechanisms as an option for settlement of disputes in the State of West Bengal?

0-25%	25-50%	50-75%	75-100%

5. At what stage during the court proceeding do you think a dispute should be referred to ADR mechanism?

Filing of service to summons	Trial Proceeding	Prolonged trial proceedings	Any other. (Please Mention)

6. In your experience, what is the major difficulty that you have faced as an arbitrator?

Parties don't take it seriously as there exist a chance to go to the court again	Parties are unwilling as it is expensive	Parties are not serious as there is no enforcement mechanism	Any other difficulty, please specify

7. According to you, what causes the main hindrance in the speedy adjudication of a case through ADR mechanisms?

Untrained ADR practitioners	Parties don't cooperate	Intervention of courts	Any other reasons, please specify

8. What discourages well informed parties to take recourse to ADR mechanisms?

Incompetency of ADR practitioners	Unsuccessful precedent	Traditional mindset	Lack of authority unlike courts	Possible breach of confidentiality

9. In what percentage of cases the neutrality of ADR administrator is questioned?

0-25%	25-50%	50-75%	75-100%

10. According to you, what type of dispute should not be categorically referred to ADR mechanism?

Injunctive relief/ corporate insolvency/individual bankruptcy	Issues of constitutional and fundamental rights	Intellectual property matters	Inheritance and succession matters	Any other, please specify

11. According to you, what specific types of cases should be taken up for adjudication through ADR mechanisms?

Matrimonial disputes	Intellectual Property Rights disputes	Industrial or labour disputes	Any other, please specify

12. How far the fund crunch contributes to the failure of effective administration of ADR and legal aid in State of West Bengal?

0-25%	25-50%	50-75%	75-100%

13. How far do you think 'institutional arbitration' is successful in the State of West Bengal?

0-25%	25-50%	50-75%	75-100%

14. In your opinion, should preference be give to court operated ADR over the ADR operated privately?

Yes, Parties and practitioners will take it more seriously	No, It will lack sufficient degree of flexibility seen in private organizations	No, ADR operated by court may have unnecessary court intervention	Yes, Unless it is court operated, it may reduce to mere commercialization of dispute settlement

15. How far do you think ADR has been successful to be an alternative to the court mechanism in the State of West Bengal?

0-25%	25-50%	50-75%	75-100%

PART II

Instructions to fill up Part-II

- **Please use the space below each question to fill in your opinion. Please note that *none of these questions* would be specifically attributed to your identity**.

1. As per your experience, how far the ADR mechanisms are successful in State of West Bengal? What changes you suggest for strengthening them?

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2. Have you got any insight into *Salesi* system, which is said to be practiced in undivided Bengal for the settlement of disputes?

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3. Briefly write your experience on conciliation, mediation and negotiation as means of amicable settlement of disputes?

4. Narrate your experience of participation in Lok Adalats.

5. What is your opinion about multi-door courthouse system, wherein the disputes can be subject to usual judicial proceedings or different ADR mechanisms depending on the suitability?

6. Do you think there is a requirement of creating a separate section of non-litigating lawyers for effectively handling ADR mechanisms in the State of West Bengal? If yes, why and how can it be implemented?

7. In your opinion, how far the legal aid has been successful in reaching the doorsteps of poor in the State of West Bengal? What measures can be taken to strengthen it?

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8. Have you taken any step to popularize ADR and free legal aid? Please explain.

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Thank you for your help!

ANNEXURE - II: QUESTIONNAIRE FOR PRACTITIONERS

ALTERNATE DISPUTE RESOLUTION (ADR) MECHANISM AND LEGAL AID IN THE SETTLEMENT OF DISPUTES: A CASE STUDY OF WEST BENGAL

2015 - 17

Questionnaire for practitioners

NAME: _____

DESIGNATION & ORGANISATION: _____

DISTRICT:_____

PHONE NUMBER: _____

EMAIL ADDRESS:_____

For a better analysis of various dynamics of the Alternative Dispute Resolution Mechanism in the State of West Bengal and the complexities involved; this empirical study is designed by the Ministry of Law & Justice (Govt. of India) in collaboration with the WB National University of Juridical Sciences, Kolkata. This study is being conducted among different groups, who are related to it directly or indirectly. On continuation of that, the perspectives of the legal professionals are also essential.

Nota bene:

- Requesting you to kindly take out time to fill up the following questionnaire.
- Kindly return it back to Ms. Amrisha Tripathi or anyone who approaches you with authority.
- Anonymity, being cardinal, kindly give your details and we assure it to keep confidential.
- Any information collected herein will be the exclusive property of the institution conducting it. Any unauthorized dissemination is strictly prohibited and the format of this questionnaire is copyrighted.
- The questionnaire is divided into two parts. Part I carries questions, which are objective in nature; while Part II questions are subjective. Kindly follow the instructions enumerated in those parts.

PART-I

Instructions to fill up Part-I

- **Please tick the relevant option while answering the following *objective* questions**
- **Where you feel *more than one option* is applicable, please list out your selections in an *order of preference*; For example: against your first choice write (i), against your second choice write (ii), against your third (iii), so on and so forth.**

……..

1. What is the most preferred mode of alternative dispute resolution mechanisms in the State of West Bengal?

Arbitration	Conciliation	Mediation	Negotiation	Lok Adalats

2. What percentages of cases are referred to alternative dispute resolution mechanisms?

	0-25%	25-50%	50-75%	75-100%
Arbitration				
Conciliation				
Mediation				
Negotiation				
Lok Adalats				

3. What do you think is the reason for non-acceptance or fewer acceptances of these mechanisms in comparison with Court proceedings?

People are unaware	People doesn't trust these mechanism	People think it is not authoritative as it is less formal	People think ultimately they have to approach court

4. How often are you engaged in any legal aid clinic each year?

Never	0-5 times	5-10 times	More than 10 times

5. What percentage of cases referred by the court to ADR under section 89 of CPC is referred back to the court under Order X, Rule 1C CPC?

0-25%	25-50%	50-75%	75-100%

6. At what stage during the court proceeding do you think a dispute should be referred to ADR mechanisms?

Filing of service to summons	Trial Proceeding	Prolonged trial proceedings	Any other, please specify

7. What are the specific types of cases that you prefer to take up for resolution under ADR mechanisms?

Matrimonial Disputes	Intellectual Property Rights	Industrial Disputes or labour dispute	Any other, please specify

8. Arbitrators who are former judges may have a tendency to prolong arbitration proceeding. How far have you have experienced such problems?

Never	0-5 times	6-10 times	More than 10 times

9. Where do you face major hurdle in an Arbitration proceeding?

Uncertainty of jurisdiction	Element of bias	Irregular mode of appointment of Arbitrator	Enforcement of awards

10. What discourages well informed parties to take recourse to ADR mechanism?

Incompetency of ADR administrators	Unsuccessful precedent	Traditional mind set	Lack of authority unlike courts

11. What is the percentage of the final award of the arbitral tribunal been challenged?

0-25%	25-50%	50-75%	75-100 %

12. What percentages of your clients are aware of ADR mechanisms to settle their disputes?

0-25%	25-50%	50-75%	75-100 %

13. How often you have been engaged in mediation or conciliation proceedings in a year?

Never	0-5 times	6-10 times	More than 10 times

14. How many times you have been a part of a Lok Adalat proceeding in your profession?

Never	0-5 times	6-10 times	More than 10 times

15. To what extent resorting to ADR mechanisms have resulted in the settlement of disputes?

0-25%	25-50%	50-75%	75-100 %

PART II

Instructions to fill up Part-II

- **Please use the space below each question to fill in your opinion. Please note that *none of these questions* would be specifically attributed to your identity**.

1. As per your experience, how far the ADR mechanisms are successful in State of West Bengal? What changes you suggest for strengthening them?

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2. Have you got any insight into *Salesi* system, which is said to be practiced in undivided Bengal for the settlement of disputes?

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3. Briefly write your experience on conciliation, mediation and negotiation as means of amicable settlement of disputes?

4. Narrate your experience of participation in Lok Adalats.

5. What is your opinion about multi-door courthouse system, wherein the disputes can be subject to usual judicial proceedings or different ADR mechanisms depending on the suitability?

6. Do you think there is a requirement of creating a separate section of non-litigating lawyers for effectively handling ADR in the State of West Bengal? If yes, why and how can it be implemented?

7. In your opinion, how far the legal aid has been successful in reaching the doorsteps of poor in the State of West Bengal? What measures can be taken to strengthen it?

8. Have you taken any step to popularize ADR and free legal aid? Please explain.

Thank you for your help!

ANNEXURE - III: QUESTIONNAIRE FOR THOSE LITIGANTS WHO RESORTED TO ADR MECHANISMS

ALTERNATE DISPUTE RESOLUTION (ADR) MECHANISM AND LEGAL AID IN THE SETTLEMENT OF DISPUTES: A CASE STUDY OF WEST BENGAL

2015 - 17

Questionnaire for those litigants who resorted to ADR mechanisms

NAME: _____

DESIGNATION & ORGANISATION: _____

DISTRICT:_____

PHONE NUMBER: _____

EMAIL ADDRESS:_____

For a better analysis of various dynamics of the Alternative Dispute Resolution Mechanism in the State of West Bengal and the complexities involved; this empirical study is designed by the Ministry of Law & Justice (Govt. of India) in collaboration with the WB National University of Juridical Sciences, Kolkata. This study is being conducted among different groups, who are related to it directly or indirectly. On continuation of that, the perspectives of the litigants who resorted to ADR mechanisms are also essential.

Nota bene:

- Requesting you to kindly take out time to fill up the following questionnaire.
- Kindly return it back to Ms. Amrisha Tripathi or anyone who approaches you with authority.
- Anonymity, being cardinal, kindly give your details and we assure it to keep confidential.
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- The questionnaire is divided into two parts. Part I carries questions, which are objective in nature; while Part II questions are subjective. Kindly follow the instructions enumerated in those parts.

PART-I

Instructions to fill up Part-I

- **Please tick the relevant option while answering the following *objective* questions**
- **Where you feel *more than one option* is applicable, please list out your selections in an *order of preference*; For example: against your first choice write (i), against your second choice write (ii), against your third (iii), so on and so forth.**

……..

1. Which of the following ADR mechanisms you are aware of?

Negotiation	Mediation	Conciliation	Arbitration	Lok Adaat

2. Have you ever been explained by your advocate about different ADR mechanisms that exist in West Bengal?

Yes, but I wasn't interested to listen	No, he/she never explained	Yes, he suggested ADR mechanism in which he is involved	Yes, in unclear terms

3. Have you ever been explained by any judge about the ADR mechanisms?

Yes, but I wasn't interested to listen	No, he/she never explained	The judge ordered to resort to ADR without any explanation	Yes, in unclear terms

4. Have you ever taken recourse to any of these ADR mechanisms?

Negotiation	Mediation	Conciliation	Arbitration	Lok Adalat

5. Do you think the ADR administrator has been able to resolve your dispute?

Yes, completely	Yes, to an extent	They made it more complicated	No, it was waste of time

6. Why did you agree to settle your dispute through the above mentioned ADR mechanism?

The judge insisted	I was losing my financial stability	In the anxiety for fast disposal of dispute	I trust ADR mechanism more than court	Any other reason, please specify

7. What is the subject matter of your dispute that has been referred to ADR?

Inheritance and succession matters	Corporate matters (please specify)	Intellectual property matters	Any other matter, please specify

8. After how many years of court litigation your matter has been referred to ADR mechanism for settlement of dispute?

Matter was directly referred to ADR	Less than 2 years	2-6 years	6-10 years	More than 10 years

9. How long did it take for the settlement of your dispute through ADR mechanisms?

It did not get resolved through ADR mechanism	Less than 2 years	2-5 years	More than 5 years

10. At what stage during the ADR mechanism resorted by you, you felt it ineffective in resolving the dispute?

Right from the beginning	In the middle of the proceedings	Almost just before the settlement of dispute	I did not find it ineffective

11. Have you approached any of the following legal aid clinics for any legal advice?

State Legal Service Authority	District Legal Service Authority	Legal aid clinics of educational institutions	Any other, please specify.

12. How many legal aid clinics are you aware of that operates in the State of West Bengal?

Not aware of any	Less than 5	6-10	More than 10

13. How far the free legal advice given to you by the legal aid service provider was helpful to you in resolving your dispute?

It was not helpful at all	It was partially helpful, but I had to go for a second opinion	Yes, it helped in complete resolution of my dispute	Any other opinion, please specify.

14. Have you been charged for legal services provided by legal aid clinics? If so how much?

No, I was not charged any amount	Rs. 100- Rs. 500	Rs. 500- Rs. 1000	More than Rs. 1000

15. How many times have you taken a second opinion after the free legal advice you received from legal aid clinic?

Never	1-5 times	5-10 times	More than 10 times

PART II

Instructions to fill up Part-II

- **Please use the space below each question to fill in your opinion. Please note that *none of these questions* would be specifically attributed to your identity**.

1. How did you come to know about the ADR mechanism/s that you have used for settlement of dispute? What is your understanding of the mechanism/s you have resorted for the settlement of your dispute?

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2. How is your experience in resolving the dispute through ADR mechanisms?

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3. If you get involved in any dispute in the future, would you prefer to resort to court litigation or ADR mechanisms? Elaborate.

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4. What is your experience of availing the legal services from legal aid clinics?

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5. What do you suggest for the improvement of ADR mechanisms and legal aid services in the State of West Bengal?

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Thank you for your help!

ANNEXURE - IV: QUESTIONNAIRE FOR THOSE LITIGANTS WHO DID NOT TAKE RESORT TO ADR MECHANISMS

ALTERNATE DISPUTE RESOLUTION (ADR) MECHANISM AND LEGAL AID IN THE SETTLEMENT OF DISPUTES: A CASE STUDY OF WEST BENGAL

2015 - 17

Questionnaire for those litigants who did not take resort to ADR mechanisms

NAME: _____

DESIGNATION & ORGANISATION: _____

DISTRICT:_____

PHONE NUMBER: _____

EMAIL ADDRESS:_____

For a better analysis of various dynamics of the Alternative Dispute Resolution Mechanism in the State of West Bengal and the complexities involved; this empirical study is designed by the Ministry of Law & Justice (Govt. of India) in collaboration with the WB National University of Juridical Sciences, Kolkata. This study is being conducted among different groups, who are related to it directly or indirectly. On continuation of that, the perspectives of the litigants who have not resorted to ADR mechanisms are also essential.

Nota bene:

- Requesting you to kindly take out time to fill up the following questionnaire.
- Kindly return it back to Ms. Amrisha Tripathi or anyone who approaches you with authority.
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- The questionnaire is divided into two parts. Part I carries questions, which are objective in nature; while Part II questions are subjective. Kindly follow the instructions enumerated in those parts.

PART-I

Instructions to fill up Part-I

- **Please tick the relevant option while answering the following *objective* questions**
- **Where you feel *more than one option* is applicable, please list out your selections in an *order of preference*; For example: against your first choice write (i), against your second choice write (ii), against your third (iii), so on and so forth.**

……..

1. Which of the following ADR mechanisms you are aware of?

Negotiation	Mediation	Conciliation	Arbitration	Lok Adalat

2. Have you ever been explained by your advocate about the different ADR mechanism that exists in West Bengal?

Yes, but I wasn't interested to listen.	No, he/she never explained.	Yes, he suggested ADR mechanism in which he is involved	Yes, in unclear terms

3. Have you ever been explained by any judge about the ADR mechanisms?

Yes, but I wasn't interested to listen.	No, he/she never explained.	Yes, in unclear terms

4. Have you ever taken recourse to any of these ADR mechanisms prior to this dispute?

Arbitration	Mediation	Conciliation	Lok Adalats

5. Why do you think you have not taken recourse to ADR mechanisms?

Incompetency of ADR administrator and practitioners	Unsuccessful precedent	I believe in court proceedings only	Any other, please specify

6. Do you think your dispute could have been resolved through ADR mechanisms?

Yes, if the judge would have insisted	No, it would have only resulted in financial loses and waste of time	Maybe, it could have been better resolved	Maybe, but I find the court settlement is better

7. What is the subject matter of your dispute?

Inheritance and succession matters	Corporate matters (please specify)	Intellectual property matters	Any other, please specify

8. How long it took to settle your dispute or how long has been your litigation going on before the Court?

0-2 years	2-6 years	6-10 years	More than 10 years

9. What is the total fee charged by your advocate for his legal services in the settlement of your dispute?

Less than Rs. 1,000	Rs. 1,000 – Rs. 10,000	Rs. 10,000 – Rs. 1,00,000	More than Rs. 1,00,000

10. How many times has your matter been referred to ADR mechanism/s for settlement?

Never	Less than 2 times	2-5 times	More than 5 times

11. Would you prefer to resort to ADR mechanisms in your future disputes for settlement?

No	Yes	May be, depending on the type of	Any other opinion, please specify

		dispute	

12. How many legal aid clinics are you aware of that operate in the State of West Bengal?

Not aware of any	Less than 5	6-10	More than 10

13. Have you approached any of the following legal aid clinics for any legal advice?

State Legal Service Authority	District Legal Service Authority	Legal aid clinics of educational institutions	Any other, please specify.

14. How far the free legal advice given to you by the legal aid service provider was helpful to you in resolving your dispute?

It was not helpful at all	It was partially helpful but I had to go for a second opinion	Yes, it helped in complete resolution of my dispute	Any other opinion, please specify.

15. How many times have you taken a second opinion after the free legal advice you received from legal aid clinic?

Never	1-5 times	5-10 times	More than 10 times

PART II

Instructions to fill up Part-II

- **Please use the space below each question to fill in your opinion. Please note that *none of these questions* would be specifically attributed to your identity**.

1. What is your understanding of ADR mechanisms?

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2. What are the primary reasons for not resorting to ADR mechanisms in the settlement of your dispute?

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3. Briefly point out your experience of resorting to court litigation.

4. What is your experience of availing the legal services from legal aid clinics?

5. What do you suggest for the improvement of ADR mechanisms and legal aid services in the State of West Bengal?

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Thank you for your help!

ANNEXURE - V: SCHEDULE FOR JUDGES' INTERVIEW

ALTERNATE DISPUTE RESOLUTION (ADR) MECHANISM AND LEGAL AID IN THE SETTLEMENT OF DISPUTES: A CASE STUDY OF WEST BENGAL

2015 - 17

Schedule for Judges' Interview

NAME: _____

DESIGNATION & ORGANISATION: _____

ADDRESS:_____

PHONE NUMBER: _____

EMAIL ADDRESS:_____

For a better analysis of various dynamics of the Alternative Dispute Resolution Mechanism in the State of West Bengal and the complexities involved; this empirical study is designed by the Ministry of Law & Justice (Govt. of India) in collaboration with the WB National University of Juridical Sciences, Kolkata. This study is being conducted among different groups, who are related to it directly or indirectly. On continuation of that, the perspectives of the Hon'ble Judges are also essential.

Nota bene:

- Requesting you to kindly take out time to fill up the following questionnaire.
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- Anonymity, being cardinal, kindly give your details and we assure it to keep confidential.
- Any information collected herein will be the exclusive property of the institution conducting it. Any unauthorized dissemination is strictly prohibited and the format of this questionnaire is copyrighted.

Instructions to fill up the form

- **Please use the space below each question to fill in your opinion. Please note that *none of these questions* would be specifically attributed to your identity**.

1. In your opinion, what would be the most suitable case for reference under section 89 of CPC?

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2. According to you, at what rate ADR mechanisms are successful in the State of West Bengal? Among negotiation, mediation, conciliation and arbitration, which mode of alternate dispute resolution mechanism would you prefer to suggest to litigants and why?

3. What is your take on changes introduced in Section 34 under Arbitration and Conciliation (Amendment) Ordinance 2015?

4. What is your opinion about the competency of people involved in the administration of ADR mechanisms in State of West Bengal?

5. How far Lok Adalat is helpful in resolving disputes in State of West Bengal?

6. Do you think there is a requirement of creating a separate section of non-litigating lawyers for effectively handling ADR mechanisms in the State of West Bengal? If yes, why and how can it be implemented?

7. What is your opinion about the multi-door court system, wherein, the disputes can be subject to usual judicial proceedings or different ADR mechanisms depending on the suitability?

8. Have you got any insight into *Salesi* system, which is said to be practiced in undivided Bengal for the settlement of disputes?

9. What are the steps taken by you for popularizing ADR mechanisms and legal aid in State of West Bengal?

10. Please give us your suggestion on the better working of ADR mechanisms and legal aid clinics in the State of West Bengal.

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Thank you for your help!