

MAKING JUSTICE ACCESSIBLE AND AFFORDABLE.. THE FUTURE BELONGS TO ADR, ODR AND ONLINE COURTS

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ABSTRACT

Covid-19 has changed the landscape of the entire world with each sector feeling the wrath of the pandemic. India is no stranger to effects of the pandemic with the country imposing the world's longest lockdown. The administrators of justice had no other choice but to close down the courts "physically". The paper throws light on the importance of 'Access to Justice' and the role played by the Judiciary in a healthy democracy. It further discusses the difficulties faced by the common litigants, advocates and the courts caused due to the pandemic. The paper highlights how some of the major problems faced by the judicial system in the country such as the pendency of cases, high litigation costs and no or little inclination towards technology are further aggravated by the advent of Covid-19. The paper then talks in detail about some possible solutions to these issues, which include ADR mechanism, ODR mechanisms and Online Courts. While recommending these solutions, the paper throws light on the jurisprudence of these mechanisms, their benefits over the conventional mode of litigation, the role and importance of these mechanisms in the Covid-19 era and the authors' perspective about the practical realities and what further needs to be done to promote and encourage the use of these mechanisms. The paper then concludes with hope and message that this time of crisis would eventually lead to better sense and a complete overhauling of the Justice Delivery System in the country. It is perhaps the best time to introspect and bring about the desired radical changes that our Justice Delivery System is longing for.

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1. Introduction

Judiciary is one of the three pillars under the Constitution of India, the other two being Legislature and Executive. The foundation of judiciary lies in the trust and confidence posed by the public in the courts to deliver impartial and prompt justice. The most important duty of the courts is to ensure that justice is properly administered so that the rights and liberties of individuals are not perished. The two essential ingredients of a justice delivery system are the rule of law and access to justice.

No society can exist without justice. The advancement of the society depends upon proper implementation of law to its needs and it is the responsibility of judicature to apply the laws to manage the rights and duties of people.³ Delivery of justice by the courts ensures general public that their rights are secure. Therefore, the main functions of the courts include safeguarding the rights of individuals, delivering prompt justice and upholding the values embodied in the Constitution of India.

1.1 Access to Justice and Speedy Trial

The Preamble to the Constitution of India secures to all citizens social, economic and political justice. The fact that justice is placed before equality and fraternity in the Preamble shows the importance given to it by the constitution makers. 'Access to Justice' connotes not just a person's access to court but also identification of grievance, being provided with legal assistance, the adjudication of any such grievance and enforcement of the relief granted.⁴

Judiciary is called the centrepiece of administration of justice. For performing its constitutional duties, the judiciary must be accessible to people from all stratum of society. It has been held in numerous cases that timely access to justice forms a part of the right to life as guaranteed under Article 21⁵ of the Constitution. In case of *Anita Kushwaha & Ors. Vs. Pushap Sudan and Ors.*⁶, the Hon'ble Supreme Court recognised "access to justice" as an invaluable human right and held it to be a part and parcel of right to life. The court further emphasised that a person's

³Rule Of Law & Access To Justice, Hon'ble Mr. Justice F.M. Ibrahim Kalifulla, Judge, Supreme Court of India. Lecture delivered at the Tamil Nadu Judicial Academy on the occasion of the Regional Judicial Conference (South Zone) from 31st January to 2nd February 2014.

⁴Supra n 1.

⁵Constitution of India

Article 21. Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law

⁶AIR 2016 SC 3506

inability to access courts for the determination of his rights or obligations also results in violation of Article 14.⁷

Another most important component of justice is that it must not only be accessible but also speedy. It has been rightly said that ‘Justice delayed is justice denied.’ Even though the Constitution does not contain any specific provision regarding speedy trial, it has been held to a part of Right to life and personal liberty under Article 21 of the Constitution. The case of *Hussainara Khatoon v. State of Bihar*⁸ is a landmark case in speedy trial jurisprudence. In this case, it was held by the Supreme Court that the right to have a speedy trial is implicit in the broad scope of Article 21. In *Sheela Barse v. Union of India*⁹, the Supreme Court declared speedy trial to be an essential right under Article 21.

The excessive delays in delivering justice leads to a flagrant violation of rule of law. It adversely affects the quality of life of an individual and his access to justice. It also leads to weakening of the justice delivery system and imperils the rule of law.¹⁰ Therefore, it is the obligation of the justice delivery system to deliver expeditious and economical justice.¹¹

1.2 Impediment to Access to Justice and Speedy Trial Due To Covid-19

On 11th March, 2020, World Health Organisation (WHO) declared Covid-19 as a pandemic.¹² Even though Covid-19 is primarily a health emergency, yet its effect on other sectors cannot be disregarded. One of the major issues emerged due to Covid-19 is its impact on the justice delivery system. Our Judiciary has always been the nation’s moral conscience, standing up for the poor and those at the bottom of the economic chain, settling disputes between the centre and the state and sometimes even saving the democracy. A common man looks towards the judiciary to safeguard his interests.

Due to Covid-19, courts are not able to function with full efficiency, which has resulted in increasing pendency of cases and further overburdening of the courts.¹³ The right of persons to

⁷Constitution of India

Article 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁸1980 1 SCC 81

⁹1988 4 SCC 226

¹⁰*Imtiyaz Ahmad v. State of U.P.*, 2012 2 SCC 688 (SCC p. 699, paras 25)

¹¹Manpreet Kaur, Constitutional Perspective of speedy Justice in India, *International Journal of Law*, Volume 5; Issue 3; May 2019; Page No. 115-120.

¹²WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, World Health Organisation, (11th March, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (Last visited on 16th July, 2020)

¹³Advocate Anushka, Impact On Constitutional Rights In Response To Coronavirus Pandemic, Legal Service India, (2020), <http://www.legalserviceindia.com/legal/article-2348-impact-on-constitutional-rights-in-response-to-coronavirus-pandemic.html>. (Last visited on 16th July, 2020)

have access to justice and speedy trial is in a serious jeopardy. Most of the courts are hearing only “urgent matters” and that too, through the mode of video-conferencing. As a result, the courts and the subsequent justice delivered by them are no longer easily accessible to general public. What amounts to “urgent” is the sole prerogative of courts and litigants have no say in the same. In most cases, litigants/lawyers have no means to approach the court if the registry does not list their case for urgent hearing.¹⁴ Such suspension of normal functioning of courts amounts to denying the people their right to access the justice.¹⁵

As a result of this pandemic, social distancing has become the need of the hour. Unfortunately, while following the new norm of social distancing, the constitutional right of people to access justice is being infringed consistently.¹⁶



2. Impact of COVID-19 On Legal Sector:

Legal sector is one of the worst affected sectors in the country. Delivery of expeditious justice goes to the very root of a democracy and the same is being hampered consistently due to the pandemic. The impact of Covid-19 on the legal sector can be understood under the following three heads:

2.1 Courts

Considering the health and safety of litigants, judges and advocates, the courts suspended the physical hearings with limited exceptions in order to prevent the overcrowding in the court premises. The unavoidable effect of such a step was the delay caused in settlement of the cases as the trials of most of cases had to be postponed as far as possible.¹⁷ The Supreme Court, High Courts as well as subordinate courts are forced to function in a highly constrained manner.¹⁸ Most of the courts are hearing only ‘urgent’ matters, which generally includes matters involving imminent threat to life or property. However, due to the lack of concrete guidelines

¹⁴M.P. Bharucha, By Scaling Down, India's Courts Have Become Party to an Undeclared Emergency, The Wire, (13th June, 2020), <https://thewire.in/law/by-scaling-down-indias-courts-have-become-party-to-an-undeclared-emergency> (Last visited on 16th July, 2020)

¹⁵Animesh Upadhyay & Shikhar Shukla, Right to Access to Justice Amidst Covid-19, Legal Service India, (2020), <http://www.legalserviceindia.com/legal/article-2351-right-to-access-to-justice-amidst-covid-19.html>(Last visited on 16th July, 2020)

¹⁶Supra n 12

¹⁷Sayra Kakkar, Global Court functioning and impact of Covid-19 on Arbitration, Jurist, (17th May, 2020, 03:04:55 AM), <https://www.jurist.org/commentary/2020/05/sayra-kakkar-court-functioning-covid19/#>(Last visited on 17th July, 2020)

¹⁸ CD Staff, Judiciary in Times of COVID-19 Outbreak, Civildaily, (12th May, 2020), <https://www.civildaily.com/burning-issue-judiciary-in-times-of-covid-19-outbreak/>(Last visited on 17th July, 2020)

relating to what constitutes urgent, various High Courts are following their own procedure. For example, while the Gauhati High Court is hearing only ‘urgent matters’, it has made no reference to citizenship-related writ petitions, bail matters and habeas corpus petitions, which are urgent because they involve loss of liberty.¹⁹

2.2 Advocates

Every profession has been severely impacted due to Covid-19 and the advocates are no exception to the same. Contrary to the common belief, most of the advocates practising in the lower courts depend upon daily cases to earn their income. Sudha Ramalingam, a family law expert has pointed out that most of the advocates are almost daily-wage earners.²⁰ Due to the irregular functioning of courts owing to the pandemic, the economic situation of such lawyers has become precarious. The closure of the courts is directly affecting the livelihood of lawyers due to which their income has become extremely low or nil.²¹

The plight of the lawyers is further demonstrated by the fact that a lawyer in Chattisgarh was forced to take up the work of weaving bamboo baskets due to complete loss of earnings owing to Covid-19 crisis. On getting to know about the same, Justice PR Ramachandra Menon, the Hon’ble Chief Justice of Chattisgarh High Court, sent him a cheque of Rs. 10,000.²²

Taking into account the problems faced by the lawyers, the Supreme Court Bar Association has proposed to provide a loan of Rs 25,000 to members to be repaid in two years.²³ The Telangana Government has released a sum of Rs 25 crores for the purpose of extending financial support to the indigent advocates and clerks during Covid-19 lockdown.²⁴ Also, the Bar Council of Delhi has proposed to extend financial assistance of Rs. 5,000 to each of the

¹⁹Sandhya PR, Corona is a wake up call for Indian courts. They aren’t equipped to function in a crisis, The Print, (27th March, 2020, 12:28 pm), <https://theprint.in/opinion/corona-is-a-wake-up-call-for-indian-courts-they-arent-equipped-to-function-in-a-crisis/389224/>(Last visited on 17th July, 2020)

²⁰Sruthisagar Yamunan, India’s coronavirus lockdown is revealing deep income disparities in the legal profession, Scroll, (10th April, 2020, 09:00 AM), <https://scroll.in/article/958528/indias-coronavirus-lockdown-is-revealing-deep-income-disparities-in-the-legal-profession>(Last visited on 17th July, 2020)

²¹Puneet Singh Bindra, COVID-19: Access to Justice and survival of stakeholders in the legal system, Bar and Bench, (22nd April, 2020, 10:22 AM), <https://www.barandbench.com/columns/covid-19-access-to-justice-and-survival-of-stakeholders-in-the-legal-system>(Last visited on 17th July, 2020)

²²Nisreen Naaz, Chhattisgarh chief justice gifts cheque to Tamil Nadu lawyer who went back to weaving baskets amidst Covid-19 crisis, The Times of India, (14th July, 2020, 18:31 IST), <https://timesofindia.indiatimes.com/city/raipur/chhattisgarh-chief-justice-gifts-cheque-to-tamil-nadu-lawyer-who-went-back-to-weaving-baskets-amidst-corona-crisis/articleshow/76961805.cms>(Last visited on 17th July, 2020)

²³Supra n 19

²⁴Rintu Mariam Biju, The Telangana Government has sanctioned an amount of Rs 25 crores to the Law department to provide financial assistance to the needy advocates and advocates clerks amid COVID-19 Lockdown, Bar and Bench, (28th May, 2020, 08:08 PM), <https://www.barandbench.com/news/telangana-govt-sanctions-rs-25-crores-aid-lawyers-covid-19-lockdown>(Last visited on 17th July, 2020)

4,639 lawyers whose applications were found in order.²⁵ However, these are only minuscule measures taken to provide assistance to few lawyers. The financial future of the majority of lawyers is still uncertain.

2.3 Litigants

Litigants are the ultimate consumers of the justice delivered by the courts with the aid of lawyers. However, the Covid-19 has hit them the worst as their fundamental right to justice is being infringed. Owing to the fear of spreading Covid-19, entry to the courts has been restricted and, unless urgent, physical access to courts is practically forbidden for litigants.²⁶ The courts are hearing urgent matters through the mode of video-conferencing. However, the virtual hearings are posing problems of their own. According to BCI, “Litigants are unable to get justice through the process of virtual courts...due to unsatisfactory Wi-Fi and other technical problems which are a common phenomenon. The public and advocates are in the dark as to what is really going on in the various courts of the country.”²⁷ Under such circumstances, finding a viable solution becomes the top priority in the interest of the entire legal profession.

LITIGANT
GREATER KNOWLEDGE. HUMAN WISDOM

3. Challenges faced by Justice Delivery System Due to COVID-19:

3.1 Pendency of Cases

One of major issues with the Indian Judiciary has always been the pendency of cases. According the pre Covid-19 figures there were around 3.5 crore cases pending before the Indian Courts.²⁸ With the country entering the Unlock phase II, the courts of the country are only taking up “urgent”²⁹ matters in a video conferencing manner. Somewhere in the middle of May, the Delhi High Court also decided to take up only “urgent” matters in a video conferencing

²⁵Delhi Bar Council to give Rs 5,000 to over 4,500 lawyers in need during lockdown, Business Insider India, (15th April, 2020, 22:16 IST), <https://www.businessinsider.in/india/news/delhi-bar-council-to-give-rs-5000-to-over-4500-lawyers-in-need-during-lockdown/articleshow/75166513.cms>(Last visited on 17th July, 2020)

²⁶Supra n 18.

²⁷Satya Prakash, Litigants unable to get justice through virtual courts: BCI, The Tribune, (21st May, 2020, 02:00 PM) <https://www.tribuneindia.com/news/nation/litigants-unable-to-get-justice-through-virtual-courts-bci-87925>(Last visited on 17th July, 2020)

²⁸ Sagar Kulkarni, DHNS, New Delhi, Deccan Herald, 16th Feb 2020, <https://www.deccanherald.com/national/nearly-46-lakh-cases-pending-in-high-courts-319-crore-in-lower-courts-805320.html>, Last visited on 18th July 2020

²⁹ Digital Desk, Supreme Court To Take Up Only 'urgent Matters' Amid COVID-19 Pandemic, Republic News, 19th April 2020, <https://www.republicworld.com/india-news/law-and-order/covid-19-supreme-court-to-take-up-short-hearings-and-urgent-matters.html> Last Visted on 18th July 2020

mode.³⁰ Similarly, keeping in view the surge in Covid-19 cases in the national capital, all pending cases listed before National Company Law Tribunal, Principal Bench and other benches at New Delhi from July 20, 2020 to September 30, 2020 have been adjourned. As per a Notice dated July 17, these cases will be listed for hearing from August 5, 2020 onwards till October 16, 2020.³¹ Similarly the current statistics of the Supreme Court are not also very encouraging as there are around 60,444 cases pending alone in the Supreme Court as on 1st July 2020.³² This pendency is only going to exaggerate in the coming days as there would be major disputes especially in the area of commercial and civil matters once the courts starts to function to their full capacity. We should not be tricked by reduction in *number* of cases ... what should also be kept in mind is the scale of burden on Indian Judiciary due to reduced disposal rate! In the entire month of April, 82,725 cases were filed in India's courts, while 35,169 cases were disposed of. Compared to 2019, when the average number of cases filed per month was around 14 lakh (total number of cases 1.70 crores), while the average number disposed cases per month was 13.25 lakh.³³

GREATER KNOWLEDGE. HUMAN WISDOM

3.2 High Litigation Expenses... Do All Have a Fair Chance to Litigate

One obstacle which has always caught the eye of those involved in the judicial process is the high costs of litigation in the Indian courts.³⁴ Although the Legal Services Act of 1987³⁵ provides a mechanism to provide legal aid to weaker and downtrodden sections of the society to make justice affordable to all, yet what is often forgotten is that layer of the population which falls above the economic eligibility threshold for legal aid as provided under Section 12 of the Legal Services Act but do not possess the economic means to pursue a claim in the courts.³⁶ It is an ill conceived notion that litigation expenses include only the fees charged by the respective

³⁰ All Benches Of Delhi High Court To Take Up Urgent Matters Via Video Conferencing From Friday, Bloomberg Quint, 21st May 2020, <https://www.bloombergquint.com/law-and-policy/all-benches-of-delhi-hc-to-take-up-urgent-matters-via-video-conferencing-from-friday>, Last visited on 18th July 2020

³¹ Aditi Singh, [COVID19] Hearing in pending cases listed from July 20 - Sept 30 before Delhi Benches of NCLT pushed further; Only urgent hearing till Aug 5, Bar and the Bench, 17th July 2020, <https://www.barandbench.com/news/litigation/covid19-hearing-in-pending-cases-listed-from-july-20-sept-30-before-delhi-benches-of-nclt-pushed-further-only-urgent-hearing-till-aug-5>, Last visited on 18th July 2020

³² <https://main.sci.gov.in/statistics>, Last Visited on 18th July 2020

³³ Manish Chibber, How lockdown has hit judiciary, in numbers — April cases fall to 82k from 14 lakh avg in 2019, The Print, 4th May, 2020, <https://theprint.in/judiciary/how-lockdown-has-hit-judiciary-in-numbers-april-cases-fall-to-82k-from-14-lakh-avg-in-2019/413666/> Last visited on 18th July 2020

³⁴ Law Commission of India, One Hundredth- Twenty Eight Report on Cost of litigation, 1988, Available at <http://lawcommissionofindia.nic.in/101-169/Report128.pdf>, Last Visited on 20th July 2020

³⁵ The legal Services Act 1987, available at https://maitri.mahaonline.gov.in/pdf/The_Legal_Services_Authority_Act,_1987.pdf (last visited on 20th July 2020)

³⁶ Legal Services Authorities Act, 1987, Section 12 of the Legal Services Authorities Act, Available at <http://cgslsa.gov.in/Acts/Act.pdf>, (Last Visited on 20th July 2020)

attorneys and the lawyers arguing the matter. The fee paid to an advocate is only one of the factors in considering the economic accessibility. Two other factors that are pertinent to be considered include the costs incurred in attending a hearing at court and the costs incurred due to loss of pay/business for attending a court hearing or in economic terms the opportunity cost. According to the studies conducted by Daksh India Org, the average cost (other than fees of lawyers) incurred by a litigant is Rs1,039 per case per day and the average cost incurred due to loss of pay/business is Rs1,746 per case per day.³⁷ Similarly according to the data compiled by ETIG from their annual reports, the legal expenses of listed Indian companies have increased from 14% to over Rs 38,660 crore (\$5.6 billion) during FY19 as new laws and regulations on insolvency and debt restructuring, among others, came into force over the past five years.³⁸ There is a rapid surge in the expenses due to the sudden increase in regulations. The companies are left with no other alternative but to respect these regulations which in turn will lead to higher legal spending. Some of the sectors which are most affected by the increase in these regulations include the manufacturing sector, mining sector and the power sector.

After the imposition of the world's strictest lockdown, about 84% of Indian households saw their incomes fall last month under the strict shelter-at-home rules, and many will not survive much longer without assistance.³⁹ According to the research data provided by Centre for Monitoring Indian Economy (CMIE) survey, joblessness in urban areas climbed to 11.26% in the week ended 5 July from 10.69% recorded in the preceding week.⁴⁰ Because of the pandemic, there is an obvious delay in supply of construction materials, shortage of labour and this has also adversely hit the developers' cash flows and project delivery capabilities.⁴¹ The Real estate sector has already suffered losses amounting to Rs 15.5 lakh crores because of the pandemic situation.⁴² The startup sector, one of the visionary sectors of the current government,

³⁷Shruti Naik, The Cost Of Litigation – What Alternatives Do We Have? dakshindia.org, 16th November 2016, <https://dakshindia.org/cost-litigation-alternatives/> (Last visited on 20th July 2020)

³⁸Maulik Vyas & Shailesh Kadam, India Inc spent 14% more on legal fees in FY19, Economic Times, 15th September 2019, <https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-spent-14-more-on-legal-fees-in-fy19/articleshow/71121319.cms?from=mdr> (Last Visited on 20th July 2020)

³⁹Marianne Bertrand, Kaushik Krishnan, and Heather Schofield, HOW ARE INDIAN HOUSEHOLDS COPING UNDER THE COVID-19 LOCKDOWN? 8 KEY FINDINGS, Chicago Booth For Social Sector Innovation, , posted on 11th May 2020, <https://www.chicagobooth.edu/research/rustandy/blog/2020/how-are-indian-households-coping-under-the-covid19-lockdown>, (Last Visited on 20th July 2020)

⁴⁰Prashant K Nanda, Live Mint, Urban job losses on the rise again, 7th July 2020, <https://www.livemint.com/industry/human-resource/urban-job-losses-on-the-rise-again-11594080860059.html>, Last Visited on 20th July 2020

⁴¹Sunita Mishra, Housing.com, Impact of Coronavirus on Indian real estate 29th June 2020, <https://housing.com/news/impact-of-coronavirus-on-indian-real-estate/> (Last Visited on 20th July 2020)

⁴²PTI, Retail trade suffers Rs 15.5 lakh cr business loss due to COVID-19: CAIT, 19TH July 2020, <https://economictimes.indiatimes.com/industry/services/retail/retail-trade-suffers-rs-15-5-lakh-cr-business-loss-due-to-covid-19->

has also been badly hit in terms of the revenue loss. According to a report by S.B.I⁴³ swap, the Covid -19 outbreak has caused losses to the tune of Rs 30.3 lakh crore to the national economy, which is 50 per cent more than the Covid-19 relief package worth Rs 20 lakh crore announced by the central government.⁴⁴

There are high chances of disputes arising due to the delays and non performance of contracts because of the imposition of the lockdown and its subsequent after effects. The policy makers need to dive deeper to find an alternative so that litigation costs can be reduced especially considering the fact that after the pandemic gets over the spending power of all the business houses as well as individuals would be reduced by great proportions. Developing a cost effective judicial system is the need of the hour.

3.3 Predicament of Online Courts

Covid-19 has compelled the judiciary to rely on technological platforms to secure the access to justice. In order to prevent contributing to the public health crisis caused by Covid-19, the Supreme Court barred physical entry in the Court premises and further ordered to hold all urgent hearings vide Video Conferencing.⁴⁵ By an order dated 6th April, 2020, the Supreme Court in *Re: Guidelines for Court Functioning through Video Conferencing during Covid-19 Pandemic*⁴⁶ issued guidelines to all the High Courts and District Courts to use the mode of video-conferencing to ensure delivery of justice to all people, while complying with the need of social distancing. Further, a 7-Judge Committee of the Supreme Court headed by Justice NV Ramana refused to resume physical hearings for now due to rising Covid-19 cases.⁴⁷ In such circumstances, the concept of online courts has become the focal point of discussion.

cait/articleshow/77054210.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Visited on 20th July 2020)

⁴³ S.B.I-State Bank Of India

⁴⁴ Anuradha Shukla, COVID-19 caused economic loss of Rs 30.3 lakh crore; Maharashtra, Tamil Nadu worst-hit: Report Indian Express, , 26th May 2020, <https://www.newindianexpress.com/business/2020/may/26/covid-19-caused-economic-loss-of-rs-303-lakh-crore-maharashtra-tamil-nadu-worst-hit-report-2148164.html>, (Last Visited on 20th July 2020)

⁴⁵ S.S. Rana & Co. Advocates, The Functioning Of The Indian Judiciary Amidst Novel Coronavirus (COVID-19) Outbreak, Mondaq, (2nd April, 2020) <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/911432/the-functioning-of-the-indian-judiciary-amidst-novel-coronavirus-covid-19-outbreak> (Last visited on 21st July, 2020)

⁴⁶ Suo Motu Writ (Civil) No.5/2020, The Supreme Court Of India, https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf

⁴⁷ Debayan Roy, Bar and Bench, [COVID-19 crisis] 7 Judge Committee of Supreme Court turns down request to resume physical hearings FOR NOW, (25th July, 2020), <https://www.barandbench.com/news/litigation/7-judge-committee-of-supreme-court-turns-down-request-to-resume-physical-hearings> (Last visited on 27th July, 2020)

Though it was unanimously believed that virtual courts will be the future of justice delivery system in India under the e-Courts Project⁴⁸, yet it seems like Covid-19 has forced the judicial system to adopt the technology for which it is not prepared yet. Virtual courts are introduced in India as an emergency measure to ensure access to justice even during the pandemic. However, there are a lot of problems which have been left untouched. According to Senior advocate and President of the Supreme Court Bar Association, Dushyant Dave, the existing technological issues are a hindrance in accessibility to justice as the current judicial system is not equipped to undergo a computer revolution. Even the technology used by the Supreme Court is of poor quality.⁴⁹ It has been pointed out that the infrastructure is not adequate to actually hold virtual hearings. Many Advocate-on-records (AORs) have complained about facing technical issues such as being clueless about the status of their application for urgent hearing and difficulty in filing matters such as the size limits prescribed for the uploading the files, etc in the e-filing of Supreme Court.⁵⁰ Another important issue lies in the lack of an unified platform to conduct virtual hearings. Judiciary had to rely on various platforms such as VIDYO, Zoom, WhatsApp, etc to conduct virtual hearing which raises grave concerns for the security and confidentiality of the sensitive information.⁵¹

Moreover, the concept of virtual hearings is not well received by the lawyers. The Chairman of Bar Council of India (BCI), Mr. Manan Kumar Mishra wrote a letter to CJI voicing the concerns regarding virtual hearings. He adverted that 90% of Advocates and Judges in the country are themselves unaware and uncertain about technology and its implications. He further said, "People sitting on elevated chairs seem to be, probably, far away from the ground realities and that is why they are harbouring and advocating such thoughts."⁵² The lack of proper training of the lawyers, especially those hailing from the remote areas and the shortage

⁴⁸The e-Court Mission Mode Project (MMP) was conceptualized as a part of National e-Governance Plan, with a vision to transform the Indian judiciary by making use of technology. <https://vikaspedia.in/e-governance/online-legal-services/how-do-i-do> (Last visited on 21st July, 2020)

⁴⁹Dharvi Vaid, How coronavirus is propelling the rise of online courts in India, DW, (11th June, 2020), <https://www.dw.com/en/how-coronavirus-is-propelling-the-rise-of-online-courts-in-india/a-53774109> (Last visited on 21st July, 2020)

⁵⁰King, Stubb & Kasiva, COVID-19 Urges Courts In India To Go Online: Pros And Cons Of Court Hearings Via Video Conference, Mondaq, (21st May, 2020), <https://www.mondaq.com/india/operational-impacts-and-strategy/938322/covid-19-urges-courts-in-india-to-go-online-pros-and-cons-of-court-hearings-via-video-conference> (Last visited on 21st July, 2020)

⁵¹Live Law News Network, Plea in SC against use of foreign apps like zoom, skype etc for video conferencing, Live Law, (19th April 2020, 9:57 AM) <https://www.livelaw.in/top-stories/plea-in-sc-against-use-of-foreign-based-apps-like-zoom-skype-etc-for-video-conferencing155461> (Last visited on 21st July, 2020)

⁵²Source: PTI, No "virtual hearings" via video conferencing post COVID-19 lockdown: BCI urges CJI, Outlook, (29th April, 2020, 8:25 PM) <https://www.outlookindia.com/newscroll/no-virtual-hearings-via-video-conferencing-post-covid19-lockdown-bci-urges-cji/1818724> (Last visited on 21st July, 2020)

of required infrastructure are two of the biggest impediments in making the virtual hearings a reality in India.

4. Proposed Solutions

The pandemic has forced us to change our thinking as well our lifestyle. Innovation is the need of the hour and our justice delivery system cannot be immune to these changing times. A perfect blend of technology, innovation and ADR mechanisms could be one of the probable solutions to this problem.

4.1 ALTERNATE DISPUTE RESOLUTION (ADR)

4.1.1 The Jurisprudence behind ADR in India

In the year 1989, Justice Malimath Committee was set up to look and dwell upon the alternatives to dispute resolution. In the report the committee conducted an extensive survey of the working of the court system in India. The main focus area of the report was to delve deeper and determine the factors that cause a delay in the delivery of justice. It made recommendations for reducing the arrears and to provide speedy justice to the indigent at a low cost, as well as setting up of ADR mechanisms as a workable alternative to court litigation. Thereafter, an amendment to Section 89 of the Civil Procedure Code 1908 was made, which has bestowed statutory recognition on Alternative Dispute Resolution mechanisms.

Section 89 and the corresponding rules were inserted by Act No. 46 of 1999(w.e.f . 1.7.2002).⁵³ But the section contained some anomalous drafting errors due to some typing or clerical mistake. It was in the leading judgment of *Afcons Infrastructure Ltd v Cherian Varkey Construction Company Pvt. Ltd*⁵⁴ that the correct interpretation was comprehensively explained. Para 7 of the judgment made it amicably clear that if Section 89 was to be read in a literal sense then it would be tormenting for a trial court judge. “It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). Despite the typical or the clerical error, the intent behind introducing Section 89 was crystal clear. Despite the shambles in the language of the statute the intent of Section 89 is apparent, pellucid and sound.” It was further discussed in *Salem*

⁵³ Code of Civil Procedure 1908, Section 89 of the Code of Civil Procedure, Available at <http://legislative.gov.in/sites/default/files/A1908-05.pdf> (Last Visited on 21st July 2020)

⁵⁴8 SCC 24 (2010).

*Advocate Bar Association v Union of India*⁵⁵ that the intent of the Parliament in introducing Section 89 and Rules 1-A to 1-C in Order X in The Civil Procedure Code to guarantee that disputes were resolved through the mechanism of ADR was upheld, with all the ambiguity as the object of Section 89 was laudable. The necessity to reduce the pendency and burden upon the courts by resorting to alternative dispute resolution (ADR) is well envisaged in the code. Para 18 and 19 of the judgment (Afcons) clearly demarcate the disputes which are suitable for ADR and those which are not suitable. Suitable disputes include disputes in relation to contracts, matrimonial disputes, consumer disputes, disputes between employer and the employee among others. Similarly disputes which are not suitable include representative suits, criminal offenses, disputes in relation to election to public offices, disputes where there is an involvement of specific and serious allegations of fraud, fabrication of documents, forgery etc. Similarly Para 27 of the judgment clearly states that if the matter is referred to Arbitration then the decision of the Arbitration tribunal is final and binding, as it becomes an independent proceeding. Similarly, the award passed by the Arbitral tribunal is executable like decree of court. Para 28 of the judgment discusses about the other four ADR processes. The court remarked that since all the other four are non adjudicatory in nature, the ultimate control and jurisdiction lies with the court only.

4.1.2 The importance of ADR in maintaining commercial relationships especially during Covid era

As the governments round the world are combating the battle to contain the spread of Covid-19, the scale of the economic disruption and its impact on the business cannot be relegated. With India coming into the stage of unlocking its economy, the effects of the lockdown are still being felt and it would take a considerable time and joint effort on parts of all the stakeholders to revive the economy. The judicial set up in the country has also shaken up as Covid-19 has caused major roadblocks in settlement of disputes as also there would be out and out growth of further legal altercations on account of the lockdown imposed. The contractual obligations especially those which were to be performed during the lockdown period were not performed. Litigation as a method of dispute settlement mechanism might be the most common option but the situation caused by Covid-19 and the subsequent lockdown might force the normal Indian litigant to look beyond the doors of the courtroom and look for other alternative mechanisms to resolve the disputes. The time has come to dwell upon the Alternative modes of Dispute Resolution.

⁵⁵1 SCC 49 (2003).

The Afcons Judgment⁵⁶(*supra*) has already demarcated the list of offenses which can be referred for ADR proceedings. With the advent of Covid-19 and the subsequent lockdown which was imposed, it is pertinent that disputes regarding these matters would arise and if traditional methods of dispute resolutions are applied, then with the kind of infrastructure that our traditional judicial set up has, it would take an eternity to adjudicate on these matters. And the most important aspect is the fact that litigation would result in one of the party losing and feeling hard done of the conditions which were not in his hand. Businesses must deliberate on the fact that Covid-19 is a bad patch and occasional, whereas maintaining business relationship is vital for sustaining the business from long-term perspective. So far, thought has been given as to how contracts might have provided for the current situation.

4.1.3 Proposed modes of ADR to resolve commercial disputes

4.1.3.1 Mediation

In these prevailing situations, Mediation is perhaps the best suited mechanism to resolve the business disputes mutually. It provides the parties with an easy and cost-effective mechanism that seeks to maintain business relations by putting forth an agreeable solution. Mediation is a mechanism which helps in repairing the strained relationships especially commercial relationships. In the case of individuals there is always the scope of talking to each other and reconciling the disputes but in the case of big multinational giants the situation is a little complex. There is an involvement of big guns , power play, no connection and there is nothing personal between parties. In this whilst of technological world they might have executed the agreement on mail, or on a video conference. There is complete absence of any personal connection leaving no or little scope for negotiation. In such cases, a trained mediator comes to picture whereas the parties and their representatives do not take a stand and just come to watch the process. The mediators are experts in communicating with the representatives of the parties. Mediation is all about facilitating or assisting negotiation between the parties. The role of the mediator is just limited to facilitate the communication process to help the parties in reaching an agreeable solution. Mediation works between the parties because it gives them a chance to come to a settlement without compromising their rights. Even the Chief Justice of India, SA Bobde has called for making pre-litigation mediation mandatory, especially in cases of commercial disputes. In an interview to ET, Justice Bobde said, “All (commercial) matters could be made to first go through pre-litigation mediation. So if there is a commercial problem

⁵⁶8 SCC 24 (2010)

or dispute between two businesses, they could first undergo pre-litigation mediation. If it cannot be solved, then they can approach the courts.”⁵⁷

In the contemporary legal world commercial contracts contain a clause that mandate pre litigation arbitration. There are barely any commercial contracts where dispute resolution clauses emphasize on the adoption of other mechanisms of alternate dispute resolution which include mediation or conciliation as a predecessor to litigation or arbitration.⁵⁸ While the courts are putting their best foot forward to adapt to the changing scenarios, there is forthcoming menace approaching of a rise in the litigations being initiated on account of increasing defaults by contracting parties. To stay relevant in the business and to maintain the commercial relationships in these times it is the need of the hour to seriously consider mediation as an alternate dispute resolution mechanism.

4.1.3.2 Conciliation

Generally, mediation and conciliation are used as indistinguishably; however India recognizes conciliation as a different method of ADR mechanism.

According to Black’s Law Dictionary, Conciliation is defined as “The adjustment and settlement of a dispute in a friendly, unantagonistic manner. Used in courts before trial with a view towards avoiding trial and in labor disputes before arbitration.”⁵⁹ In simpler terms Conciliation involves the settling of disputes arising out of a legal relationship between parties without the interference of the Court, through conciliator(s) appointed by the parties. In case of conciliation proceedings, the conciliator plays an active role in contrast to a mediator as he proposes the amicable solutions for the parties involved in the proceedings. The job of the conciliator is to bring about an amicable resolution of the dispute between the parties by convincing them to reach a settlement. Section 66 of the Arbitration and Conciliation Act provides that the conciliator is not bound by the Indian Evidence Act or the Code of Civil Procedure.⁶⁰ This makes the process of Conciliation even more lucrative for the commercial

⁵⁷ Ajmer Singh,, Commercial disputes should go through mediation first Bobde,The Economics Times 14th November 2019, https://economictimes.indiatimes.com/news/politics-and-nation/commercial-disputes-should-go-through-mediation-first-bobde/articleshow/72048517.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, Last Visited on 17th July, 2020

⁵⁸ Sangeeta Bharti,Conciliation an Effective ADR, India Legal live 20th June ,2020 <https://www.indialegallive.com/special-story/conciliation-an-effective-adr-mechanism> , Last Visited on 17th July 2020

⁵⁹ <https://www.latestlaws.com/wp-content/uploads/2015/04/Blacks-Law-Dictionary.pdf> Last Visited on 17th July 2020

⁶⁰ The Arbitration and Conciliation Act 1996 , Section 66 of the Arbitration and Conciliation Act, Available at <http://legislative.gov.in/sites/default/files/A1996-26.pdf> (Last Visited on 17th July 2020)

players as they are not bound by the technical nature of adducing evidence and following the statutory requirements. Similarly, Section 67⁶¹ of the Act provides for the Role of the Conciliator which is to accommodate the parties in *an unfettered and unbiased manner* in their attempt to reach an amicable settlement of dispute. The mechanism of conciliation is governed by principles of objectivity, fairness and justice, consideration to rights and obligations of the parties, usages of trade and surrounding circumstances to the dispute and basic principles of natural justice. The conciliator is authorized to make proposals for a settlement at any stage of the proceedings. After a settlement agreement is signed between the parties, it is final and binding having the same status and effect as that of an arbitral award (Sections 73 and 74).⁶²

4.1.3.3 Arbitration

Arbitration has always been a preferred mode of dispute resolution when it comes to complex commercial matters. The governing law of arbitration is the Arbitration & Conciliation Act, 1996 (A&C Act). One of the major reasons for choosing arbitration is the flexibility it offers in regard to time and procedure of conduct of proceedings. A fundamental strength of arbitration is its efficiency. Unlike traditional court hearings, strict timelines are followed.⁶³ Section 29A(1)⁶⁴ of the A&C Act specifies that in case of arbitrations other than international commercial arbitration, the award shall be made within a period of 12 months from the date of completion of pleadings under Section 23(4). Under Section 19⁶⁵, the parties are free to choose the procedure to be followed by the arbitral tribunal as it provides that the tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The most important advantage is that the parties have the liberty to select their Arbitrator(s) having specialised knowledge which is beneficial in disputes involving technical matters.⁶⁶

⁶¹ The Arbitration and Cancellation Act 1996, Section 67 of the Arbitration and Conciliation Act, Available at <http://legislative.gov.in/sites/default/files/A1996-26.pdf> (Last Visited on 17th July 2020)

⁶² Arbitration and Conciliation act, 1996, Section 73 of the Arbitration and Conciliation Act, Available at <http://legislative.gov.in/sites/default/files/A1996-26.pdf> (Last Visited on 17th July 2020)

The Arbitration and Conciliation Act 1996, Section 74 of the Arbitration and Conciliation Act, Available at <http://legislative.gov.in/sites/default/files/A1996-26.pdf> (Last Visited on 17th July 2020)

⁶³ Divyam Agarwal and Saumay Bhasin, COVID-19 and reforms in the arbitration process, CNBC TV18, (4th June, 2020, 06:07 PM), <https://www.cnbcv18.com/views/covid-19-and-reforms-in-the-arbitration-process-6070881.htm> (Last visited on 18th July, 2020)

⁶⁴ Arbitration and Conciliation act, 1996, Section 29A of the Arbitration and Conciliation Act, Available at <http://legislative.gov.in/sites/default/files/A1996-26.pdf> (Available at 18th July 2020)

⁶⁵ Arbitration and Conciliation act, 1996, Section 19 of the Arbitration and Conciliation Act, Available at <http://legislative.gov.in/sites/default/files/A1996-26.pdf> (Last Visited on 18th July 2020)

⁶⁶ Kiran Bhardwaj, Recent Developments And Impact Of Changes In Arbitration, Indian Legal, (23rd June, 2020, 6:11 PM), <https://www.indialegalive.com/top-news-of-the-day/news/recent-developments-and-impact-of-changes-in-arbitration> (Last visited on 18th July, 2020)

Due to the harm caused by Covid-19 to the world's economy and business relationships, huge numbers of commercial disputes are emerging as parties are finding it difficult to respect their contractual obligations. To resolve the same, most parties would prefer an expeditious resolution system.⁶⁷ In such cases, arbitration comes to the rescue of the parties. Arbitration is well positioned to respond and adapt swiftly to the challenges posed by Covid-19. The major international arbitral institutions were swift and prompt to find ways to maintain access to justice in a timely and efficient manner through arbitration.⁶⁸ Generally, the arbitral institutes can broker an agreement between the parties in 2-3 successive meetings which is far less than other dispute resolution methods.⁶⁹ Taking into account the problem of adhering to the strict time limits in times of Covid-19, the Supreme Court has extended the period of limitation in all proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not w.e.f. 15th March 2020 till further order/s.⁷⁰ Since the order covers general as well as special laws, it becomes clear that the order applies to A&C Act as well. A further order was passed by the Supreme Court, specifically in relation to A&C Act on 6th May, 2020.⁷¹ In *Rategain Travel Technologies v Ujjwal Suri*⁷², the Delhi High Court relying upon the order dated 06.05.2020, held that the limitation under the Arbitration Act has been extended by the Supreme Court and directed that the parties in cases concerning arbitration law will have a period of two weeks, after the lockdown is lifted, to approach the court if required.⁷³

⁶⁷Riya Dani, Role of Expedited Arbitration and Party Autonomy in Covid-19 related Supply-Chain Disruptions, VIA Mediation and Arbitration Centre, <https://viamediationcentre.org/readnews/NDg1/Role-of-Expedited-Arbitration-and-Party-Autonomy-in-Covid-19-related-Supply-Chain-Disruptions> (Last visited on 18th July, 2020)

⁶⁸Andrew Battison, Sherina Petit, Tamlyn Mills, Katie Chung and Clinton Slogrove, Institutional responses to the COVID-19 pandemic, International Arbitration Report 6 (Issue 14, June 2020), <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report--issue-14.pdf?la=en-in&revision=>(Last visited on 22nd July, 2020)

⁶⁹KS Legal & Associates, Alternative Conflict Resolution Mechanisms Amidst COVID-19, Mondaq, (16th July, 2020) <https://www.mondaq.com/india/trials-appeals-compensation/966136/alternative-conflict-resolution-mechanisms-amidst-covid-19> (Last visited on 18th July, 2020)

⁷⁰In Re: Cognizance For Extension Of Limitation, Suo Motu Writ Petition (Civil) No(s).3/2020, Supreme Court of India, Order dated 23.03.2020, https://main.sci.gov.in/supremecourt/2020/10787/10787_2020_1_12_21570_Order_23-Mar-2020.pdf(Last visited on 22nd July, 2020)

⁷¹In Re: Cognizance For Extension Of Limitation, Suo Moto Writ (Civil) NO. 3 of 2020, Supreme Court of India, Order dated 06.05.2020, <https://districts.ecourts.gov.in/sites/default/files/Solemn%20Order%20dated%2006%2005%202020%20in%20Suo%20Moto%20Writ%20of%20Civil%20of%202020%20in%20connection%20with%20Cognizance%20for%20Extension%20of%20Limitation.pdf>(Last visited on 22nd July, 2020)

⁷²O.M.P. (Misc) No. 14 of 2020, Delhi HC, decided on May 11, 2020.

⁷³Ankoosh Mehta, Ria Lulla & Kritika Sethi, Supreme Court's Continuous Battle with Covid-19, India Corporate Law - A Cyril Amarchand Mangaldas Blog, (21st May, 2020) <https://corporate.cyrilamarchandblogs.com/2020/05/supreme-courts-continuous-battle-with-covid-19/>(Last visited on 18th July, 2020)

4.1.3.4 Lok Adalats

In the Covid -19 era Lok Adalats can be of great importance especially after the courts of the land are looking to take them online. In a recent development, Chhattisgarh High Court along with Legal Services Authorities pioneered E-Lok Adalats in the state during the lockdown and were able to dispose off more than 2200 hundred matters which were pending for more than 5 years.⁷⁴ This is quite a welcome development as cases relating to partition claims, motor accident claims, unpaid bank loans, compoundable offences etc can be easily resolved using the Online e-Adalats. The main focus of a Lok Adalat proceeding is trying to reach an cordial compromise between the parties. Lok Adalats cannot adjudicate on the issues nor can it influence the parties to decide in a certain way. It encourages accepted arrangements. Also, disputes are not only settled but it also helps in maintaining the friendly relationship amongst the parties as the settlement is reached with the mutual consent of both the parties and results in a win-win situation for both the parties. As discussed above maintaining commercial relationships is of utmost importance in the Covid -19 era and Lok Adalats perfectly fit in the bill.

Authors' Perspective

Businesses must deliberate on the fact that Covid-19 is a bad patch and occasional, whereas maintaining business relationship is vital for sustaining the business from long-term perspective. Mediation and Conciliation could turn out to be a useful method to address disputes. Both Mediation & Conciliation provide a mechanism to resolve their disputes amicably without straining their commercial relationships. Since both of them provide a win – win situation for the parties, it is best suited for resolving commercial disputes .E-Lok Adalats can be used to settle petty disputes without getting tangled into the web of litigation.

Similarly, arbitration furnishes an easy and efficient solution for dispute resolution during the time of Covid-19. The parties decide the procedure mutually, they can mutually decide upon a procedure which suits the needs of both the parties.

4.2 ODR: THE FUTURE OF DISPUTE RESOLUTION

The world is witnessing a pandemic like situation and conditions would be far from normal in the near future. Indian judicial system has always been guilty of delays in administration of

⁷⁴ Dhananjay Mahapatra, Chhattisgarh becomes first state to start e-Lok Adalats, Times Of India, **11th July 2020** http://timesofindia.indiatimes.com/articleshow/76912410.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Visited on 24th July 2020)

justice and litigation has always been a costly affair for the common Indian person. Even though the Supreme Court has allowed for online filing of cases⁷⁵ yet we cannot neglect the fact that judiciary is already overburdened and is heavily clogged with tons of cases.⁷⁶ Another key factor which is to be kept in mind is the fact that the lower courts lack the infrastructure⁷⁷ to keep track with these advancements. India now has over 504 million active internet users or those who have accessed the internet in the last one month.⁷⁸ These statistics along with the prevailing conditions in the world have forced the Indian authorities to ponder over a dispute resolution mechanism that uses technology to facilitate the resolution of disputes between the parties. The mechanism is known as Online Dispute Resolution or ODR.

4.2.1 Jurisprudence of ODR

Online Dispute Resolution (ODR) is often referred as a form of ADR which takes advantage of the speed and convenience of the Internet and ICT.⁷⁹⁸⁰ ODR can be a very useful tool in reducing the burden on the judicial set up in the country especially in the coming months where we will see an increase in the number of commercial and financial disputes. India has not been alien to the concept of Online Dispute Resolution as even before pandemic situation Online Arbitral proceedings were being conducted. The legal backing for ODR can be easily found in Section 19 of the Arbitration & Conciliation Act.⁸¹ Section 19 mandates that the tribunal is not bound and governed by the provisions of Code of Civil Procedure⁸² and Indian Evidence Act⁸³ and is free to decide upon the procedure to be followed in conduct of such proceedings. This makes online or live conduct well within the legal domain. No one can challenge such

⁷⁵ Soni Mishra, Supreme Court unveils e-filing module to facilitate online filing of cases, The Week 15th May 2020, <https://www.theweek.in/news/india/2020/05/15/supreme-court-unveils-e-filing-module-to-facilitate-online-filin.html> (Last Visited on 21st July 2020)

⁷⁶ Advocate Karan Singh, Online Dispute Resolution (ODR): A Positive Contrivance to Justice Post Covid- 19, Indian Law Watch, 12th May 2020, <https://indianlawwatch.com/practice/online-dispute-resolution-odr-a-positive-contrivance-to-justice-post-covid-19/> (Last Visited on 21st July 2020)

⁷⁷ Soibam Rocky Singh, Backlog of cases due to lack of judicial infrastructure, The Hindu, , 26th July 2018, <https://www.thehindu.com/news/cities/Delhi/backlog-of-cases-due-to-lack-of-judicial-infrastructure/article24515317.ece> (Last Visited on 21st July 2020)

⁷⁸ Nandita Mathur, , India now has over 500 million active Internet users: IAMAI, Live Mint 05th May 2020, <https://www.livemint.com/news/india/india-now-has-over-500-million-active-internet-users-iamai-11588679804774.html> (Last Visited on 21st July 2020)

⁷⁹ Dr. Pablo Cortés, What should the ideal ODR system for e-commerce consumers look like? The Hidden World of Consumer ADR: Redress and Behaviour, CSLS Oxford, 28 October 2011, https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf (Last Visited on 21st July 2020)

⁸⁰ ICT-Information & Communication Technology

⁸¹ Supra n 62

⁸² The Code of Civil Procedure, 1908 available at <http://legislative.gov.in/sites/default/files/A1908-05.pdf> (Last Visited on 21st July 2020)

⁸³ Indian Evidence Act, 1872 available at <http://legislative.gov.in/sites/default/files/A1872-01.pdf> (Last Visited on 21st July 2020)

proceeding merely on the ground of being an online resolution proceeding. ODR mechanisms may make use of services like email, text-messaging software, audio/video conferencing software for communication or other automated systems like blind bidding between the arbitrator/mediator and the disputants. As per September 13, 2018 notification issued by the Department of Justice, Ministry of Law Justice, Government of India, there were more than three crore pending cases in various courts. Out of these 46% of total cases involved either Government Departments or Government Bodies. In the above-mentioned notice, it was advised to the departments to reduce their litigation and settle their disputes through ADR and ODR⁸⁴. Further, the department provided a list of agencies providing ADR and ODR services.

4.2.2 Benefits of ODR

ODR mechanisms are cost effective and provide speedier resolution of disputes as compared to traditional forms of litigation. The proceedings in ODR mechanism are completed in a time bound manner and do not drag for years. Similarly it allows parties sitting in remote areas of the world to communicate via telephones or video conferencing modes to settle their disputes and it dispenses away with physical presence of the parties which is quite crucial in these times considering the pandemic like situations. ODR can be very useful in resolving money lending disputes, real estate disputes, commercial disputes, disputes relating to dishonor of cheques and disputes between employers and the employees which are critical for revival of the economy.⁸⁵ ODR provides a more flexible solution as it can be initiated at any point of a judicial proceeding even before a judicial proceeding begins. Similarly proceedings under ODR can also be terminated if the parties in conjunction decide that it is not leading to a workable solution. Basically ODR mechanism offers all the benefits offered by a normal ADR process over the traditional litigation, the only difference being that parties are not physically present in the proceedings and disputes can be resolved by sitting at a place convenient for the parties concerned.

4.2.3 Major Platforms providing ODR Services

Some of the major Indian platforms providing ODR services include **Centre for Alternate Dispute Resolution Excellence (CADRE), Centre for Online Dispute Resolution (CODR), Better Business Bureau, National Arbitration and Mediation, Square Trade,**

⁸⁴ Online Dispute Resolution Through Mediation, Arbitration, Conciliation, Etc., available at: <https://doj.gov.in/page/online-dispute-resolution-through-mediation-arbitration-conciliation-etc> (last visited on 21st July 2020)

⁸⁵ Online Dispute Resolution, Drishti IAS, 8th June 2020, <https://www.drishtias.com/daily-updates/daily-news-analysis/online-dispute-resolution> (Last Visited on 21st July 2020)

SAMA(Space for Resolution) and many new players are entering into providing ODR platforms.

4.2.4 Major Breakthrough meeting by NITI Aayog:

Recently, the NITI Aayog, in association with Agami and Omidyar Network India, brought together key stakeholders in a virtual meeting for advancing ODR in India.⁸⁶ The major agenda of the meeting was to reach a Multi- stakeholder agreement to work in collaboration to scale the level of ODR in India. Some of the key suggestions from the meeting included:

1. It is imperative to add ADR and ODR mechanisms in the system so that various industries can make use of such mechanisms.
2. Making ODR or ADR voluntary will defeat the purpose of so it is desired that in certain categories of disputes it should be made mandatory, especially in high volume repeatable disputes like disputes arising out of Motor Vehicles Act, cheque bouncing, insurance claims.⁸⁷
3. More acknowledgment should be given to the ODR mechanisms so that the idea of ODR mechanism should reach the common litigant.

4.2.5 Noble Practice: Singapore's Community Justice and Tribunals System (CJTS)

Community Justice and Tribunals System (CJTS) is one of a kind dispute resolution cum information portal that is in practice in Singapore.⁸⁸ It provides a variety of services; before an aggrieved person files a claim, he has to conduct an-Assessment of his case to ensure he is ready to proceed. When a claim is filed online, the claimant is guided by the CJTS throughout the filing process including the submission of required documents. The portal then assists the claimant to pay the fee as well as to select date of preference for court appearance. After that process, the portal gives access to the claimant to either opt for e-Negotiation, e-Mediation or the traditional process. With effect from 7 January 2019, all Employment Claims Tribunal (ECT) cases were mandated to be filed and managed by the CJTS system.⁸⁹ The only prerequisite for signing in to CJTS for a Singapore citizen is a SingPass⁹⁰ (or CorpPass for

⁸⁶NITI Aayog, Agami and Omidyar Network India, **Catalyzing Online Dispute Resolution In India**, 12th June 2020, <https://niti.gov.in/catalyzing-online-dispute-resolution-india> (Last Visited on 21st July 2020)

⁸⁷Nandan Nilekani, Co-founder and Non-Executive Chairperson, Infosys speaking at Niti Ayog meeting on Catalyzing Online Dispute Resolution In India, 12th June 2020, <https://niti.gov.in/catalyzing-online-dispute-resolution-india> (Last Visited on 21st July 2020)

⁸⁸<https://www.statecourts.gov.sg/cws/ECT/Pages/Using-the-Community-Justice-and-Tribunals-System.aspx>

⁸⁹<https://www.statecourts.gov.sg/cws/ECT/Pages/Using-the-Community-Justice-and-Tribunals-System.aspx>

⁹⁰ Launched in March 2003, Singapore Personal Access (or SingPass) allows users to transact with over 60 government agencies online easily and securely. Managed by the Government Technology Agency (GovTech),

business entities). In cases where a person is not eligible for either of the passes, an application can be moved for a temporary CJTS Pass.

Authors' Perspective

The first thing which is mandatory for the development of a successful ODR mechanism in India is to create awareness about ODR, not only among the legal stakeholders but also amongst the common public who are ultimately the consumers of justice. Similarly, the legal fraternity especially the advocates should be taken into confidence that ODR mechanism is not a threat to their profession but is actually an opportunity for them. Advocates are the first point of contact for any common litigant involved in any legal dispute and if the advocate, by reason of his own vested interest, misguides about ODR then chances of that litigant opting for ODR or any other alternative dispute resolution mechanism are miniscule. Infrastructure can be created within some years but building trust and credibility takes generations. A concentrated effort is needed to change the mindset of the common litigant. Efforts have started. Now it is time to put foot on the accelerator so that justice is delivered in a desired time frame and at an affordable cost. Otherwise Justice delayed is equivalent to justice denied only.

4.3 IMPARTING TRAINING AND IMPROVING INFRASTRUCTURE TO MAKE ONLINE COURTS A REALITY IN INDIA

4.3.1 Potential of Online Courts in India:

While the online courts (virtual hearings and e-filings) have faced some hindrances, the efforts of judiciary to deliver justice in times of Covid-19 are commendable. The need to digitalise judicial functions has been a long sought after objective since technology has entered our lives. Online courts will reduce the cost of justice and will also provide better accessibility to the persons seeking justice. They will lead to an increase in the efficiency in judicial functioning. It will also have a positive impact on the productivity of the lawyers as the requirement to go to court will decrease substantially.⁹¹ While stressing on the importance of virtual courts, the apex court noted that the need of administration of justice cannot be allowed to be crumbled

the SingPass system is reviewed regularly, and there are many on-going security enhancements to ensure that a secure SingPass service is delivered to our users. Text taken from website: <https://www.singpass.gov.sg/singpass/common/aboutus> (Last Visited on 21st July 2020)

⁹¹Kirit Javali (Advocate, Supreme Court), The Wheels of Justice Delivery Mechanism: An Introspection, The SCC Online Blog, (6th July, 2020), <https://www.sconline.com/blog/post/2020/07/06/the-wheels-of-justice-delivery-mechanism-an-introspection/> (Last visited on 21st July, 2020)

during a pandemic.⁹² The incredible performance of the Apex Court through video-conferencing during the times of Covid-19 shows the potential of Indian courts to work virtually. According to the data released by the Supreme Court on 3rd June, 2020, a total of 617 benches of Supreme Court sat during the pandemic and heard matters through the mode of video-conferencing which included 293 benches for main matters and 324 for review petitions. Approximately 25,000 video links were shared with advocates for the virtual court hearings. Almost 670 judgments were delivered by the Court during this period. Emphasising on the efficiency of virtual courts, the Apex Court observed that “one virtual court can hear as many as 40 matters, instead of 20, through video-conferencing in a day”.⁹³

While appreciating the performance of the top court of the country, it must not be forgotten that the courts of the lower judiciary are not equally blessed to have access to similar facilities. The problems faced by the courts and the lawyers owing to virtual courts have already been highlighted. However, the inevitable thrust towards online courts in India can be perceived to be a blessing in disguise, if we try to make the most of it. The potential and the subsequent advantages of online courts are manifold, only if we are able to adapt to the same in a timely manner. It has been pointed out by Dr. Lalit Bhasin, President, Society of Indian Law Firms that to use technology in judicial functions, considerable work is required to be done.⁹⁴

4.3.2 Need to have full utilisation of E- Courts Infrastructure

The E-Courts Mission Mode Project (E-Courts Project⁹⁵) was launched to unite judicial functions with the technology and its main focus was on developing technological infrastructure for the District and Taluka courts of India. As per the data available from National Informatics Centre, a total of 627 District Courts, 3093 Court Complexes and 6645 Court Establishments have been digitalised under the E-Courts Project.⁹⁶ While it seems that the necessary infrastructure for virtual courts is in place, it is also a fact that it is highly under-utilised. Only a handful of advocates and litigants opt for the e-filing feature of the courts. As

⁹²Source:PTI, SC defends 'virtual courts system' during COVID-19 pandemic, says it ensured justice, The New Indian Express, (2nd May, 2020, 11:48 PM), <https://www.newindianexpress.com/nation/2020/may/02/sc-defends-virtual-courts-system-during-covid-19-pandemic-says-it-ensured-justice-2138432.html>(Last visited on 21st July, 2020)

⁹³ Preeti Ahluwalia, A Supreme Benchmark, India Legal (27th June, 2020, 3:49PM), <https://www.indialegallive.com/top-news-of-the-day/a-supreme-benchmark>(Last visited on 21st July, 2020)

⁹⁴ Dr. Lalit Bhasin, Covid-19 and its Impact on the Legal System, Legal Era, (10th April, 2020), <https://www.legaleraonline.com/articles/covid-19-and-its-impact-on-the-legal-system>(Last visited on 21st July, 2020)

⁹⁵Supra n 45

⁹⁶ National Informatics Centre, eCourts Services Transforming Judiciary for Effective Justice Delivery, InformaticsVol28 No.1 (July 2019) 22 https://informatics.nic.in/uploads/pdfs/340be9b6_info_julyupdated05082019.pdf(Last visited on 21st July, 2020)

per the available data, only 600 cases have been filed through the e-filing module in the Punjab and Haryana High Court and about 50 cases have been filed in the Delhi High Court through the e-filing module.⁹⁷ As compared to actual number of physical filings done in the first six months of 2019 (around 1.9 lakhs⁹⁸), the number of e-filings are almost negligible. The reasons for this severe under-utilisation could be unfriendly user interfaces or lack of training for actual users.⁹⁹

4.3.3 Need to impart proper training

Lack of awareness and training is one of the biggest reasons for opposing the online courts. It has been suggested repeatedly that there is an impending need to impart training to make people; especially the judges and the advocates become familiar with the system of e-filing and online courts. While emphasising on the fact that most of the advocates are not properly aware about the technology, it was suggested by Mr. Manan Kumar Mishra that some advocates can learn and adapt to the technology if proper training is given.¹⁰⁰ Madan Lokur, former Supreme Court judge has also recommend the organisation of awareness and training programmers for the lawyers, litigants, judges and court officers for India's smooth transition towards online courts. He also stressed that there is a need to strength the infrastructure by providing proper access to technology and making the systems more user-friendly.¹⁰¹

Authors' Perspective:

The importance of physical courts and physical hearings cannot be undermined. It is a well accepted fact that online courts cannot fully replace the physical courts. However, a blend of online and physical courts can provide an easy solution to the problem of accessibility to justice in times like this as well as for future. The complex commercial disputes involving important questions of law can be taken up in physical hearings, rest can be adjudicated through the mode of online courts.

⁹⁷ Innovations: Phase II eCourts Project, eCourts India, https://ecourts.gov.in/ecourts_home/static/manuals/FINAL%20INNOVATIONS%20IN%20PHASE%20II.pdf (Last visited on 21st July, 2020)

⁹⁸ Jai Brunner&Balunair, Digitising Filings, Supreme Court Observer (20th April, 2020), <https://www.scobserver.in/beyond-the-court/digitising-filings> (Last visited on 21st July, 2020)

⁹⁹ Virtual Courts in India: A Strategy Paper, VIDHI Centre for Legal Policy, (April 2020) 20 https://vidhilegalpolicy.in/wp-content/uploads/2020/06/20200501_Strategy-Paper-for-Virtual-Courts-in-India_Vidhi-1.pdf (Last visited on 21st July, 2020)

¹⁰⁰Supra n49

¹⁰¹Supra n 46

5. CONCLUSION

The judicial system has been hit by the pandemic on a very large scale. The compulsions associated with following the norms of “social distancing” have left the administrators of justice with no other choice but to close down the temples of justice “physically”. But as they say, adversity is the mother of invention and desperate times call for drastic measures. If we look at the pandemic with a positive outlook, it may have given us the opportunity to transform our justice delivery system for the better. The judiciary is already inclining towards technology to ensure that the justice delivery system does not crumble. Tough time as it may, it has shown us not only the importance of online courts but also our potential when it comes to delivery of justice. Supreme Court is leading all other courts by example by being the first one to adopt online hearing mechanism. The Supreme Court after receiving numerous memorandums from the Bar Council of India has proposed to start two more courts on the digital platform — chamber judge hearings and registrar hearings.¹⁰² The proceedings before these two courts are usually mechanical and attended by junior counsels. This would allow them to get a chance to appear and generate work. The rest of the courts, including Delhi High Court, are following suit. Similarly, opening of the E-Seva Kendras to facilitate the e –filling process by the Lower courts is an appreciated step. By allowing the online filling of cases, Supreme Court has added a new segment to the judicial history of the country.¹⁰³ All the stakeholders in the legal world are also noticing the shift in the judicial system and are trying to adapt to the same promptly. At the same time, efforts should be made towards encouraging the use of ADR and especially ODR mechanisms. These mechanisms are not only cost effective but also efficient in resolving the disputes within a stipulated time frame. In stimulating the use of ADR and ODR techniques, the role played by the advocates is very crucial. They should try to convince their clients to opt for such mechanisms, whenever applicable to make dispute resolution easier and speedy. A separate course in ADR and ODR mechanisms, with special emphasis on their advantages, especially for the young lawyers can prove to be very useful in increasing the recourse to these mechanisms.

¹⁰²Bhadra Sinha, „Supreme Court could opt for combination of physical and virtual hearings after summer break,The Print14 June, 2020,
<https://theprint.in/judiciary/supreme-court-could-opt-for-combination-of-physical-and-virtual-hearings-after-summer-break/441503/> (Last Visited on 23rd July 2020)

¹⁰³Dhananjay Mahapatra , Times of India, Combination of virtual, physical courts will be way forward:Times of India 18thMay,2020
http://timesofindia.indiatimes.com/articleshow/75796059.cms?utm_source=contentofinterest&utm_medium=txt&utm_campaign=cppst (Last Visited on 23rd July 2020)

As the country tries to get back to normal, the norms of social distancing would continue for an indefinite future. The importance of open physical courts cannot be overlooked. However, the need of the hour is to forge a model legal system that incorporates online courts as well other dispute resolution modes. A hybrid mechanism embodying physical courts, online courts, and ADR and ODR systems can prove to be a viable solution. As **Angie Engstrom** once said *“Every choice makes a difference as we get ourselves unstuck and move towards the life we desire. Select your choices wisely.”* The choices we make during this pandemic era will decide our future course of life. If administrators of justice make a wise choice then these choices can lead to overcoming two prominent problems of the Indian Judicial system, i.e., high pendency of cases and low access to justice. The starting so far has been quite positive and we hope that this horrendous night shall be followed by a new dawn.

