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LAW OPINION

Enforcement of ADR without force

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In legal parlance, when do we term the legislature utopian? It is obviously at that time, when they expect proper compliance of any legal provision without providing for any force. In fact, presence of force draws the line of difference between legal and moral principles. I consider alternative dispute resolution (ADR) and/or mediation system in the Civil Procedure Code (CPC) of 1908 as utopian since it has

accommodated no element of force in case of unexplainable non-compliance.

In par with the civil justice system of different countries, the mediation provisions have been included in the CPC in 2003 with a noble goal of reducing huge case backlog. But why this system is not working could be identified observing the real scenario of mediation sessions in the subordinate judiciary.

In practice, when the written statement is submitted, the suit is required to be sent to mediation. In most of the cases, the advocate-mediator submits report of non-agreement of the parties to the compromise effort irrespective of the merits of the cases referred to mediation. Sometimes, the judges call the parties in private with an endeavour to settle but the tutored parties either imitate their lawyers' stand or show tremendous adversity to such efforts. Consequently, the suits end up in framing issues for trial. Meanwhile, two court-dates, i.e. at least two months elapse without any positive improvement to the case.

As part of making the mediation mandatory, an amendment to section 89A of the CPC has already been brought substituting the word 'may' with 'shall' thus making directory provision mandatory (this would be effective on publication of gazette under section 89E). The result would, however, be same even if the mandatory provision is given into effect (i.e., sending suits for mediation and returning to cause-lists without any success wasting, at least, two more months) because it does not provide for any sanction to the negligent party to the compromise efforts. This deduction of sanction might sound peculiar as we believe compromising any dispute is the discretion of the party and there should be no sanction for its failure. There is no disagreement with this belief, but who would be held responsible for the costs borne by the winning party as s/he had a reasonable right to expect compromise-offer from the defeating (weaker) party.

In the UK, before going to court, at the 'Pre-action Protocol' stage, lawyers on both sides are under a heavy obligation to consider the ADR and to opt for litigation only as a means of last resort. Both sides are required to advance evidence before the court that ADR options were considered. However, like our system, this protocol expressly recognises that the parties cannot be forced to enter into any form of ADR, but a failure to comply with the requirement to consider ADR may be taken into account as a means to impose costs.

Generally, the defeated party is required to pay all the costs of the case

incurred by the winning party in the form of paying court fees, process fees, evidence collection fees, lawyer's fees etc. There is also apprehension of exceeding the value of real claim by the amount of costs. For example, at the end of the trial, it might happen that the real claim decreed is £5000, whereas the costs of the case are determined at £8000. However, question may arise how the judge identifies the real costs of a case. This would happen well-ahead of the trial when a judge hears both the parties for a cost budgeting to determine the expected expenditure of the case. The level of concern about costs is to such an extent that this is one of the main reasons for choosing an ADR process because it is likely to prove cheaper than taking a case to trial. This costs concern compels the parties to cooperate rather than to compete in the dispute settlement.

Another question may arise as to why the stronger party in evidence would cooperate for compromise. This is because of the part-36 offer which, in brief, is an offer to settle a dispute by any party at any stage of the proceedings, refusal of which has some cost implications. Such as, if the refusing party finally wins the case, s/he may not obtain any costs from the losing party (the party offering compromise). Sometimes, the court even may order the winning party to pay all the costs incurred by the losing party from the date of offer to final judgement. It may happen that after deducting the winning party's own costs and the costs to be paid to the losing party, the winning party may get less amount than the amount offered in part-36 offer.

Therefore, the force of costs compels even the party having strong evidence to cooperate in compromising any dispute at the earliest possible time reducing pressure on courts. Following the UK-ADR system, I think, we should carry out research to locate the position of 'force' or 'sanction' into the ADR provisions of our country for making it effective.

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