



ADVOCATES PERCEPTION ON REFERRAL OF CASES THROUGH ALTERNATIVE DISPUTE RESOLUTION

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Section 89 of the Civil Procedure Code (CPC) is the provision which makes mandatory for the judges to refer the case to any of the Alternative Dispute Resolution (ADR) mechanism, if there is an element of settlement between the parties.² According to the data provided by the National Judicial Data Grid, 40163776 cases are pending in India, in which 10697252 are civil cases and 29466524 are criminal cases.³ To reduce these numbers, many measures have been taken by the government with the help of judiciary such as increase in the number of judges, courts, time duration of courts, etc. Along with these measures, in 1999, Sec 89 of Civil Procedure Code, 1908 was also amended so that the pending cases can be settled by Alternative Dispute Resolution (ADR) mechanisms i.e. Arbitration, Mediation, Lok Adalats etc.⁴ For popularisation of the ADR, the government also gave some waiver in the court fees if the case is settled down via ADR mechanisms. The main aim of this study is to find out the current referral system under Sec 89 of the CPC, 1908 – exclusively to see that whether the perception of the advocates got transformed or not to settle their dispute via ADR? For this, the study has been conducted to see the approaches of the advocates towards the ADR. The primary focus is on the ‘Mediation’ as this is the most popular ADR mechanism used in the courts u/Sec 89, CPC.

The role of the Advocates is very essential as they create communication link between the judge and the parties to the case. It is assumed that when the case comes to the advocates, they may have already suggested to their client to go for ADR, if there is an element of outside settlement - the notion behind this is to lesser down the burden from the courts. Practically, the advocates are having number of cases pending with them and it is important to know the perception of the Advocates towards the ADR. For this, the data has been collected through the survey from the 50 advocates who are currently practicing in different courts of Jaipur, Rajasthan. The following are the questions which have been asked to them and the responses given on those questions by the advocates:

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² Sec 89, The Code of Civil Procedure, 1908.

³ NJDG, ‘National Judicial Data Grid (District and Taluka Courts of India)’ (October 20, 2021) https://njdgcourts.gov.in/njdgnew/?p=main/pend_dashboard (Last visited on October 20, 2021).

⁴ Sec 89, The Code of Civil Procedure (Amendment) 1999.

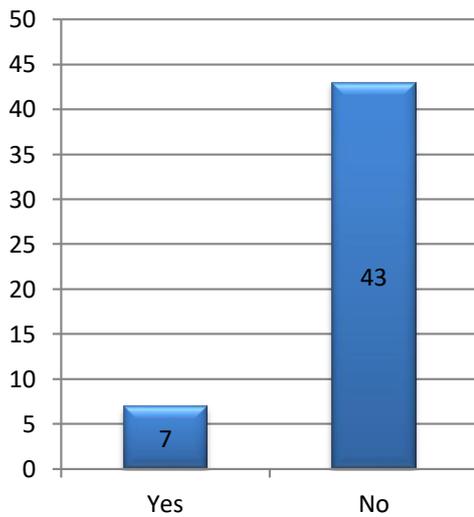
1. What is the reason that the litigants are approaching to the court?



- Trust in Courts in getting justice
- To take revenge from the other
- On someone's suggestion
- Any other reasons

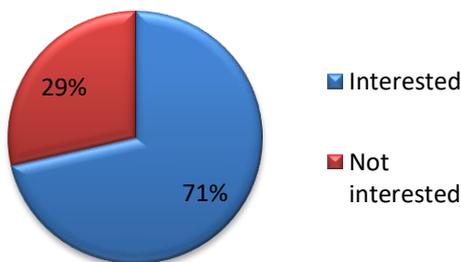
The chart shows the study of 50 advocates in which 68% states that the litigants are coming to the court because of the trust in courts to get justice, 13% come to take revenge, 5% on someone's suggestion, and 14% due to any other reason.

2. Are you suggesting your clients to go for ADR?



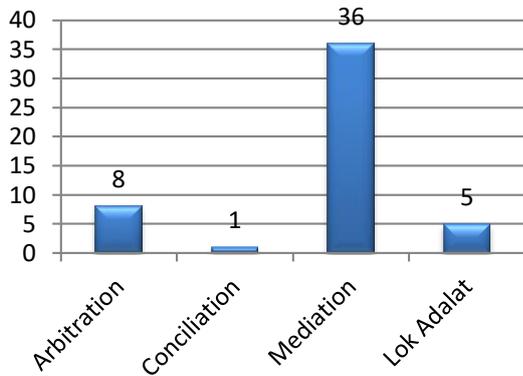
In the chart out of 50 advocates, only 7 advocates stated that they are suggesting their clients for the ADR if they feel that the matter can be resolved through the ADR, and 43 advocates stated that they are not suggesting their clients to go for ADR.

3. Whether the client is interested in your suggestion on ADR or not?



dispute. But 2 advocates mentioned that the clients were not interested to take the suggestion of adopting ADR.

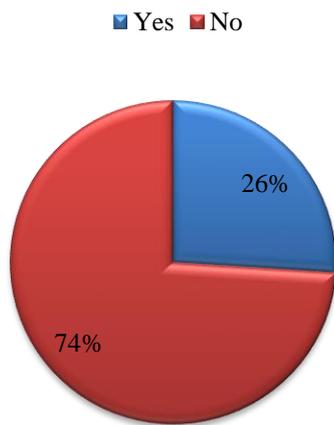
It can be clearly observed from the chart that those 7 advocates who suggested ADR to their clients, out of them 5 advocates said that the clients were interested and have chosen ADR for their



4. Which ADR mechanism is mostly used in the courts and referred by the judges?

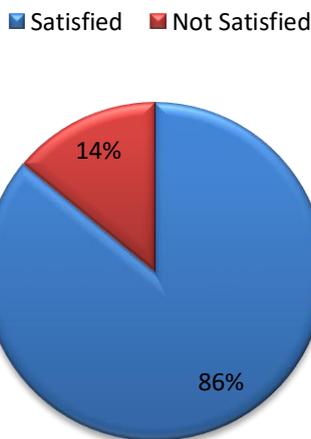
In this chart out of 50 advocates, 36 advocates said that the mediation is mostly preferred in the court by the judges, 8 advocates voted for arbitration, 5 advocates for Lok Adalats, and 1 advocate for conciliation. This preference is also depend upon the nature of the case.

5. In practical scenario the judges have been referred more cases to the Mediation, so have you taken the mediation training?



The chart states that out of 50 advocates, 74% of them i.e. 37 advocates have not taken mediation training and only 26% i.e. 13 advocates have taken it.

6. Are you satisfied with the current ADR referrals under Section 89 of CPC by the Judges?



cases to the ADR and they are not satisfied with the opinion of the court.

Form this chart, it can be observed that there are 86% (43 advocates) said that the courts are making proper referrals and they are satisfied with that. But 14% (7 advocates) said that the courts are not referring the

From the above the survey, it is clear that the advocates are aware about the ADR mechanism. But, firstly, the above data shows that they are not guiding their clients to resolve their matter amicably through the ADR mechanism. As the data shows that out of 50 advocates, 93% advocates are not suggesting their clients to go for ADR. This is one of the major concerns if the advocates are doing so, because if the legal professionals will not help in popularising the ADR and support the courts to reduce the burden then in this figure of pending cases will never come down instead will rapidly increase. Secondly, as per the data the courts are more referring the matter to the mediation under Sec 89 of CPC. So, it is essential for the advocates to undergo the mediation training. But the survey shows that 74% i.e. majority of the advocates have not taken the mediation training. The reason for not taking the mediation training can be two – the primary reason is the guidelines of the courts for the mediation (as the court wants more senior or experienced person to be the mediator), or the other reason may be that the advocates are not in favour of ADR because of their own reasons. Lastly, it is most important to see that whether the advocates are satisfied with the judges of the courts in respect to the referral process of the ADR under Sec 89 or not. According to the survey 86% of the advocates are satisfied with the referrals made by the judges. This shows that the judges are performing their legal duty properly and the advocates are in support of the referrals.

So, from the above data analyses it can be observed that the advocates are in dilemma, which means on the one hand the advocates are not favouring ADR over the traditional litigation and on the other hand they are also supporting the ADR referral process by the judges. This may be because of the following concerns:

- *Lack of Awareness:* As they are not guiding their clients to adopt ADR, because of the reason that the advocates are not that much aware about the ADR mechanism. They are not much familiar that now Sec 89 is the very common provision which is used in practical scenario.
- *Lack of Training:* The advocates are stepping back from taking the mediation training programme, as there are not enough trainers to train them and also because of not having proper infrastructure and management.
- *Financial Loss:* This is the major reason that the advocates are not in the favour of the ADR referral system. If they are guiding their client to adopt the ADR and the client would do so, then that could create negative impact directly upon the fees which the advocate(s) would have charge from that client.
- *Less involvement in the case:* The courts are making more referrals to the mediation which reduces the advocate(s) involvement in the case. This is because of the reason that the mediation is party dominated process, means the parties will themselves solve the matter with the help of the neutral third party.

- *Reduction in number of cases in their hands:* If the litigants are adopting more ADR mechanism either on sayings of the advocates or by themselves, in both cases this will reduce the number of cases that the advocate(s) have in their hands in litigation.

There is a saying that each and every problem has the solution. So, for the above concerns of the advocates, solutions are there too. So, the following are the recommendations from the above analysis:

- In relation to the awareness, the very first step is that the Judiciary with the help of Advocates Bar Association conduct conferences, webinars, etc. (twice a year) on the referral system under Sec 89, and further, makes it mandatory for the advocates to attend these conferences, webinars, etc. at least for once in a year. Further, the short courses should also be conducted in the court premises to educate the advocates on the ADR mechanisms.
- For the practicing advocates, it should be made mandatory to undergo the Mediation Training Programme. This will help the advocates to enhance the knowledge about the Mediation and will also experience the practicality on becoming the mediator. This will also give them the scope to build their professional career in Mediation by becoming certified mediator.
- As to popularize the ADR, waiver in the court fees was given to the parties, similarly whenever the Advocates are guiding their clients to adopt ADR and if the parties are agreeing upon the suggestion, then some pecuniary benefits should be provided to the advocates too. If the advocates will get in return some pecuniary benefits, then the concern with respect to the financial loss will get reduce to some extent.
- As the mediation is party dominating process, so the courts should provide certain guidelines in respect to appointment of the advocate as mediator. If this is done by the court, then the advocates may feel their involvement (not directly but otherwise) in the cases, and they will also have the professional experience to add as a mediator. Further, this will help the advocates to make their perception clear about the ADR mechanism. In addition, his is true that the numbers of cases with the advocates will affect if more clients adopt ADR. So, once the advocates see that there are the opportunities in their hands to be the mediator, then their concern in respect to reducing number of cases with them will automatically resolve to some extent.

If the above-mentioned recommendations would be implemented, then there would be higher probabilities that the advocate(s) perception towards the ADR mechanism get transformed. Apart from their personal concerns, in the interest of the justice the advocates should guide the clients to adopt the ADR mechanisms otherwise it would probably lead to injustice and would also against the constitutional principal of natural justice. Lastly, it is the high time to have separate guidelines for the advocates which consists the mandatory rules for all the advocates in respect to guide their clients for the ADR. Further, whenever the litigants approached the Court, the court must ask the litigants that whether their respective counsels suggested them to adopt for any of the ADR mechanism to resolve this matter. If no, then some action must be taken against those advocates. It is also further recommended to maintain the proper data of cases which adopt ADR for dispute resolution on the guidance of their advocates. This will help to enshrine the perception of the advocates towards the ADR mechanisms.