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Effectiveness of Section 89 of Code of Civil Procedure

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ABSTRACT

Alternative Dispute Resolution (“ADR”) refers to a variety of techniques resolving disputes by means other than the litigation. Section 89 of the Code of Civil Procedure, 1908 which was introduced by the Act of 1999 and came into effect from 01/07/2002, embodies the legislative mandate to the court to refer civil disputes to various ADR mechanisms mentioned in the Section where it finds it appropriate to do so. ADR system helps in providing parties with cheap, simple, quick and accessible justice. The general principle behind all the matters is to reach to a settlement, then why not opting for the ways which can be settled amicably by means of compromise. These methods will also develop a culture of settlement amongst the parties and is needed in today’s society. In spite of such great objects the section is not effective due to several flaws in the drafting and implementation of the section. Therefore this paper tries to analyse the effectiveness of Section 89 of Code of Civil Procedure (“CPC”) and provide some solution for making it more effective.

I. INTRODUCTION

Mediation, Conciliation and Arbitration, in their earlier forms are historically more ancient than the present-day Anglo-Saxon adversarial system of law. Various forms of mediation and arbitration gained a great popularity amongst businessmen during pre-British Rule in India and has developed over the years.³

The present-day discourse on the need to evolve Alternative Dispute Resolution mechanisms tends to focus upon the large, and almost unmanageable, docket of litigation before Courts. The rationale for ADR is perceived in terms of reducing the arrears of cases in Courts.⁴

Section 89 of the Code of Civil Procedure, 1908 embodies the legislative mandate to the court to refer sub judice disputes to various ADR mechanisms enunciated therein where it finds it

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³ Mediation Training Manual of India, The Mediation and Conciliation Project Committee, Supreme Court of India, Chapter I, at 3-4.

⁴ Dr. Justice Dhananjaya Y. Chandrachud, *Mediation – Realizing The Potential And Designing Implementation Strategies*, L. COMMISSION INDIA, http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf.

appropriate to do so, in order to enable the parties to finally resolve their pending cases through well-established dispute resolution methods other than litigation. Section 89 has therefore recognized the need and importance of ADR even at the post litigation stage.

Wording and History of the Section

In order to understand the niceties of Section 89 it is essential to refer to its text, which is as under:

89. Settlement of disputes outside the Court –

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may re-formulate the terms of a possible settlement and refer the same for-

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-Section (1) of Section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Thus the court can refer the parties to arbitration, conciliation, mediation, Lok Adalat or judicial settlement in terms of Section 89 of the Code of Civil Procedure, 1908 for resolution of their

disputes at the post-litigation stage. In fact the Delhi High Court has gone one step forward and held that there is no reason why Early Neutral Evaluation (ENE), which is a different form of ADR though similar to mediation, cannot be resorted to towards the object of a negotiated settlement in pursuance of Section 89 of the Code of Civil Procedure, 1908 specially when the parties volunteer for the same.⁵

The Law Commission of India⁶ had recommended the introduction of the conciliation court system and had underlined the importance of conciliation/ mediation as a mode of ADR. The Malimath Committee,⁷ had also advocated the need of an amendment in law for introduction of ADR mechanisms.⁸ On the recommendations of the Law Commission of India and the Malimath Committee,⁹ the Code of Civil Procedure (Amendment) Bill was initiated in 1997. The Statement of Objects and Reasons attached to the said bill read as under:

Statement of Objects and Reasons: With a view to implement the 129th Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the Section in which it was filed.”¹⁰

Resultantly Section 89 as it stands today was introduced into the statute book by the Code of Civil Procedure (Amendment) Act, 1999 with effect from 01.07.2002. With the introduction of this provision, a mandatory duty has been cast on the civil courts to make an endeavour for settlement of disputes by relegating the parties to an ADR process.¹¹ **It has now become imperative that resort should be had to ADR mechanisms with a view to bringing an end to litigation between the parties at an early date.**¹² Indeed this is the policy in the west also where court efforts to facilitate settlement in civil cases, whether through judicial settlement

⁵ Bawa Masala Co. v. Bawa Masala Co. Pvt. Ltd, AIR 2007 Delhi 284.

⁶ Law Commission of India, 129th Report, Urban Litigation: Mediation as Alternative to Litigation (1988).

⁷ The Malimath Committee Report (Aug., 1990).

⁸ SARKAR, CODE OF CIVIL PROCEDURE (Sudipto Sarkar & V.R. Manohar eds., 11th ed., 2006).

⁹ A.R. Lakshmanan, *Settlement of Disputes Outside the Court under Section 89(1) read with Order X Rules 1A, 1B and 1C of the Code of Civil Procedure, 1908*, 5 M. L. J. 22 (2007).

¹⁰ The notes attached to the bill further stated that clause 7 seeks to insert a new Section 89 in the Code in order to provide for alternative dispute resolution based on the recommendations made by the Law Commission of India and the Malimath Committee.

¹¹ It has now become imperative that resort should be had to ADR mechanisms with a view to bring an end to litigation between the parties at an early date. Law Commission of India, 238th Report, Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions (Dec., 2011); In fact mandatory ADR is accepted globally. See Paul Randolph, *Compulsory Mediation?*, 4 (2) INDIAN ARBITRATOR 2 (Feb., 2012).

¹² Salem Advocate Bar Association v. Union of India, AIR 2003 SC 189 [hereinafter Salem (I)].

conferences or court-connected mediation and other ADR processes, have become commonplace.¹³

The Supreme Court has also stated that the intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists elements of settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the five ADR methods mentioned in Section 89 and if the parties do not agree, the court shall refer them to one or other of the said modes.¹⁴

II. EXPLORING THE JUDICIAL PATHWAY: IMPORTANT PRONOUNCEMENTS

Section 89 apparently was drafted in a hurry. It is not very happily worded. It is not very practical. But the object behind Section 89 is sound. The issue raised before the courts was whether the amendments made in the Code of Civil Procedure, 1908 by the Amendment Act of 1999 and 2000 were constitutionally valid?

The Judicial Approach

Its constitutional validity was upheld in *Salem Advocate Bar Association v. Union of India (I)*.¹⁵ The court held that *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. If the parties agree to arbitration, then the provisions of the 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.*¹⁶ 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 will ultimately go to trial.

In Salem Advocate Bar Association v. Union of India (II),¹⁷ the Supreme Court observed “The intention of the legislature behind enacting Section 89 is that where it appears to the

¹³Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. DISP. RES. 271 (2011).

¹⁴ *Salem Advocate Bar Association v. Union of India (II)*, AIR 2005 SC 3353 [hereinafter *Salem (II)*].

¹⁵ *Salem (I)*, *supra* note 10.

¹⁶ *Id.*

¹⁷ *Salem (II)*, *supra* note 12.

court that there exists an element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or other of the said modes.” The court further held that *the intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or other of the said modes. Section 89 uses both the word 'shall' and 'may' whereas Order X, Rule 1A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods.*

This case is a landmark case in the history of Indian Judiciary. This set of two cases, former one, laying down the amendments and the latter one providing a report on the amendment's feasibility have laid down the foundation of providing quick, financially accessible and proper justice.

Potting of the Ball: Guidelines for Stricter enforcement of the Provision

The Supreme Court in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*,¹⁸ has discussed, in great detail the provisions of Section 89 of the Code of Civil Procedure, 1908 which casts a duty on the courts to encourage parties for settlement of their disputes by means of alternate dispute resolution. Even though upon an examination of Section 89 of the Code along with the stipulations of Order X, the Supreme Court was of the opinion that the provision is incorrectly worded and various faults in the legislative drafting to that effect were pointed out, the Bench applied the rule of interpretation to make it workable. *The Bench also, on its own, took up the task of identifying which all cases could be referred to alternate forms of dispute resolution, given the nature of these disputes and also noted that "Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non-adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement."*¹⁹

Thereupon the Supreme Court passed the following guidelines to be adopted by the Courts

¹⁸ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, JT 2010 (7) SC 616 [hereinafter *Afcons*].

¹⁹ *Id.*

in India:

a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with Section 64 of The Arbitration and Conciliation Act.

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes: (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not

available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of The Arbitration and Conciliation Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is *ex facie* illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code:

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the

ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum.

Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases.

III. ANALYSIS OF THE SECTION: FROM CRITICISM TO NEED OF AMENDMENT

It is generally seen that various shortcomings have been pointed out by the Supreme Court in the text of Section 89 and therefore there is an urgent need that Section 89 be amended to eliminate the anomalies.

The Supreme Court had in fact unequivocally directed that the changes made by the Supreme Court in Section 89 by interpretative process shall remain in force till the legislature corrects the mistakes, so that it is not rendered meaningless and infructuous.²⁰ There cannot be a more unequivocal assertion of the fact that this Section needs to be amended. In fact, instead of amending the provision we may have a separate comprehensive legislation dealing with ADR in all respects.²¹

Another error in drafting as observed by the Court in the *Afcons* case was intermingling of definitions of 'mediation' and 'judicial settlement'. "Mediation" should be replaced by "Judicial settlement" in clause (c) of Section 89 (2) and the latter replaced by the former in clause (d). An agreement/ negotiated settlement by court being termed as a mediation is a misnomer and reference to another forum to arrive at a compromise should not be termed as a "judicial settlement".

Under Section 82(2)(d), the mediation rule is clearly applicable to conciliation by a third party (individual or institution), however Section 89(2)(d) is aimed at court-stimulated settlement.

²⁰*Afcons*, *supra note* 16.

²¹ For example, The Alternative Dispute Resolution Act, 1998 in the United States of America deals with the use of ADR processes in district courts of the United States of America; The Alternative Dispute Resolution Act, 2004 of the Republic of Philippines comprehensively deals with ADR in all respects.

This leads to another anomaly wherein when mediator's intervention leads to a settlement and such

settlement is also authenticated by the mediator, still it is not regarded as a decree. Notwithstanding, when the same mediator is called as a conciliator, the settlement reached through him is regarded as a decree.

Also, when we read Section 89, it states “Where it appears to the Court that there exist elements of a settlement.....” shows that this provision has vested decision making power on the courts *as* to when they find the elements of settlement they could refer the suit to any alternative dispute resolution ways. Therefore, this provision is discretionary rather than being obligatory. Further, the judgment of the Supreme Court in *Afcons* has been considered by the Law Commission of India and the Law Commission²² has also opined that Section 89 which provides for settlement of disputes outside the court is inappropriately worded and the language adopted has created difficulty in giving effect to the provision and therefore Section 89 should be recast.

Since Section 89 was formulated to lessen the burdens of the court but the formulation and reformulation of the issues to be dealt with by the courts and specifying the method to be adopted may leave the provision meaningless and out of place at the pre-ADR stage. The right manner of interpretation of the Section 89 would be if it is read with Order X Rule 1-A where the Court may only direct the parties to refer to ADR forums and no need to formulate terms of settlement arises.

Another lacuna is that, the Code of Civil Procedure (Amendment) Act, 1999 by which Section 89 was amended into the Code also amended a new Section 16 in the Court Fees Act, 1870 which states the following, in the following manner as described below: **Refund of fee:** Where the court refers the parties to the suit to any one of the modes of settlement of dispute referred to in Section 89 of the Code of Civil Procedure, 1908 the plaintiff shall be entitled to a certificate from the court authorizing him to receive back from the Collector, the full amount of the fee paid in respect of such plaint.

The main problem arises that when a dispute could not be resolved by ADR processes and is brought back to the same Court, and there has already been refund of the Court fees before reference is made to ADR. There is no provision in the said circumstance to impose fresh Court fees and this creates a situation where the suit becomes free which is not possible.

²² Law Commission of India, 238th Report, Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions (Dec., 2011).

Another major reason for section failing to fulfill its purpose is the lack of legal knowledge among the people. Rather than going for Alternate means which are much cheaper and less time consuming, citizens continue to go for trial hoping to secure a larger award from the Court. The alternate forums accorded under Section 89 are economically more viable as there are relatively lesser amount of transaction costs and thus, there is a need to make people aware about the same. Hence, the provision under Section 89 is right in its essence but its purpose is defeated due to legal intricacies, draftsmen's error and lack of awareness among individuals.

IV. CONCLUSION

Section 89 is an important part of the Code of Civil Procedure and is an effective method to resolve dispute between parties where there is scope for the same. The Section is right in its spirit as the objective has been to reduce the burden of the court, ensure a compromise is arrived at between parties and move towards speedier/ effective method of administering justice. Alternate Dispute Resolution is a means of increasing access to justice without decreasing the quality of justice.²³

However, as has been highlighted, the Section suffers from many anomalies, which have reduced its efficiency and act as a hindrance in delivering justice to the people. The recommendations of the 238th Law Commission report strike at the heart of the matter and there is a need for amendments specified by the Report.

The initiatives taken by the Supreme Court in *Salem Advocate Bar Association v. Union of India*, and *Salem Advocate Bar Association v. Union of India (II)*, gave the initial momentum to use of ADR in courts pursuant to Section 89. Thereafter in *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, which can be described as a comprehensive practical guide for effective use of Section 89, the Supreme Court has given detailed practical guidelines so that this Section can be utilized so as to achieve the best results. In *Afcons Infrastructure Ltd.* the Supreme Court has also directed interchange of clauses (c) and (d) of Section 89 (2) by interpretative process to correct the draftsman's error so that Section 89 is not rendered meaningless and infructuous.

The Supreme Court has pointed out serious errors in Section 89 which have also been acknowledged by the Law Commission of India thereby underlining the need of an amendment of Section 89. However despite these flagrant errors Section 89 has been made workable by the Supreme Court by laying down detailed guidelines for efficient utilization of Section 89.

²³ Sriram Panchu, *The Road less Travelled-An Increasingly Attractive Path*, 19(2) SBR 31 (2007).

Apart from the legal aspect of the inefficiency of the provision, another major reason for Section failing to fulfil its purpose is the lack of legal knowledge among the people. Rather than going for Alternate means which are much cheaper and less time consuming, citizens continue to go for trial hoping to secure a larger award from the Court. The alternate forums accorded under Section 89 are economically more viable as there are relatively lesser amount of transaction costs and thus, there is a need to make people aware about the same. Hence, the provision under Section 89 is right in its essence but its purpose is defeated due to legal intricacies, draftsmen's error and lack of awareness among individuals.
