"Alternate Dispute Resolution under Civil Procedure Code"

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INTRODUCTION

"The philosophy of Alternate Dispute Resolution systems is well-stated by Abraham Lincoln: "discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expense, cost and time." Litigation does not always lead to a satisfactory result. It is expensive in terms of time and money. A case won or lost in court of law does not change the mindset of the litigants who continue to be adversaries and go on fighting in appeals after appeals. Alternate Dispute Resolution systems enable the change in mental approach of the parties……"[1]

Before the advent of formal legal system in India, there were alternate mechanisms available for people to resolve the disputes among themselves. Either the king would pronounce his judgement or the parties took help of the elders in the community or amicably tried to resolve the dispute among them. However with the arrival of British a formal legal system developed in India. Since then on courts were flooded with cases and the rate of pending litigations increased. Even after so many years of constant effort Indian judiciary could find no way to reduce the pending cases. The time consuming court process, delay in resolving the dispute and insufficient number of judges subverts the end of justice in India.

One of the pillars on which the Civil procedure code is based is "Justice delayed is justice denied" and one of the most essential requirement of justice is that it should be provided as quickly as possible. However when the Civil Procedure Code of 1908 was drafted it had too many deformities and lacuna and even after subsequent amendments it did not helped in bringing down the number of pending cases. According to a report, currently there is a backlog of approximately three crore cases in courts across the country.[2] Even after a high disposal rate per judge it seems impossible for the judiciary to cope up with the arrears.

[1] Dr. H. K. Bhardwaj, "Legal and Judicial Reforms in India", the International Centre for Alternative Dispute Resolution, available at http://icadr.ap.nic.in/articles/articles.html.

[2] "The Economic Times", Politics and Nation, December 7, 2014, available at http://articles.economictimes.indiatimes.com/2014-12-07/news/56802830_1_120-cases-high-courts-expeditious-disposal.

An effort was made in 1999 to harmonize and blend the judicial and non-judicial dispute resolution mechanisms in order to relieve the court from overburdening of litigations and even providing a way to the parties to resolve their disputed expediously. Section 89 of the Civil Procedure Code was enacted to popularize among the public the options available to them to resolve their disputes through Alternate Dispute Resolution Mechanisms.

BACKGROUND OF SECTION 89

In 1989, on the advice of Chief Justice of India, government of India constituted a committee under the chairmanship of Justice Malimath[3] (the then Chief Justice of Kerela High Court) in order to suggest ways and means "to reduce and control arrears in the High Courts and subordinate Courts." [4]

Following the recommendation of the Malimath committee and 129th report of the Law Commission[5] to introduce Conciliation procedure and promote alternative mechanism for dispute settlement, the legislature drafted section 89 of the code with the hope that it would bring down the number of cases and help in early disposal of cases.

Section 89[6] of the civil procedure code came into being through the Code of Civil Procedure (Amendment) Act 1999 and became effective from 01-07-2002. The section reads as follows

"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 reformulate the terms of a possible settlement and refer the same for –

a)Arbitration;
b)Conciliation;
c)Judicial settlement including settlement through Lok Adalat;
d) Mediation
(2)Where a dispute has been referred-

[3] The Malimath Committee submitted its report in August 1990.
[4] Dr. H. K. Bhardwaj, "Legal and Judicial Reforms in India", the International Centre for Alternative Dispute Resolution, available at http://icadr.ap.nic.in/articles/articles.html.
[5] Law Commission of India, 129thReport, Urban Litigation: Mediation as Alternative to Litigation (1988).

[6] Khetrpal, "Civil Procedure Code,1908", Puja law House, bareact.

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 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 Authorities Act, 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 Authorities Act, 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."

The purpose of section 89 was to facilitate out-of-court settlement before the trial commences by choosing any of the ADR mechanisms.[7] 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.[8]

Along with section 89, Order X rule 1A, 1B and 1C[9] were also incorporated through the same Amendment act.

"1A. Direction of the Court to opt for any one mode of alternative dispute resolution.--After recording the admissions and denials, the court shall direct the parties to suit to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties."
"1B. Appearance before the conciliatory forum or authority.- where a suit is referred under rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.
"1C. Appearance before the Court consequent to the failure of efforts of conciliation.-

[7] Law Commission Of India, 238th Report, "Amendment of section 89 of Civil Procedure code, 1908 and Allied Provisions", pg 4
[8] AIR 2003 SC 189, AIR 2005 SC 3353
[9] Khetrpal, "Civil Procedure Code,1908", Puja law House, bareact.

Where a suit is referred under rule 1A and the forum or authority to whom the matter has been referred is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it."

ADR MECHANISM AVAILABLE UNDER SECTION 89

ADR is an alternative for those parties who are willing to communicate with each other make genuine attempt to resolve the dispute with the help of a neutral party. When a civil suit is filed in a court of law, a formal process occurs which is operated by advocates and managed by the courts. The parties virtually loose all control over the result of their dispute when a court makes a decision. Many disputes like consumer complaints, family disputes, construction disputes, business disputes can be effectively resolved by ADR.[10]

ARBITRATION

In India, in order to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitration awards and to define law relating to conciliation, taking into account the Model law and conciliation rules adopted by United Nation Commission on International Trade Law(UNCITRAL), Arbitration and Conciliation Act, 1996 was enacted.[11]

If a matter is referred to Arbitration under section 89, Arbitration and Conciliation Act, 1966 would apply from the stage after reference. Also even if the matter is referred under section 89, the consent of the parties is important to continue the matter under this Act.[12] Once a matter is referred to arbitration, it permanently moves out of the realm of court and the arbitration award is regarded a decree.

CONCILIATION

Conciliation is a process by which a third party assists the parties to resolve their dispute by agreement. A Conciliator may do this by expressing an opinion about the merits of a dispute to help the parties to reach a settlement it is a compromise with the help of Conciliator. This mechanism is also governed by the Arbitration and Conciliation Act, 1966. However in this the matter does not permanently goes out of the realm of Court, it can be again brought back if no settlement is agreed between the parties.

[10] Ashwinie Kumar Bansal and Rahul Kaushik, "Arbitartion and ADR", Universal Law Series, pg 2 (3rd ed. 2012)
[11] Supranote 13, pg 13
[12] *Jagdish Chander* v. *Ramesh Chander,* 2007 (6) SCC 719.

MEDIATION

Mediation is a process for resolving dispute with the aid of an independent third person that assists the parties in dispute to reach a negotiated resolution.[13] Mediation is referred to a suitable person or institution which is deemed to be a Lok adalat and like Lok adalat consent of parties is not necessary.

LOK ADALAT

Court may refer a matter to lok adalat under section 20 sub section (1) of Legal Services Authority Act, 1987. Reference to the lok adalat can be made even without the consent of the parties. The adalat effects a settlement between the parties according to the terms of Legal Service Authority Act, 1987 and passes the award after which the court disposes off the suit according to the terms of settlement.

JUDICIAL SETTLEMENT

The term judicial settlement therefore refers to a settlement of a civil case with the help of a judge who has not been not assigned the duty to adjudicate upon the dispute.[14] It is usually presided over by a judge who by using his fair techniques try to reach an amicable settlement between the parties and the provisions of Legal Service Authority Act, 1987 are applicable.

AFCONS CASE: A JUDICIAL RELOOK

Despite a number of loopholes, the validity of section 89 was upheld in the case of Salem Bar Association v. Union of India[15], wherein the court had applied purposive construction to uphold its validity. However in Afcons case it was stated that if section 89 was implemented in literal sense, it will lead to be a "Trial Judges Nightmare". According to Justice R. V. Raveendran "It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1)."[16]

The first shortcoming pointed out is that there has been error in drafting the meaning of "Mediation" and "Judicial Settlement" under section 89(2). Clause (c) states that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be

[13] Supranote 13, pg 5
[14] *Afcons Infrastructure Ltd.* v. *Cherian Varkey Construction Co. (P) Ltd.,* JT 2010 (7) SC 616.
[15] AIR 2003 SC 189, AIR 2005 SC 3353
[16] *Afcons Infrastructure Ltd.* v. *Cherian Varkey Construction Co. (P) Ltd.,* JT 2010 (7) SC 616.

deemed to be a Lok Adalat and clause (d) states that for "mediation", the court shall effects a compromise between the parties by following such procedure as may be prescribed. The Supreme Court pointed out that in order to give proper meaning to section 89, the said two words should be interchanged.

The second shortcoming is that section 89 (1) requires the court to formulate the terms of settlement and refer the same to the parties for their observation and once the parties approve it the terms shall be reformulated and refer to appropriate forum. However if the court does these things there will be nothing left for the conciliator or mediator to do as this is the task of the conciliator or mediator at the final stage. Also if the dispute is referred to Arbitration it will be of no use as the arbitrator does not adjudicate upon the terms of settlement. This will in no way reduce the burden of the court and the pendency will continue. Thus formulation and reformulation of terms of settlement by the court is wholly out of place in the pre-reference stage of ADR process.[17]

Thirdly, section 89 states that "where it appears to the court that there exist elements of a settlement" and uses the words "shall" and "may". This implies that the court needs to determine in each case whether it is suitable for ADR or not and refer only those suits which it thinks are capable of being resolved by ADR. However in Order X Rule 1A the term "shall" makes it mandatory for court to refer the suit for ADR. However this ambiguity was cleared in Afcons' case where the court held that on harmonious construction of both the provisions it is clear that it is mandatory to consider a case for ADR whether or not it is actually referred to.

Another anomaly is with regard to Court fees. The amendment act of 1999 also brought about an amendment in section 16 of the court fees Act, 1870,[18] which states that where a suit is referred by court to any other mode of settlement under section 89 of CPC, the person shall receive back the full amount of the fees that he had paid for plaint. However no remedy has been suggested in case in the person returns back to the court on failure to resolve the dispute through ADR process.

[17] R.V. Raveendran, "Section 89 CPC: Need for an Urgent Relook" 4 SCC Journal 23 (2007).

[18] Refund of fee: Where the court refers the parties to the suit to any one of the mode 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.

In Afcons Infrastructure case court has also formulated a list of matters which may or may not be suitable for reference to ADR. Cases like representative suits under order I rule 8, election petitions, suits for grant of probate or letters of administration, cases involving serious allegations of fraud, forgery, coercion etc, suits for declaration of title against government, claims against minors etc are classified as unsuitable for reference to ADR. On the other hand cases relating to trade, commerce and contract, cases involving strained relationships, tort claims or consumer dispute are held to be suitable for ADR.[19]

CONCLUSION

Section 89 is brought into the realm of Civil Procedure Code with the objective to speed up the process of adjudication in the court with the help of Alternate Dispute Resolution Mechanisms. The intention of the legislature behind incorporating section 89 was a noble step in itself however the law was hastily drafted and the loose drafting has left a lot of scope for raising argument about its interpretation.

The initiative taken by the Supreme Court in Salem Advocate Bar Association v. Union of India[20] gave the initial momentum to use of ADR in pursuant to section 89 and thereafter in Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd[21] the court gave guidelines as to how best results can be achieved from Section 89.[22]

With the growing litigation there is an obvious need to increase the scope of ADR mechanisms in India however currently there is also need for an amendments in CPC, as has been suggested by the 238th Law commission report.[23] As a starting Section 89 CPC has

[19] *Afcons Infrastructure Ltd.* v. *Cherian Varkey Construction Co. (P) Ltd.,* JT 2010 (7) SC 616.
[20] AIR 2003 SC 189 and *Salem Advocate Bar Association* v. *Union of India (II)*, AIR 2005 SC 3353
[21] JT 2010 (7) SC 616
[22] "Alternate Dispute Resolution under Section 89of the Code of Civil Procedure", chap VI, available at http://shodhganga.inflibnet.ac.in/bitstream/10603/26666/12/12_chapter%206.pdf.

[23] 89: Settlement of disputes outside the court – 1) Where it appears to the court, having regard to the nature of the dispute involved in the suit or other proceeding that the dispute is fit to be settled by one of the non-adjudicatory alternative dispute resolution processes, namely, conciliation, judicial-settlement, settlement through Lok Adalat or mediation the court shall, preferably before framing the issues, record its opinion and direct the parties to attempt the resolution of dispute through one of the said processes which the parties prefer or the court determines. 2) Where the parties prefer conciliation, they shall furnish to the court the name or names of the conciliators and on obtaining his or their consent, the court may specify a time-limit for the completion of conciliation. Thereupon, the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996, as far as may be, shall apply and to this effect, the court shall inform the parties. A copy of the settlement agreement reached between the parties shall be sent to the court concerned. In the absence of a settlement, the conciliator shall send a brief report on the process of conciliation and the outcome thereof. 3) Where

given a massive boost to the ADR revolution in Delhi and has helped in developing a settlement culture which is the most important aspect to be taken care of.[24]

However people all over the country do not have much faith in these ADR mechanisms and still consider judiciary as the best place to settle their disputes, therefore there is a need to educate the public about these mechanisms and instil their faith in it. The courts after suggesting the most suitable method of ADR for a particular matter, should also consider the choice of the parties and thereafter pass the matter to a particular ADR mechanism in consensus with the choice of the parties.

The justice delivery system in India is suffering from stress due to several reasons. Therefore it is necessary for the court to discharge some of their burden to ADR which would not only decrease the pendency of litigation in India but is also less expensive method and gives party a chance to get directly involved in the process unlike in the formal legal system.

The future litigation in the 21st Century will need active intervention of the judges, mediators, conciliators and arbitrators to achieve speedy disposal of pending cases and reduce expenditure. [25]

the dispute has been referred:- a) for judicial-settlement, the Judicial Officer shall endeavour to effect a compromise between the parties and shall follow such procedure as may be prescribed; b) to Lok Adalat, the provisions of sub-sections (3) to (7) of section 20, sections 21 and 22 of the Legal Services Authorities Act, 1987 shall apply in respect of the dispute so referred and the Lok Adalat shall send a copy of the award to the court concerned and in case no award is passed, send a brief report on the proceedings held and the outcome thereof; c) for mediation, the court shall refer the same to a suitable institution or person or persons with appropriate directions such as time-limit for completion of mediation and reporting to the court. (4) On receipt of copy of the settlement agreement or the award of Lok Adalat, the court, if it finds any inadvertent mistakes or obvious errors, it shall draw the attention of the conciliator or the Lok Adalat who shall take necessary steps to rectify the agreement or award suitably with the consent of parties. (5) Without prejudice to section 8 and other allied provisions of the Arbitration and Conciliation Act, 1996, the court may also refer the parties to arbitration if both parties enter into an arbitration agreement or file applications seeking reference to arbitration during the pendency of a suit or other civil proceeding and in such an event, the arbitration shall be governed, as far as may be, by the provisions of the Arbitration and Conciliation Act, 1996. The suit or other proceeding shall be deemed to have been disposed of accordingly".

[24] Justice S.H. Kapadia, Chief Justice of India. See "Let litigation make way for settlement culture: Kapadia", *The Hindu*, New Delhi, July 11 2010.

[25] Dr. H. K. Bhardwaj, "Legal and Judicial Reforms in India", the International Centre for Alternative Dispute Resolution, available at http://icadr.ap.nic.in/articles/articles.html