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Implementation and interpretation of section 89 CPC: A critical study of legislative and judicial trends

Dr. Anupam Kurlwal
Faculty of Law, University Institute of Law and Management Studies, Sector 40, Gurugram, Haryana, India

Abstract
The present research paper seeks to examine the legislative and judicial sensitivity of the legislature and courts with regard to the ADR promotion especially Section 89 of the Civil Procedure Code, 1908. The topics like Justice Malimath Committee Report, Pre-Existing Provisions of CPC, Implementation of Section 89-Literal or Actual, Interpretation of Section 89 have also been covered. The legislative and judicial trends have also been examined in the conceptual and applied aspects.

Keywords: civil procedure code, ADR

1. Introduction
The section 89 [1] has been introduced in Part V-Special Proceedings (Arbitration) of CPC for the first time for settlement of disputes outside the Court. It is now made obligatory for the Court to refer dispute after issues are framed for settlement with the concurrence of the parties either by way of: (a) Arbitration, (b) Conciliation, (c) Judicial settlement including settlement through Lok Adalat, or (d) Mediation. Where the parties fail to get their disputes settled through any of the Alternative Dispute Resolution methods, the suit would come back to go further in the Court in which it was filed. The procedure to be followed in matters referred for different modes of settlement is spelt out in sub-section (2). Section 89(2)(d) empowers the Government and the High Courts to make rules to be followed in mediation proceedings for the purpose of bringing about compromise between the parties. Notes on clauses of the CPC (Amendment) Bill, 1999 clarified the rationale of the new provisions [2] The Statement of Objects and Reasons attached to the Bill stated on the same lines [3].

a) Justice Malimath Committee Report
Justice Malimath Committee in its Report recommended that "If a law is enacted giving legal sanction to such machinery for resolution of disputes and resort thereto is made compulsory, much of the inflow of commercial litigation in regular civil courts gradually moving up hierarchically would be controlled and reduced." This Committee agreeing with the Law Commission recommended that Conciliation Courts should be established all over the country with power, authority and jurisdiction to initiate conciliation proceedings in all types of cases at all levels and that the amendment suggested by the Law Commission should be carried out to enable the Scheme to function effectively. The conciliation procedure should also be made applicable to the Motor Accident Claims Tribunal [4].

b) Pre-Existing Provisions of CPC
To begin with the Bengal Regulation 1 of 1772 provided for Resolution of dispute through arbitration. The successive Regulation i.e., Bengal Regulation 1781 contained a provision which is fascinating to read: "The judge do recommend and so far as he can without compulsion prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties... No award of any arbitrator be set aside, except upon full proof, made by oath of two creditable witnesses that the arbitrators had been guilty of gross corruption or partially, in the course of which they had made their award."
As far as the arbitration as an alternative dispute resolution is concerned, to author's mind it appears that the Bengal Regulation of 1781 is revived. It is really amazing that more than two centuries ago, foreign administrators had recognized arbitration as the alternative method of dispute resolution and our law makers have now become wiser. Better than never.
We have to now see whether the amendments have made any significant departure from the existing provisions in respect of arbitration and what their effect is.
The courts were playing a passive role under the pre-existing provision of CPC and Arbitration Acts in referring the disputes for arbitration. Courts used to either refer disputes for arbitration or remove and appoint arbitrator in three situations. (1) Where there exists an arbitration agreement, but the parties for some reason or the other do not appoint arbitrator or the arbitrator failed or neglected to act. (2) Where despite existence of an arbitration agreement one of the parties files a civil suit or initiates similar proceedings in a civil court by-passing arbitration remedy. (3) Where during the pendency of suit both parties request the court to refer the dispute for arbitration. In all these situations it is the parties who have to take the initiative and request the court to set the arbitral proceedings in motion. Now under the present amendments to CPC, the courts are assigned a catalyst role to persuade the parties to the suits to agree for alternative methods even in the absence of a pre-existing agreement in this regard. With the intervention of courts there are more and more possibilities of reference of disputes to ADR forums.

2. Section 89- A Critical Evaluation

There are two questions that arise for consideration:
(1) What is the procedure to be followed by a court in implementing section 89 and Order 10 Rule 1A of the Code?
(2) Whether consent of all parties to the suit is necessary for reference to arbitration under section 89 of the Code?
The Apex Court [5] analyzed the object, purpose, scope and tenor of section 89 and Order 10 Rule 1A of the Code to find answers to the said questions.

i) Implementation of Section 89-Literal or Actual

Section 89 starts with the words where it appears to the court that there exist elements of a settlement. This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must [6].

The Apex Court [7] has said: If section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. 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). In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in *Salem Bar-(I)* [8] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In *Salem Bar-(II)* [9], the Apex Court applied the principle of purposive construction in an attempt to make it workable.

The first inconsistency is the mixing up of the definitions of `mediation' [10] and `judicial settlement' [11] under Section 89(2) (c) [12] and Section 89(2) (d) [13] of the Code. It makes no sense to call a compromise effected by a court, as mediation, as is done in Section 89 (2) (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as judicial settlement, as is done in Section 89 (2) (c). The mix-up of definitions of the terms judicial settlement and mediation in Section 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in clauses (c) and (d) of Section 89(2). If the word mediation in clause (d) and the words judicial settlement in clause (c) are interchanged, we find that the said clauses make perfect sense.

The second inconsistency is that Section 89(1) [14] imports the final stage of conciliation referred to in section 73(1) of the 1996 Act into the pre-ADR reference stage under section 89 of the Code. If sub-section (1) of Section 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

Section 73 of 1996 Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into section 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/LokAdalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the LokAdalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing section 89 of the Code. The Apex Court therefore diluted this anomaly in *Salem Bar (II)* by equating terms of settlement to a summary of disputes meaning thereby that the court is only required to formulate a `summary of disputes' and not `terms of settlement'.

ii) Interpretation of Section 89

How can we interpret section 89? The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and literal meaning [15]. A classic example of correcting an error committed by the draftsman in legislative drafting is the substitution of the words `defendant's witnesses' by this Court for the words `plaintiff's witnesses' occurring in Order

VII Rule 14(4) of the Code, in *Salem Bar-II*. Justice G.P. Singh [16] is of the opinion that a court is justified in departing from the plain words of the statute when it is satisfied that:

a. There is clear and gross balance of anomaly;
b. Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective;
c. The anomaly can be obviated without detriment to such a legislative objective; and
d. The language of the statute is susceptible of the modification required to obviate the anomaly.

All the aforesaid four conditions justifying departure from the literal rule exist with reference to section 89 of the Code. Therefore, in *Salem Bar -II*, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-section (1) of section 89, is excluded or done away with by stating that the said provision merely requires formulating a summary of disputes. Further, the Apex Court in *Salem Bar-II*, adopted the following definition of `mediation' suggested in the model mediation rules, in spite of a different definition in section 89(2) (d) [17]. All over the country the courts have been referring cases under section 89 to mediation by assuming and understanding `mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

Section 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading Section 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to section 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

3. Concluding Observations

In sight of the above mentioned, it has to be concluded that proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of `judicial settlement' and `mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged: (c) for mediation, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a LokAdalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a LokAdalat under the provisions of that Act;(d) for judicial settlement, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

4. References

1. Section 89-Settlement of Disputes Outside the Court (Inserted by Act No. 46 of 1999 (w.e.f. 30-12-1999).
   Where it appears to the Court that there exist elements of 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 settlement and refer the same for- Arbitration; (b) Conciliation; (c) Judicial settlement including settlement through lok Adalat; or (d) Mediation. Where a dispute has been referred- (a) for arbitration or conciliation, the Arbitration and Conciliation Act, 1996 (26 of 1996) 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 disputes were referred to a Lok Adalat under the provisions of that Act.(d) for mediation, the Court shall effect a between the parties and shall follow such procedure as may be prescribed
2. Notes on clauses of the CPC (Amendment) Bill, clarified the rationale of the new provisions: “Clause 7 provides for the settlement of disputes outside the court. The provisions of clause 7 are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended that it should be made obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the Alternate Dispute Resolution methods that the suit could

go further, 1999.

3. The Statement of Objects and Reasons attached to the Bill stated as follows: 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 go further in the court in which it was filed.
4. Justice Malimath Committee-(Chapter VIII, page 112 and Chapter IX pp. 168, 170 and 171). See also Avtar Singh *Supra* pp. 395-397.
5. M/S. Afcons Infra. Ltd. & Anr v. M/S Cherian Varkey Constructio Co. (P) Ltd. & Anr.... Decided on 26 July, 2010, CIVIL APPEAL NO.6000 OF 2010 (Arising out of SLP (C) No.760 of 2007).
6. *Afcons Infra* (Supra). The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

   Representative suits under Order 1 Rule 8 CPC which involves public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance). (ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration. (iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc. (v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government. (vi) Cases involving prosecution for criminal offences.

   All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes: (i) All cases relating to trade, commerce and contracts, including - disputes arising out of contracts (including all money claims); - disputes relating to specific performance;- disputes between suppliers and customers;- disputes between bankers and customers;- disputes between developers/builders and customers; - disputes between landlords and tenants/licensor and licensees; - disputes between insurer and insured; (ii) All cases arising from strained or soured relationships, including - disputes relating to matrimonial causes, maintenance, custody of children;- disputes relating to partition/division among family members/co-parceners/co-owners; and - disputes relating to partnership among partners. (iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);- disputes between employers and employees;- disputes among members of societies/associations/Apartment owners Associations; (iv) All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents; and (v) All consumer disputes including- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.

   The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.
7. M/S. Afcons Infra. Ltd. & Anr v. M/S Cherian Varkey Constructio Co. (P) Ltd. & Anr.... Decided on 26 July, 2010, CIVIL APPEAL NO.6000 OF 2010 (Arising out of SLP (C) No.760 of 2007).
8. *Salem Advocate Bar Association* v. *Union of India* reported in [2003 (1) SCC 49 - for short, Salem Bar - (I)]
9. *Salem Advocate Bar Association* v. *Union of India* [2005 (6) SCC 344 - for short, Salem Bar-(II)]
10. Mediation is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term `conciliation'. When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation.
11. Judicial settlement is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute.
12. Section 89(2) (c) says that 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 disputes were referred to a Lok Adalat under the provisions of that Act.
13. Section 89(2) (d) provides that for mediation, the Court shall effect a between the parties and shall follow such procedure as may be prescribed.
14. Sub-section (1) of section 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes.
15. See: Shri Mandir Sita Ramji v. Lt. Governor of Delhi - (1975) 4 SCC 298).See also Tirath Singh v. Bachittar Singh [AIR 1955 SC 830]. See also Shamrao V. Parulekar v. District Magistrate, Thana, Bombay [AIR 1952 SC 324]. See also Molar Mal v. Kay Iron Works (P) Ltd. - 2004 (4) SCC 285. See also Mangin v. Inland Revenue Commission [1971 (1) All.ER 179]
16. Justice G.P. Singh: Principles of Statutory Interpretation
17. Settlement by `mediation' means the process by which a

mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them.