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SHORT POST

SECTION 89: A FAÇADE TO ALLEVIATE THE BURDEN OF PROOF OF CIVIL COURTS

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ABSTRACT

Section 89 of the Code of Civil Procedure, 1908 provides a civil court judge with the opportunity to refer a case for Alternative Dispute Resolution (ADR) with the intent of reducing litigations and the burden of courts, to provide speedy justice. However, this section is not very effective in carrying out its intent because of the presence of multiple anomalies in its drafting which has caused many hindrances in the judicial process. This article aims to provide analysis of the same for which, despite much deliberation by Judiciary and Commissions, no major changes have been incorporated. This manuscript provides certain suggestions comparing various models existing in foreign countries for benefitting the administration of justice and upholding the spirit of the provision.

Keywords: Alternate Dispute Resolution, Mediation, Adjudication of Disputes, Reduction of the Burden, Terms of Settlement

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INTRODUCTION

The Code of Civil Procedure, 1908[1] (hereinafter referred to as 'Code') provides for civil disputes in India with the appropriate procedures. It has undergone numerous amendments to uphold the aims of delivering justice and being efficient for its people. However, the number of on-going litigations across the country are astronomically high. Thus, faster adjudication becomes an essential tool for the public concerning the costs and time which are attached to the normal civil suits. It is to this aspect section 89 of the Code becomes an alternative for the parties involved in a suit to opt for faster disposal of cases through the process of Alternate Dispute Resolution (hereinafter referred to as 'ADR'). However, this section has many issues in its drafting which has led to several hindrances in its implementation by the Judiciary, and thus, it must be redrafted or modified to serve the object which it aspires to achieve.

Section 89 of the Code brings relief to the parties as well as to the civil courts with its main objective to facilitate out-of-court settlements to reduce litigations and thus, the burden on the Judiciary. The provision states that in cases where the courts apprehend a probable settlement acceptable to the parties, the court will formulate the terms of the settlement and after getting an affirmation from the parties on the same, will refer them to either arbitration, conciliation, judicial settlement or mediation.[2] Furthermore, it also states that the applicable acts for the aforementioned dispute resolutions i.e. Arbitration and Conciliation Act, 1996; The Legal Services Authority Act, 1987 and a compromise for opting mediation.[3] This provision should be read harmoniously with Order X (Rules 1A-C) which discusses the examination of the parties.[4]

LEGISLATIVE BACKGROUND

Section 89 was introduced via the Civil Procedure Code (Amendment) Act, 1999[5] (with effect from 2002) and was later repealed by the Arbitration Act, 1940 (section 49).[6] However, after introducing more types of dispute resolution methods apart from arbitration, the section was again revived with the emphasis on the recommendations from the 129th Law Commission Report[7] and the Malimath Committee Report[8] where the object was to uphold the aim with which the Code was enacted i.e. to deliver justice and provide for efficient working of the system. These Committee formulations were with an objective of providing a timely disposal of the immense litigations and to come up with an efficient remedy to tackle such a system. The Law Commission emphasized the need for a more amicable

[1] The Code of Civil Procedure, 1908, No. 5, Acts of the Parliament, 1908 (India).
[2] *Id.*, §89(1).
[3] *Id.*, §89(2).
[4] *Id.*, Order 10, Rule 1A-1C.
[5] Code of Civil Procedure (Amendment) Act, 1999, No. 46, Acts of the Parliament, 1908, §7.
[6] The Arbitration Act, 1940, No. 10, Acts of the Parliament, 1940 (India), §49.
[7] Law Commission of India, *Urban Litigation Mediation as Alternative to Adjudication*, MINISTRY OF LAW AND JUSTICE (Sep 28, 2020, 10:14 AM), http://lawcommissionofindia.nic.in/101-169/Report129.pdf.
[8] Justice V.S. Malimath, *Committee on Reforms on Criminal Justice System*, MINISTRY OF HOME AFFAIRS (Sep 28, 11:00 AM), https://www.mha.gov.in/sites/default/files/criminal_justice_system_2.pdf.

settlement of disputes between the parties.[9] The Malimath Committee, on the other hand, recommended a mandatory provision to be included for referring civil disputes for ADR.[10] An option to opt for a full trial, as per the Code, should be the last resort for the events wherein adoption of such resolution fails.

ANALYSIS ON THE STANCE OF JUDICIARY

In the case of *H.V. Venkatesh v. Oriental Insurance Company Ltd.*,[11] Justices R. Raveendran and K. Manjunath highlighted the need for ADR vis-à-vis the current framework. They acknowledged the rise in cases burdening the Judges in such courts with the same and a delay in disposing the cases leading to negative consequences and eroding the confidence of the public towards the justice delivery system.[12] Their main argument laid down was:

> "*When memories of litigation tend to be unpleasant and harsh, there is a tendency on the part of the litigant to avoid approaching the Courts, for relief, but seek remedy outside the legal framework…. In this background, it became necessary to seriously consider the need to encourage alternative dispute resolution methods*".[13]

Now, the case of *Salem Advocate Bar Association v. Union of India*[14] is the first precedent whereby the Judiciary looked into the constitutional validity of the 1999 Amendment that inserted section 89 into the Code. The case had recognized the intention behind enacting this section as stated above. The Court stated that the drafting of the section was not perfect and had some *"creases that were required to be ironed out"*. The court suggested a creation of the Committee for such purposes which was made later.[15] The Court in light of the observations made by the Committee noted that while referring a case for ADR, the terms of an agreement need to be formulated and specified while acknowledging that the term 'may' in the provision is limited to the reformulation of the terms post the observations by the parties.[16] Moreover, the Committee had also recommended that the Government should consider bearing the costs of ADR as the parties may not be inclined to follow such dispute resolution mechanisms because costs of ADR are relatively higher than the cost of filing a suit in the civil courts.[17]

Furthermore, an issue pertaining to Clause (d) of Section 89(1) was raised in this case regarding finalization of the terms of compromise i.e., whether such terms are finalized in the mediation or in the courts. As per the Court, Clause (d) states that when mediation succeeds, the mediator will report to the Court and the Court will 'effect' the compromise

[9] Law Commission of India, *supra* note 8.
[10] Justice V.S. Malimath, *supra* note 9.
[11] H.V. Venkatesh v. Oriental Insurance Company Ltd., ILR 2002 KAR 3666.
[12] *Id.*
[13] *Id.* at 3667.
[14] Salem Advocate Bar Association v. Union of India, AIR 2003 SC 189.
[15] *Id.*
[16] *Id.*
[17] Salem Advocate Bar Association v. Union of India, (2005) 6 SCC 344.

through a decree after serving a notice and hearing to the parties.[18] It also stated that the Judge is not barred from hearing the matter if the mediation fails because when they refer the matter to ADR the only question considered is whether or not there are reasonable grounds to expect that there will be a settlement.[19]

Additionally, the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. Ltd.*[20] further clarified and pointed out the various issues in respect of this provision. The Apex Court formulated two issues regarding the procedure to be followed by a Court as per Section 89 and Order X Rule 1A and whether the consent of all the parties was necessary for arbitration or not.[21]

The Court critiqued the application of section 89 as interpreted by the trial court categorizing it as 'trial judge's nightmare.'[22] It stated that such interpretation led to 'putting the cart before the horse.'[23] The major observation was regarding the mix-up of the definitions of mediation and judicial settlement done by the provision which had an interchanged meaning leading to difficulties in its implementation.[24] However, the provision tries to break the order by adopting a procedure that is to be used in the final stage of the conciliation by providing for it in the pre-ADR stage. Moreover, the Court further iterated the fact that a suit should be referred to ADR if and only if it 'appears to the court for an existence of a settlement.'[25] The Court in such a scenario must justify the non-referral of the suit which would be limited to disputes of public offences, serious offences in relation to fraud, forgery, etc.

Post the Afcons case, the 238th Law Commission Report[26] was constituted which emphasised the restructuring of the provision to remove/eliminate the ambiguity. Further, it specifically recommended for the referral of Section 89 to take place at the stage of framing issues to reduce the litigations since soon after the settlement, a copy to be provided to the required court. The Report also suggested for altering the Order X Rules concerning this provision.[27]

CRITIQUE

Upon observing the stance of the Judiciary and the Legislature on this provision, there are certain aspects that still need to be investigated and rectified in the light of Civil Suits. The bare interpretation of section 89 is problematic to the extent of being ambiguous with the above-mentioned drawbacks acknowledged by the Judiciary as well. It must be harmoniously

[18] *Id.* at 377.
[19] *Id.*
[20] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. Ltd, (2010) 8 SCC 24.
[21] *Id.*
[22] *Id.* at 31.
[23] *Id.*
[24] *Id.* at 32.
[25] *Id.* at 42.
[26] Law Commission of India, *Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions*, Ministry of Law and Justice, (Sep 28, 2020, 11:15 AM), http://lawcommissionofindia.nic.in/reports/report238.pdf.
[27] *Id.*

read with Order X to seek the recourse of ADR after pleadings are conducted and before issues are framed. However, the Court in the *Afcons* case categorically stated that the Judge is not barred from activating this provision after the issues are framed.[28]

While referring a case to ADR, the Court's only important duty is to allocate the appropriate forum of ADR to the parties depending on the matter because the provision contains both adjudicatory and non-adjudicatory means and thus, the power which has been vested to the Judge by the Code should be applied cautiously. Any irrational decision can lead the case in hand to have a detrimental effect. For instance, arbitration is a form of adjudicatory ADR mechanism whereas others, as per the section, are non-adjudicatory ADR forums. There has been an implied duty of the Court to make the parties aware of such forums since if the case has been sent to the adjudicatory ADR forum i.e., arbitration, then it would be not possible for the case to revert to the courts from the said arbitration.[29]

However, the provision mandates the Court to formulate the terms of the settlement to the parties, which is a lengthy process that puts unnecessary burden on the court. Moreover, this limits the powers of ADR mechanisms in resolving the disputes as they cannot deviate from the terms of the settlement as stated in the *Salem Advocates* case.[30] These terms of settlement benefit only the mediator if and only if, the parties are satisfied with the terms of settlement framed by the Court. If the terms do not satisfy the parties, then the job of mediator becomes difficult as he cannot go outside the terms framed by the court. Moreover, in case the mediation fails, the matter reverts to the Court and then the Judge adjudicates from the same place where he left off the matter.

Additionally, the section starts with the phrase "where it appears to the Court"[31] and this plays a critical role towards making this provision to be directory and discretionary in nature. The presumption of the Court to opt for such methods in a just manner when it is satisfied, is highly problematic since no threshold to such satisfaction has been defined either by the legislation or by the precedents leading to a subjective and an open-ended interpretation by the courts. Such omission of the threshold could sometimes lead to a delay in justice; thereby causing injury to the parties and deviating from the purpose of the section.

COMPARATIVE JURISDICTION

In countries like United Kingdom (UK), the State has taken some steps towards encouraging the use of ADR. This had started with the genesis of the Civil Procedure Rules, 1998 where the court under Rule 1.4 (e) said that Courts must strongly encourage the use of ADR if it considers it appropriate.[32] One of the most important case law regarding this was *Halsey v. Milton Keynes General NHS Trust*[33], where the Court explains the value of ADR and lays down

[28] Afcons Infrastructure Ltd. *supra* note 21 at 42.
[29] *Id.*
[30] Salem Advocate Bar Association, *supra* note 15.
[31] The Civil Procedure Code *supra* note 2.
[32] Civil Procedure Rules, 1999, rule 1.4(e) (United Kingdom).
[33] Halsey v. Milton Keynes General NHS Trust, [2004] 1 WLR 3002 (United Kingdom).

some principles regarding its enforcement.[34] However, courts have now gone far enough to make ADR mandatory as in the case of *Lomax v. Lomax*[35], the English Court of Appeal held that a Judge can refer the case to ADR without the consent of one or both parties.[36] This shows that the law is moving towards making ADR mandatory to reduce the burden of the courts.

Whereas in the United States of America (USA), the district courts require the litigants in all civil cases to consider the use of ADR in the appropriate stage in their litigation.[37] The district courts also have the power to exempt some cases from entering the domain of arbitration, rather than to form the rules in this case and thus, each district court must consult its bar association.[38] USA has a very decentralized approach towards forming rules of arbitration as each district is directed to create their own rules mentioning a variety of specifications like mandatory consideration of ADR, confidentiality rules, etc.

RECOMMENDATIONS AND SUGGESTIONS

After analysing the anomalies mentioned above, there are certain recommendations that, if implemented, would carry out the intended purpose of such enactment of the section. Formulating the terms of the settlement in the Court while invoking section 89 is a time-consuming task. Thus, it is suggested that the legislature divides the cases into categories of whether they can be settled through ADR mechanisms or not. For example, most property disputes or small cause disputes have an element of settlement in them as the parties want speedy justice. Such cases should go for ADR first and on the failure of this, the Court should be a secondary means for adjudication of the dispute. This acts as a disincentive for people to keep small cases for a long time as ADR is an expensive means of dispute resolution. While this disincentive may be wrong as it makes justice expensive, if the legislature makes a rule on shouldering the cost of ADR, as suggested by the Committee constituted in the *Salem Advocates* case,[39] then ADR can be used to a great extent in the adjudication of civil matters. This suggestion is inspired by the model implemented in the UK which makes the use of ADR mandatory before asking the courts to resolve the dispute.

If the above suggestion is implemented, there must also be an allied proviso stating that if the parties can prove the dispute cannot be solved by an ADR mechanism for reasons including the declaration of documents or a question of law then the matter should directly go to a civil judge and must not hinder the ADR mechanism. Also, for sensitive cases like family matters or cases that have a trace of criminal activity like fraud should not be hindered by ADR in its initial stages although they may be referred by the Court as per its discretion.

[34] *Id.*
[35] Lomax v. Lomax, [2019] EWCA Civ 1467 (United Kingdom).
[36] *Id.*
[37] Alternative Dispute Resolution Act, 28 U. S. C. § 652(a) (1998).
[38] *Id.* clause (b).
[39] Salem Advocate Bar Association, *supra* note 15.

CONCLUSION

Lastly, the case law and the various law commission reports have been quite critical regarding the application of this provision especially regarding the formulation of the terms of the settlement. An alternative remedy could be looked at in the form of erasing the boundaries set by the courts as present in the current regime. Instead, giving the ADR mechanisms a summary of the dispute would help such mechanisms pick up from where the Court left off and function independently for the parties in finding a settlement that suits them. This gives the mediator an independent role in adjudicating the dispute, ultimately reducing the burden of the Court.

Section 89 was introduced with a good intention of speedy justice and reducing the burden of Courts through the medium of Alternate Dispute Resolution which helps in accessing justice without decreasing its quality. However, the section is riddled with anomalies which have reduced its efficiency and sometimes hinders the process of delivery of justice. India should adopt a hybrid model as recommended above instead of the procedure which is carried out in foreign countries. Even though there have been various recommendations pointed out by Judiciary and Commission Report, no major changes have been incorporated in the provision, and thus, for the section to serve its ultimate purpose, the ADR mechanisms should be allowed to function independently, and more cases should be referred to that system for reducing the number of litigations in courts and adding burden on the same.

CONFLICT OF INTEREST

The authors declare that the research work does not have any conflict of interest and the was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.