

ALTERNATIVE DISPUTE RESOLUTION UNDER CPC - A CRITICAL ANALYSIS

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INTRODUCTION

Under Code of Civil Procedure, 1908, Section 89 and Rules 1A, 1B and 1C in Order 10, provides for settlement of disputes through Alternative Dispute Resolution mechanism. These are the out of court methods to resolve the disputes which the court can order if it feels so, but not bound to order in every case.

The first Indian Arbitration Act was enacted in 1899, which was replaced by the Arbitration Act, 1940 which in turn was replaced by the Arbitration and Conciliation Act of 1996. The Law Commission of India in its 163rd report voiced its concern on CPC Amendment Bill 1997 regarding the quality of justice which was being delivered with delay and stated that it poses a threat to the justice. It weakens the justice as the memory of witnesses will weaken and also the evidence presentation becomes difficult

There are several relevant cases with relation to this section, some of which are *Afcons Infrastructure v. Cherian Varkey Construction*¹ and *Salem Bar Association* cases I² and II³ which were the turning point for alternative dispute resolution mechanism in India. But if a case does not result in fruitful solution then that case will have to be dealt by the court at the end so as to fulfill the purpose of delivering justice. This section has been repealed and then reinserted after a bit consideration. There were certain committees formed for this purpose.

The main motive behind formation of this mechanism is simple, to ensure efficient, speedy trial which is also cost efficient and in the ultimate benefit of the parties. As it has been

¹ 2010 (8) SCC 24

² 2003 (1) SCC 49

³ 2005 (6) SCC 344

observed that the number pendency of cases in courts is rising day by day. Therefore to lessen the burden upon the courts was also a purpose behind the insertion of this section.

In this project, there is a brief description of what the section 89 entails in connection with alternative dispute resolution mechanism in context of India. It covers a limited scope while covering all the relevant acts therein. Also what is the constitutionality of this section which was previously challenged will be discussed. And finally what is the current position of this section in India will be analyzed critically.

ALTERNATE DISPUTE RESOLUTION UNDER CPC: A BRIEF HISTORY

Section 89 of the Code of Civil procedure was introduced with a purpose of amicable, peaceful and mutual settlement between parties without the intervention of the court. This section has been inserted by the CPC Amendment Act, 1999. At the commencement of the Code, a provision was provided for Alternate Dispute Resolution. However this section was repealed⁴ by Arbitration Act, 1940, under Section 49 and Schedule 10. The old provision had reference only to arbitration and its procedure under the Second Schedule of the Code. It was believed after the enactment of the Arbitration Act, 1940, the law had been consolidated and there was no need of Sec 89.

However, the Section was re-inserted with new alternatives which was not restricted to arbitration only. A new Section 89 was incorporated in the Code by Section 7 of the CPC Amendment Act, 1999 to resolve disputes without going to trial and pursuant to the recommendations of Law Commission of India and Malimath Committee report.⁵ This section is read with rules 1A, 1B and 1C of Order X. The clauses under Order X are specified to ensure proper exercise of jurisdiction by the court. Sub-Section (1) refers to the different mediums for alternate resolution and sub-section (2) refers to various Acts in relation to the mentioned alternate resolutions.

If one refers to Statement of Objects and Reasons and Notes on Clauses attached to the Code of Civil Procedure (Amendment) Bill initiated in 1997 it clearly states that, “(d) with a view to

⁴ M. P. JAIN, THE CODE OF CIVIL PROCEDURE, 282-297 (Lexis Nexis, 3d ed. 2014)

⁵ 1 S. C. SARKAR., THE LAW OF CIVIL PROCEDURE, 498 (Lexis Nexis 11th ed. 2006)

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.”

Malimath Committee Report and 129th Report (1988) of the Law Commission of India:

The Law Commission recommended introduction of the Conciliation Court system which had been in vogue in Himachal Pradesh. The Commission referred to Order XXVII Rule 5B of the CPC which bears the heading “Duty of court in suits against the Government or a public officer in arriving at a settlement” and then observed: “*Though rule 5B is limited in its application to a suit to which the Government or the public officer acting in his official capacity is a party, it is time to expand the coverage of the method of resolution of disputes therein provided to all suits in civil courts, including the claim for compensation before the Motor Accidents Claims Tribunal. Rule 5B provides that in a suit to which it applies, it should be the duty of the court to make, in the first instance, every endeavor where it is possible to do so consistently with the nature and circumstances of the case to assist the parties in arriving at a settlement in respect of the subject matter of the dispute. Where the court is of the opinion that there is a reasonable possibility of a settlement between the parties to the suit, the proceedings may be adjourned for such period as it thinks fit to enable attempts to be made to effect such settlement. Rule 5B expects the court before which the suit is pending to itself attempt to conciliate the dispute*”.⁶

Malimath committee called for a “*legal sanction to a machinery for resolution of disputes and resort thereto is compulsory*” which the sole objective of reducing the large influx of commercial litigation in courts of civil nature, number of appeals to higher courts lessened and the efficiency of courts revitalized by such implementation.

The Commission, considered it necessary to introduce a provision in Order X of the CPC to the following effect:

- (i) The following may be added as sub-clause (c) immediately after sub-clause (b), clause (i) rule 2 of Order X of the Code of Civil Procedure:⁷

⁶ Justice P.V. Reddy, *Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions*, 238 Law Commission of India Report, (2011)

⁷ Ibid

“may require the attendance of any party to the suit or proceedings, to appear in person with a view to arriving at an amicable settlement of the dispute between the parties and make an attempt to settle the dispute between the parties amicably”.

- (ii) The following may be added as clause (3) immediately below clause (2) of rule 4 of Order X Code of Civil Procedure:⁸

“Where a party ordered to appear before the court in person with a view to arriving at an amicable settlement of the dispute between the parties, fails to appear in person before the court without lawful excuse on the date so appointed, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit”.

INTERPRETATION AND ANALYSIS OF ALTERNATE DISPUTE RESOLUTION UNDER CPC

ADR was formulated with a purpose of reducing the burden of the burdened system and render expeditious justice⁹. With the introduction of these provisions, namely Section 89, and the rules in Order X, a mandatory duty has been cast on the civil courts to endeavor for settlement of disputes by relegating the parties to an ADR process. Five ADR methods are referred to in section 89. They are: (a) Arbitration, (b) Conciliation, (c) Judicial settlement, (d) Settlement through Lok Adalat, and (e) Mediation.

Section 89 does not impose a mandatory duty upon the courts to refer the parties to such ADR methods. The court has wide discretion to decide whether the matter can be settled outside the court or not. This can be interpreted by the use of the words “shall” and “may” in the section. It is just an alternate means to resolve the dispute.

Arbitration as well as Conciliation are governed by the Arbitration and Conciliation Act, 1996 which superseded the previous Arbitration Act of 1940. Arbitration or conciliation can only be on account of the consent of parties to a dispute and it is not within the powers of the court to refer disputes for arbitration in absence of consent of parties.¹⁰ The reference to arbitration or

⁸ Ibid

⁹ 1 K. S. GOPALA KRISHNAN, THE CODE OF CIVIL PROCEDURE, 912 (Alt Publications, 1st ed. 2011)

¹⁰ *BOC India Ltd v Instant Sales Pvt Ltd*, AIR 2007 Cal 275 at 276

conciliation is only possible if there is consent of the parties. In the absence of consent, the court cannot on its own refer the parties to arbitration or conciliation.

In the case of arbitration, if there is no pre-existing arbitration agreement, the parties to suit can agree for arbitration by filing a joint memo or application and the court can then refer the matter to arbitration and such arbitration will be governed by the provisions of the AC Act. The award of the arbitrators is binding on the parties and is enforceable as if it is a decree of the court. When the matter is settled through conciliation, the settlement agreement shall have the same status and effect as if it is an arbitral award (vide Section 74 of the Act¹¹) and therefore it is enforceable as a decree of the court by virtue of section 36 of the Act¹². Similarly, when a settlement takes place before the Lok Adalat, the award of the Lok Adalat is deemed to be a decree of a civil court under section 21 of the Legal Services Authorities Act, 1987 and executable as such.¹³

The Supreme Court observed in the case of *Afcons Infrastructure*¹⁴, “As the court continues to retain control and jurisdiction over the cases which it refers to conciliations or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court recording it and disposal in its terms”.

In *Afcons Infrastructure* case¹⁵, the Supreme Court referred to the definition of mediation as given in the Model Mediation Rules, according to which “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 the parties directly or by communicating with each other through the mediator, by assisting the 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.”

Judicial settlement means 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. In Black’s

¹¹ Arbitration and Conciliation Act, 1996

¹² Arbitration and Conciliation Act, 1996

¹³ C. K. TAKWANI, CIVIL PROCEDURE WITH LIMITATION ACT, 1963 (Eastern Book Company, 8th ed. 2017)

¹⁴ *Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24

¹⁵ *Supra*

Law Dictionary, “judicial settlement” is defined as “the settlement of a civil case with the help of a Judge who is not assigned to adjudicate the dispute”.

Section 89 confers the jurisdiction on the court to refer a dispute to an ADR process, whereas Rules 1A to 1C of Order X lay down the manner in which the jurisdiction is to be exercised by the court. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.¹⁶

DRAWBACKS OF SECTION 89 - A CONSTITUTIONAL PERSPECTIVE

Article 39A of the Constitution of India (enacted in 1976) enjoins that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Thus, easy access to justice to all sections of people and provision of legal aid for the poor and needy and dispensation of justice by an independent Judiciary within a reasonable time are the cherished goals of our Constitution.¹⁷

The Supreme Court aptly observed in *Afcons Infrastructure case*¹⁸ that the correct interpretation and understanding of the provision has become “a trial judge’s nightmare”. The first error is related to sub-section (1) of section 89, especially the words “shall formulate the terms of settlement”. The Section in itself suffers from many anomalies which need to be looked at to ensure the objective of the Section is achieved and there is swifter and speedier form of justice. The drafting of the Section 89 was said to be done in a haphazard manner.

The constitutionality of this case was challenged on the grounds of arbitrariness. The argument was that what should be done was given but it is to be done or implemented was not mentioned. The wording of the Section 73(1) of the Arbitration and Conciliation Act is borrowed under

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Supra

this section defeating the objective with which the section was revived as was observed by the Court in the *Afcons* case.

As was observed in this case by Supreme Court,¹⁹“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”. The Supreme Court further commented: “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 terms of settlement and reformulate them at a stage prior to reference to an ADR process”

It gave no guidelines as to what all cases are to be considered under out of court settlement or what rules and regulations should be followed. Courts are of the opinion that the purpose behind forming this section is speedier delivery of justice, which is an important aspect of Article 21 of Indian Constitution, right to life and personal liberty. Any such arbitrariness could be resolved if guidelines or rules and regulations are provided.

Salem Advocate Bar Association Case and Justice M. Jagannadh Rao Committee Report

Supreme Court in its judgment in the Salem Bar Advocate case²⁰ where the constitutional validity of Section 89 was challenged and upheld, constituted a committee so as to ensure that the amendments become effective and result in quicker dispensation of justice. Committee consisted of Justice M. Jagannadha Rao, Arun Jaitley, Kapil Sibal, Sri D. V. Subba Rao and Sri C. S. Vaidyanathan.

It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternate Disputes Resolution (ADR) referred to in section 89. It was also observed that the model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to section 89(2)(d) of the Code. Further, it was observed that if any difficulties are felt in the working of the amendments, the same can be placed before the Committee which would consider the same and make necessary suggestions in its report.

¹⁹ Supra

²⁰ Salem Advocate Bar Association v Union of India (2003) 1 SCC 49

The report was in three parts. Report 1 contained the consideration of the various grievances relating to amendments to the Code and the recommendations of the Committee. Report 2 contained the consideration of various points raised in connection with draft rules for ADR and mediation as envisaged by Section 89 of the Code read with Order X Rule 1A, 1B and 1C. It also contains model Rules. Report 3 contained a conceptual appraisal of case management. It also contains the model rules of case management.²¹

The end result of this judgment was that Supreme Court ordered that every High Court in the country would take notice of the recommendations made in the above mentioned committee's report and frame rules on the basis of the report for the State in which it exercises the territorial jurisdiction. Various High Courts were required to make rules on the basis of the recommendation made in the report for the governance of alternate dispute resolution mechanism under power entrusted to them under Order X of CPC.

CONCLUSION

Alternate Dispute Resolution is a means of increasing access to justice without decreasing the quality of justice.²² Section 89 is an important part of the Code of Civil Procedure and is an effective method to resolve dispute between parties where the same is possible. The section is right in its objective as the purpose has been to reduce the burden of the court and at the same time to ensure that compromise is achieved between parties. It is also an alternative to move towards speedier/ as well as effective method of administering justice.

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. There are various drawbacks with this section which remains as it is. The first and foremost being the incongruity in the wordings of the section itself as it is depended upon the interpretation of every one.

The second drawback is that there is no definite difference between the means of ADR, namely mediation and conciliation. It's clear and exact interpretation can only be given by the lawmakers who enacted this section with a definite mindset and not according to anyone else. Even though courts have interpreted it accordingly, it is still lacking in certain prospects.

²¹ Supra

²² Sriram Panchu, *The Road less Travelled-An Increasingly Attractive Path*, 19(2) SBR 31 (2007)

The third major drawback is the lack of awareness among the general public. Ultimately ADRs are to be used in the benefit of the parties and if they themselves are not aware of such an alternative, it is deemed that the first resolution taken by them will be related to courts only. The alternatives provided in this section are much more beneficial in comparison to the normal course as they provide speedier resolution of the case, are cost efficient and also in some cases, work according to the consent of the parties as is in the case of arbitration.

The lack of such an awareness is a much bigger hindrance in the way of success of the purpose behind making this section. If people are not using it as much as it is needed, then the cases in the courts will keep on pending, and the main ultimate purpose was to give speedier and effective result towards justice. Justice will not be delivered until the tool is used properly which is given for this specific purpose only. Therefore the hypothesis is proved to be true in this project. There is a dire need for amendment in the language of this section so as to give a little bit clarity on the subject matter.

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