# INDIAN SYMPOSIUM ON DISPUTE RESOLUTION, 2018

AMITY LAW SCHOOL, DELHI &
Peacekeeping And Conflict Resolution Team
(The PACT.)

Reading Material (Volume 1 of 4); curated by, Arjun Natarajan, Advisor – ISDR

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INDEX


| Serial No. | Particulars | Page No.(s) |
|---|---|---|
| 1. | **Annexure V1/1**<br>The Arbitration and Conciliation Act, 1996 – Introduction, Statement of Objects and Reasons and Preamble | 1-4 |
| 2. | **Annexure V1/2**<br>UNCITRAL Conciliation Rules, 1980 | 5-15 |
| 3. | **Annexure V1/3**<br>Section 30 of The Arbitration and Conciliation Act, 1996 | 16 |
| 4. | **Annexure V1/4**<br>Section 89 of The Code of Civil Procedure, 1908 | 17-18 |
| 5. | **Annexure V1/5**<br>Rules 1A, 1B and 1C of Order X | 19 |
| 6. | **Annexure V1/6**<br>Salem (II) | 20-79 |
| 7. | **Annexure V1/7**<br>Justice M. Jagannadha Rao, Concepts of Conciliation and Mediation and their differences | 80-89 |
| 8. | **Annexure V1/8**<br>Sriram Panchu, Mediation Practice & Law The Path to Successful Dispute Resolution, Second Edition, 2015, Lexis Nexis at page 312 | 90-91 |
| 9. | **Annexure V1/9**<br>Afcons | 92-116 |
| 10. | **Annexure V1/10**<br>Law Commission of India's Report No. 38, | 117-148 |



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## NOTE

*Part III of The Arbitration and Conciliation Act, 1996 is inspired by UNCITRAL Conciliation Rules.

1

ANNEXURE V1/1

# THE ARBITRATION AND CONCILIATION ACT, 1996

## INTRODUCTION

The law on arbitration was substantially contained in three enactments, *viz.* the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act, 1940 was widely felt to have become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration had proposed amendments to this Act to make it more responsive to contemporary requirements. It was also felt that economic reforms taking place in the country may not become fully effective if the laws dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Conciliation, like arbitration is also getting worldwide recognition as an instrument for settlement of disputes. The United Nations Commission on International Trade Law adopted the Model Law on International Commercial Arbitration. It also adopted a set of Conciliation Rules. The General Assembly of the United Nations had recommended that all countries give due consideration to the said Model Law and use the Conciliation Rules in cases where the disputes arise in the context of international commercial relation. In order to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the Model Law and Conciliation Rules adopted by the United Nations Commission on International Trade Law the President, on 16th January, 1996, promulgated the Arbitration and Conciliation Ordinance, 1996 as the Parliament was not in session and the circumstances existed which rendered it necessary to take immediate action. The Ordinance could not be replaced by an Act as the Parliament session was prorogued without passing the Bill.

In order to give further continued effect to the provisions of the said Ordinance the President promulgated the Arbitration and Conciliation (Second) Ordinance, 1996 on 26th March, 1996 which could also not be passed by the Parliament. On 21st June, 1996 the President promulgated the Arbitration and Conciliation (Third) Ordinance, 1996. To replace the Ordinance of 21st June, 1996 the Arbitration and Conciliation Bill was introduced in the Parliament.

## STATEMENT OF OBJECTS AND REASONS

The law on arbitration in India is at present substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. It is widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated. The Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to this Act to make it more responsive to contemporary requirements. It is also recognised that our economic reforms may

not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. Like arbitration, conciliation is also getting increasing worldwide recognition as an instrument for settlement of disputes. There is, however, no general law on the subject in India.

2. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The UNCITRAL also adopted in 1980 a set of Conciliation Rules. The General Assembly of the United Nations has recommended the use of these Rules in cases where the disputes arise in the context of international commercial relations and the parties seek amicable settlement of their disputes by recourse to conciliation. An important feature of the said UNCITRAL Model Law and Rules is that they have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contain provisions which are designed for universal application.

3. Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the said UNCITRAL Model Law and Rules.

4. The main objectives of the Bill are as under:—

(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

(ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

(v) to minimise the supervisory role of courts in the arbitral process;

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award.

5. The Bill seeks to achieve the above objects.

## ACT 26 OF 1996

The Arbitration and Conciliation Bill having been passed by both the Houses of Parliament received the assent of the President on 16th August, 1996. It came on the Statute Book as THE ARBITRATION AND CONCILIATION ACT, 1996 (26 of 1996) (*Came into force on 22-8-1996*).

## AMENDING ACT

The Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) (w.r.e.f. 23-10-2015).

4

# THE ARBITRATION AND CONCILIATION ACT, 1996

(26 of 1996)

[*16th August, 1996*]

*An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.*

## PREAMBLE

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985;

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;

BE it enacted by Parliament in the Forty-seventh Year of the Republic as follows:—

## COMMENTS

**Applicability of Act**

The applicability of the Act does not depend upon the dispute being a commercial dispute. Reference to arbitration and arbitrability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or commercial dispute. There can be arbitration agreements in non-commercial civil disputes also; *H. Srinivas Pai* v. *H.V. Pai*, 2010 (7) SCALE 171: 2010 (5) RAJ 64: 2010 (5) SLT 516.

**Legislative intent and essence**

The Legislative intent and essence of the Act is to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention and Geneva Convention; *Chloro Controls (I) P. Ltd.* v. *Severn Trent Water Purification Inc.*, JT 2012 (10) SC 187: (2012) 9 SCALE 595: 2012 (6) RAJ 1.

## NOTE

*UNCITRAL Conciliation Rules, 1980 do not contain the word mediation.

5

ANNEXURE V1/2

# UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

*UNCITRAL Conciliation Rules*

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## Contents


GENERAL ASSEMBLY RESOLUTION 35/52

UNCITRAL CONCILIATION RULES

Article 1: Application of the rules

Article 2: Commencement of conciliation proceedings

Article 3: Number of conciliators

Article 4: Appointment of conciliators

Article 5: Submission of statements to conciliator

Article 6: Representation and assistance

Article 7: Role of conciliator

Article 8: Administrative assistance

Article 9: Communication between conciliator and parties

Article 10: Disclosure of information

Article 11: Co-operation of parties with conciliator

Article 12: Suggestions by parties for settlement of dispute

Article 13: Settlement agreement

Article 14: Confidentiality

Article 15: Termination of conciliation proceedings

Article 16: Resort to arbitral or judicial proceedings

Article 17: Costs

Article 18: Deposits

Article 19: Role of conciliator in other proceedings

Article 20: Admissibility of evidence in other proceedings

Model Conciliation Clause

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## RESOLUTION 35/52 ADOPTED BY THE GENERAL ASSEMBLY ON 4 DECEMBER 1980

### 35/52. Conciliation Rules of the United Nations Commission on International Trade Law

*The General Assembly*,

*Recognizing* the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

*Convinced* that the establishment of conciliation rules that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

*Noting* that the Conciliation Rules of the United Nations Commission on International Trade Law were adopted by the Commission at its thirteenth session[1] after consideration of the observations of

Governments and interested organizations,

1. *Recommends* the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

2. *Requests* the Secretary-General to arrange for the widest possible distribution of the Conciliation Rules.

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[1] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), paras. 105 and 106

## UNCITRAL CONCILIATION RULES

*APPLICATION OF THE RULES*

**Article 1**

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

*COMMENCEMENT OF CONCILIATION PROCEEDINGS*

**Article 2**

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the

acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

*NUMBER OF CONCILIATORS*

**Article 3**

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

*APPOINTMENT OF CONCILIATORS*

**Article 4**

(1) *(a)* In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

*(b)* In conciliation proceedings with two conciliators, each party appoints one conciliator;

*(c)* In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

*(a)* A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

*(b)* The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

*SUBMISSION OF STATEMENTS TO CONCILIATOR*

**Article 5**

(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

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*In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

*REPRESENTATION AND ASSISTANCE*

**Article 6**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

*ROLE OF CONCILIATOR*

**Article 7**

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

*ADMINISTRATIVE ASSISTANCE*

**Article 8**

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

*COMMUNICATION BETWEEN CONCILIATOR AND PARTIES*

**Article 9**

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

*DISCLOSURE OF INFORMATION*

**Article 10**

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

*CO-OPERATION OF PARTIES WITH CONCILIATOR*

**Article 11**

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

*SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE*

**Article 12**

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

*SETTLEMENT AGREEMENT*

**Article 13**

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.** If requested by the parties, the conciliator draws up, or assists the parties in

drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

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**The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

*CONFIDENTIALITY*

**Article 14**

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

*TERMINATION OF CONCILIATION PROCEEDINGS*

**Article 15**

The conciliation proceedings are terminated:

*(a)* By the signing of the settlement agreement by the parties, on the date of the agreement; or

*(b)* By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

*(c)* By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

*(d)* By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated,

on the date of the declaration.

*RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS*

**Article 16**

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

*COSTS*

**Article 17**

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

*(a)* The fee of the conciliator which shall be reasonable in amount;

*(b)* The travel and other expenses of the conciliator;

*(c)* The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

*(d)* The cost of any expert advice requested by the conciliator with the consent of the parties;

*(e)* The cost of any assistance provided pursuant to articles 4, paragraph (2)*(b)*, and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

*DEPOSITS*

**Article 18**

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

*ROLE OF CONCILIATOR IN OTHER PROCEEDINGS*

**Article 19**

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

*ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS*

**Article 20**

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings;

*(a)* Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

*(b)* Admissions made by the other party in the course of the conciliation proceedings;

*(c)* Proposals made by the conciliator;

*(d)* The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

## MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)

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## NOTE

*The words 'mediation' and 'conciliation' are used distinctly in Section 30 of The Arbitration and Conciliation Act, 1996.

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.]

**30. Settlement.**—(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

**COMMENTS**

**Settlement**

When the arbitrator, having been invested with the jurisdiction to decide the arbitrability of certain claims has committed error of jurisdiction in not considering the arbitrability of the claims and passed a non-speaking award granting certain lump sum amount, it is difficult to give acceptance to the award made by the umpire; *Tamil Nadu Electricity Board* v. *Bridge Tunnel Constructions*, AIR 1997 SC 1376.

**31. Form and contents of arbitral award.**—(1) An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

(2) For the purposes of sub-section (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

(3) The arbitral award shall state the reasons upon which it is based, unless—

## NOTE

*The subheading of Section 89 of The Code of Civil Procedure, 1908 is *Arbitration*.

*The words 'conciliation' and 'mediation' are used distinctly in Section 89 of The Code of Civil Procedure, 1908.

**87. Style of foreign Rulers as parties to suits.**—The Ruler of a foreign State may sue, and shall be sued, in the name of his State:

Provided that in giving the consent referred to in section 86, the Central Government may direct that the Ruler may be sued in the name of an agent or in any other name.

*HIGH COURT AMENDMENTS*

**Calcutta.**—(i) In section 87, after the words "Ruler of a foreign State may sue", omit the words, and shall be sued,";

(ii) omit the proviso.

[*Vide* Calcutta Gazette, Pt. I, dated 20th April, 1967.]

**87A. Definitions of "foreign State" and "Ruler".**—(1) In this Part,—

(a) "foreign State" means any State outside India which has been recognised by the Central Government; and

(b) "Ruler", in relation to a foreign State, means the person who is for the time being recognized by the Central Government to be the head of that State.

(2) Every Court shall take judicial notice of the fact—

(a) that a State has or has not been recognized by the Central Government;

(b) that a person has or has not been recognized by the Central Government to be the head of a State.

*Suits against Rulers of former Indian States*

**87B. Applications of sections 85 and 86 to Rulers of former Indian States.**—[1][(1) In the case of any suit by or against the Ruler of any former Indian State which is based wholly or in part upon a cause of action which arose before the commencement of the Constitution or any proceeding arising out of such suit, the provisions of section 85 and sub-sections (1) and (3) of section 86 shall apply in relation to such Ruler as they apply in relation to the Ruler of a foreign State.]

(2) In this section—

(a) "former Indian State" means any such Indian State as the Central Government may, by notification in the Official Gazette, specify for the purposes of this section; [2][***]

[3][(b) "commencement of the Constitution" means the 26th day of January, 1950; and

(c) "Ruler" in relation to a former Indian State, has the same meaning as in Article 363 of the Constitution.]]

*Interpleader*

**88. Where interpleader-suit may be instituted.**—Where two or more persons claim adversely to one another the same debts, sum of money or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

## PART V

## SPECIAL PROCEEDINGS

*Arbitration*

[4][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,

1. Subs. by Act 54 of 1972, sec. 3, for sub-section (1) (w.e.f. 9-9-1972).
2. The word "and" omitted by Act 54 of 1972, sec. 3 (w.e.f. 9-9-1972).
3. Subs. by Act 54 of 1972, sec. 3, for clause (b) (w.e.f. 9-9-1972).
4. Ins. by Act 46 of 1999, sec. 7 (w.e.f. 1-7-2002). Earlier section 89 was repealed by Act 10 of 1940, sec. 49 and Sch. II.

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; 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.]

*Special case*

**90. Power to state case for opinion of Court.**—Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

[1]*[Public nuisances and other wrongful acts affecting the public]*

**91. Public nuisances and other wrongful acts affecting the public.**—[2][(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,—

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.]

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

[3][**92. Public charities.**—(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the [4][leave of the Court] may institute a suit, whether

1. Subs. by Act 104 of 1976, sec. 30(i), for the former heading (w.e.f. 1-2-1977).
2. Subs. by Act 104 of 1976, sec. 30(ii), for sub-section (1) (w.e.f. 1-2-1977).
3. Section 92 shall not apply to any religious trust in Bihar, *See* Bihar Act 1 of 1951.
4. Subs. by Act 104 of 1976, sec. 31(i), for "consent in writing of the Advocate-General" (w.e.f. 1-2-1977).

## NOTE

*Para. 7 of Afcons.

*Para. 9 of Afcons.

*Para. 24 of Afcons.

*Para. 26 of Afcons.

*Para. 29 of Afcons.

*Para. 30 of Afcons.

*Para. 32 of Afcons.

*Para. 34.2 of Afcons.

*Para. 41 of Afcons.

19



ANNEXURE V 1/5

ORDER X

## EXAMINATION OF PARTIES BY THE COURT

**1. Ascertainment whether allegations in pleadings are admitted or denied.**—At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by the necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

[1][**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 the 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.]

[1][**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.]

[1][**1C. Appearance before the Court consequent to the failure of efforts of conciliation.**—Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority 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.]

[2][**2. Oral examination of party, or companion of party.**—(1) At the first hearing of the suit, the Court—

(a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit; and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) At any subsequent hearing, the Court may orally examine any party appearing in person or present in Court, or any person, able to answer any material question relating to the suit, by whom such party or his pleader is accompanied.

(3) The Court may, if it thinks fit, put in the course of an examination under this rule questions suggested by either party.]

[3]**3. Substance of examination to be written.**—The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

**4. Consequence of refusal or inability of pleader to answer.**—(1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court [4][may postpone the hearing of the suit to a day not later than seven days from the date of first hearing] and direct that such party shall appear in person on such day.

---

1. Ins. by Act 46 of 1999, sec. 20(i) (w.e.f. 1-7-2002).
2. Subs. by Act 104 of 1976, sec. 60, for rule 2 (w.e.f. 1-2-1977).
3. This rule is not applicable to the Chief Court of Oudh, *see* the Oudh Court Act, 1925 (U.P. 4 of 1925), sec. 16 (2).
4. Subs. by Act 46 of 1999, sec. 20(ii), for "may postpone the hearing of the suit to a future day" (w.e.f. 1-7-2002).

## NOTE

*Para. 1 of Salem (II).

*Para. 61 of Salem (II).

*Page 83 of this volume.

*Page 86 of this volume.

*Para. 64 of Salem (II).

*Pages 55 to 66 of this volume.

*Page 91 of this volume.

*Page 57 of this volume.

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ANNEXURE V 1/6

20



**(2005) 6 Supreme Court Cases 344**

(BEFORE Y.K. SABHARWAL, D.M. DHARMADHIKARI AND TARUN CHATTERJEE, JJ.)

SALEM ADVOCATE BAR ASSOCIATION, T.N. .. Petitioner;

*Versus*

UNION OF INDIA .. Respondent.

Writ Petitions (C) No. 496 of 2002† with No. 570 of 2002, decided on August 2, 2005

A. **Civil Procedure Code, 1908 — Ss. 35, 35-A, 35-B and 95 — Costs — Importance of awarding realistic costs as a general rule, so as to deter frivolous and vexatious litigation — Mandate of S. 35(2) — Necessity to obey — General practice of courts being presently followed of directing parties to bear their own costs deprecated and disapproved — Deleterious consequences for efficiency of judicial system pointed out — Held, when S. 35(2) provides for costs to follow the event it is implicit that the costs have to be those which are reasonably incurred by a successful party, except in those cases where court in its discretion may direct otherwise by recording reasons therefor — How to determine reasonable costs indicated — Practice and Procedure — Costs — Constitution of India — Arts. 136 & 226 and 21 — Costs — Supreme Court Rules, 1966 — Or. 41 R. 1 — Costs**

B. **Civil Procedure Code, 1908 — Ss. 35, 35-A, 35-B and 95 — Costs — Scope — Quantum of — Types of expenses recoverable as "costs" — Held, costs have to be actual reasonable costs including (*1*) cost of time spent by successful party, (*2*) on transportation and lodging, if any, and (*3*) any other incidental costs, besides (*4*) the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation — High Courts to examine these aspects and make requisite rules, regulations or give practice directions so as to provide appropriate guidelines for subordinate courts to follow — Practice and Procedure — Costs — Constitution of India — Arts. 136 & 226 and 21 — Costs — Supreme Court Rules, 1966 — Or. 41 R. 1 — Costs**

Disposing of the appeal in the terms below, the Supreme Court

*Held* :

Sections 35, 35-A and 95 deal with three different aspects of the award of costs and compensation. Under Section 95 costs can be awarded up to Rs 50,000 and under Section 35-A the costs awardable are up to Rs 3000. The award of the costs of the suit is in the discretion of the court. In Sections 35 and 35-B, there is no upper limit of amount of costs awardable. (Para 36)

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) CPC. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise

† Under Article 32 of the Constitution

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21



by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow. (Para 37)

[**Ed.**: *See also* editorial note to para 37 at pp. 370 herein.]

C. **Constitution of India — Arts. 247, 246 and Sch. VII List I Entry 95, List III Entry 46 and List II Entry 65 — Funding for establishment of courts subordinate to High Court — Obligation of Central Government — Judicial impact assessment necessary of legislation introduced either in Parliament or State Legislatures — Scope of, delineated and need for, stressed — Financial memorandum attached to each Bill must also estimate budgetary requirements for dealing with cases likely to arise on it becoming an Act — Directions issued to Central Government to examine the above and submit a report within four months of this order**

CA. **Constitution of India — Art. 21 — Right to speedy justice — Adequacy of judicial infrastructure**

Having regard to the constitutional obligation to provide fair, quick and speedy justice the Central Government is directed to examine and submit a report to the Supreme Court within four months with respect to the suggestions that (*I*) the Central Government has to provide substantial funds for establishing courts which are subordinate to the High Court, and the Planning Commission and the Finance Commission must make adequate provisions therefor, and that (*II*) there must be "judicial impact assessment", as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far, in the last fifty years such judicial impact assessment has never been made by any legislature or by Parliament in our country. (Paras 50 and 48)

D. **Civil Procedure Code, 1908 — S. 39(4) [as inserted by Act 22 of 2002 w.e.f. 1-7-2002], Or. 21 Rr. 3 and 48 — Power of court to execute decree outside its jurisdiction — Effect of insertion of S. 39(4) — Held, other provisions allowing the same not diluted**

Section 39 does not authorise the court to execute the decree outside its jurisdiction, but it does not dilute the other provisions giving such power on compliance with the conditions stipulated in those provisions. Thus, the provisions, such as, Order 21 Rule 3 or Order 21 Rule 48 which provide differently, would not be affected by Section 39(4) CPC. (Para 24)

E. **Civil Procedure Code, 1908 — S. 64(2) [as inserted by Act 22 of 2002 w.e.f. 1-7-2002] — Validity, scope and object of insertion of — Held, there is no ambiguity therein**

The concept of registration introduced in Section 64(2) has been introduced to prevent false and frivolous cases of contracts being set up with a view to

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22



defeat the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid. If it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in Section 64(2). (Para 25)

F. **Civil Procedure Code, 1908 — S. 80 — Two months' notice period under — Object of — Duty to reply — Object and scope — Duties of Govts. or departments or other statutory bodies to send a reply properly dealing with all material points and issues raised therein, pointed out and rationale for, explained — Widespread practice of non-sending of, or of vague and evasive replies, strongly deprecated — All Governments, State or Central and other authorities concerned, directed to nominate, within three months, officer who would be made responsible to ensure that proper replies are sent within period stipulated after due application of mind — In default of said duties of reply, court to ordinarily award heavy costs against Govt. and direct it to take appropriate action against officer concerned, including recovery of costs from officer(s) concerned — Public Accountability and Vigilance — Govt. Depts./PSUs — Govt. Officers — Accountability — Constitution of India — Art. 21 — Right to speedy justice — Unnecessary suits against Govt. — Curtailment of**

The two months' period mentioned in Section 80 has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail litigation. The object is also to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefor, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, government departments or statutory authorities are defendants in a large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in a large number of cases either the notice is not replied to or in the few cases where a reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 CPC and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expenses and costs to the exchequer as well. A proper reply can result in reduction of litigation between the State and the citizens. In case a proper reply is sent either the claim in the notice may be admitted or the area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80. (Para 38)

These provisions cast an implied duty on all Governments and States and statutory authorities concerned to send appropriate reply to such notices. Having regard to the existing state of affairs it is directed that all Governments, Central or State or other authorities concerned, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the court finds that either the notice has not been replied to or the reply is

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23



evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy costs against the Government and direct it to take appropriate action against the officer concerned including recovery of costs from him. (Para 39)

G. **Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A [as inserted by Act 46 of 1999 w.e.f. 1-7-2002] — Formulation of terms of settlement and reference to ADR by Court — Mandatory or directory (on the conditions therefor being fulfilled) — Held, is mandatory — Only the requirement of reformulation of the terms of a possible settlement is directory being governed by the word "may" — If there exists element of settlement which may be acceptable to the parties, they "shall" be made to apply their mind so as to opt for one or other of the four ADR modes specified in S. 89, and if the parties do not agree, the Court shall so refer them — Interpretation of Statutes — Subsidiary rules — Mandatory or directory — Use of "shall" and "may" — Instance of — Constitution of India — Art. 21 — Right to fair, speedy and inexpensive justice — Recourse to ADR — Facilitation and encouragement of**

As can be seen from Section 89, its first part uses the word "shall" when it stipulates that the "Court shall formulate terms of settlement". The use of the word "may" in later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the 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 the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A 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 the ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarised in the terms of settlement formulated or reformulated in terms of Section 89. (Para 55)

GA. **Constitution of India — Art. 21 — Right to fair, speedy and inexpensive justice — Adoption of Model Case Flow Management Rules [set out in para 68 herein] to expedite justice delivery and dispute resolution — High Courts directed to examine the said draft Rules expeditiously and to finalise the same within four months of this order — Registrars General, Central Government and State/UTs directed to file progress reports in regard to action taken within four months — Constitution of India — Art. 136 — Compliance — Orders given to ensure**

H. **Civil Procedure Code, 1908 — Ss. 89(2)(a) & (b) and Or. 10 Rr. 1-A to 1-C [as inserted by Act 46 of 1999 w.e.f. 1-7-2002] and Part X (Ss. 121 to 131) — Arbitration or conciliation of dispute or resolution thereof by Lok Adalat, on reference under Ss. 89(2)(a) & (b) — Rules applicable, held, are rules framed under Part X CPC and not the rules framed under the Arbitration and Conciliation Act, 1996 or Legal Services Authorities Act, 1987 — Reason for, explained — High Courts directed to examine draft Civil Procedure ADR and Mediation Rules [set out in para 65 herein] expeditiously and to finalise the same within four months of this order — Registrars General, Central Government and State/UTs directed to file**

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24



**progress reports in regard to action taken within four months — Arbitration and Conciliation Act, 1996 — Ss. 82 and 84 — Legal Services Authorities Act, 1987 — Ss. 27 to 30**

I. **Civil Procedure Code, 1908 — S. 89(2)(a) [as inserted by Act 46 of 1999 w.e.f. 1-7-2002] — Applicability of Arbitration and Conciliation Act, 1996 to dispute referred to arbitration or conciliation under S. 89(2)(a) — Held, 1996 Act would apply only from stage after reference and not before stage of reference — Reason for, explained**

J. **Civil Procedure Code, 1908 — S. 89(2)(b) [as inserted by Act 46 of 1999 w.e.f. 1-7-2002] — Applicability of Legal Services Authority Act, 1987, to dispute referred to Lok Adalat under S. 89(2)(b) — Held, 1987 Act would apply only from stage after reference and not before stage of reference — Reason for, explained**

The draft ADR and Mediation Rules [set out in para 65 herein] having been finalised by the Committee, it is for the respective High Courts to take appropriate steps for making the Civil Procedure Alternative Dispute Resolution and Mediation Rules in exercise of the rule-making power subject to modifications, if any, which may be considered relevant. The High Courts can examine the Model Case Flow Management Rules [set out in para 68 herein], discuss the matter and consider the question of adopting or making the Model Case Law Management Rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice. It is hoped that the High Courts in the country would be in a position to examine the aforesaid Rules expeditiously and would be able to finalise the Rules within a period of four months. The Registrars General, Central Government and State/Union Territories shall file the progress report in regard to the action taken within a period of four months. (Paras 64, 65, 67, 69 and 71)

*P. Anand Gajapathi Raju* v. *P.V.G. Raju*, (2000) 4 SCC 539, *relied on*

The 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 CPC where the Court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration. The procedure for option to arbitration among four ADRs is not contemplated by the 1996 Act and, therefore, Section 82 or 84 has no applicability where parties agree to go for arbitration under Section 89 CPC. For the purposes of Section 89 and Order 10 Rules 1-A, 1-B and 1-C, the relevant Sections in Part X CPC enable the High Court to frame rules. If reference is made to arbitration under Section 89 CPC, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties. On the same analogy, the 1996 Act in relation to conciliation would apply only after the stage of reference to conciliation. Thus, there is no impediment in the ADR Rules being framed in relation to the civil court as contemplated in Section 89 up to the stage of reference to ADR. (Para 56)

Applying the same analogy, the Legal Services Authority Act, 1987 or the rules framed thereunder by the State Governments cannot act as impediment to the High Court in making rules under Part X CPC covering the manner in which option to the Lok Adalat can be made as one of the modes provided in Section 89. The 1987 Act also does not deal with the aspect of exercising option to one

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25



of the four ADR methods mentioned in Section 89. Section 89 makes applicable the 1996 Act and the 1987 Act from the stage after exercise of options and making of reference. (Para 56)

a

**K. Civil Procedure Code, 1908 — S. 89(2)(d) and Or. 1 R. 10-C [as inserted by Act 46 of 1999 w.e.f. 1-7-2002] — Mediation — Role of court on success and on failure of mediation — Held, court is not involved in actual mediation/conciliation — S. 89(2)(d) only means that when mediation succeeds, court may pass a decree in accordance with terms of settlement accepted by the parties and may execute it, if the parties so wish —** b **However, if the parties do not want the settlement recorded or decree passed, they can inform the court accordingly — Further, if mediation fails, the referring court is not barred from hearing the matter thereafter**

**L. Civil Procedure Code, 1908 — S. 89(2) — Nature of proceedings under the four alternatives under — Held, the same are meant to be actions of persons or institutions outside court and not before the court**

It is evident that all the four alternatives, namely, arbitration, conciliation, c judicial settlement including settlement through the Lok Adalat, and mediation are meant to be the action of persons or institutions outside the court and not before the court. Order 10 Rule 1-C speaks of the "Conciliation Forum" referring back the dispute to the court. In fact, the court is not involved in the actual mediation/conciliation. Section 89(2)(*d*) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to d the court and the court, after giving notice and hearing to the parties, "effect" the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, there is no question of the court, which refers the matter to mediation/conciliation, being debarred from hearing the matter where settlement is not arrived at. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be a settlement, and on that ground he cannot be treated to e be disqualified to try the suit afterwards, if no settlement is arrived at between the parties. (Para 57)

When the parties come to a settlement upon a reference made by the court for mediation and the parties want the same, there has to be some public record of the manner in which the suit is disposed of and, therefore, the court must first record the settlement and pass a decree in terms thereof and, if necessary, f proceed to execute it in accordance with law. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that the settlement can be implemented even without a decree. In such eventuality, nothing prevents them from informing the court that the suit may be dismissed as a dispute has been settled between the parties outside the court. (Para 62)

**M. Civil Procedure Code, 1908 — Ss. 89(2)(a)&(d) — Mediation and** g **conciliation — Difference between — Held, in conciliation there is a little more latitude and a conciliator can suggest some terms of settlement also — Words and phrases — Arbitration and Conciliation Act, 1996 — Ss. 61 and 67 (Para 61)**

**N. Civil Procedure Code, 1908 — Ss. 89(2)(a) & (d) — Panel of mediators and conciliators — High Courts and District Courts directed to take appropriate steps to constitute a panel of, so as to facilitate** h **conciliation/mediation where parties are unable to reach a consensus on an agreed name — Arbitration — Arbitration and Conciliation Act, 1996 —**

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26



**S. 61 — Constitution of India — Art. 21 — Right to fair, speedy and inexpensive justice — Recourse to ADR — Facilitation and encouragement of (Para 59)**

O. **Civil Procedure Code, 1908 — S. 89 and Part X (Ss. 121-131) — Family Court proceedings referred to ADR under — Rules applicable — Held, ADR rules framed under Part X CPC to supplement rules made under Family Courts Act, 1984 — Reason for, explained — Family Law — Family Courts Act, 1984 — Ss. 21 to 23 and 10 (Para 60)**

P. **Civil Procedure Code, 1908 — Ss. 89(2)(a) & (d) — Expenditure on compulsory reference to mediation/conciliation under — Central Govt. directed to examine suggestion that the same be borne by the Govt., and if agreeable, to request Planning and Finance Commissions to make specific financial allocation for the judiciary in this regard — In case Central Govt. had any reservations, the same to be placed before Supreme Court within four months (Para 58)**

Q. **Civil Procedure Code, 1908 — S. 89 — Refund of court fee on reference to ADR — State Governments directed to amend laws on lines of amendment made in Central Court Fees Act by Act 46 of 1999 — Court Fees (Para 63)**

R. **Civil Procedure Code, 1908 — S. 115 [as amended by Act 46 of 1999 w.e.f. 1-7-2002] — Held, said amendment does not affect jurisdiction of High Courts under Arts. 226 and 227 of the Constitution — Said jurisdiction exists, untrammelled and is available to be exercised subject to rules of self-discipline and practice which are well settled (Para 40)**

*Surya Dev Rai* v. *Ram Chander Rai*, (2003) 6 SCC 675, *followed*

S. **Civil Procedure Code, 1908 — S. 148 [as amended by Act 46 of 1999 w.e.f. 1-7-2002] — Enlargement of time under — Upper limit of 30 days introduced by amendment — Mandatory or directory — Held, extension beyond 30 days is permissible if sufficient cause exists or if the act could not be performed within 30 days for reasons beyond the control of the party — Inherent power of court is saved — Clarified that S. 148 does not deal with cases to which Limitation Act, 1963 applies — Limitation Act, 1963 — Applicability (Paras 41 and 43)**

*Mahanth Ram Das* v. *Ganga Das*, (1961) 3 SCR 763 : AIR 1961 SC 882, *relied on*

T. **Civil Procedure Code, 1908 — Or. 5 Rr. 9 and 9-A [as amended/inserted by Act 22 of 2002 w.e.f. 1-7-2002] — Service of summons by courier and at instance of plaintiff under — Held, permissible and provision for, is valid — Rationale for introduction of provisions in respect of, discussed — Precautions to be taken against false reports of service — Rules, regulations to be made, and approach of court, prescribed — High Courts directed to issue requisite guidelines to trial courts by framing appropriate rules, orders, regulations or practice directions, expeditiously — Practice and Procedure — Notice/summons — Permissible modes**

The problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that defendants have been avoiding to accept summons. There have been serious problems in process serving agencies in various courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier. There is, however, a danger of false reports of service. It is required to be adequately guarded against. The courts

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27.



shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of the person effecting service shall state as to who all were present at that time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if an affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be blacklisted. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial courts by framing appropriate rules, orders, regulations or practice directions. (Para 28)

U. **Civil Procedure Code, 1908 — Or. 6 Rr. 15(4) & 17 and S. 26(2) — Affidavit in support of pleadings (and on amendment thereof) — Requirement of — Held, is not illegal and unnecessary — The same has the effect of fixing additional responsibility on the deponent as to truth of facts stated in the pleadings — However, clarified, such affidavit would not be evidence for purpose of the trial — Moreover, on amendment of the pleadings, a fresh affidavit to be filed in consonance therewith — Evidence Act, 1872, S. 5 — Practice and Procedure — Affidavit (Para 4)**

V. **Civil Procedure Code, 1908 — Or. 6 R. 17 proviso [as inserted by Act 22 of 2002 w.e.f. 1-7-2002] — Scope, object, effect and legality — Curtailment of discretion of court to allow amendment of pleadings "at any stage" under — Extent — Held, Or. 6 R. 17 proviso to some extent curtails absolute discretion of court to allow amendment at any stage — Now, for amendments sought after commencement of trial it has to be shown that in spite of due diligence amendment sought could not have been sought earlier — Object is to prevent frivolous applications filed to delay trial — There is no illegality therein — Constitution of India — Art. 21 — Speedy justice — Right to — Curtailment of discretion to allow amendments to pleadings (Para 26)**

W. **Civil Procedure Code, 1908 — Or. 7 R. 14(4) — Words "plaintiff's witnesses", held, have been mentioned as a result of mistake of legislature and ought to be "defendant's witnesses" — Till a legislative change is made, the words "plaintiff's witnesses" are to be read as "defendant's witnesses" (Paras 34 and 35)**

X. **Civil Procedure Code, 1908 — Or. 8 R. 1 and proviso thereto r/w Or. 8 R. 10 [as inserted by Act 22 of 2002 w.e.f. 1-7-2002] — Word "shall" occurring in Or. 8 R. 1 and proviso thereto — Outer limit of 90 days specified under — Nature and effect of — Power of court to pass such order as it thinks fit under Or. 8 R. 10 — Significance of — Held, Or. 8 R. 1 and proviso thereto are directory in character and not mandatory — Rationale for, explained in detail — Hence in exceptional cases [see Shortnote Y, below], court may permit filing of written statement beyond upper limit of 90 days — Interpretation of Statutes — Subsidiary rules — Mandatory or directory — Constitution of India — Art. 21 — Speedy justice — Right to — Written statement — Prompt filing of**

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28



**Y. Civil Procedure Code, 1908 — Or. 8 R. 1 and proviso thereto r/w Or. 8 R. 10 [as amended by Act 22 of 2002 w.e.f. 1-7-2002] and Ss. 35-A and 35-B — Power of court to permit filing of WS beyond upper limit of 90 days — When may be exercised — Held, not in routine cases and only in exceptionally hard cases — Discretion of court to extend time is not to be so frequently and routinely exercised so as to nullify period fixed by Or. 8 R. 1 and proviso thereto**

The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. (Para 20)

The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. The object which is required to be served by this provision and its design and context in which it is enacted has to be ascertained. The rule in question being one of procedure is made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure is the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice. (Para 20)

In construing this provision, support can also be had from Order 8 Rule 10. On failure to file written statement under this provision, the court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to the suit as it thinks fit. In the context of the provision, despite use of the word "shall" in Order 8 Rule 1, the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if the written statement is not filed and instead pass such order as it may think fit in relation to the suit in Order 8 Rule 10. In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Order 8 Rule 10, the court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. (Para 21)

However, it is necessary to clarify that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1. (Para 21)

*Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur*, (1965) 1 SCR 970 : AIR 1965 SC 895; *Sangram Singh* v. *Election Tribunal, Kotah*, (1955) 2 SCR 1 : AIR 1955 SC 425; *Topline Shoes Ltd.* v. *Corpn. Bank*, (2002) 6 SCC 33, *relied on*

[**Ed.**: *See also* Short Notes E to J in *Kailash* v. *Nanhku*, (2005) 4 SCC 480 wherein this was the only question before the Supreme Court (though in the context of election petitions) and wherein a three-Judge Bench has come to exactly the same conclusion. *See* especially Short Notes F and G therein wherein the Court has dealt in detail with the issue of how to deal with defendants bent on abusing the process of court and delaying proceedings.]

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Page 10 Wednesday, January 10, 2018
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29



**Z. Civil Procedure Code, 1908 — Or. 9 R. 5 [as amended by Act 46 of 1999 w.e.f. 1-7-2002] — Period of seven days mentioned under — Held, is clearly directory (Para 44)**

a

**ZA. Civil Procedure Code, 1908 — Or. 11 R. 15 [as amended by Act 46 of 1999 w.e.f. 1-7-2002] — Confining of inspection of documents to time "at or before the settlement of issues" — Effect — Held, is directory — It does not mean that inspection cannot be allowed after the settlement of issues (Para 45)**

[Ed.: It would seem that the Supreme Court's words of caution expressed while interpreting Or. 8 R. 1 and proviso thereto, that discretion of court to extend time is not to be so frequently and routinely exercised so as to nullify period fixed by legislature, would be equally applicable in both the above cases. *See* Shortnote Y, above.]

b

**ZB. Civil Procedure Code, 1908 — Or. 17 Rr. 1(1) proviso and 1(2) [as amended by Act 46 of 1999 w.e.f. 1-7-2002], Or. 17 R. 1(2) proviso (b) and Ss. 35-A and 35-B — Right to adjournment — If any — Maximal limit of three adjournments imposed under Or. 17 R. 1(1) proviso — Mandatory or directory — More than three adjournments, when to be granted — Conditions/costs that may be imposed — Held, more than three adjournments may be granted in case it can be shown that circumstances are beyond the control of a party — Ultimately, it would depend on facts and circumstances of each case — Rationale for, explained and instances discussed — Further held, even in cases which may not strictly come within the category of "circumstances beyond control of a party", court by resorting to provision of higher costs, including punitive costs in the discretion of the court, may grant adjournments beyond three having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case — However, cautioned that grant of any adjournment is not a right of a party — Grant of adjournment has to be on showing special and extraordinary circumstances and cannot be routine, and legislative intent to restrict grant thereof is to be kept in mind — Practice and Procedure — Adjournment — Constitution of India — Art. 136 — Supreme Court Rules, 1966 — Or. 41 R. 1 — Constitution of India — Art. 21 — Speedy justice — Right to — Adjournments — Restrictions on**

c d e

**ZC. Civil Procedure Code, 1908 — Or. 17 R. 1(2) [as amended by Act 46 of 1999 w.e.f. 1-7-2002] and Ss. 35-A and 35-B — Costs — Imposition of, for grant of adjournment — Nature of requirement — Mandatory or directory — Costs that must be awarded — Nature, scope and quantum — Held, under Or. 17 R. 1(2) the awarding of costs has been made mandatory — Rationale for, explained — Further held, ordinarily where costs or higher costs for adjournment are awarded, the same should be realistic, and as far as possible, actual costs that had to be incurred by the other party shall be awarded where the adjournment being sought is found to be avoidable — Practice and Procedure — Adjournment — Constitution of India — Art. 136 — Supreme Court Rules, 1966 — Or. 41 R. 1 — Constitution of India — Art. 21 — Speedy justice — Right to — Adjournments — Award of costs against**

f g

The proviso to Order 17 Rule 1(1) and Order 17 Rule 1(2) have to be read together. So read, Order 17 does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on the number of adjournments to be granted. It cannot be said that

h

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30



even if the circumstances are beyond the control of a party, after having obtained the third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalised on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though the circumstances may be beyond the control of a party, further adjournment cannot be granted because of the restriction of three adjournments as provided in the proviso to Order 17 Rule 1. In some extreme cases, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (for man made or natural calamity). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the court would decide to grant or refuse adjournment. (Para 30)

However, grant of any adjournment, let alone the first, second or third adjournment, is not a right of a party. The grant of adjournment by a court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering the prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict the grant of adjournments. (Para 31)

To save the proviso to Order 17 Rule (1) from the vice of Article 14 of the Constitution, it is necessary to read it down so as not to take away the discretion of the court in the extreme hard cases noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances which are beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the court by resorting to the provision of higher costs which can also include punitive costs in the discretion of the court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with reference to peculiar facts of a case. (Para 31)

Under Order 17 Rule 1(2) the awarding of costs has been made mandatory. Costs that can be awarded are of two types. First, costs occasioned by the adjournment and second such higher costs as the court deems fit. The provision for costs and higher costs has been made because of the practice having been developed to award only nominal costs even when adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic, and as far as possible actual costs that had to be incurred by the other party shall be awarded where the adjournment is found to be avoidable, but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason. (Paras 29 and 31)

ZD. **Civil Procedure Code, 1908 — Or. 18 R. 2 [as amended by Act 46 of 1999 w.e.f. 1-7-2002] and S. 151 — Power of court to call for any witness at any stage, suo motu or on prayer of party — Nature and scope — Held, the same being an inherent power of court is preserved and is not affected by deletion of Or. 18 R. 2(4) by 1999 amendment — Evidence Act, 1872, S. 165** **(Para 32)**

ZE. **Civil Procedure Code, 1908 — Or. 18 Rr. 2(3-A) to (3-D) [as inserted by Act 22 of 2002 w.e.f. 1-7-2002] — Object of insertion of**

The object of filing written arguments or fixing the time-limit of oral arguments is with a view to save time of the court. The adherence to the requirement of Order 18 Rule 2 sub-rules (3-A) to (3-D) is likely to help in administering fair and speedy justice. (Para 33)

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31



ZF. **Civil Procedure Code, 1908 — Or. 18 R. 4(1) and proviso thereto [as amended by Act 22 of 2002 w.e.f. 1-7-2002] and Or. 19 Rr. 1 & 2 — Examination-in-chief to be on affidavit in every case — Requirement of, in every case under — Validity and scope — Held, said requirement is valid — Clarified, in light of Or. 18 R. 4(1) proviso, that there is no question of inadmissible documents being read into evidence — Further, in appropriate cases court may permit examination-in-chief to be recorded in court — Constitution of India — Art. 21 — Speedy justice — Right to — Efficient modes for taking evidence**

ZG. **Civil Procedure Code, 1908 — Or. 18 R. 4(2) and proviso thereto [as amended by Act 22 of 2002 w.e.f. 1-7-2002] and Or. 26 R. 4-A [as inserted by Act 46 of 1999] — Power to permit cross-examination or re-examination on Commission under — Validity and scope — Held, said power is valid — Principles for exercise of said power, laid down — Illustrative cases, discussed — Held, in cases which are "complex", prayer for recording evidence on Commission may be declined — Clarified, that cost of recording of evidence on Commission, by facilitating and expediting litigation was likely to *decrease* net financial burden of litigation and not increase it — Practice and Procedure — Commissions — Constitution of India — Art. 21 — Speedy justice — Right to — Efficient modes for taking evidence**

ZH. **Civil Procedure Code, 1908 — Or. 18 R. 4 [as amended by Act 22 of 2002, w.e.f. 1-7-2002] and Or. 26 R. 4-A [as inserted by Act 46 of 1999 w.e.f. 1-7-2002] — Recording of evidence on Commission — Original documents — Duties of Commission in respect of, laid down — High Courts directed to frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of documents when same were before Commission**

The court has already been vested with the power to permit affidavits to be filed as evidence as provided in Order 19 Rules 1 and 2 CPC. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order 18 Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order 18 Rule 4 has been examined and its validity upheld in *Salem (I)*, (2003) 1 SCC 49. In light of Order 18 Rule 4(1) proviso there is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of the examination-in-chief. Further, the trial court in appropriate cases can permit the examination-in-chief to be recorded in court. The proviso to Order 18 Rule 4(2) clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order 18 Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint a Commissioner to record the cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance,

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32



a case may involve complex questions of title, complex questions in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of Wills, etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses and the prayer for recording evidence by the Commissioner may be declined by the court. (Para 5)

*Salem Advocate Bar Assn. (I)* v. *Union of India*, (2003) 1 SCC 49, *affirmed* and *followed*

Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, generally the expenses incurred towards the fee payable to the Commissioner are likely to be less than the expenditure incurred for attending court on various dates for recording evidence besides the harassment and inconvenience to attend court again and again for the same purpose and, therefore, in reality in most of the cases, there would be no additional burden. (Para 6)

Undoubtedly, the Commission has to take proper care of the original documents handed over to it either by the court or filed before it during the recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in the absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the court in case long adjournments are granted and for taking back the documents before the adjourned date. (Para 12)

ZI. **Civil Procedure Code, 1908 — Or. 18 Rr. 4(2) & (4) [as amended by Act 22 of 2002 w.e.f. 1-7-2002] and Or. 26 R. 4-A [as inserted by Act 46 of 1999] — Power to permit cross-examination or re-examination on Commission under — Demeanour of witnesses — Validity of said power, held, is not affected merely because in some cases court may be deprived of benefit of watching demeanour of witnesses, especially in light of provision in Or. 18 R. 4(4) — Practice and Procedure — Commissions**

Even though when evidence is recorded by the Commissioner, the court would be deprived of the benefit of watching the demeanour of witnesses, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving the court's time taken for the said purpose, cannot be defeated merely on the ground that the court would be deprived of watching the demeanour of the witnesses. In any case Order 18 Rule 4(4) specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The court would have the benefit of the observations if made by the Commissioner. (Para 5)

ZJ. **Civil Procedure Code, 1908 — Or. 18 R. 4 [as amended by Act 22 of 2002 w.e.f. 1-7-2002] and Or. 26 R. 4-A [as inserted by Act 46 of 1999] — Commissions to record evidence under — Creation of panels of advocates for, on basis of tests conducted by High Courts therefor — Validity of — Held, is valid and to be appreciated — However, High Courts are free to adopt said practice or not — Practice and Procedure — Commissions — Constitution of India — Art. 21 — Speedy justice — Right to — Efficient modes for taking evidence (Para 6)**

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33



ZK. **Civil Procedure Code, 1908 — Or. 18 R. 4(3) [as amended by Act 22 of 2002 w.e.f. 1-7-2002], Or. 18 R. 19 and Or. 26 R. 4-A [as amended/inserted by Act 46 of 1999, w.e.f. 1-7-2002] and Or. 18 R. 5 & Or. 41 Rr. 24 to 26 — Appeals — Power to permit cross-examination or re-examination on Commission in — Validity and scope — Overriding effect of Or. 18 R. 19 — Held, court is empowered to appoint a Commission for recording evidence in appealable cases as well — Or. 18 R. 19 and Or. 26 R. 4-A would override Or. 18 Rr. 5(a) and (b) — Practice and Procedure — Appeal — Commissions — Constitution of India — Art. 21 — Speedy justice — Right to — Efficient modes for taking evidence (Paras 7 to 9)**

ZL. **Civil Procedure Code, 1908 — Or. 18 R. 4 [as amended by Act 22 of 2002 w.e.f. 1-7-2002] and Or. 26 Rr. 16 to 18 — Hostile witness — Declaration of witness as, and cross-examination of — Power of Commissioner — Scope — Power of Commissioner to declare witness as hostile, held, does not exist — Declaration of witness as hostile and cross-examination of such witness, by party calling such witness by Commissioner, held, is permissible only after obtaining permission from court under S. 154, Evidence Act, 1872**

The discretion to declare a witness hostile has not been conferred on the Commissioner. The powers delegated to the Commissioner under Order 26 Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in the court under Section 154 of the Evidence Act to declare a witness hostile. If a situation as to declaring a witness hostile arises before a Commission recording evidence, the party concerned shall have to obtain permission from the court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the court may either grant such permission or even consider to withdraw the Commission so as to itself record the remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party. (Paras 10 and 11)

ZM. **Civil Procedure Code, 1908 — S. 151, Or. 18 R. 17-A [after its deletion by Act 46 of 1999 w.e.f. 1-7-2002] and Or. 41 R. 27 — Production of evidence at later stage — Permissibility — Evidence not known to parties or which could not be produced in spite of due diligence at the time of leading of evidence — Power of court to allow adduction of, held, being inherent is unaffected by deletion of Or. 18 R. 17-A by Act 46 of 1999 — Court on being satisfied as to the above may permit leading of such evidence at a later stage on such terms as may appear to be just — Practice and Procedure — Additional evidence — Constitution of India — Art. 21 — Speedy justice — Right to — Leading of evidence at later stage**

Even before insertion of Order 18 Rule 17-A, the court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order 18 Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the court may permit leading of such evidence at a later stage on such terms as may appear to be just. (Para 13)

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34



Advocates who appeared in this case :

K. Parasaran, C.S. Vaidyanathan and Arun Mohan, Senior Advocates [K.V. Viswanathan (Amicus Curiae), with them] for the Petitioner;

T. Raja, Advocate, for the Petitioner in WP (C) No. 496 of 2002;

P.N. Puri, Advocate, for the Petitioner in WP (C) No. 570 of 2002;

Goolan, E. Vahanvati, Solicitor General for Union of India;

T.L.V. Iyer, Senior Advocate ([Devadatt Kamat, Advocate for Attorney General] Shreekant N. Terdal, Ms Priya Puri and Sanjeev Sachdeva, Advocates, with him) for BCI;

Ms Kiran Suri, Himanshu Buttan and Mali Santosh, Advocates for Intervenor in WP (C) No. 496 of 2002.

***Chronological list of cases cited*** — ***on page(s)***

1. (2003) 6 SCC 675, *Surya Dev Rai* v. *Ram Chander Rai* — 372*b-c*
2. (2003) 1 SCC 49, *Salem Advocate Bar Assn. (I)* v. *Union of India* — 358*d-e*, 359*f-g*, 359*g*, 362*a-b*
3. (2002) 6 SCC 33, *Topline Shoes Ltd.* v. *Corpn. Bank* — 363*f-g*
4. (2000) 4 SCC 539, *P. Anand Gajapathi Raju* v. *P.V.G. Raju* — 376*f*
5. (1965) 1 SCR 970 : AIR 1965 SC 895, *Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur* — 363*a*
6. (1961) 3 SCR 763 : AIR 1961 SC 882, *Mahanth Ram Das* v. *Ganga Das* — 372*g*
7. (1955) 2 SCR 1 : AIR 1955 SC 425, *Sangram Singh* v. *Election Tribunal, Kotah* — 363*c*

The Judgment of the Court was delivered by

**Y.K. SABHARWAL, J.**— The challenge made to the constitutional validity of amendments made to the Code of Civil Procedure (for short "the Code") by Amendment Acts of 1999 and 2002 was rejected by this Court (*Salem Advocate Bar Assn. (I)* v. *Union of India*[1]) but it was noticed in the judgment that modalities have to be formulated for the manner in which Section 89 of the Code and, for that matter, the other provisions which have been introduced by way of amendments, may have to be operated. For this purpose, a Committee headed by a former Judge of this Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. 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 Alternative Dispute 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 were felt in the working of the amendments, the same could be placed before the Committee which would consider the same and make necessary suggestions in its report. The Committee has filed the report.

**2.** The report is in three parts. Report 1 contains the consideration of the various grievances relating to amendments to the Code and the recommendations of the Committee. Report 2 contains the consideration of various points raised in connection with the draft rules for ADR and mediation as envisaged by Section 89 of the Code read with Order 10 Rules

1 (2003) 1 SCC 49

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35



1-A, 1-B and 1-C. It also contains model rules. Report 3 contains a conceptual appraisal of case management. It also contains the model rules of case management.

**3.** First, we will consider Report 1 which deals with the amendments made to the Code.

***REPORT I***

***Amendment inserting sub-section (2) to Section 26 and Rule 15(4) to Order 6 Rule 15***

**4.** Prior to insertion of the aforesaid provisions, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in Section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading [Order 6 Rule 15(4)]. It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings. We are unable to agree. The affidavit required to be filed under amended Section 26(2) and Order 6 Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

***Amendment of Order 18 Rule 4***

**5.** The amendment provides that in every case, the examination-in-chief of a witness shall be on affidavit. The court has already been vested with the power to permit affidavits to be filed as evidence as provided in Order 19 Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order 18 Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order 18 Rule 4 has been examined and its validity upheld in *Salem Advocate Bar Assn. case*[1]. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of the examination-in-chief. Further, in *Salem Advocate Bar Assn. case*[1] it has been held that the trial court, in appropriate cases can permit the examination-in-chief to be recorded in court. Proviso to sub-rule (2) of Rule 4 Order 18 clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order 18 Rule 4(2) is required to be exercised with great circumspection

1 *Salem Advocate Bar Assn. (I)* v. *Union of India*, (2003) 1 SCC 49

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36



having regard to the facts and circumstances of the case. It is not necessary to lay down hard-and-fast rules controlling the discretion of the court to appoint a Commissioner to record the cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex questions of title, complex questions in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of Wills, etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the court would be deprived of the benefit of watching the demeanour of witnesses. That may be so, but in our view, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving the court's time taken for the said purpose, cannot be defeated merely on the ground that the court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the court. It may also be noted that Order 18 Rule 4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The court would have the benefit of the observations if made by the Commissioner.

**6.** The report notices that in some States, advocates are being required to pass a test conducted by the High Court in the subjects of the Civil Procedure Code and the Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. We would, however, leave it to the High Courts to examine this aspect and decide whether to adopt such a procedure or not. Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, we feel that generally the expenses incurred towards the fee payable to the Commissioner are likely to be less than the expenditure incurred for attending court on various dates for recording evidence besides the harassment and inconvenience to attend court again and again for the same purpose and, therefore, in reality in most of the cases, there would be no additional burden.

**7.** Amendment to Order 18 Rules 5(*a*) and (*b*) was made in 1976 whereby it was provided that in all appealable cases evidence shall be recorded by the court. Order 18 Rule 4 was amended by Amendment Act of 1999 and again by Amendment Act of 2002. Order 18 Rule 4(3) enables the Commissioners to record evidence in all types of cases including appealable cases. The contention urged is that there is conflict between these provisions.

**8.** To examine the contention, it is also necessary to keep in view Order 18 Rule 19 which was inserted by Amendment Act of 1999. It reads as under:

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Page 18 Wednesday, January 10, 2018
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37



"19. *Power to get statements recorded on commission.*— Notwithstanding anything contained in these rules, the court may, instead of examining witnesses in open court, direct their statements to be recorded on commission under Rule 4-A of Order 26."

The aforesaid provision contains a non obstante clause. It overrides Order 18 Rule 5 which provides the court to record evidence in all appealable cases. The court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well.

**9.** Further, Order 26 Rule 4-A inserted by Amendment Act of 1999 provides that notwithstanding anything contained in the Rules, any court may in the interest of justice or for the expeditious disposal of the case or for any other reason, issue a Commission in any suit for the examination of any person resident within the local limits of the court's jurisdiction. Order 18 Rule 19 and Order 26 Rule 4-A, in our view, would override Order 18 Rules 5(*a*) and (*b*). There is, thus, no conflict.

**10.** The next question that has been raised is about the power of the Commissioner to declare a witness hostile. Order 18 Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the court at the stage of arguments. Order 18 Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 Order 26, insofar as they are applicable, shall apply to the issue, execution and return of such Commission thereunder. The discretion to declare a witness hostile has not been conferred on the Commissioner. Under Section 154 of the Evidence Act, 1872 it is the court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order 26 Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in the court under Section 154 of the Evidence Act to declare a witness hostile.

**11.** If a situation as to declaring a witness hostile arises before a Commission recording evidence, the party concerned shall have to obtain permission from the court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the Commission so as to itself record the remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party.

**12.** Another aspect is about proper care to be taken by the Commission of the original documents. Undoubtedly, the Commission has to take proper care of the original documents handed over to it either by the court or filed before it during the recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one

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Page 19 Wednesday, January 10, 2018
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38



party in the absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in case long adjournments are granted and for taking back the documents before the adjourned date.

***Additional evidence***

**13.** In *Salem Advocate Bar Assn. case*[1] it has been clarified that on deletion of Order 18 Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment i.e. 1-7-2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order 18 Rule 17-A, the court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order 18 Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the court may permit leading of such evidence at a later stage on such terms as may appear to be just.

***Order 8 Rule 1***

**14.** Order 8 Rule 1, as amended by Act 46 of 1999 provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. The rigour of this provision was reduced by Amendment Act 22 of 2002 which enables the court to extend the time for filing written statement, on recording sufficient reasons therefor, but the extension can be maximum for 90 days.

**15.** The question is whether the court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order 8 Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the court is altogether powerless to extend the time even in an exceptionally hard case.

**16.** It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order 8 Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view.

1 *Salem Advocate Bar Assn. (I)* v. *Union of India*, (2003) 1 SCC 49

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Page 20 Wednesday, January 10, 2018
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39



**17.** In *Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur*[2] a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

**18.** In *Sangram Singh* v. *Election Tribunal, Kotah*[3] considering the provisions of the Code dealing with the trial of the suits, it was opined that: (SCR pp. 8-9)

> "Now a code of procedure must be regarded as such. It is *procedure*, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to *both* sides) lest the very means designed for the furtherance of justice be used to frustrate it.
>
> Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle." (emphasis in original)

**19.** In *Topline Shoes Ltd.* v. *Corpn. Bank*[4] the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond the total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide a time-frame to file reply is really made to expedite the hearing of such matters and avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that

2 (1965) 1 SCR 970 : AIR 1965 SC 895
3 (1955) 2 SCR 1 : AIR 1955 SC 425
4 (2002) 6 SCC 33

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40



the provision is more by way of procedure to achieve the object of speedy disposal of the case.

**20.** The use of the word "shall" in Order 8 Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word "shall" is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules of procedure are the handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

**21.** In construing this provision, support can also be had from Order 8 Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the court, the court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to the suit as it thinks fit. In the context of the provision, despite use of the word "shall", the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if the written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order 8 Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 Order 8, the court in its discretion would have the power to allow the defendant to file written statement even after expiry of the period of 90 days provided in Order 8 Rule 1. There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1.[†§]

†§ **Ed.**: *See also* Short Notes E to J in *Kailash* v. *Nanhku*, (2005) 4 SCC 480 wherein this was the only question before the Supreme Court and wherein a three-Judge Bench has come to exactly the same conclusion. See especially Short Notes F and G therein wherein the Court has dealt with the issue of how to deal with defendants bent on abusing the process of court and delaying proceedings.

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41



***Section 39***

**22.** Section 39(1) of the Code provides that the court which passed a decree may, on the application of the decree-holder send it for execution to another court of competent jurisdiction. By Act 22 of 2002, Section 39(4) has been inserted providing that nothing in the section shall be deemed to authorise the court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The question is whether this newly added provision prohibits the executing court from executing a decree against a person or property outside its jurisdiction and whether this provision overrides Order 21 Rule 3 and Order 21 Rule 48 or whether these provisions continue to be an exception to Section 39(4) as was the legal position before the amendment.

**23.** Order 21 Rule 3 provides that where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure. Likewise, under Order 21 Rule 48, attachment of salary of a government servant, railway servant or servant of local authority can be made by the Court whether the judgment-debtor or the disbursing officer is or is not within the local limits of the court's jurisdiction.

**24.** Section 39 does not authorise the court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance with the conditions stipulated in those provisions. Thus, the provisions, such as, Order 21 Rule 3 or Order 21 Rule 48 which provide differently, would not be affected by Section 39(4) of the Code.

***Section 64(2)***

**25.** Section 64(2) in the Code has been inserted by Amendment Act 22 of 2002. Section 64, as it originally stood, has been renumbered as Section 64(1). Section 64(1), inter alia, provides that where an attachment has been made, any private transfer or delivery of property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. Sub-section (2) protects the aforesaid acts if made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. The concept of registration has been introduced to prevent false and frivolous cases of contracts being set up with a view to defeat the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid. If it is unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected. There is no ambiguity in sub-section (2) of Section 64.

***Order 6 Rule 17***

**26.** Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The

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42



proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

***Service through courier***

**27.** Order 5 Rule 9, inter alia, permits service of summons by party or through courier. Order 5 Rule 9(3) and Order 5 Rule 9-A permit service of summons by courier or by the plaintiff. Order 5 Rule 9(5) requires the court to declare that the summons had been duly served on the defendant on the contingencies mentioned in the provision. It is in the nature of deemed service. The apprehension expressed is that service outside the normal procedure is likely to lead to false reports of service and passing of ex parte decrees. It is further urged that the courier's report about the defendant's refusal to accept service is also likely to lead to serious malpractice and abuse.

**28.** While considering the submissions of learned counsel, it has to be borne in mind that the problem in respect of service of summons has been one of the major causes of delay in the due progress of the case. It is common knowledge that defendants have been avoiding to accept summons. There have been serious problems in process serving agencies in various courts. There can, thus, be no valid objection in giving opportunity to the plaintiff to serve the summons on the defendant or get it served through courier. There is, however, a danger of false reports of service. It is required to be adequately guarded against. The courts shall have to be very careful while dealing with a case where orders for deemed service are required to be made on the basis of endorsement of such service or refusal. The High Courts can make appropriate rules and regulations or issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. In this regard, the High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. For instance, it can be provided that the affidavit of the person effecting service shall state as to who all were present at that time and also that the affidavit shall be in the language known to the deponent. It can also be provided that if an affidavit or any endorsement as to service is found to be false, the deponent can be summarily tried and punished for perjury and the courier company can be blacklisted. The guidelines as to the relevant details to be given can be issued by the High Courts. The High Courts, it is hoped, would issue as expeditiously as possible, requisite guidelines to the trial courts by framing appropriate rules, orders, regulations or practice directions.

***Adjournments***

**29.** Order 17 of the Code relates to grant of adjournments. Two amendments have been made therein. One that adjournment shall not be granted to a party more than three times during hearing of the suit. The other relates to the costs of adjournment. The awarding of costs has been made

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43



mandatory. Costs that can be awarded are of two types. First, costs occasioned by the adjournment and second such higher costs as the court deems fit.

**30.** While examining the scope of the proviso to Order 17 Rule 1(1) that more than three adjournments shall not be granted, it is to be kept in view that the proviso to Order 17 Rule 1(2) incorporating clauses (*a*) to (*e*) by Act 104 of 1976 has been retained. Clause (*b*) stipulates that no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party. The proviso to Order 17 Rule 1(1) and Order 17 Rule 1(2) have to be read together. So read, Order 17 does not forbid grant of adjournment where the circumstances are beyond the control of the party. In such a case, there is no restriction on the number of adjournments to be granted. It cannot be said that even if the circumstances are beyond the control of a party, after having obtained the third adjournment, no further adjournment would be granted. There may be cases beyond the control of a party despite the party having obtained three adjournments. For instance, a party may be suddenly hospitalised on account of some serious ailment or there may be serious accident or some act of God leading to devastation. It cannot be said that though the circumstances may be beyond the control of a party, further adjournment cannot be granted because of the restriction of three adjournments as provided in the proviso to Order 17 Rule 1.

**31.** In some extreme cases, it may become necessary to grant adjournment despite the fact that three adjournments have already been granted (take the example of the Bhopal gas tragedy, Gujarat earthquake and riots, and devastation on account of the tsunami). Ultimately, it would depend upon the facts and circumstances of each case, on the basis whereof the court would decide to grant or refuse adjournment. The provision for costs and higher costs has been made because of the practice having been developed to award only nominal costs even when adjournment on payment of costs is granted. Ordinarily, where the costs or higher costs are awarded, the same should be realistic, and as far as possible actual costs that had to be incurred by the other party shall be awarded where the adjournment is found to be avoidable, but is being granted on account of either negligence or casual approach of a party or is being sought to delay the progress of the case or on any such reason. Further, to save the proviso to Order 17 Rule 1(1) from the vice of Article 14 of the Constitution, it is necessary to read it down so as not to take away the discretion of the court in the extreme hard cases noted above. The limitation of three adjournments would not apply where adjournment is to be granted on account of circumstances which are beyond the control of a party. Even in cases which may not strictly come within the category of circumstances beyond the control of a party, the court by resorting to the provision of higher costs which can also include punitive costs in the discretion of the court, adjournment beyond three can be granted having regard to the injustice that may result on refusal thereof, with

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44



reference to peculiar facts of a case. We may, however, add that grant of any adjournment, let alone the first, second or third adjournment, is not a right of a party. The grant of adjournment by a court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering the prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict the grant of adjournments.

***Order 18 Rule 2***

**32.** Order 18 Rule 2(4) which was inserted by Act 104 of 1976 has been omitted by Act 46 of 1999. Under the said rule, the court could direct or permit any party, to examine any party or any witness at any stage. The effect of deletion is the restoration of the status quo ante. This means that law that was prevalent prior to the 1976 amendment, would govern. The principles as noticed hereinbefore in regard to deletion of Order 18 Rule 17(*a*) would apply to the deletion of this provision as well. Even prior to the insertion of Order 18 Rule 2(4), such a permission could be granted by the court in its discretion. The provision was inserted in 1976 by way of caution. The omission of Order 18 Rule 2(4) by the 1999 amendment does not take away the court's inherent power to call for any witness at any stage either suo motu or on the prayer of a party invoking the inherent powers of the court.

**33.** In Order 18 Rule 2 sub-rules (3-A) to (3-D) have been inserted by Act 22 of 2002. The object of filing written arguments or fixing the time-limit of oral arguments is with a view to save time of the court. The adherence to the requirement of these Rules is likely to help in administering fair and speedy justice.

***Order 7 Rule 14***

**34.** Order 7 Rule 14 deals with production of documents which are the basis of the suit or the documents in the plaintiff's possession or power. These documents are to be entered in the list of documents and produced in the court with the plaint. Order 7 Rule 14(3) requires leave of the court to be obtained for production of the documents later. Order 7 Rule 14(4) reads as under:

> "14. (4) Nothing in this rule shall apply to document produced for the cross-examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

In the aforesaid Rule, it is evident that the words "plaintiff's witnesses" have been mentioned as a result of a mistake that seems to have been committed by the legislature. The words ought to be "defendant's witnesses". There is a similar provision in Order 8 Rule 1-A(4) which applies to a defendant. It reads as under:

> "1-A. (4) Nothing in this rule shall apply to documents—
> (*a*) produced for the cross-examination of the plaintiff's witnesses, or
> (*b*) handed over to a witness merely to refresh his memory."

**35.** Order 7 relates to the production of documents by the plaintiff whereas Order 8 relates to production of documents by the defendant. Under

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45



Order 8 Rule 1-A(4) a document not produced by the defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of "defendant's witnesses", the words "plaintiff's witnesses" have been mentioned in Order 7 Rule 14(4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words "plaintiff's witnesses", would be read as "defendant's witnesses" in Order 7 Rule 14(4). We, however, hope that the mistake would be expeditiously corrected by the legislature.

***Costs***

**36.** Section 35 of the Code deals with the award of costs and Section 35-A with the award of compensatory costs in respect of false or vexatious claims or defences. Section 95 deals with grant of compensation for obtaining arrest, attachment or injunction on insufficient grounds. These three sections deal with three different aspects of the award of costs and compensation. Under Section 95 costs can be awarded up to Rs 50,000 and under Section 35-A, the costs awardable are up to Rs 3000. Section 35-B provides for the award of costs for causing delay where a party fails to take the step which he was required by or under the Code to take or obtains an adjournment for taking such step or for producing evidence or on any other ground. In the circumstances mentioned in Section 35-B an order may be made requiring the defaulting party to pay to the other party such costs as would, in the opinion of the court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of the suit or the defence. Section 35 postulates that the costs shall follow the event and if not, reasons thereof shall be stated. The award of the costs of the suit is in the discretion of the court. In Sections 35 and 35-B, there is no upper limit of amount of costs awardable.

**37.** Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the

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46



High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.§§

*Section 80*

**38.** Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the court may not insist on the rigid rule of prior notice. The two months' period has been provided for so that the

§§ **Ed.**: The importance of awarding true costs in discouraging frivolous and vexatious litigation cannot be emphasised enough. The Supreme Court has in recent cases awarded costs or exemplary costs against parties that had been prosecuting various proceedings only with a view to prolong them or to vex the other party. *See*

| | | |
|---|---|---|
| (2005) 5 SCC 375, *Short Note* J | (2005) 5 SCC 548, *Short Note* D | (2005) 5 SCC 543, *Short Note* C |
| (2005) 5 SCC 527, *Short Note* A | (2005) 4 SCC 605, *Short Note* E | (2005) 4 SCC 191, *Short Note* A |
| (2005) 4 SCC 480, *Short Note* G | (2005) 4 SCC 99, *Short Note* A | (2005) 4 SCC 315, *Short Note* C |
| (2005) 2 SCC 244, *Short Note* E | (2005) 2 SCC 126 | (2005) 1 SCC 590, *Short Notes* C and D |
| (2005) 1 SCC 590, *Short Note* A | (2005) 1 SCC 705, *Short Note* B | (2005) 2 SCC 217, *Short Note* A |
| (2005) 9 SCC 335, *Short Note* E | (2004) 12 SCC 469, *Short Note* B | (2005) 9 SCC 592, *Short Note* C |
| (2004) 5 SCC 353, *Short Note* H | (2004) 10 SCC 649, *Short Note* C | (2004) 5 SCC 175 |
| (2004) 6 SCC 786, *Short Note* H | (2004) 5 SCC 90, *Short Note* D | (2004) 6 SCC 299, *Short Note* A |
| (2004) 3 SCC 437 | (2004) 3 SCC 363, *Short Notes* C and D | (2004) 3 SCC 178, *Short Note* G |
| (2004) 1 SCC 551, *Short Note* D | (2004) 2 SCC 297, para 58 | (2004) 1 SCC 530, *Short Note* D |
| (2004) 1 SCC 712, *Short Note* V | (2004) 1 SCC 656, *Short Note* C | (2004) 10 SCC 65, *Short Note* C |
| (2004) 3 SCC 349, *Short Notes* B and C | (2004) 1 SCC 287, *Short Note* F | (2003) 7 SCC 270, *Short Note* B |
| (2004) 10 SCC 129 | (2003) 9 SCC 401, *Short Note* F | (2003) 6 SCC 595, *Short Note* N |
| (2003) 6 SCC 423, *Short Note* G | (2003) 3 SCC 117, *Short Note* B. | |

It is interesting to note the considerations that the court must take into account in awarding costs in England. Relevant portions of Rule 44.3 of the English Civil Procedure Rules, March 2005, 39th Update have been extracted below, but the entire Civil Procedure Rules can be obtained from: http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm

"*44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs.*— (*1*) – (*3*) * * *

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including —

(*a*) the conduct of all the parties;

(*b*) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(*c*) * * *

(5) The conduct of the parties includes —

(*a*) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;

(*b*) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(*c*) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(*d*) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

*See also* Part (A), Rules II.8 and III.7 relating to costs in the Model Case Flow Management Rules set out on pp. 391 et seq. herein.

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Page 28 Wednesday, January 10, 2018
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47



Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail litigation. The object is also to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the Governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, government departments or statutory authorities are defendants in a large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in a large number of cases either the notice is not replied to or in the few cases where a reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expenses and costs to the exchequer as well. A proper reply can result in reduction of litigation between the State and the citizens. In case a proper reply is sent either the claim in the notice may be admitted or the area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

**39.** These provisions cast an implied duty on all Governments and States and statutory authorities concerned to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all Governments, Central or State or other authorities concerned, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the court finds that either the notice has not been replied to or the reply is evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy costs against the Government and direct it to take appropriate action against the officer concerned including recovery of costs from him.

***Section 115***

**40.** Section 115 of the Code vests power of revision in the High Court over courts subordinate to it. Proviso to Section 115(1) of the Code before the amendment by Act 46 of 1999 read as under:

> "Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—
>
> (*a*) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

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Page 29 Wednesday, January 10, 2018
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48



(*b*) the order, if allowed to stand, would occasion a *failure of justice or cause irreparable injury* to the party against whom it was made."

(emphasis supplied)

Now, the aforesaid proviso has been substituted by the following proviso:

"Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

The aforesaid clause (*b*) stands omitted. The question is about the constitutional powers of the High Courts under Article 227 on account of omission made in Section 115 of the Code. The question stands settled by a decision of this Court in *Surya Dev Rai* v. *Ram Chander Rai*[5] holding that the power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. Curtailment of revisional jurisdiction of the High Court under Section 115 of the Code does not take away and could not have taken away the constitutional jurisdiction of the High Court. The power exists, untrammelled by the amendment in Section 115 and is available to be exercised subject to rules of self-discipline and practice which are as well settled.

***Section 148***

**41.** The amendment made in Section 148 affects the power of the court to enlarge time that may have been fixed or granted by the court for the doing of any act prescribed or allowed by the Code. The amendment provides that the period shall not exceed 30 days in total. Before amendment, there was no such restriction of time. Whether the court has no inherent power to extend the time beyond 30 days is the question. We have no doubt that the upper limit fixed in Section 148 cannot take away the inherent power of the court to pass orders as may be necessary for the ends of justice or to prevent abuse of process of the court. The rigid operation of the section would lead to absurdity. Section 151 has, therefore, to be allowed to operate fully. Extension beyond maximum of 30 days, thus, can be permitted if the act could not be performed within 30 days for reasons beyond the control of the party. We are not dealing with a case where time for doing an act has been prescribed under the provisions of the Limitation Act which cannot be extended either under Section 148 or Section 151. We are dealing with a case where the time is fixed or granted by the court for performance of an act prescribed or allowed by the court.

**42.** In *Mahanth Ram Das* v. *Ganga Das*[6] this Court considered a case where an order was passed by the Court that if the court fee was not paid by a particular day, the suit shall stand dismissed. It was a self-operating order leading to dismissal of the suit. The party's application filed under Sections

5 (2003) 6 SCC 675

6 (1961) 3 SCR 763 : AIR 1961 SC 882

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Page 30 Wednesday, January 10, 2018
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49



148 and 151 of the Code for extension of time was dismissed. Allowing the appeal, it was observed: (SCR pp. 767-68)

> "How undesirable it is to fix time peremptorily for a future happening which leaves the Court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out often enough to be inexpedient. Such procedural orders, though peremptory (conditional decrees apart) are, in essence, *in terrorem*, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves on the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians."

**43.** There can be many cases where non-grant of extension beyond 30 days would amount to failure of justice. The object of the Code is not to promote failure of justice. Section 148, therefore, deserves to be read down to mean that where sufficient cause exists or events are beyond the control of a party, the court would have inherent power to extend time beyond 30 days.

***Order 9 Rule 5***

**44.** The period of seven days mentioned in Order 9 Rule 5 is clearly directory.

***Order 11 Rule 15***

**45.** The stipulation in Order 11 Rule 15 confining the inspection of documents "at or before the settlement of issues" instead of "at any time" is also nothing but directory. It does not mean that the inspection cannot be allowed after the settlement of issues.

***Judicial impact assessment***

**46.** The Committee has taken note of para 7.8.2 of Vol. I of the Report of the National Commission to Review the Working of the Constitution which reads as follows:

> "*7.8.2* The Government of India should not throw the entire burden of establishing the subordinate courts and maintaining the subordinate judiciary on the State Governments. There is a concurrent obligation on the Union Government to meet the expenditure for subordinate courts. Therefore, the Planning Commission and the Finance Commission must allocate sufficient funds from national resources to meet the demands of the State Judiciary in each of the States."

**47.** The Committee has further noticed that:

> "*33.3* As pointed out by the Constitution Review Commission, the laws which are being administered by the courts which are subordinate to the High Court are laws which have been made by:
>
> (*a*) Parliament on subjects which fall under the entries in List I and List III of Schedule 7 to the Constitution, or

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Page 31 Wednesday, January 10, 2018
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50



(*b*) State Legislatures on subjects which fall under the entries in List II and List III of Schedule 7 to the Constitution.

But, the bulk of the cases (civil, criminal) in the subordinate courts concern the law of contract, the Transfer of Property Act, the Sale of Goods Act, the Negotiable Instruments Act, the Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure, etc., which are all *Central laws* made under List III. In addition, the subordinate courts adjudicate cases (in civil, criminal) arising under *Central laws* made under List I.

*33.4* The Central Government has, therefore, to bear a substantial portion of the expenditure on subordinate courts which are now being established/maintained by the States. (The Central Government has only recently given monies for the Fast Track Courts but these courts are a small fraction of the required number.)

*33.5* Under Article 247, the Central Government could establish courts for the purpose of administering Central laws in List I. Except a few tribunals, no such courts have been established commensurate with the number of cases arising out of subjects in List I."

**48.** The Committee has suggested that the Central Government has to provide substantial funds for establishing courts which are subordinate to the High Court, and the Planning Commission and the Finance Commission must make adequate provisions therefor, noticing that it has been so recommended by the Constitution Review Committee.

**49.** The Committee has also suggested that:

"Further, there must be 'judicial impact assessment', as done in the United States, whenever any legislation is introduced either in Parliament or in the State Legislatures. The financial memorandum attached to each Bill must estimate not only the budgetary requirement of other staff but also the budgetary requirement for meeting the expenses of the additional cases that may arise out of the new Bill when it is passed by the legislature. The said budget must mention the number of civil and criminal cases likely to be generated by the new Act, how many courts are necessary, how many judges and staff are necessary and what is the infrastructure necessary. So far in the last fifty years such judicial impact assessment has never been made by any legislature or by Parliament in our country."

**50.** Having regard to the constitutional obligation to provide fair, quick and speedy justice, we direct the Central Government to examine the aforesaid suggestions and submit a report to this Court within four months.

***Report 2***

**51.** We will now take up Report 2 dealing with Model Alternative Dispute Resolution and Mediation Rules.

**52.** Part X of the Code (Sections 121 to 131) contains provisions in respect of the Rules. Sections 122 and 125 enable the High Courts to make rules. Section 128 deals with matters for which rules may provide. It, inter

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51



alia, states that the rules which are not inconsistent with the provisions in the body of the Code, but, subject thereto, may provide for any matters relating to the procedure of the civil courts.

**53.** The question for consideration is about framing of the rules for the purposes of Section 89 and Order 10 Rules 1-A, 1-B and 1-C. These provisions read 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 reformulate 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 Authorities 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 Authorities 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."

*Order 10*

"1-A. *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 the 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.

1-B. *Appearance before the conciliatory forum or authority.*—Where a suit is referred under Rule 1-A, the parties shall appear before such forum or authority for conciliation of the suit.

1-C. *Appearance before the court consequent to the failure of efforts of conciliation.*—Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it

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Page 33 Wednesday, January 10, 2018
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52



shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it."

**54.** Some doubt as to a possible conflict has been expressed in view of use of the word "may" in Section 89 when it stipulates that "the court may reformulate the terms of a possible settlement and refer the same for" and use of the word "shall" in Order 10 Rule 1-A when it states that "the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of Section 89".

**55.** As can be seen from Section 89, its first part uses the word "shall" when it stipulates that the "court shall formulate terms of settlement". The use of the word "may" in later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the 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 the other of the said modes. Section 89 uses both the words "shall" and "may" whereas Order 10 Rule 1-A 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. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarised in the terms of settlement formulated or reformulated in terms of Section 89.

**56.** One of the modes to which the dispute can be referred is "arbitration". Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju* v. *P.V.G. Raju*[7] the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course, the parties have to agree for arbitration. Section 82 of the 1996 Act enables the High Court to make rules consistent with this Act as to all proceedings before the Court under the 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to arbitration among four ADRs is not contemplated by the 1996 Act and, therefore, Section 82 or 84 has no applicability where parties agree to go for arbitration under Section 89 of the

7 (2000) 4 SCC 539

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53



Code. As already noticed, for the purposes of Section 89 and Order 10 Rules 1-A, 1-B and 1-C, the relevant sections in Part X of the Code enable the High Court to frame rules. If reference is made to arbitration under Section 89 of the Code, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties. On the same analogy, the 1996 Act in relation to conciliation would apply only after the stage of reference to conciliation. The 1996 Act does not deal with a situation where after the suit is filed, the court requires a party to choose one or the other ADRs including conciliation. Thus, for conciliation also rules can be made under Part X of the Code for the purposes of procedure for opting for "conciliation" and up to the stage of reference to conciliation. Thus, there is no impediment in the ADR Rules being framed in relation to the civil court as contemplated in Section 89 up to the stage of reference to ADR. The 1996 Act comes into play only after the stage of reference up to the award. Applying the same analogy, the Legal Services Authorities Act, 1987 (for short "the 1987 Act") or the Rules framed thereunder by the State Governments cannot act as impediment to the High Court in making rules under Part X of the Code covering the manner in which option to the Lok Adalat can be made being one of the modes provided in Section 89. The 1987 Act also does not deal with the aspect of exercising option to one of the four ADR methods mentioned in Section 89. Section 89 makes applicable the 1996 Act and the 1987 Act from the stage after exercise of options and making of reference.

**57.** A doubt has been expressed in relation to clause (*d*) of Section 89(2) of the Code on the question as to finalisation of the terms of the compromise. The question is whether the terms of compromise are to be finalised by or before the mediator or by or before the court. It is evident that all the four alternatives, namely, arbitration, conciliation, judicial settlement including settlement through the Lok Adalat and mediation are meant to be the action of persons or institutions outside the court and not before the court. Order 10 Rule 1-C speaks of the "Conciliation Forum" referring back the dispute to the court. In fact, the court is not involved in the actual mediation/conciliation. Clause (*d*) of Section 89(2) only means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing to the parties, "effect" the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. Further, in this view, there is no question of the court which refers the matter to mediation/conciliation being debarred from hearing the matter where settlement is not arrived at. The judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be a settlement, and on that ground he cannot be treated to be disqualified to try the suit afterwards, if no settlement is arrived at between the parties.

**58.** The question also is about the payment made and expenses to be incurred where the court compulsorily refers a matter for conciliation/mediation. Considering large number of responses received by the

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54



Committee to the draft rules it has suggested that in the event of such compulsory reference to conciliation/mediation procedures if expenditure on conciliation/mediation is borne by the Government, it may encourage parties to come forward and make attempts at conciliation/mediation. On the other hand, if the parties feel that they have to incur extra expenditure for resorting to such ADR modes, it is likely to act as a deterrent for adopting these methods. The suggestion is laudable. The Central Government is directed to examine it and if agreed, it shall request the Planning Commission and Finance Commission to make specific financial allocation for the judiciary for including the expenses involved for mediation/conciliation under Section 89 of the Code. In case the Central Government has any reservations, the same shall be placed before the court within four months. In such event, the Government shall consider provisionally releasing adequate funds for these purposes also having regard to what we have earlier noticed about many statutes that are being administered and litigations pending in the courts in various States are Central legislations concerning the subjects in List I and List III of Schedule 7 to the Constitution.

**59.** With a view to enable the court to refer the parties to conciliation/mediation, where parties are unable to reach a consensus on an agreed name, there should be a panel of well-trained conciliators/mediators to which it may be possible for the court to make a reference. It would be necessary for the High Courts and District Courts to take appropriate steps in the direction of preparing the requisite panels.

**60.** A doubt was expressed about the applicability of the ADR Rules to disputes arising under the Family Courts Act, 1984 since that Act also contemplates rules to be made. It is, however, to be borne in mind that the Family Courts Act, 1984 applies the Code for all proceedings before it. In this view, the ADR Rules made under the Code can be applied to supplement the Rules made under the Family Courts Act, 1984 and provide for ADR insofar as conciliation/mediation is concerned.

**61.** It seems clear from the Report that while drafting the model rules, after examining the Mediation Rules in various countries, a fine distinction is tried to be maintained between conciliation and mediation, accepting the views expressed by the British author Mr Brown in his work on India that in "conciliation" there is a little more latitude and a conciliator can suggest some terms of settlements too.

**62.** When the parties come to a settlement upon a reference made by the court for mediation, as suggested by the Committee that there has to be some public record of the manner in which the suit is disposed of and, therefore, the court has to first record the settlement and pass a decree in terms thereof and if necessary proceed to execute it in accordance with law. It cannot be accepted that such a procedure would be unnecessary. If the settlement is not filed in the court for the purpose of passing of a decree, there will be no public record of the settlement. It is, however, a different matter if the parties do not want the court to record a settlement and pass a decree and feel that

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Page 36 Wednesday, January 10, 2018
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55 .



the settlement can be implemented even without a decree. In such eventuality, nothing prevents them in informing the court that the suit may be dismissed as a dispute has been settled between the parties outside the court.

**63.** Regarding refund of the court fee where the matter is settled by the reference to one of the modes provided in Section 89 of the Act, it is for the State Governments to amend the laws on the lines of amendment made in the Central Court Fees Act by the 1999 amendment to the Code. The State Governments can consider making similar amendments in the State court fee legislations.

**64.** The draft rules have been finalised by the Committee. Prior to finalisation, the same were circulated to the High Courts, subordinate courts, the Bar Council of India, State Bar Councils and the Bar Associations, seeking their responses. Now, it is for the respective High Courts to take appropriate steps for making rules in exercise of the rule-making power subject to modifications, if any, which may be considered relevant.

**65.** The draft Civil Procedure Alternative Dispute Resolution and Mediation Rules as framed by the Committee read as under:

### Civil Procedure ADR and Mediation Rules

(These Rules are the final rules framed by the Committee, in modification of the draft rules circulated earlier, after considering the responses to the consultation paper.)

#### *Civil Procedure Alternative Dispute Resolution and Mediation Rules, 2003*

In exercise of the rule-making power under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and clause (*d*) of sub-section (2) of Section 89 of the said Code, the High Court of……., is hereby issuing the following Rules:

PART I

ALTERNATIVE DISPUTE RESOLUTION RULES

1. *Title*.—These rules in Part I shall be called the 'Civil Procedure Alternative Dispute Resolution Rules, 2003'.

2. *Procedure for directing parties to opt for alternative modes of settlement*.—(*a*) The Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 Order 10 and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, formulate the terms of settlement and give them to the parties for their observations under sub-section (1) of Section 89, and the parties shall submit to the Court their responses within thirty days of the first hearing.

(*b*) At the next hearing, which shall be not later than thirty days of the receipt of responses, the Court may reformulate the terms of a possible settlement and shall direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in clauses (*a*) to (*d*) of sub-section (1) of Section 89 read with Rule 1-A of Order 10 in the manner stated hereunder:

Provided that the Court, in the exercise of such power, shall not refer any dispute to arbitration or to judicial settlement by a person or institution without the written consent of all the parties to the suit.

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Page 37 Wednesday, January 10, 2018
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56



3. *Persons authorised to take decision for the Union of India, State Governments and others.*—(1) For the purpose of Rule 2, the Union of India or the Government of a State or Union Territory, all local authorities, all Public Sector Undertakings, all statutory corporations and all public authorities shall nominate a person or persons or group of persons who are authorised to take a final decision as to the mode of alternative dispute resolution in which it proposes to opt in the event of direction by the Court under Section 89 and such nomination shall be communicated to the High Court within the period of three months from the date of commencement of these Rules and the High Court shall notify all the subordinate courts in this behalf as soon as such nomination is received from such Government or authorities.

(2) Where such person or persons or group of persons have not been nominated as aforesaid, such party as referred to in clause (1) shall, if it is a plaintiff, file along with the plaint or if it is a defendant, file along with or before the filing of the written statement, a memo into the Court, nominating a person or persons or group of persons who is or are authorised to take a final decision as to the mode of alternative dispute resolution, which the party prefers to adopt in the event of the Court directing the party to opt for one or other mode of alternative dispute resolution.

4. *Court to give guidance to parties while giving direction to opt.*—(*a*) Before directing the parties to exercise option under clause (*b*) of Rule 2, the Court shall give such guidance as it deems fit to the parties, by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their option as to the particular mode of settlement, namely:

(*i*) that it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one or other of these modes of settlement referred to in Section 89 rather than seek a trial on the disputes arising in the suit;

(*ii*) that, where there is no relationship between the parties which requires to be preserved, it may be in the interest of the parties to seek reference of the matter of arbitration as envisaged in clause (*a*) of sub-section (1) of Section 89;

(*iii*) that, where there is a relationship between the parties which requires to be preserved, it may be in the interest of parties to seek reference of the matter to conciliation or mediation, as envisaged in clause (*b*) or (*d*) of sub-section (1) of Section 89;

*Explanation.*—Disputes arising in matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.

(*iv*) that, where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to the Lok Adalat or to judicial settlement as envisaged in clause (*c*) of sub-section (1) of Section 89;

(*v*) the difference between the different modes of settlement, namely, arbitration, conciliation, mediation and judicial settlement is as explained below:

*Settlement by 'arbitration'* means the process by which an arbitrator appointed by parties or by the Court, as the case may be, adjudicates the disputes between the parties to the suit and passes an award by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996), insofar as they refer to arbitration.

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Page 38 Wednesday, January 10, 2018
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57



*Settlement by 'conciliation'* means the process by which a conciliator who is appointed by parties or by the Court, as the case may be, conciliates the disputes between the parties to the suit by the application of the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) insofar as they relate to conciliation, and in particular, in exercise of his powers under Sections 67 and 73 of that Act, by making proposals for a settlement of the dispute and by formulating or reformulating the terms of a possible settlement; and has a greater role than a mediator.

*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 emphasising that it is the parties' own responsibility for making decisions which affect them.

*Settlement in the Lok Adalat* means settlement by the Lok Adalat as contemplated by the Legal Services Authorities Act, 1987.

'*Judicial settlement*' means a final settlement by way of compromise entered into before a suitable institution or person to which the Court has referred the dispute and which institution or person are deemed to be the Lok Adalats under the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) and where after such reference, the provisions of the said Act apply as if the dispute was referred to a Lok Adalat under the provisions of that Act.

5. *Procedure for reference by the Court to the different modes of settlement.*—(*a*) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within thirty days of the direction of the Court under clause (*b*) of Rule 2 and the Court shall, within thirty days of the said application, refer the matter to arbitration and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to arbitration under that Act, shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act.

(*b*) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat or where one of the parties applies for reference to the Lok Adalat, the procedure envisaged under the Legal Services Authorities Act, 1987 and in particular by Section 20 of that Act, shall apply.

(*c*) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within thirty days of the direction under clause (*b*) of Rule 2 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to the Lok Adalat under that Act, shall apply as if the proceedings were referred for settlement under the provisions of that Act.

(*d*) Where none of the parties are willing to agree to opt or agree to refer the dispute to arbitration, or the Lok Adalat, or to judicial settlement, within thirty days

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Page 39 Wednesday, January 10, 2018
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58



of the direction of the Court under clause (*b*) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

(*e*)(*i*) Where all the parties opt and agree for conciliation, they shall apply to the Court, within thirty days of the direction under clause (*b*) of Rule 2 and the Court shall, within thirty days of the application refer the matter to conciliation and thereafter the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) which are applicable after the stage of making of the reference to conciliation under that Act, shall apply, as if the proceedings were referred for settlement by way of conciliation under the provisions of that Act.

(*ii*) Where all the parties opt and agree for mediation, they shall apply to the Court, within thirty days of the direction under clause (*b*) of Rule 2 and the Court shall, within thirty days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

(*f*) Where under clause (*d*), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within thirty days of the direction under clause (*b*) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of thirty days issue notice to the other parties to respond to the application, and

(*i*) In case all the parties agree for conciliation, the Court shall refer the matter to conciliation and thereafter, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act, shall apply.

(*ii*) In case all the parties agree for mediation, the Court shall refer the matter to mediation in accordance with the Civil Procedure Mediation Rules, 2003 in Part II shall apply.

(*iii*) In case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be. In case the dispute is referred to conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act shall and in case the dispute is referred to mediation, the provisions of the Civil Procedure Mediation Rules, 2003, shall apply.

(*g*)(*i*) Where none of the parties apply for reference either to arbitration, or the Lok Adalat, or judicial settlement, or for conciliation or mediation, within thirty days of the direction under clause (*b*) of Rule 2, the Court shall, within a further period of thirty days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

(*ii*) After hearing the parties or their representatives on the day so fixed the Court shall, if there exist elements of a settlement which may be acceptable to the parties and there is a relationship between the parties which has to be preserved, refer the matter to conciliation or mediation. In case the dispute is referred to conciliation, the provisions of the Arbitration and Conciliation Act, 1996 which are applicable after the stage of making of the reference to conciliation under that Act shall apply and in case the dispute is referred to mediation, the provisions of the Civil Procedure Mediation Rules, 2003, shall apply.

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Page 40 Wednesday, January 10, 2018
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59



(*h*)(*i*) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings of the Court, opt for any one of the modes of alternative dispute resolution nor shall enter into any settlement on behalf of a minor or person under disability with reference to the suit in which he acts as mere friend or guardian.

(*ii*) Where an application is made to the Court for leave to enter into a settlement initiated into in the alternative dispute resolution proceedings on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file a certificate along with the said application to the effect that the settlement is, in his opinion, for the benefit of the minor or other person under disability. The decree of the Court based on the settlement to which the minor or other person under disability is a party, shall refer to the sanction of the Court thereto and shall set out the terms of the settlement.

6. *Referral to the Court and appearance before the Court upon failure of attempts to settle disputes by conciliation or judicial settlement or mediation.*—(1) Where a suit has been referred for settlement for conciliation, mediation or judicial settlement and has not been settled or where it is felt that it would not be proper in the interests of justice to proceed further with the matter, the suit shall be referred back again to the Court with a direction to the parties to appear before the Court on a specific date.

(2) Upon the reference of the matter back to the Court under sub-rule (1) or under sub-section (5) of Section 20 of the Legal Services Authorities Act, 1987, the Court shall proceed with the suit in accordance with law.

7. *Training in alternative methods of resolution of disputes, and preparation of manual.*—(*a*) The High Court shall take steps to have training courses conducted in places where the High Court and the District Courts or courts of equal status are located, by requesting bodies recognised by the High Court or the universities imparting legal education or retired faculty members or other persons who, according to the High Court are well versed in the techniques of alternative methods of resolution of disputes, to conduct training courses for lawyers and judicial officers.

(*b*)(*i*) The High Court shall nominate a committee of judges, faculty members including retired persons belonging to the above categories, senior members of the Bar, other members of the Bar specially qualified in the techniques of alternative dispute resolution, for the purpose referred to in clause (*a*) and for the purpose of preparing a detailed manual of procedure for alternative dispute resolution to be used by the Courts in the State as well as by the arbitrators, or authority or person in the case of judicial settlement or conciliators or mediators.

(*ii*) The said manual shall describe the various methods of alternative dispute resolution, the manner in which any one of the said methods is to be opted for, the suitability of any particular method for any particular type of dispute and shall specifically deal with the role of the above persons in disputes which are commercial or domestic in nature or which relate to matrimonial, maintenance and child custody matters.

(*c*) The High Court and the District Courts shall periodically conduct seminars and workshops on the subject of alternative dispute resolution procedures throughout the State or States over which the High Court has jurisdiction with a view to bring awareness of such procedures and to impart training to lawyers and judicial officers.

(*d*) Persons who have experience in the matter of alternative dispute resolution procedures, and in particular in regard to conciliation and mediation, shall be given

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Page 41 Wednesday, January 10, 2018
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60



preference in the matter of empanelment for the purposes of conciliation or mediation.

8. *Applicability to other proceedings.*—The provisions of these Rules may be applied to proceedings before the Courts, including Family Courts constituted under the Family Courts Act (66 of 1984), while dealing with matrimonial, maintenance and child custody disputes, wherever necessary, in addition to the rules framed under the Family Courts Act (66 of 1984).

PART II

*CIVIL PROCEDURE MEDIATION RULES*

1. *Title.*—These Rules in Part II shall be called the Civil Procedure Mediation Rules, 2003.

2. *Appointment of mediator.*—(*a*) Parties to a suit may all agree on the name of the sole mediator for mediating between them.

(*b*) Where, there are two sets of parties and are unable to agree on a sole mediator, each set of parties shall nominate a mediator.

(*c*) Where parties agree on a sole mediator under clause (*a*) or where parties nominate more than one mediator under clause (*b*), the mediator need not necessarily be from the panel of mediators referred to in Rule 3 nor bear the qualifications referred to in Rule 4 but should not be a person who suffers from the disqualifications referred to in Rule 5.

(*d*) Where there are more than two sets of parties having diverse interests, each set shall nominate a person on its behalf and the said nominees shall select the sole mediator and failing unanimity in that behalf, the Court shall appoint a sole mediator.

3. *Panel of mediators.*—(*a*) The High Court shall, for the purpose of appointing mediators between parties in suits filed on its original side, prepare a panel of mediators and publish the same on its notice board, within thirty days of the coming into force of these Rules, with a copy to the Bar Association attached to the original side of the High Court.

(*b*)(*i*) The Courts of the Principal District and Sessions Judge in each district or the Courts of the Principal Judge of the City Civil Court or courts of equal status shall, for the purposes of appointing mediators to mediate between parties in suits filed on their original side, prepare a panel of mediators, within a period of sixty days of the commencement of these Rules, after obtaining the approval of the High Court to the names included in the panel, and shall publish the same on their respective notice boards.

(*ii*) Copies of the said panels referred to in clause (*i*) shall be forwarded to all the courts of equivalent jurisdiction or courts subordinate to the courts referred to in sub-clause (*i*) and to the Bar Associations attached to each of the courts.

(*c*) The consent of the persons whose names are included in the panel shall be obtained before empanelling them.

(*d*) The panel of names shall contain a detailed annexure giving details of the qualifications of the mediators and their professional or technical experience in different fields.

4. *Qualifications of persons to be empanelled under Rule 3.*—The following persons shall be treated as qualified and eligible for being enlisted in the panel of mediators under Rule 3, namely:

(*a*)(*i*) Retired Judges of the Supreme Court of India;

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61



(*ii*) Retired Judges of the High Court;

(*iii*) Retired District and Sessions Judges or retired Judges of the City Civil Court or courts of equivalent status.

a

(*b*) Legal practitioners with at least fifteen years' standing at the Bar at the level of the Supreme Court or the High Court; or the District Courts or courts of equivalent status.

(*c*) Experts or other professionals with at least fifteen years' standing; or retired senior bureaucrats or retired senior executives.

b

(*d*) Institutions which are themselves experts in mediation and have been recognised as such by the High Court, provided the names of its members are approved by the High Court initially or whenever there is change in membership.

5. *Disqualifications of persons*.—The following persons shall be deemed to be disqualified for being empanelled as mediators:

c

(*i*) any person who has been adjudged as insolvent or is declared of unsound mind, or

(*ii*) any person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending, or

(*iii*) any person who has been convicted by a criminal court for any offence involving moral turpitude,

d

(*iv*) any person against whom disciplinary proceedings or charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment,

(*v*) any person who is interested or connected with the subject-matter of dispute or is related to any one of the parties or to those who represent them, unless such objection is waived by all the parties in writing,

e

(*vi*) any legal practitioner who has or is appearing for any of the parties in the suit or in any other suit or proceedings,

(*vii*) such other categories of persons as may be notified by the High Court.

6. *Venue for conducting mediation*.—The mediator shall conduct the mediation at one or other of the following places:

(*i*) Venue of the Lok Adalat or permanent Lok Adalat.

f

(*ii*) Any place identified by the District Judge within the court precincts for the purpose of conducting mediation.

(*iii*) Any place identified by the Bar Association or State Bar Council for the purpose of mediation, within the premises of the Bar Association or State Bar Council, as the case may be.

(*iv*) Any other place as may be agreed upon by the parties subject to the approval of the Court.

g

7. *Preference*.—The Court shall, while nominating any person from the panel of mediators referred to in Rule 3, consider his suitability for resolving the particular class of dispute involved in the suit and shall give preference to those who have proven record of successful mediation or who have special qualification or experience in mediation.

h

8. *Duty of mediator to disclose certain facts*.—(*a*) When a person is approached in connection with his possible appointment as a mediator, the person shall disclose

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Page 43 Wednesday, January 10, 2018
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62



in writing to the parties, any circumstances likely to give rise to a justifiable doubt as to his independence or impartiality.

(*b*) Every mediator shall, from the time of his appointment and throughout the continuance of the mediation proceedings, without delay, disclose to the parties in writing, about the existence of any of the circumstances referred to in clause (*a*).

9. *Cancellation of appointment*.—Upon information furnished by the mediator under Rule 8 or upon any other information received from the parties or other persons, if the Court, in which the suit is filed, is satisfied, after conducting such inquiry as it deems fit, and after giving a hearing to the mediator, that the said information has raised a justifiable doubt as to the mediator's independence or impartiality, it shall cancel the appointment by a reasoned order and replace him by another mediator.

10. *Removal or deletion from panel*.—A person whose name is placed in the panel referred to in Rule 3 may be removed or his name be deleted from the said panel, by the Court which empanelled him, if:

(*i*) he resigns or withdraws his name from the panel for any reason;

(*ii*) he is declared insolvent or is declared of unsound mind;

(*iii*) he is a person against whom criminal charges involving moral turpitude are framed by a criminal court and are pending;

(*iv*) he is a person who has been convicted by a criminal court for any offence involving moral turpitude;

(*v*) he is a person against whom disciplinary proceedings on charges relating to moral turpitude have been initiated by the appropriate disciplinary authority which are pending or have resulted in a punishment;

(*vi*) he exhibits or displays conduct, during the continuance of the mediation proceedings, which is unbecoming of a mediator;

(*vii*) the Court which empanelled, upon receipt of information, if it is satisfied, after conducting such inquiry as it deems fit, is of the view, that it is not possible or desirable to continue the name of that person in the panel:

Provided that, before removing or deleting his name, under clauses (*vi*) and (*vii*), the Court shall hear the mediator whose name is proposed to be removed or deleted from the panel and shall pass a reasoned order.

11. *Procedure of mediation*.—(*a*) The parties may agree on the procedure to be followed by the mediator in the conduct of the mediation proceedings.

(*b*) Where the parties do not agree on any particular procedure to be followed by the mediator, the mediator shall follow the procedure hereinafter mentioned, namely:

(*i*) he shall fix, in consultation with the parties, a time-schedule, the dates and the time of each mediation session, where all parties have to be present;

(*ii*) he shall hold the mediation conference in accordance with the provisions of Rule 6;

(*iii*) he may conduct joint or separate meetings with the parties;

(*iv*) each party shall, ten days before a session, provide to the mediator a brief memorandum setting forth the issues, which according to it, need to be resolved, and its position in respect to those issues and all information reasonably required for the mediator to understand the issue; such memoranda shall also be mutually exchanged between the parties;

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(*v*) each party shall furnish to the mediator, *copies of pleadings or documents* or such other information as may be required by him in connection with the issues to be resolved:

a

Provided that where the mediator is of the opinion that he should look into any original document, the Court may permit him to look into the original document before such officer of the Court and on such date or time as the Court may fix.

(*vi*) each party shall furnish to the mediator such other information as may be required by him in connection with the issues to be resolved.

b

(*c*) Where there is more than one mediator, the mediator nominated by each party shall first confer with the party that nominated him and shall thereafter interact with the other mediators, with a view to resolving the disputes.

12. *Mediator not bound by the Evidence Act, 1872 or the Code of Civil Procedure, 1908*.—The mediator shall not be bound by the Code of Civil Procedure, 1908 or the Evidence Act, 1872, but shall be guided by the principles of fairness and justice, have regard to the rights and obligations of the parties, usages of trade, if any, and the nature of the dispute.

c

13. *Non-attendance of parties at sessions or meetings on due dates*.—(*a*) The parties shall be present personally or may be represented by their counsel or power-of-attorney holders at the meetings or sessions notified by the mediator.

(*b*) If a party fails to attend a session or a meeting notified by the mediator, other parties or the mediator can apply to the court in which the suit is filed, to issue appropriate directions to that party to attend before the mediator and if the court finds that a party is absenting himself before the mediator without sufficient reason, the court may take action against the said party by imposition of costs.

d

(*c*) The parties not resident in India, may be represented by their counsel or power-of-attorney holders at the sessions or meetings.

14. *Administrative assistance*.—In order to facilitate the conduct of mediation proceedings, the parties, or the mediator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

e

15. *Offer of settlement by parties*.—(*a*) Any party to the suit may, 'without prejudice', offer a settlement to the other party at any stage of the proceedings, with notice to the mediator.

(*b*) Any party to the suit may make a, 'with prejudice' offer, to the other party at any stage of the proceedings, with notice to the mediator.

f

16. *Role of mediator*.—The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasising that it is the responsibility of the parties to take decisions which affect them; he shall not impose any terms of settlement on the parties.

g

17. *Parties alone responsible for taking decision*.—The parties must understand that the mediator only facilitates in arriving at a decision to resolve disputes and that he will not and cannot impose any settlement nor does the mediator give any warranty that the mediation will result in a settlement. The mediator shall not impose any decision on the parties.

h

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64



18. *Time-limit for completion of mediation*.—On the expiry of sixty days from the date fixed for the first appearance of the parties before the mediator, the mediation shall stand terminated, unless the court, which referred the matter, either suo motu, or upon request by the mediator or any of the parties, and upon hearing all the parties, is of the view that extension of time is necessary or may be useful; but such extension shall not be beyond a further period of thirty days.

19. *Parties to act in good faith*.—While no one can be compelled to commit to settle his case in advance of mediation, all parties shall commit to participate in the proceedings in good faith with the intention to settle the dispute, if possible.

20. *Confidentiality, disclosure and inadmissibility of information*.—(1) When a mediator receives confidential information concerning the dispute from any party, he shall disclose the substance of that information to the other party, if permitted in writing by the first party.

(2) When a party gives information to the mediator subject to a specific condition that it be kept confidential, the mediator shall not disclose that information to the other party, nor shall the mediator voluntarily divulge any information regarding the documents or what is conveyed to him orally as to what transpired during the mediation.

(3) Receipt or perusal, or preparation of records, reports or other documents by the mediator, or receipt of information orally by the mediator while serving in that capacity, shall be confidential and the mediator shall not be compelled to divulge information regarding the documents nor in regard to the oral information nor as to what transpired during the mediation.

(4) Parties shall maintain confidentiality in respect of events that transpired during mediation and shall not rely on or introduce the said information in any other proceedings as to:

(*a*) views expressed by a party in the course of the mediation proceedings;

(*b*) documents obtained during the mediation which were expressly required to be treated as confidential or other notes, drafts or information given by parties or mediators;

(*c*) proposals made or views expressed by the mediator;

(*d*) admission made by a party in the course of mediation proceedings;

(*e*) the fact that a party had or had not indicated willingness to accept a proposal;

(5) There shall be no stenographic or audio or video recording of the mediation proceedings.

21. *Privacy*.—Mediation sessions and meetings are private; only the parties or their counsel or power-of-attorney holders concerned can attend. Other persons may attend only with the permission of the parties or with the consent of the mediator.

22. *Immunity*.—No mediator shall be held liable for anything bona fide done or omitted to be done by him during the mediation proceedings for civil or criminal action nor shall he be summoned by any party to the suit to appear in a court of law to testify in regard to information received by him or action taken by him or in respect of drafts or records prepared by him or shown to him during the mediation proceedings.

23. *Communication between mediator and the Court*.—(*a*) In order to preserve the confidence of parties in the Court and the neutrality of the mediator, there should

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Page 46 Wednesday, January 10, 2018
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65



be no communication between the mediator and the Court, except as stated in clauses (*b*) and (*c*) of this Rule.

(*b*) If any communication between the mediator and the Court is necessary, it shall be in writing and copies of the same shall be given to the parties or their counsel or power of attorney.

(*c*) Communication between the mediator and the Court shall be limited to communication by the mediator:

(*i*) with the Court about the failure of the party to attend;

(*ii*) with the Court with the consent of the parties;

(*iii*) regarding his assessment that the case is not suited for settlement through mediation;

(*iv*) that the parties have settled the dispute or disputes.

24. *Settlement agreement*.—(1) Where an agreement is reached between the parties in regard to all the issues in the suit or some of the issues, the same shall be reduced to writing and signed by the parties or their power-of-attorney holders. If any counsel have represented the parties, they shall attest the signature of their respective clients.

(2) The agreement of the parties so signed and attested shall be submitted to the mediator who shall, with a covering letter signed by him, forward the same to the court in which the suit is pending.

(3) Where no agreement is arrived at between the parties, before the time-limit stated in Rule 18 or where, the mediator is of the view that no settlement is possible, he shall report the same to the said court in writing.

25. *Court to fix a date for recording settlement and passing decree*.—(1) Within seven days of the receipt of any settlement, the Court shall issue notice to the parties fixing a day for recording the settlement, such date not being beyond a further period of fourteen days from the date of receipt of settlement, and the Court shall record the settlement, if it is not collusive.

(2) The Court shall then pass a decree in accordance with the settlement so recorded, if the settlement disposes of all the issues in the suit.

(3) If the settlement disposes of only certain issues arising in the suit, the Court shall record the settlement on the date fixed for recording the settlement and

(*i*) if the issues are severable from other issues and if a decree could be passed to the extent of the settlement covered by those issues, the Court may pass a decree straight away in accordance with the settlement on those issues without waiting for a decision of the Court on the other issues which are not settled.

(*ii*) If the issues are not severable, the Court shall wait for a decision of the Court on the other issues which are not settled.

26. *Fee of mediator and costs*.—(1) At the time of referring the disputes to mediation, the Court shall, after consulting the mediator and the parties, fix the fee of the mediator.

(2) As far as possible a consolidated sum may be fixed rather than for each session or meeting.

(3) Where there are two mediators as in clause (*b*) of Rule 2, the Court shall fix the fee payable to the mediators which shall be shared equally by the two sets of parties.

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Page 47 Wednesday, January 10, 2018
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66



(4) The expense of the mediation including the fee of the mediator, costs of administrative assistance, and other ancillary expenses concerned, shall be borne equally by the various contesting parties or as may be otherwise directed by the Court.

(5) Each party shall bear the costs for production of witnesses on his side including experts, or for production of documents.

(6) The mediator may, before the commencement of mediation, direct the parties to deposit equal sums, tentatively, to the extent of 40% of the probable costs of the mediation, as referred to in clauses (1), (3) and (4). The remaining 60% shall be deposited with the mediator, after the conclusion of mediation. For the amount of cost paid to the mediator, he shall issue the necessary receipts and a statement of account shall be filed, by the mediator in the Court.

(7) The expense of mediation including fee, if not paid by the parties, the Court shall, on the application of the mediator or parties, direct the parties concerned to pay, and if they do not pay, the Court shall recover the said amounts as if there was a decree for the said amount.

(8) Where a party is entitled to legal aid under Section 12 of the Legal Services Authorities Act, 1987, the amount of fee payable to the mediator and costs shall be paid by the Legal Services Authority concerned under that Act.

27. *Ethics to be followed by the mediator.*—The mediator shall:

(1) follow and observe these Rules strictly and with due diligence;

(2) not carry on any activity or conduct which could reasonably be considered as conduct unbecoming of a mediator;

(3) uphold the integrity and fairness of the mediation process;

(4) ensure that the parties involved in the mediation are fairly informed and have an adequate understanding of the procedural aspects of the process;

(5) satisfy himself/herself that he/she is qualified to undertake and complete the assignment in a professional manner;

(6) disclose any interest or relationship likely to affect impartiality or which might seek an appearance of partiality or bias;

(7) avoid, while communicating with the parties, any impropriety or appearance of impropriety;

(8) be faithful to the relationship of trust and confidentiality imposed in the office of mediator;

(9) conduct all proceedings related to the resolutions of a dispute, in accordance with the applicable law;

(10) recognise that mediation is based on the principles of self-determination by the parties and that mediation process relies upon the ability of parties to reach a voluntary, undisclosed agreement;

(11) maintain the reasonable expectations of the parties as to confidentiality;

(12) refrain from promises or guarantees of results.

28. *Transitory provisions.*—Until a panel of arbitrators is prepared by the High Court and the District Court, the courts referred to in Rule 3, may nominate a mediator of their choice if the mediator belongs to the various classes of persons referred to in Rule 4 and is duly qualified and is not disqualified, taking into account the suitability of the mediator for resolving the particular dispute.

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67



*REPORT 3*

**66.** Report 3 deals with the Model Case Flow Management Rules. The case-management policy can yield remarkable results in achieving more disposal of the cases. Its mandate is for the judge or an officer of the court to set a time-table and monitor a case from its initiation to its disposal. On survey of the progress made in other countries the Committee has come to a conclusion that the case-management system has yielded exceedingly good results.

**67.** The Model Case Flow Management Rules have been separately dealt with for the trial courts and first appellate subordinate courts and for the High Courts. These draft rules extensively deal with the various stages of the litigation. The High Courts can examine these Rules, discuss the matter and consider the question of adopting or making the Model Case Flow Management Rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice.

**68.** The Model Case Flow Management Rules read as under:

**Model Case Flow Management Rules**

***(A) Model Case Flow Management Rules for trial courts and first appellate subordinate courts***

*I. DIVISION OF CIVIL SUITS AND APPEALS INTO TRACKS*

*II. ORIGINAL SUITS*

1. Fixation of time-limits while issuing notice
2. Service of summons/notice and completion of pleadings
3. Calling of cases (Hajri or call work or roll-call)
4. Procedure on the grant of interim orders
5. Referral to alternative dispute resolution
6. Procedure on the failure of alternative dispute resolution
7. Referral to the Commissioner for recording of evidence
8. Costs
9. Proceedings for perjury
10. Adjournments
11. Miscellaneous applications.

*III. FIRST APPEALS TO SUBORDINATE COURTS*

1. Service of notice of appeal
2. Essential documents to be filed with the memorandum of appeal
3. Fixation of time-limits in interlocutory matters
4. Steps for completion of all formalities (call work or hajri)
5. Procedure on grant of interim orders
6. Filing of written submissions
7. Costs

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68



*IV. APPLICATION/PETITION UNDER SPECIAL ACTS*

*V. CRIMINAL TRIAL AND CRIMINAL APPEALS TO SUBORDINATE COURTS*

(*a*) Criminal trials

(*b*) Criminal appeals

*VI. NOTICE UNDER SECTION 80 OF THE CODE OF CIVIL PROCEDURE*

*VII. NOTE*

***(B) Model Case Flow Management Rules in the High Court***

I. Division of cases into tracks

II. Writ of habeas corpus

III. Mode of advance service

IV. First appeals to the High Court

V. Appeals to the Division Bench

VI. Second appeals

VII. Civil revisions

VIII. Criminal appeals

IX. Note

**... High Court Rules, 2003**

In exercise of the power conferred by Part X of the Code of Civil Procedure 1908, (5 of 1908) and ... High Court Act, ... and all other powers enabling, the ... High Court hereby makes the following Rules, in regard to case flow management in the subordinate courts.

***(A) Model Rules for trial courts and first appellate subordinate courts***

I. DIVISION OF CIVIL SUITS AND APPEALS INTO TRACKS

1. Based on the nature of dispute, the quantum of evidence to be recorded and the time likely to be taken for the completion of suit, the suits shall be channelled into different tracks. Track 1 may include suits for maintenance, divorce and child custody and visitation rights, grant of letters of administration and succession certificate and simple suits for rent or for eviction (upon notice under Section 106 of the Transfer of Property Act). Track 2 may consist of money suits and suits based solely on negotiable instruments. Track 3 may include suits concerning partition and like property disputes, trade marks, copyrights and other intellectual property matters. Track 4 may relate to other matters. All efforts shall be taken to complete the suits in Track 1 within a period of 9 months, Track 2 within 12 months and suits in Tracks 3 and 4 within 24 months.

This categorisation is illustrative and it will be for the High Court to make appropriate categorisation. It will be for the Judge concerned to make an appropriate assessment as to which track any case can be assigned to.

2. Once in a month, the Registry/administrative staff of each court will prepare a report as to the stage and progress of cases which are proposed to be listed in the next month and place the report before the Court. When the matters are listed on each day, the Judge concerned may take such decision as he may deem fit in the presence of counsel/parties in regard to each case

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69



for removing any obstacles in service of summons, completion of pleadings, etc. with a view to make the case ready for disposal.

a

3. The Judge referred to in clause (2) above, may shift a case from one track to another, depending upon the complexity and other circumstances of the case.

4. Where computerisation is available, the monthly data will be fed into the computer in such a manner that the Judge referred to in clause (2) above, will be able to ascertain the position and the stage of every case in every track from the computer screen. Over a period, all cases pending in his court will be covered. Where computerisation is not available, the monitoring must be done manually.

b

5. The Judge referred to in clause (2) above, shall monitor and control the flow or progress of every case, either from the computer or from the register or data placed before him in the above manner or in some other manner he may innovate.

c

II. ORIGINAL SUIT

1. *Fixation of time-limits while issuing notice*.—(*a*) Wherever notice is issued in a suit, the notice should indicate that the Code prescribes a maximum of 30 days for filing written statement (which for special reasons may be extended up to 90 days) and, therefore, the defendants may prepare the written statement expeditiously and that the matter will be listed for that purpose on the expiry of eight weeks from the date of issue of notice (so that it can be a definite date). After the written statement is filed, the replication (if any, proposed and permitted), should be filed within six weeks of receipt of the written statement. If there are more than one defendants, each one of the defendants should comply with this requirement within the time-limit.

d

(*b*) The notice referred to in clause (*a*) shall be accompanied by a complete copy of the plaint and all its annexure/enclosures and copies of the interlocutory applications, if any.

e

(*c*) If interlocutory applications are filed along with the plaint, and if an ex parte interim order is not passed and the Court is desirous of hearing the respondent, it may, while sending the notice along with the plaint, fix an earlier date for the hearing of the application (than the date for filing written statement) depending upon the urgency for interim relief.

f

2. *Service of summons/notice and completion of pleadings*.—(*a*) Summons may be served as indicated in clause (3) of Rule 9 Order 5.

(*b*) In the case of service of summons by the plaintiff or a courier where a return is filed that the defendant has refused notice, the return will be accompanied by an undertaking that the plaintiff or the courier, as the case may be, is aware that if the return is found to be false, he can be punished for perjury or summarily dealt with for contempt of court for abuse of the provisions of the Code. Where the plaintiff comes forward with a return of 'refusal', the provisions of Order 9-A Rule 4 will be followed by reissue of summons through court.

g

(*c*) If it has not been possible to effect service of summons under Rule 9 Order 5, the provisions of Rule 17 Order 5 shall apply and the plaintiff shall within 7 days from the date of its inability to serve the summons, to request the court to permit substituted service. The dates for filing the written statement and replication, if any, shall accordingly stand extended.

h

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70



3. *Calling of cases (hajri or call work or roll-call).*—The present practice of the Court Master or Bench-clerk calling all the cases listed on a particular day at the beginning of the day in order to confirm whether counsel are ready, whether parties are present or whether various steps in the suit or proceeding have been taken, is consuming a lot of time of the Court, sometimes almost two hours of the best part of the day when the Judge is fresh. After such work, the Court is left with very limited time to deal with cases listed before it. Formal listing should be first before a nominated senior officer of the Registry, one or two days before the listing in court. He may give dates in routine matters for compliance with earlier orders of the Court. Cases will be listed before the Court only where an order of the Court is necessary or where an order prescribing the consequences of default or where a peremptory order or an order as to costs is required to be passed on the judicial side. Cases which have to be adjourned as a matter of routine for taking steps in the suit or proceeding should not be unnecessarily listed before the Court. Where parties/counsel are not attending before the court officer or are defiant or negligent, their cases may be placed before the Court. Listing of cases on any day before a court should be based on a reasonable estimate of time and number of cases that can be disposed of by the Court in a particular day. The courts shall, therefore, dispense with the practice of calling all the cases listed adjourned to any particular day. Cases will be first listed before a nominated senior officer of the Court, nominated for the purpose.

4. *Procedure on the grant of interim orders.*—(*a*) If an interim order is granted at the first hearing by the Court, the defendants would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

(*b*) If the Court passes an ad interim ex parte order in an interlocutory application, and the reply by the defendants is filed, and if, thereafter, the plaintiff fails to file the rejoinder (if any) without good reason for the delay, the Court has to consider whether the stay or interim order passed by the Court should be vacated and shall list the case with that purpose. This is meant to prevent parties taking adjournment with a view to have undue benefit of the ad interim orders. The plaintiff may, if he so chooses, also waive his right to file a rejoinder. A communication of option by the plaintiff not to file a rejoinder, made to the Registry will be deemed to be the completion of pleadings in the interlocutory application.

5. *Referral to alternative dispute resolution.*—(In the hearing before the Court, after completion of pleadings, time-limit for discovery and inspection, and admission and denials, of documents shall be fixed, preferably restricted to 4 weeks each.)

After the completion of admission and denial of documents by the parties, the suit shall be listed before the Court (for examination of parties under Order 10 of the Civil Procedure Code. A joint statement of admitted facts shall be filed before the said date). The Court shall thereafter, follow the procedure prescribed under the Alternative Dispute Resolution and Mediation Rules, 2002.

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71



6. *Procedure on the failure of alternative dispute resolution.*—On the filing of report by the mediator under the Mediation Rules that efforts at mediation have failed, or a report by the conciliator under the provisions of the Arbitration and Conciliation Act, 1996, or a report of no settlement in the Lok Adalat under the provisions of the Legal Services Authorities Act, 1987 the suit shall be listed before the Registry within a period of 14 days. At the said hearing before the Registry, all the parties shall submit the draft issues proposed by them. The suit shall be listed before the Court within 14 days thereafter for framing of issues.

When the suit is listed after failure of the attempts at conciliation, arbitration or the Lok Adalat, the Judge may merely inquire whether it is still possible for the parties to resolve the dispute. This should invariably be done by the Judge at the first hearing when the matter comes back on failure of conciliation, mediation or Lok Adalat.

If the parties are not keen about settlement, the Court shall frame the issues and direct the plaintiff to start examining his witnesses. The procedure of each witness filing his examination-in-chief and being examined in cross- or re-examination will continue, one after the other. After completion of evidence on the plaintiff's side, the defendants shall lead evidence likewise, witness after witness, the chief-examination of each witness being by affidavit and the witness being then cross-examined or re-examined. The parties shall keep the affidavit in chief-examination ready whenever the witness's examination is taken up. As far as possible, evidence must be taken up day by day as stated in clause (*a*) of the proviso to Rule 2 Order 17. The parties shall also indicate the likely duration for the evidence to be completed, and for the arguments to be thereafter heard. The Judge shall ascertain the availability of time of the Court and will list the matter for trial on a date when the trial can go on from day to day and conclude the evidence. The possibility of further negotiation and settlement should be kept open and if such a settlement takes place, it should be open to the parties to move the Registry for getting the matter listed at an earlier date for disposal.

7. *Referral to the Commissioner for recording of evidence.*—(*a*) The High Court shall conduct an examination on the subjects of the Code of Civil Procedure and the Evidence Act. Only those advocates who have passed an examination conducted by the High Court on the subjects of 'Code of Civil Procedure' and the Evidence Act, shall be appointed as Commissioners for recording evidence. They shall be ranked according to the marks secured by them.

(*b*) It is not necessary that in every case the Court should appoint a Commissioner for recording evidence. Only if the recording of evidence is likely to take a long time, or there are any other special grounds; should the Court consider appointing a Commissioner for recording the evidence. The Court should direct that the matter be listed for arguments fifteen days after the Commissioner files his report with the evidence.

The Court may initially fix a specific period for the completion of the recording of the evidence by the Commissioner and direct the matter to be listed on the date of expiry of the period, so that the Court may know

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72



whether the parties are cooperating with the Commissioner and whether the recording of evidence is getting unnecessarily prolonged.

(*c*) The Commissioners should file an undertaking in the Court upon their appointment that they will keep the records handed over to them and those that may be filed before them, safe and shall not allow any party to inspect them in the absence of the opposite party/counsel. If there is delay of more than one month in the dates fixed for recording evidence, it is advisable for them to return the file to the Court and take it back on the eve of the adjourned date.

8. *Costs*.—So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory inasmuch as the liberal attitude of the courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or point but loses on a number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.§

9. *Proceedings for perjury*.—If the trial Judge, while delivering the judgment, is of the view that any of the parties or witnesses have wilfully and deliberately uttered blatant falsehoods, he shall consider (at least in some grave cases) whether it is a fit case where prosecution should be initiated for perjury and order prosecution accordingly.

10. *Adjournments*.—The amendments to the Code have restricted the number of adjournments to three in the course of hearing of the suit, on reasonable cause being shown. When a suit is listed before a court and any party seeks adjournment, the court shall have to verify whether the party is seeking adjournment due to circumstances beyond the control of the party, as required by clause (*b*) of the proviso to Rule 2 (*sic* 1) Order 17. The court shall impose costs as specified in Rule 2 (*sic* 1) Order 17.

11. *Miscellaneous applications*.—The proceedings in a suit shall not be stayed merely because of the filing of miscellaneous application in the course of suit unless the court in its discretion expressly thinks it necessary to stay the proceedings in the suit.

III. FIRST APPEALS TO SUBORDINATE COURTS

1. *Service of notice of appeal*.—First appeals being appeals on question of fact and law, the courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected at the admission stage under Rule 11 Order 41. In view of the amended CPC, a copy of the memorandum of appeal is required to be filed in the subordinate court. It has been clarified by the Supreme Court that the requirement of filing a copy of the appeal memorandum in the subordinate court does not mean

§ **Ed.**: *See also* Rule 44.3, English Civil Procedure Rules, March 2005, 39th Update, set out in editorial note to para 37, above.

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73



that the appeal memorandum cannot be filed in the appellate court immediately for obtaining interim orders.

Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party who appeared in the subordinate court so as to enable the respondents to appear if they so choose, even at the first hearing stage.

2. *Essential documents to be filed with the memorandum of appeal.*—The appellant shall, as far as possible, file, along with the appeal, copies of essential documents marked in the suit, for the purpose of enabling the appellate court to understand the points raised or for purpose of passing interim orders.

3. *Fixation of time-limits in interlocutory matters.*—Whenever notice is issued by the appellate court in interlocutory matters, the notice should indicate the date by which the reply should be filed. The rejoinder, if any, should be filed within four weeks of receipt of the reply. If there are more parties than one who are respondents, each one of the respondents should comply with this requirement within the time-limit and the rejoinder may be filed within four weeks from the receipt of the last reply.

4. *Steps for completion of all formalities/(call work) (hajri).*—The appeal shall be listed before the Registry for completion of all formalities necessary before the appeal is taken up for final hearing. The procedure indicated above of listing the case before a senior officer of the appellate court Registry for giving dates in routine matters must be followed to reduce the 'call work' (hajri) and only where judicial orders are necessary, such cases should be listed before the Court.

5. *Procedure on grant of interim orders.*—If an interim order is granted at the first hearing by the Court, the respondents would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

If the Court passes an ad interim ex parte order, and if the reply is filed by the respondents and if, without good reason, the appellant fails to file the rejoinder, the Court shall consider whether it is a fit case for vacating the stay or interim order and list the case for that purpose. This is intended to see that those who have obtained ad interim orders do not procrastinate in filing replies. The appellant may also waive his right to file the rejoinder. Such choice shall be conveyed to the Registry on or before the date fixed for filing of rejoinder. Such communication of option by the applicant to the Registry will be deemed to be completion of pleadings.

6. *Filing of written submissions.*—Both the appellants and the respondents shall be required to submit their written submissions two weeks before the commencement of the arguments in the appeal. The cause list should indicate if written submissions have been filed or not. Wherever they have not been filed, the Court must insist on their being filed within a particular period to be fixed by the Court and each party must serve a copy thereof on the opposite side before the date of commencement of arguments. There is no question of parties filing replies to each other's written submissions.

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74



The Court may consider having a caution list/alternative list to take care of eventualities when a case does not go on before a court, and those cases may be listed before a court where, for any reason, the scheduled cases are not taken up for hearing.

7. *Costs.*—Awarding of costs must be treated generally as mandatory inasmuch as it is the liberal attitude if the courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the appellate court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.§

IV. APPLICATION/PETITION UNDER SPECIAL ACTS

This chapter deals with applications/petitions filed under Special Acts like the Industrial Disputes Act, Hindu Marriage Act, Indian Succession Act, etc.

The practice directions in regard to original suits should mutatis mutandis apply in respect of such applications/petitions.

V. CRIMINAL TRIALS AND CRIMINAL APPEALS TO SUBORDINATE COURTS

*(a) Criminal trials.*—

1. Criminal trials should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment, rape and cases involving sexual offences or dowry deaths should be kept in Track I. Other cases where the accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy and food adulteration cases, etc. should be kept in Track III. Offences which are tried by Special Courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V — all other offences.

The endeavour should be to complete Track I cases within a period of nine months, Track II and Track III cases within twelve months and Track IV within fifteen months.

2. The High Court may classify criminal appeals pending before it into different tracks on the same lines mentioned above.

*(b) Criminal appeals.*—

3. Wherever an appeal is filed by a person in jail, and also when appeals are filed by the State, as far as possible, the memorandum of appeal may be accompanied by important documents, if any, having a bearing on the question of bail.

4. In respect of appeals filed against acquittals, steps for appointment of amicus curiae or the State legal aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the Registry/State Legal Services Authority immediately

§ Ed.: *See also* Rule 44.3, English Civil Procedure Rules, March 2005, 39th Update, set out in editorial note to para 37, above.

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75.



after completion of four weeks of service of notice. It shall be presumed that in such an event the accused is not in a position to appoint counsel.

5. Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the subordinate court, so as to enable the other party to appear if they so choose even at the first hearing stage.

VI. NOTICE ISSUED UNDER SECTION 80 OF THE CODE OF CIVIL PROCEDURE

Every public authority shall appoint an officer responsible to take appropriate action on a notice issued under Section 80 of the Code of Civil Procedure. Every such officer shall take appropriate action on receipt of such notice. If the Court finds that the officer concerned, on receipt of the notice, failed to take necessary action or was negligent in taking the necessary steps, the Court shall hold such officer responsible and recommend appropriate disciplinary action by the authority concerned.

VII. NOTE

Whenever there is any inconsistency between these Rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973 or the High Courts Act or any other statutes, the provisions of such Codes and statutes shall prevail.

***(B) Model Case Flow Management Rules in the High Court***

**... High Court Rules, 2003**

In exercise of the power conferred by Article 225 of the Constitution of India, and Chapter X of the Code of Civil Procedure, 1908 (5 of 1908) and Section ... of the ... High Court Act and all other powers enabling it, the ... High Court hereby makes the following Rules:

I. DIVISION OF CASES INTO DIFFERENT TRACKS

1. *Writ petitions*: The High Court shall, at the stage of admission or issuing notice before admission categorise the writ petitions other than the writ of habeas corpus, into three categories depending on the urgency with which the matter should be dealt with: the fast track, the normal track and the slow track. The petitions in the fast track shall invariably be disposed of within a period not exceeding six months while the petitions in the normal track should not take longer than a year. The petitions in the slow track, subject to the pendency of other cases in the court, should ordinarily be disposed of within a period of two years.

Where an interim order of stay or injunction is granted in respect of liability to tax or demolition or eviction from public premises, etc. shall be put on the fast track. Similarly, all matters involving tenders would also be put on the fast track. These matters cannot brook delays in disposal.

2. Senior officers of the High Court, nominated for the purpose, shall at intervals of every month, monitor the stage of each case likely to come up for hearing before each Bench (the Division Bench or the Single Judge) during that month which have been allocated to the different tracks. The details shall be placed before the Chief Justice or the Committee nominated for that purpose as well as the Judge concerned dealing with cases.

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Page 57 Wednesday, January 10, 2018
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76



3. The Judge or Judges referred to in clause (2) above may shift the case from one track to another, depending upon the complexity, (urgency) and other circumstances of the case.

4. Where computerisation is available, data will be fed into the computer in such a manner that the court or Judge or Judges, referred to in clause (2) above will be able to ascertain the position and stage of every case in every track from the computer screen.

5. Whenever the roster changes, the Judge concerned who is dealing with *final* matters shall keep himself informed about the stage of the cases in various tracks listed before him during every week, with a view to see that the cases are taken up early.

6. *Other matters*: The High Court shall also divide civil appeals and other matters in the High Court into different tracks on the lines indicated in sub-clauses (2) to (5) above and the said clauses shall apply, mutatis mutandis, to the civil appeals filed in the High Court. The High Court shall make a subject-wise division of the appeals/revision application for allocation into different tracks.

(Division of criminal petitions and appeals into different tracks is dealt with separately under the heading 'criminal petitions and appeals'.)

II. WRIT OF HABEAS CORPUS

Notices in respect of writ of habeas corpus where the person is in custody under orders of a State Government or Central Government shall invariably be issued by the Court at the first listing and shall be made returnable within 48 hours. The State Government or Central Government may file a brief return enclosing the relevant documents to justify the detention. The matter shall be listed after notice on the fourth working day after issuance of notice, and the Court shall consider whether a more detailed return to the writ is necessary, and, if so required, shall give further time of a week and three days' time for filing a rejoinder. A writ of habeas corpus shall invariably be disposed of within a period of fifteen days. It shall have preference over and above the fast track cases.

III. MODE OF ADVANCE SERVICE

The Court Rules will provide for mode of service of notice on the Standing Counsel for the respondents wherever available, against whom, interim orders are sought. Such advance service shall generally relate to Governments or public sector undertakings who have Standing Counsel.

IV. FIRST APPEALS TO THE HIGH COURT

1. *Service of notice of appeal*.—First appeals being appeals on questions of fact and law, the courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected under Order 41 Rule 11 at the admission stage. In view of the amended CPC, a copy of the appeal is required to be filed in the trial court. It has been clarified by the Supreme Court that the requirement of filing of appeal in the trial court does not mean that the party cannot file the appeal in the appellate court (the High Court) immediately for obtaining interim orders.

In addition to the process for normal service as per the Code of Civil Procedure, advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party in the trial court itself so as to enable them to inform the parties to appear if they so choose even at the first hearing stage.

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Page 58 Wednesday, January 10, 2018
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77



2. *Filing of documents.*—The appellant shall, on the appeal being admitted, file all the essential papers within such period as may be fixed by the High Court for the purpose of the High Court understanding the scope of the dispute and for the purpose of passing interlocutory orders.

3. *Printing or typing of paper-book.*—Printing and preparation of paper-books by the High Court should be done away with. After service of notice is effected, counsel for both sides should agree on the list of documents and evidence to be printed or typed and the same shall be made ready by the parties within the time to be fixed by the Court. Thereafter the paper-book shall be got ready. It must be assured that the paper-books are ready at lease six months in advance before the appeal is taken up for arguments. (Cause-lists must specify if paper-books have been filed or not.)

4. *Filing of written submissions and time for oral arguments.*—Both the appellants and the respondents shall be required to submit their written submissions with all the relevant pages as per the Court paper-book marked therein within a month of preparation of such paper-books, referred to in para 3 above.

Cause-list may indicate if written submissions have been filed. If not, the Court must direct that they be filed immediately.

After the written submissions are filed (with due service of copy to the other side) the matter should be listed before the Registrar/Master for the parties to indicate the time that will be taken for arguments in the appeal. Alternatively, such matters may be listed before a Judge in chambers for deciding the time duration and thereafter to fix a date of hearing on a clear date when the requisite extent of time will be available.

In the event that the matter is likely to take a day or more, the High Court may consider having a caution list/alternative list to meet eventualities where a case gets adjourned due to unavoidable reasons or does not go on before a court, and those cases may be listed before a court where, for one reason or another, the scheduled cases are not taken up for hearing.

5. *Court may explore the possibility of settlement.*—At the first hearing of a first appeal when both parties appear, the Court shall find out if there is a possibility of a settlement. If the parties are agreeable even at that stage for mediation or conciliation; the High Court could make a reference to mediation or conciliation for the said purpose.

If necessary, the process contemplated by Section 89 CPC may be resorted to by the appellate court so, however, that the hearing of the appeal is not unnecessarily delayed. Whichever is the ADR process adopted, the Court should fix a date for a report on ADR two months from the date of reference.

V. APPEALS TO THE DIVISION BENCH FROM JUDGMENT OF THE SINGLE JUDGE OF THE HIGH COURT [LETTERS PATENT APPEALS (LPA) OR SIMILAR APPEALS UNDER THE HIGH COURTS ACTS]

An appeal to a Division Bench from judgment of a Single Judge may lie in the following cases:

(1) Appeals from interlocutory orders of the Single Judge in original jurisdiction matters including writs; (2) appeals from final judgments of a Single Judge in original jurisdiction; (3) other appeals permitted by any law to a Division Bench.

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Page 59 Wednesday, January 10, 2018
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79



Appeals against interlocutory orders falling under category (1) above should be invariably filed after advance notice to the opposite counsel (who has appeared before the Single Judge) so that both the sides will be represented at the very first hearing of the appeals. If both parties appear at the first hearing, there is no need to serve the opposite side by normal process and at least in some cases, the appeals against interlocutory orders can be disposed of even at the first hearing. If, for any reason, this is not practicable, such appeals against interim orders should be disposed of within a period of a month.

In cases referred to above, necessary documents should be kept ready by the counsel to enable the Court to dispose of the appeal against interlocutory matter at the first hearing itself.

In all appeals against interim orders in the High Court, in writs and civil matters, the Court should endeavour to set down and observe a strict time-limit in regard to oral arguments. In case of original side appeals/LPAs arising out of final orders in a writ petition or arising out of civil suits filed in the High Court, a flexible time-schedule may be followed.

The practice direction in regard to first appeal should mutatis mutandis apply in respect of LPAs/original side appeals against final judgments of the Single Judge.

Writ appeals/letters patent appeals arising from orders of the Single Judge in a writ petition should be filed with simultaneous service on the counsel for the opposite party who had appeared before the Single Judge or on service of the opposite party.

Writ appeals against interim orders of the Single Judge should invariably be disposed of early and, at any rate, within a period of thirty days from the first hearing. Before writ appeals against final orders in writ petitions are heard, brief written submissions must be filed by both parties within such time as may be fixed by the Court.

VI. SECOND APPEALS

Even at the stage of admission, the questions of law with a brief synopsis and written submissions on each of the propositions should be filed so as to enable the Court to consider whether there is a substantial question of law. Wherever the Court is inclined to entertain the appeal, apart from normal procedure for service as per rules, advance notice shall be given to the counsel who had appeared in the first appellate court. The notice should require the respondents to file their written submissions within a period of eight weeks from service of notice. Efforts should be made to complete the hearing of the second appeals within a period of six months.

VII. CIVIL REVISION

A revision petition may be filed under Section 115 of the Code or under any special statute. In some High Courts, petitions under Article 227 of the Constitution of India are registered as civil revision petitions. The practise direction in regard to LPAs and first appeals to the High Courts, should mutatis mutandis apply in respect of revision petitions.

VIII. CRIMINAL APPEALS

Criminal appeals should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment cases, rape, sexual offences, dowry death cases should be kept in Track I. Other cases where the

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Page 60 Wednesday, January 10, 2018
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79



accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy, food adulteration cases, offences of sensitive nature should be kept in Track III. Offences which are tried by Special Courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V — all other offences.

The endeavour should be to complete Track I cases within a period of six months, Track II cases within nine months, Track III within a year, Track IV and Track V within fifteen months.

Wherever an appeal is filed by a person in jail, and also when appeals are filed by the State, the complete paper-books including the evidence, should be filed by the State within such period as may be fixed by the Court.

In appeals against acquittals, steps for appointment of amicus curiae or State legal aid counsel in respect of the accused who do not have a lawyer of their own should be undertaken by the Registry/State Legal Services Committee immediately after completion of four weeks of service of notice. It shall be presumed that in such an event the accused is not in a position to appoint counsel, and within two weeks thereafter counsel shall be appointed and shall be furnished all the papers.

IX. NOTE

Wherever there is any inconsistency between these Rules and the provisions of either the Code of Civil Procedure, 1908 or the Code of Criminal Procedure, 1973 or the High Court Act, or any other statute, the provisions of such Codes and statutes, shall prevail."

**69.** Before concluding, we wish to place on record our sincere gratitude and appreciation for the members of the Committee, in particular Hon'ble Mr Justice M. Jagannadha Rao, Chairman of the Committee and Law Commission of India who as usual has taken great pains in examining the whole issue in detail and going into the depth of it and has filed the three Reports abovereferred which we hope will go a long way in dispensation of effective and meaningful administration of justice to the litigating public. We hope that the High Courts in the country would be in a position to examine the aforesaid Rules expeditiously and would be able to finalise the Rules within a period of four months.

**70.** Further, we place on record our deep appreciation for very useful assistance rendered by Senior Advocates Mr K. Parasaran and Mr Arun Mohan who on request from this Court readily agreed to render assistance as amicus curiae. We also record our appreciation for useful assistance rendered by Mr Goolan Vahanvati, learned Solicitor General on behalf of the Union of India and the Attorney General of India and Mr T.L.V. Iyer, Senior Advocate on behalf of the Bar Council of India.

**71.** A copy of this judgment shall be sent to all the High Courts through the Registrars General, Central Government through Cabinet Secretary and the State Governments/Union Territories through Chief Secretaries so that expeditious follow-up action can be taken by all concerned. The Registrars General, Central Government and State Governments/Union Territories shall file the progress report in regard to the action taken within a period of four months.

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**NOTE:**

*Page 83 of this volume.

*Page 86 of this volume.

80

ANNEXURE V1/7

# CONCEPTS OF CONCILIATION AND MEDIATION AND THEIR DIFFERENCES

by Justice M. Jagannadha Rao

One of the questions constantly asked by many is as to what is meant by conciliation and mediation, whether they are the same and, if not, whether there are any differences?

## Conciliation and Mediation

Whether, in common parlance, there is some difference between conciliation and mediation or not, it is however clear that two statutes by Parliament treat them as different. (a) In the yeaf 1996, the Arbitration and Conciliation Act, 1996 was passed and sec. 30 of that Act, which is in Part I, provides that an arbitral tribunal may try to have the dispute settled by use of 'mediation' or 'conciliation'. Sub-section (1) of sec. 30 permits the arbitral tribunal to

"use mediation, conciliation or other procedures",

for the purpose of reaching settlement.

(b) The Civil Procedure Code (Amendment) Act, 1999 which introduced sec. 89, too speaks of 'conciliation' and 'mediation' as different concepts. Order 10 Rules 1A, 1B, 1C of the Code also go along with sec. 89.

Thus our Parliament has made a clear distinction between conciliation and mediation. In Part III of the 1996 Act (sections 61 to 81) which deals

with 'Conciliation' there is no definition of 'conciliation'. Nor is there any definition of 'conciliation' or 'mediation' in sec. 89 of the Code of Civil Procedure, 1908 (as amended in 1999).

Conciliation

In order to understand what Parliament meant by 'Conciliation', we have necessarily to refer to the functions of a 'Conciliator' as visualized by Part III of the 1996 Act. It is true, section 62 of the said Act deals with reference to 'Conciliation' by agreement of parties but sec. 89 permits the Court to refer a dispute for conciliation even where parties do not consent, provided the Court thinks that the case is one fit for conciliation. This makes no difference as to the meaning of 'conciliation' under sec. 89 because, it says that once a reference is made to a 'conciliator', the 1996 Act would apply. Thus the meaning of 'conciliation' as can be gathered from the 1996 Act has to be read into sec. 89 of the Code of Civil Procedure. The 1996 Act is, it may be noted, based on the UNCITRAL Rules for conciliation.

Now under section 65 of the 1996 Act, the 'conciliator' may request each party to submit to him a brief written statement describing the "general nature of the dispute and the points at issue". He can ask for supplementary statements and documents. Section 67 describes the role of a conciliator. Subsection (1) states that he shall assist parties in an independent and impartial manner. Subsection (2) states that he shall be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned

and the circumstances surrounding the dispute, including any previous business practices between the parties. Subsection (3) states that he shall take into account "the circumstances of the case, the wishes the parties may express, including a request for oral statements". Subsection (4) is important and permits the 'conciliator' to make proposals for a settlement. It states as follows:

> "Section 67(4). The conciliator may, at any stage of the conciliation proceeding, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor."

I shall briefly refer to the other provisions before I come to sec. 73. Section 69 states that the conciliator may invite parties to meet him. Sec. 70 deals with disclosure by the conciliator of information given to him by one party, to the other party. Sec. 71 deals with cooperation of parties with the conciliator, sec. 72 deals with suggestions being submitted to the conciliator by each party for the purpose of settlement. Finally, Sec. 73, which is important, states that the conciliator can formulate terms of a possible settlement if he feels there exist elements of a settlement. He is also entitled to 'reformulate the terms' after receiving the observations of the parties. Subsection (1) of sec. 73 reads thus:

> "Sec. 73(1) settlement agreement. (1) When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After

receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations."

The above provisions in the 1996 Act, make it clear that the 'Conciliator' under the said Act, apart from assisting the parties to reach a settlement, is also permitted to make "proposals for a settlement" and "formulate the terms of a possible settlement" or "reformulate the terms". This is indeed the UNCITRAL concept.

Mediation:

If the role of the 'conciliator' in India is pro-active and interventionist as stated above, the role of the 'mediator' must necessarily be restricted to that of a 'facilitator'.

In their celebrated book 'ADR Principles and Practice' by Henry J. Brown and Arthur L. Mariot (1997, 2nd Ed. Sweet & Maxwell, Lord on Chapter 7, p 127), the authors say that 'mediation' is a facilitative process in which "disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain procedures, techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication."

In yet another leading book on 'Dispute Resolution' (Negotiation, Mediation and other processes' by Stephen B. Goldberg, Frank E.A. Sander

and Nancy H. Rogers (1999, 3rd Ed. Aspine Law & Business, Gaithesburg and New York)(Ch. 3, p. 123), it is stated as follows:

> "Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties.
>
> Despite the lack of 'teeth' in the mediation process, the involvement of a mediator alters the dynamics of negotiations. Depending on what seems to be impeding (an) agreement, the mediator may attempt to encourage exchange of information, provide new information, help the parties to understand each others' views, let them know that their concerns are understood; promote a productive level of emotional expression; deal with differences in perceptions and interest between negotiations and constituents (including lawyer and client); help negotiators realistically, assess alternatives to settlement, learn (often in separate sessions with each party) about those interest the parties are reluctant to disclose to each other and invent solutions that meet the fundamental interests of all parties.

Prof. Robert Baruch Bush and Prof. Joseph Folgen (ibid, p 136) say:

> "In a transformative approach to mediation, mediating persons consciously try to avoid shaping issues, proposals or terms of settlement, or even pushing for the achievement of settlement at all. In stead, they encourage parties to define problems and find solutions for themselves and they endorse and support the parties' own efforts to do so."

The meaning of these words as understood in India appears to be similar to the way they are understood in UK. In the recent Discussion Paper by the lord Chancellor's Department on Alternative Dispute Resolution (***http://www.lcd.gov.uk/Consult/cir-just/adi/annexald/htm***) (Annexure A), where while defining 'Mediation' and 'Conciliation', it is stated that 'Mediation' is a way of settling disputes by a third party who helps both sides to come to an agreement, which each considers acceptable. Mediation can be 'evaluative' or 'facilitative'. 'Conciliation', it is said, is a procedure like mediation but the third party, the conciliator, takes a more interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve a settlement. But it is also stated that the term 'conciliation' is gradually falling into disuse and a process which is pro-active is also being regarded as a form of mediation. (This has already happened in USA).

The above discussion shows that the 'mediator' is a facilitator and does not have a pro-active role. (But, as shown below, these words are differently understood in US).

The difference between conciliation and mediation:

Under our law and the UNCITRAL model, the role of the mediator is not pro-active and is somewhat less than the role of a 'conciliator'. We have seen that under Part III of the Arbitration and Conciliation Act, the 'Conciliator's powers are larger than those of a 'mediator' as he can suggest proposals for settlement. Hence the above meaning of the role of 'mediator'

in India is quite clear and can be accepted, in relation to sec. 89 of the Code of Civil Procedure also. The difference lies in the fact that the 'conciliator' can make proposals for settlement, 'formulate' or 'reformulate' the terms of a possible settlement while a 'mediator' would not do so but would merely facilitate a settlement between the parties.

Brown quotes (at p 127) the 1997 Handbook of the City Disputes Panel, UK which offers a range of dispute resolution processes, facilitative, evaluative and adjudicative. It is there stated that conciliation "is a process in which the Conciliator plays a proactive role to bring about a settlement" and mediator is "a more passive process".

This is the position in India, UK and under the UNCITRAL model. However, in the USA, the person having the pro-active role is called a 'mediator' rather than a 'conciliator'. Brown says (p 272) that the term 'Conciliation' which was more widely used in the 1970s has, in the 1970s, in many other fields given way to the term 'mediation'. These terms are elsewhere often used interchangeably.

Where both terms survived, some organizations use 'conciliation' to refer to a more proactive and evaluative form of process. However, reverse usage is sometimes employed; and even in UK, 'Advisory, Conciliation and Arbitration Service' (ACAS) (UK) applies a different meaning. In fact, the meanings are reversed. In relation to 'employment', the term 'conciliation' is used to refer to a mediatory process that is wholly facilitative and non-evaluative. The definition of 'conciliation' formulated by the ILO (1983) is as follows:

"the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator."

However, according to the ACAS, 'mediation' in this context involves a process in which the neutral "mediator takes a more pro-active role than a conciliator for the resolution of the dispute, which the parties are free to accept or reject. (The ACAS role in Arbitration, Conciliation and Mediation, 1989). It will be seen that here, the definitions, even in UK, run contrary to the meanings of these words in UK, India and the UNCITRAL model.

The National Alternative Dispute Resolution Advisory Council, (NADRAC), Barton Act 2600, Australia (see ***www.nadrac.gov.au***) in its recent publication (ADR terminology, a discussion Paper, at p 15) states that the terms "conciliation" and "mediation" are used in diverse ways. ( The 'New" Mediation: Flower of the East in Harvard Bouquet: Asia Pacific Law Review Vol. 9, No.1, p 63-82 by Jagtenbury R and de Roo A, 2001). It points out that the words 'conciliation' and 'counselling' have disappeared in USA. In USA, the word 'conciliation' has disappeared and 'mediation' is used for the neutral who takes a pro-active role. For example:

"Whereas the terms 'conciliation' and 'conselling' have long since disappeared from the literature in reference to dispute resolution

services in the United States and elsewhere, these terms have remained enshrined in Australian family laws, with 'mediation' grafted on as a separate dispute resolution service in 1991."

Conversely, policy papers in countries such as Japan still use the term 'conciliation' rather than 'mediation' for this pro-active process (see *www.kantei.go.jp/foreign/judiciary/2001/0612* report of Justice System Reform Council, 2001, Recommendations for a Justice System to support Japan in the 21st Century). NADRAC refers, on the other hand, to the view of the OECD Working Party on Information, Security and Privacy and the Committee on Consumer Policy where 'conciliation' is treated as being at the less formal end of the spectrum while 'mediation' is at the more formal end. Mediation is described there as more or less active guidance by the neutrals. This definition is just contrary to the UNCITRAL Conciliation Rules which in Art 7(4) states

"Art 7(4). The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute...."

In an article from US entitled "Can you explain the difference between conciliation and mediation" (***http://www.colorodo.edu/conflict/civil-rights/topics/1950.html***), a number of conciliators Mr. Wally Warfield, Mr. Manuel Salivas and others treat 'conciliation' as less formal and 'mediation' as pro-active where there is an agenda and there are ground rules. In US from the informal conciliation process, if it fails, the neutral person moves on to a greater role as a 'conciliator'. The above article shows that in US the word 'mediator'

reflects a role which is attributed to a pro-active conciliator in the UNCITRAL Model. In fact, in West Virginia, 'Conciliation' is an early stage of the process where parties are just brought together and thereafter, if conciliation has not resulted in a solution, the Mediation programme is applied which permits a more active role (see ***http://www.state.wv.us/wvhic/Pre-Determination/20comc.htm***) The position in USA, in terms of definitions, is therefore just the otherway than what it is in the UNCITRAL Conciliation Rules or our Arbitration and Conciliation Act, 1996 where, the conciliator has a greater role on the same lines as the 'mediator' in US.

I have thus attempted to clear some of the doubts raised as to the meaning of the words 'conciliation' and 'mediation'. Under our law, in the context of sec. 30 and sec. 64(1) and sec. 73(1) of the 1996 Act, the conciliator has a greater or a pro-active role in making proposals for a settlement or formulating and reformulating the terms of a settlement. A mediator is a mere facilitator. The meaning of these words in India is the same in the UNCITRAL and Conciliation Rules and in UK and Japan. But, in USA and in regard to certain institutions abroad, the meaning is just the reverse, a 'conciliator' is a mere 'facilitator' whereas a 'mediator' has a greater pro-active role. While examining the rules made in US in regard to 'mediation', if we substitute the word 'conciliation' wherever the word 'mediation' is used and use the word 'conciliator' wherever the word 'mediator' is used, we shall be understanding the said rules as we understand them in connection with 'conciliation' in India.

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90

ANNEXURE V1/3

# Mediation
## Practice & Law

The path to successful dispute resolution


Sriram Panchu

*Senior Advocate*
*and*
*Mediator*


*Foreword by*
Justice T S Thakur
*Judge, Supreme Court of India*

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would help them here. Third, proper and adequate referrals are a key factor for the success of mediation programs. Fourth, the role of the judge is paramount when it comes to the promotion of mediation, the implementation of agreements reached therein and the management of court-annexed mediation schemes. Fifth, as explained above, a mediation practice is an attractive post-retirement option for judges, provided they can make the shift from decider to facilitator.

## MODEL RULES UNDER SECTION 89

The Committee headed by Mr. Justice Jagannadha Rao, appointed by the Supreme Court in the *Salem Bar Association (II) v. Union of India,*[39] formulated Model Rules to implement Section 89—Model Civil Procedure ADR and Mediation Rules, 2003.[40]

The Supreme Court recommended these Model Rules to the High Courts for making rules under Section 125 of the Code of Civil Procedure to regulate the working of Section 89. The Supreme Court clarified that the High Courts could modify the Model Rules as they deemed fit. These have been adopted by various High Courts, with some or nil modification.

Part I of these rules, deals with the reference to different ADR processes; Part II deals specifically with mediation.

### Model Civil Procedure ADR and Mediation Rules, 2003 : Part I

These Rules provide the procedure to be followed at the first stage of Section 89—making the reference to the different ADR modes.

Rule 2 states that where it appears to the court, after recording admissions and denials under Order X of the CPC, that elements of a settlement exist, the court should formulate a settlement and after getting responses from the parties, reformulate the settlement and direct the parties to opt for one of the modes specified in Section 89(1)(a) to (d) of the CPC.

As mentioned above, it is quite unrealistic to require the court to formulate or reformulate the terms of settlement.

Rule 3 provides that government and public sector undertakings and authorities should nominate persons who can take a decision as to which mode of ADR to opt for.

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[39] AIR 2005 SC 3353 : (2005) 6 SCC 344.
[40] See Annexure 1.

NOTE:

*Para. 23 of Afcons.

*Para. 12 of Afcons.

*Paras. 13 and 25 of Afcons.

*Para. 29 of Afcons.

*Para. 36 of Afcons.

*Para. 38 of Afcons.

*Para. 39 of Afcons.

*Para. 40 of Afcons.

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92

ANNEXURE V 1/9



**53.** The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to revisit the provisions relating to costs and compensatory costs contained in Sections 35 and 35-A of the Code.

***Conclusion***

**54.** In the result, we allow this appeal in part, set aside the order of the Division Bench and the learned Single Judge directing the appellant-plaintiff to file an affidavit undertaking to pay ₹25 lakhs to the respondent- defendants in the event of failure of the suit. Instead, we permit the respondent-defendants under Section 52 of the TP Act, to deal with or dispose of the suit property in the manner they deem fit, in spite of the pendency of the suit by the plaintiff, subject to their furnishing security to an extent of ₹3 lakhs to the satisfaction of the learned Single Judge.

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**(2010) 8 Supreme Court Cases 24**

(BEFORE R.V. RAVEENDRAN AND J.M. PANCHAL, JJ.)

AFCONS INFRASTRUCTURE LIMITED AND ANOTHER .. Appellants;

*Versus*

CHERIAN VARKEY CONSTRUCTION COMPANY PRIVATE LIMITED AND OTHERS .. Respondents.

Civil Appeal No. 6000 of 2010†, decided on July 26, 2010

A. **Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Reference to ADR processes under — Preconditions, choice of ADR process and proper procedure — After completion of pleading, respondent filing application for arbitration (an adjudicatory ADR process) under S. 89 but appellant opposing the same — Reference of matter to arbitration in such situation by trial court, held, is erroneous — Reference to adjudicatory ADR processes (arbitration or conciliation) can be made only with consent of all parties — As appellant was not agreeing to arbitration, matter remanded to trial court for deciding upon appropriate non-adjudicatory ADR process — Legal Aid and ADR — Reference to ADR**

B. **Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Reference to ADR processes under — Appropriate stage, discussed — Present case (a money suit) distinguished from family disputes and matrimonial disputes with regard to stage for reference to ADR**

† Arising out of SLP (C) No. 760 of 2007. From the Judgment and Order dated 11-10-2006 of the High Court of Kerala at Ernakulam in Civil Revision Petition No. 1219 of 2005

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93



The general scope of Section 89 CPC and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arose for consideration in this appeal. The respondent filed a money suit against the appellant. In the said suit an order of attachment was made. Thereafter the respondents filed an application for arbitration which was opposed by the appellants by filing a counter. The trial court by a reasoned order referred the matter to arbitration though it was opposed by the appellants. The High Court by the impugned order upheld the order of the trial court.

Allowing the appeal, the Supreme Court

*Held* :

A civil court exercising power under Section 89 CPC cannot refer a suit to arbitration unless all the parties to the suit agree to such reference. If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. If the reference is to any other non-adjudicatory ADR process, the court should briefly record the same.

[Paras 49(*ii*), 44(*i*) and 44(*ii*)]

The trial court did not adopt the proper procedure while enforcing Section 89. Failure to invoke Section 89 suo motu after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous. Consequently, the orders of the trial court referring the matter to arbitration and of the High Court affirming the said reference are set aside. The trial court will now consider and decide upon a non-adjudicatory ADR process.

[Paras 49(*i*), 50, 47 and 48]

*Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531, *distinguished* and *clarified*

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. 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. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

[Paras 24, 41, 45, 43(*a*) to 43(*d*)]

However, in family disputes or matrimonial cases the ideal stage for mediation will be immediately after service of notice on the respondent and *before* the respondent files objections/written statements. The reason being to avert the hostility which might further aggravate by the counter-allegations made in his or her written statement or objections. (Para 42)

C. **Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Interpretation — Anomalies and draftsman's errors — Practicable/proper interpretation, prescribed — Regarding first anomaly, merely describing nature of dispute in a sentence or two, held, would be sufficient for the requirement of S. 89(1) that the court should formulate or reformulate the terms of settlement — Secondly, interchanging the definitions of "judicial settlement" and "mediation" in Ss. 89(2)(c) and (d), held, would correct the draftsman's error — Interpretation of Statutes — Basic rules — Purposive construction — When a departure from literal rule of plain and ordinary meaning warranted — Rationale for, stated**

**[Paras 9 to 19, 21, 25 and 44(iii)]**

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94



D. **Interpretation of Statutes — Basic rules — Plain or ordinary meaning — When applicable (not as in present case), stated**
**(Paras 20 and 21)** a

*Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344, *relied on*

*Black's Law Dictionary*, 7th Edn., pp. 1377 and 996, *referred to*

*Salem Advocate Bar Assn. (I)* v. *Union of India*, (2003) 1 SCC 49; *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344, *relied on*

*Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344; *Shri Mandir Sita Ramji* v. *Lt. Governor of Delhi*, (1975) 4 SCC 298; *Tirath Singh* v. *Bachittar Singh*, AIR 1955 SC 830; *Shamrao V. Parulekar* v. *District Magistrate, Thana*, AIR 1952 SC 324 : 1952 Cri LJ 1503; *Molar Mal* v. *Kay Iron Works (P) Ltd.*, (2000) 4 SCC 285; *Mangin* v. *IRC*, 1971 AC 739 : (1971) 2 WLR 39 : (1971) 1 All ER 179 (PC); *Stock* v. *Frank Jones (Tipton) Ltd.*, (1978) 1 WLR 231 : (1978) 1 All ER 948 (HL), *relied on* b

Maxwell: *Interpretation of Statutes* (12th Edn., p. 228); *Principles of Statutory Interpretation* (12th Edn. 2010, Lexis Nexis, p. 144), *referred to*

E. **Civil Procedure Code, 1908 — S. 89, Or. 10 R. 1-A and Or. 23 R. 3 — Procedure under S. 89 r/w Or. 10 R. 1-A, elaborated — ADR processes being a non-starter in many courts, such elaboration is necessary — Therefore, (1) detailed procedure of valid reference and choosing appropriate ADR process, (2) procedure if there is a settlement or if the reference failed, (3) procedure regarding civil court keeping track of matters referred so that non-adjudicatory ADR processes may be expedited, and (4) procedure regarding keeping or sending of original records, explained and elaborated — Arbitration and Conciliation Act, 1996 — Ss. 8, 11, 64, 36, 30 and 74 — Legal Services Authorities Act, 1987, S. 21** c d

*Held*:

The ADR processes in Section 89 are being referred to elaborately because Section 89 has been a non-starter with many courts. 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. e

[Paras 45, 43(*a*) to 43(*d*) and 44(*i*) to 44(*iii*)]

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. 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). If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 CPC. [Paras 43(*h*), 40 and 43(*i*)] f g

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. [Para 43(*j*)] h

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95



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. [Para 44(*iv*)]

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. [Para 44(*v*)]

Normally the court should not send the original record of the case when referring the matter to an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a court annexed mediation centre which is under the exclusive control and supervision of a judicial officer, the original file may be made available wherever necessary. [Para 44(*vi*)]

F. **Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Different ADR processes — Distinctive nature and procedural mode, examined — ADR processes, distinguished with reference to (1) as to whether consent of parties is required or the parties have to abide by court's discretionary order, (2) binding nature of ADR process (i.e. whether ADR process is adjudicatory or non-adjudicatory), and (3) whether case would go out of the stream of court permanently or come back to court (Paras 32 to 38)**

*Salem Advocate Bar Assn. (I)* v. *Union of India*, (2003) 1 SCC 49; *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344; *Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719, *relied on*

*P. Anand Gajapathi Raju* v. *P.V.G. Raju*, (2000) 4 SCC 539, *cited*

G. **Civil Procedure Code, 1908 — S. 89 and Or. 10 R. 1-A — Reference to ADR for proceeding under other statutory schemes, (1) categorised and (2) non-overriding effect of S. 89 and Or. 10 R. 1-A on such other schemes, clarified — Legal Aid and ADR — Legal Services Authorities Act, 1987 — S. 21 — Arbitration and Conciliation Act, 1996, S. 74**

H. **Civil Procedure Code, 1908 — S. 89 — Mandatory aspects — Held, consideration for reference of ADR process is mandatory, but not actual reference**

I. **Civil Procedure Code, 1908 — S. 89 — Applicability — Suitability for reference to ADR process — Categorised on the basis of nature of dispute/case**

*Held*:

The object of Section 89 is that settlement should be attempted by adopting an appropriate ADR process. Neither Section 89 nor Order 10 Rule 1-A is intended to supersede or modify the provisions of the Arbitration and Conciliation Act or the Legal Services Authorities Act, 1987. Section 89 makes it clear that two of the ADR processes (i.e. arbitration and conciliation) will be governed by the AC Act, two others (i.e. Lok Adalat settlement and mediation)

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Page 5 Wednesday, January 10, 2018
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96



by the Legal Services Authorities Act, 1987 and the last of the ADR process by judicial settlement. (Para 29)

Having a hearing after completion of pleadings, to consider recourse to ADR process under Section 89, 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 cases reference to ADR process is a must. (Para 26)

The starting words of Section 89 clearly show that cases which are not suited for ADR process should not be referred under Section 89. Where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89. (Para 26)

The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature: (*i*) Representative suits under Order I Rule 8 CPC which involve 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, associations, 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 the Government. (*vi*) Cases involving prosecution for criminal offences. (Para 27)

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/coparceners/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.); (1) disputes between employers and employees; (2) 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.

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Page 6 Wednesday, January 10, 2018
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97.



The above enumeration of "suitable" and "unsuitable" categorisation 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. (Para 28)

Appeal allowed SS-D/46520/CV

Advocates who appeared in this case :

Krishnan Venugopal, Senior Advocate [Anil K. Bhatnagar, Amit Dhingra and Manu Seshadri (for Dua Associates), Advocates] for the Appellants;

T.L.V. Iyer, Senior Advocate (V.J. Francis, Anupam Mishra, C.N. Sreekumar, P.R. Nayak and Dushyant Parashar, Advocates) for the Respondents.

***Chronological list of cases cited*** ***on page(s)***

1. (2007) 5 SCC 719, *Jagdish Chander* v. *Ramesh Chander* 42*f*
2. (2005) 6 SCC 344, *Salem Advocate Bar Assn. (II)* v. *Union of India* 32*a-b*, 34*d-e*, 36*d*, 37*b*, 37*c*, 41*g-h*
3. (2003) 5 SCC 531, *Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya* 30*e*, 47*g*, 47*g-h*, 48*c-d*, 48*d-e*
4. (2003) 1 SCC 49, *Salem Advocate Bar Assn. (I)* v. *Union of India* 32*a-b*, 41*b-c*, 41*d*
5. (2000) 4 SCC 539, *P. Anand Gajapathi Raju* v. *P.V.G. Raju* 42*e*
6. (2000) 4 SCC 285, *Molar Mal* v. *Kay Iron Works (P) Ltd.* 36*a*
7. (1978) 1 WLR 231 : (1978) 1 All ER 948 (HL), *Stock* v. *Frank Jones (Tipton) Ltd.* 36*g*
8. (1975) 4 SCC 298, *Shri Mandir Sita Ramji* v. *Lt. Governor of Delhi* 34*g*
9. 1971 AC 739 : (1971) 2 WLR 39 : (1971) 1 All ER 179 (PC), *Mangin* v. *IRC* 36*b-c*
10. AIR 1955 SC 830, *Tirath Singh* v. *Bachittar Singh* 35*f*
11. AIR 1952 SC 324 : 1952 Cri LJ 1503, *Shamrao V. Parulekar* v. *District Magistrate, Thana* 35*f*

The Judgment of the Court was delivered by

**R.V. RAVEENDRAN, J.**— Leave granted. The general scope of Section 89 of the Code of Civil Procedure, 1908 ("the Code", for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

**2.** The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20-4-2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1-8-2001. It is not in dispute that the agreement between the appellants and the first respondent did not contain any provision for reference of the disputes to arbitration.

**3.** The first respondent filed a suit against the appellants for recovery of ₹2,10,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15-9-2004 in regard to a sum of ₹2.25 crores. Thereafter in March 2005, the first respondent filed an application under Section 89 of the Code before the trial court praying that

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Page 7 Wednesday, January 10, 2018
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98



the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24-10-2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes under Section 89 of the Code.

**4.** In the meanwhile, the High Court of Kerala by the order dated 8-9-2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent under Section 89 of the Code.

**5.** The trial court heard the said application under Section 89. It recorded the fact that the first respondent (the plaintiff) was agreeable for arbitration and the appellants (Defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application under Section 89 by a reasoned order dated 26-10-2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court.

**6.** The High Court by the impugned order dated 11-10-2006 dismissed the revision petition holding that the apparent tenor of Section 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration. The High Court also held that the concept of pre-existing arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration and Conciliation Act, 1996 ("the AC Act", for short) was inapplicable to references under Section 89 of the Code, having regard to the decision in *Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*[1]. The said order is challenged in this appeal.

**7.** On the contentions urged, two questions arise for consideration:

(*i*) What is the procedure to be followed by a court in implementing Section 89 and Order 10 Rule 1-A of the Code?

(*ii*) Whether consent of all parties to the suit is necessary for reference to arbitration under Section 89 of the Code?

**8.** To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions. The said provisions are extracted below:

"**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;

1 (2003) 5 SCC 531

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99



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

a (*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 (*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 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

c (*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 (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."

***Order 10 Rule 1-A***

d "1-A. *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 the 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."

e ***Order 10 Rule 1-B***

"1-B. *Appearance before the conciliatory forum or authority*.—Where a suit is referred under Rule 1-A, the parties shall appear before such forum or authority for conciliation of the suit."

***Order 10 Rule 1-C***

f "1-C. *Appearance before the court consequent to the failure of efforts of conciliation*.—Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority 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."

**9.** If Section 89 is to be read and required to be implemented in its literal g 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 spite of these defects, the object behind Section 89 is laudable and sound. Resort to alternative disputes resolution (for short "ADR") processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon h the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to

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Page 9 Wednesday, January 10, 2018
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100



1-C in Order 10 in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits.

**10.** In view of its laudable object, the validity of Section 89, with all its imperfections, was upheld in *Salem Advocate Bar Assn. (I)* v. *Union of India*[2] [for short *Salem Bar (I)*] but referred to a committee, as it was hoped that Section 89 could be implemented by ironing the creases. In *Salem Advocate Bar Assn. (II)* v. *Union of India*[3] [for short *Salem Bar (II)*], this Court applied the principle of purposive construction in an attempt to make it workable.

***What is wrong with Section 89 of the Code?***

**11.** The first anomaly is the mixing up of the definitions of "mediation" and "judicial settlement" under clauses (*c*) and (*d*) of sub-section (2) of Section 89 of the Code. Clause (*c*) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (*d*) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in clause (*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 clause (*c*).

**12.** "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. "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 a synonym of the term "conciliation". (See *Black's Law Dictionary*, 7th Edn., pp. 1377 and 996.)

**13.** 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. 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.

**14.** The second anomaly is that sub-section (1) of Section 89 imports the final stage of conciliation referred to in Section 73(1) of the AC Act into the pre-ADR reference stage under Section 89 of the Code. 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

2 (2003) 1 SCC 49
3 (2005) 6 SCC 344

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Page 10 Wednesday, January 10, 2018
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101



possible settlement and then refer the same for any one of the ADR processes.

**15.** If sub-section (1) of Section 89 is to be literally followed, every trial Judge before framing issues, is required to ascertain whether there exist any elements of a settlement which may be acceptable to the parties, formulate the terms of settlement, give them to the 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.

**16.** Section 73 of the AC Act shows that formulation and reformulation of the 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.

| *Section 73(1) of the Arbitration and Conciliation Act, 1996 relating to the final stage of settlement process in conciliation* | *Section 89(1) of the Code of Civil Procedure relating to a stage before reference to an ADR process* |
|---|---|
| "73. *Settlement agreement.*—(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations." | "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—<br>(*a*) arbitration;<br>(*b*) conciliation;<br>(*c*) judicial settlement including settlement through Lok Adalat; or<br>(*d*) mediation." |

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Page 11 Wednesday, January 10, 2018
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102



**17.** Formulation and reformulation of the terms of settlement by the court is therefore wholly out of place at the stage of pre-ADR reference. 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.

**18.** 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/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, 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 the terms of settlement at pre-reference stage?

**19.** 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. This Court therefore diluted this anomaly in *Salem Bar (II)*[3] by equating the "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".

***How should Section 89 be interpreted?***

**20.** 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 normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in a somewhat different context:

> "*6*. ... When a procedure is prescribed by the legislature, it is not for the court to substitute a different one according to its notion of justice. When the legislature has spoken, the judges cannot afford to be wiser."

(See *Shri Mandir Sita Ramji* v. *Lt. Governor of Delhi*[4], SCC p. 301, para 6.)

**21.** There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts

3 *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344

4 (1975) 4 SCC 298

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Page 12 Wednesday, January 10, 2018
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103



may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance with a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

**21.1.** Maxwell on *Interpretation of Statutes* (12th Edn., p. 228), under the caption "modification of the language to meet the intention" in the chapter dealing with "Exceptional Construction" states the position succinctly:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

This Court in *Tirath Singh* v. *Bachittar Singh*[5] approved and adopted the said approach.

**21.2.** In *Shamrao V. Parulekar* v. *District Magistrate, Thana*[6] this Court reiterated the principle from *Maxwell*: (AIR p. 327, para 12)

> "*12.* ... if one construction will lead to an absurdity while another will give effect to what common sense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided."

5 AIR 1955 SC 830
6 AIR 1952 SC 324 : 1952 Cri LJ 1503

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Page 13 Wednesday, January 10, 2018
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106



**21.3.** In *Molar Mal* v. *Kay Iron Works (P) Ltd.*[7] this Court while reiterating that courts will have to follow the rule of literal construction, which enjoins the court to take the words as used by the legislature and to give it the meaning which naturally implies, held that there is an exception to that rule. This Court observed: (SCC p. 295, para 12)

> "*12.* ... That exception comes into play when application of literal construction of the words in the statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the statute as a whole, it requires a different meaning."

**21.4.** In *Mangin* v. *IRC*[8] the Privy Council held: (AC p. 746 E)

> "... the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted."

**21.5.** 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 7 Rule 14(4) of the Code, in *Salem Bar (II)*[3]. We extract below the relevant portion of the said decision: (SCC pp. 368-69, para 35)

> "*35.* Order 7 relates to the production of documents by the plaintiff whereas Order 8 relates to production of documents by the defendant. Under Order 8 Rule 1-A(4) a document not produced by the defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order 7 Rule 14(4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words 'plaintiff's witnesses', would be read as 'defendant's witnesses' in Order 7 Rule 14(4). We, however, hope that the mistake would be expeditiously corrected by the legislature."

**21.6.** Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the statute, in his treatise *Principles of Statutory Interpretation* (12th Edn., 2010, Lexis Nexis, p. 144) from the decision of the House of Lords in *Stock* v. *Frank Jones (Tipton) Ltd.*[9]: (WLR p. 237 F-G)

> "... a court would only be justified in departing from the plain words of the statute when it is satisfied that: (*1*) there is clear and gross balance of anomaly; (*2*) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to

7 (2000) 4 SCC 285

8 1971 AC 739 : (1971) 2 WLR 39 : (1971) 1 All ER 179 (PC)

3 *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344

9 (1978) 1 WLR 231 : (1978) 1 All ER 948 (HL)

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Page 14 Wednesday, January 10, 2018
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105



accept it in the interest of a supervening legislative objective; (*3*) the anomaly can be obviated without detriment to such legislative objective; (*4*) the language of the statute is susceptible of the modification required to obviate the anomaly."

**22.** 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)*[3], 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 a 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, this Court in *Salem Bar (II)*[3] SCC p. 381, para 65, adopted the following definition of "mediation" suggested in the model mediation rules, in spite of a different definition in Section 89(2)(*d*):

> "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 emphasising that it is the parties' own responsibility for making decisions which affect them."

**23.** 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.

**24.** 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 a 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 *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344

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106



**25.** In view of the foregoing, 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 reformulate 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 Lok Adalat and all the provisions of the Legal Services Authorities 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 "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.

***Whether the reference to ADR process is mandatory?***

**26.** 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 1-A of Order 10 of the Code, the civil court should *invariably* refer cases to ADR process. Only in certain recognised 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 processes, 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 cases reference to ADR process is a must.

**27.** The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

> (*i*) Representative suits under Order 1 Rule 8 CPC which involve 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).

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107



(*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 the Government.

(*vi*) Cases involving prosecution for criminal offences.

**28.** 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/coparceners/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.

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108



The above enumeration of "suitable" and "unsuitable" categorisation 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.

***How to decide the appropriate ADR process under Section 89?***

**29.** 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. The object of Section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither Section 89 nor Rule 1-A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, Section 89 of the Code makes it clear that two of the ADR processes—arbitration and conciliation, will be governed by the provisions of the AC Act and the two other ADR processes—Lok Adalat settlement and mediation (see amended definition in para 25 above), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes—judicial settlement (see amended definition in para 25 above), Section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

**30.** Rule 1-A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, Section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1-A to 1-C of Order 10 lay down the manner in which the said jurisdiction is to be exercised. 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.

**31.** Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

***Arbitration***

**32.** Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an "arbitration agreement" between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking Section 8 or Section 11 of the AC Act, and there would be no need to have recourse to arbitration under Section 89 of the Code. Section 89 therefore presupposes that there is no pre-existing arbitration agreement.

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109



**33.** Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under Section 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the order-sheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under Section 89 of the Code; and on such reference, the provisions of the AC Act will apply to the arbitration, and as noticed in *Salem Bar (I)*[2], the case will go outside the stream of the court permanently and will not come back to the court.

**34.** If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration under Section 89 of the Code. This is evident from the provisions of the AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though Section 89 of the Code mandates reference to ADR processes, reference to arbitration under Section 89 of the Code could only be with the consent of both sides and not otherwise.

**34.1.** In *Salem Bar (I)*[2] this Court held: (SCC p. 55, paras 9-10)

"9. 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. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation...

*10. ... **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. 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."

(emphasis supplied)

**34.2.** In *Salem Bar (II)*[3] this Court held: (SCC p. 376, paras 54-56)

"54. Some doubt as to a possible conflict has been expressed in view of use of the word 'may' in Section 89 when it stipulates that 'the court

2 *Salem Advocate Bar Assn. (I)* v. *Union of India*, (2003) 1 SCC 49
3 *Salem Advocate Bar Assn. (II)* v. *Union of India*, (2005) 6 SCC 344

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110



may reformulate the terms of a possible settlement and refer the same for' and use of the word 'shall' in Order 10 Rule 1-A when it states that '*the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in sub-section (1) of Section 89*'.

55. *The intention of the legislature behind enacting Section 89 is that where it appears to the 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 the other of the said modes.* Section 89 uses both the words 'shall' and 'may' whereas Order 10 Rule 1-A 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 the ADR methods. There is no conflict. It is evident that what is referred to *one of the ADR modes is the dispute which is summarised in the terms of settlement formulated or reformulated in terms of Section 89.*

56. One of the modes to which the dispute can be referred is 'arbitration'. Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act') shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju* v. *P.V.G. Raju*[10] the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. *Of course, the parties have to agree for arbitration.*" (emphasis supplied)

**34.3.** The position was reiterated by this Court in *Jagdish Chander* v. *Ramesh Chander*[11] thus: (SCC p. 726, para 10)

"*10.* ... It should not also be overlooked that even though Section 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, *there cannot be a reference to arbitration even under Section 89 CPC, unless there is a mutual consent of all parties, for such reference.*" (emphasis supplied)

**34.4.** Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject-matter of the suit to arbitration under Section 89 of the Code.

10 (2000) 4 SCC 539
11 (2007) 5 SCC 719

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***Conciliation***

a **35.** Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of the AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in Section 62 of the AC Act followed by appointment of conciliator(s) as provided in Section 64 of the b AC Act. If both parties do not agree for conciliation, there can be no "conciliation". As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under Section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of the court process permanently. If there is no settlement, the matter is returned to the c court for framing issues and proceeding with the trial.

***The other three ADR processes***

**36***. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, mediation and judicial d settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If the facility of mediation is available, then the choice becomes wider. If the suit is complicated or lengthy, mediation will be the recognised choice. If the suit is not complicated and the e disputes are easily sortable or could be settled by applying clear-cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has to use its discretion in choosing the ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

f

***Whether the settlement in an ADR process is binding in itself?***

**37.** When the court refers the matter to arbitration under Section 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the Arbitral Tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no g question of failure of the ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to Section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, under Section 30 of the AC Act.

h

* **Ed.**: Para 36 corrected vide Official Corrigendum No. F.3/Ed.B.J./112/2010 dated 4-10-2010.

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112



**38.** The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non-adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the settlement agreement is enforceable as if it is a decree of the court having regard to Section 74 read with Section 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such under Section 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. 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 for recording it and disposal in its terms.

**39.** Where the reference is to a neutral third party ("mediation" as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as the court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it.

**40.** Whenever such settlements reached before non-adjudicatory ADR fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject-matter of the suit/proceeding. In regard to matters/disputes which are not the subject-matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by Section 74 of the AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a mediator). Only then such settlements will be effective.

***Summation***

**41.** Having regard to the provisions of Section 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR processes under Section 89 before framing issues, nothing prevents the court from resorting to Section 89 even after framing issues. But

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113



once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

**42.** Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and *before* the respondent files objections/written statements. Be that as it may.

**43*.** We may summarise the procedure to be adopted by a court under Section 89 of the Code as under:

(*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 that 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 AC Act.

(*f*) If the 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

* **Ed.**: Para 43 corrected vide Official Corrigenda Nos. F.3/Ed.B.J./87/2010 dated 27-8-2010 and F.3/Ed.B.J./112/2010 dated 4-10-2010, respectively.

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114



matter to any one of the other three 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 AC 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). If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 of the Code. 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.

**44.** 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.

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115



(*iii*) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that the 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 to an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a court annexed mediation centre which is under the exclusive control and supervision of a judicial officer, the original file may be made available wherever necessary.

**45.** The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the court concerned may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that Section 89 has been a non-starter with many courts. 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.

***Conclusion***

**46.** Coming back to this case, we may refer to the decision in *Sukanya Holdings*[1] relied upon by the respondents, to contend that for a reference to arbitration under Section 89 of the Code, consent of parties is not required. The High Court assumed that *Sukanya Holdings*[1] has held that Section 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. *Sukanya Holdings*[1] does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under Section 8 of the AC Act could be maintained

1 *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531

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116



even where a part of the subject-matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to Section 89 are as under: (SCC p. 536, para 18)

"*18.* Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."

**47.** The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under Section 8 of the Act, there can be a reference under Section 89 to arbitration if parties agree to arbitration. The observations in *Sukanya Holdings*[1] do not assist the first respondent as they were made in the context of considering a question as to whether Section 89 of the Code could be invoked for seeking a reference under Section 8 of the AC Act in a suit, where only a part of the subject-matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement.

**48.** The first respondent next contended that the effect of the decision in *Sukanya Holdings*[1] is that Section 89 CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration. There can be no dispute in regard to the said proposition as Section 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under Section 89 of the Code in regard to the said four ADR processes.

**49.** In the light of the above discussion, we answer the questions as follows:

(*i*) The trial court did not adopt the proper procedure while enforcing Section 89 of the Code. Failure to invoke Section 89 suo motu after completion of pleadings and considering it only after an application under Section 89 was filed, is erroneous.

(*ii*) A civil court exercising power under Section 89 of the Code cannot refer a suit to arbitration unless all the parties to the suit agree for such reference.

**50.** Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The trial court will now consider and decide upon a non-adjudicatory ADR process.

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1 *Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531

NOTE:

*Para. 5.2 of the report at page 134 of this volume.

*Para. 5.3 of the report at pages 134 to 136 of this volume.

117

# GOVERNMENT OF INDIA

## LAW COMMISSION OF INDIA

## Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions

**Report No. 238**

December, 2011

**Justice P. V. Reddi**
(Former Judge, Supreme Court of India)
Chairman
Law Commission of India

New Delhi
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113

D. O. No. 6(3)/190/2010 – LC (LS) 30th December, 2011

Dear Hon. Minister Salman Khurshid ji,

The accompanying report relates to Section 89 of Civil Procedure Code. The Supreme Court observed in Afcons Infrastructure case (2010 8 SCC 24) that there are many drafting errors in Section 89 and suggested amendments to the Section which may be considered by Law Commission of India. In order to remove the deficiencies in Section 89 which is a pivotal provision for facilitating dispute resolution in civil matters and to make it more simple and straightforward, the Law Commission has proposed amendments to Section 89 CPC as well as Order X Rules 1-A to 1-C. Further, the amendment of Section 16 of Court Fee Act has also been suggested. The amended provisions as proposed are found at paras 6.2, 6.3 and 6.4 of the Report.

With regards and good wishes

Sd./

(P.V. Reddi)

Shri Salman Khurshidji,
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119

Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions

CONTENTS


| | | Page No. |
|---|---|---|
| 1. | INTRODUCTION | 5 |
| 2. | ANALYSIS OF SECTION 89 AND ITS SCHEME | 6 - 10 |
| 3. | THE BACKGROUND TO SECTION 89 | 11 -13 |
| 4. | DRAFTING ERRORS IN SECTION 89 – *AFCONS INFRASTRUCTURE* CASE | 14 -17 |
| 5. | CHANGES CONSIDERED BROADLY | 18 -23 |
| 6. | AMENDMENTS PROPOSED | 24 -27 |
| 7. | RECOMMENDATIONS | 28 |

120


| | | |
|---|---|---|
| ANNEXURE I | EXTRACT OF SECTION 73(1) of AC ACT AND SECTION 89 OF CPC | 29 - 30 |
| ANNEXURE II | PARAGRAPHS 43 & 44 OF THE JUDGMENT IN *AFCONS INFRASTRUCTURE* CASE | 31 - 33 |

121

## 1. Introduction

1.1 The proliferation and pendency of litigation in Civil Courts for a variety of reasons has made it impracticable to dispose of cases within a reasonable time. The overburdened judicial system is not in a position to cope up with the heavy demands on it mostly for reasons beyond its control. Speedy justice has become a casualty, though the disposal rate per-Judge is quite high in our country. The need to put in place Alternative Dispute Resolution (in short, "ADR") mechanisms has been immensely felt so that the courts can offload some cases from their dockets. The ADR systems have been very successful in some countries, especially USA wherein the bulk of litigation is settled through one of the ADR processes before the case goes for trial.

1.2 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 Constitutional Republic and for that matter, of any progressive democracy.

1.3 In our country, arbitration and mediation have been in vogue since long. Arbitration was originally governed by the provisions contained in different enactments, including those in the Code of Civil Procedure. 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 mediation of informal nature was being adopted at the village level to resolve petty disputes from times immemorial. Thanks to the innovative measures taken by the judiciary in some States, resolution of court litigation through Lok Adalats became quite popular during 1970s and '80s. With the advent of Legal Services Authorities Act 1987, Lok Adalats and Legal Aid Schemes have received statutory recognition and become an integral and important part of the justice delivery system.

## 2. Analysis of Section 89 and its Scheme

2.1 By the Code of Civil Procedure (Amendment) Act 1999, section 89 had been introduced in the Code of Civil Procedure, 1908 and it became effective from 01-07-2002. Section 89 of the CPC reads 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 reformulate 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 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 objective of Section 89 is to ensure that the court makes an endeavour to facilitate out-of-court settlements through one of the ADR processes before the trial commences.

2.2 The related provisions which were incorporated by the same amendment Act are those contained in Rules 1A, 1B and 1C of Order X, CPC, which are extracted hereunder:

> "**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.**- 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."

2.3 With the introduction of these provisions, a mandatory duty has been cast on the civil courts to endeavour 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.

2.4 Arbitration as well as Conciliation are governed by the Arbitration and Conciliation Act, 1996 ("AC" Act, for short) which superseded the previous Arbitration Act of 1940. The arbitration unlike conciliation is an adjudicatory process. Once a civil dispute is referred to arbitration, the case will go outside the stream of the court permanently and will not come back to the court. However, in contrast, a dispute referred to conciliation which is a non-adjudicatory process, does not go out of the domain of the court-process permanently. If there is no amicable settlement, the matter reverts back to the court which has to proceed with the trial after framing

issues. The reference to arbitration or 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. This legal position is no longer in doubt in view of the recent judgment of Supreme Court in *Afcons Infrastructure Ltd. Vs. Cherian Varkey Consturction Co. (P) Ltd.*[1] 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, in view of what has been said in section 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the arbitrator on the basis of such agreed terms will have the same status and effect as any other arbitral award, *vide* section 30 of the AC Act.

2.5 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 AC Act) and therefore it is enforceable as a decree of the court by virtue of section 36 of the AC Act. 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 (for short, "LSA Act") and executable as such.

2.6 The Supreme Court observed in the case of *Afcons Infrastructure* (supra): "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". Whether or not such a course of action is really necessary, we shall discuss a little later.

2.7 Coming to mediation, there is practically no difference between conciliation and mediation and quite often they are used as inter-changeable terms. Mediation is aimed at conciliation and conciliation has the elements of mediation. In the Dictionary of Modern Legal Usage by Bryan A. Garner, it is stated thus:

[1] (2010) 8 SCC 24

"The distinction between *mediation* and *conciliation* is widely debated among those interested in ADR... Some suggest that *conciliation* is 'a nonbinding arbitration', whereas *mediation* is merely 'assisted negotiation'. Others put it nearly the opposite way: *conciliation* involves a third party's trying to bring together disputing parties to help them reconcile their differences, whereas *mediation* goes further by allowing the third party to suggest terms on which the dispute might be resolved. *Still others reject these attempts at DIFFERENTIATION and contend that there is no consensus about what the two words mean- that they are generally interchangeable. Though a distinction would be convenient, those who argue that usage indicates a broad synonymy are most accurate".*

2.8 It may be noticed that section 73 of the AC Act contemplates the conciliator suggesting the terms of settlement. Therefore, the point of distinction noted in the above passage does not hold good in India. According to Shri Justice R. V. Raveendran, former Judge, Supreme Court of India and author of the judgment in *Afcons Infrastructure* case, where the conciliator is a professional trained in the art of mediation (as contrasted from a layman, friend, relative, well-wisher, or social worker acting as a conciliator), the process of conciliation is referred to as mediation. In cases where the third party assisting the parties to arrive at a settlement is not a trained professional mediator, the process is referred to as conciliation.[2] It is however necessary to point out that in many States, there are trained mediators including legal professionals and there are mediation centres managed by the Judiciary in few States. Mediation has emerged as a science now.

In *Afcons Infrastructure* case, 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." In short, mediation is a

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[2]Justice R. V. Raveendran, " Section 89 CPC: Need for an Urgent Relook", (2007) 4 SCC J23

process of dispute-resolution by which the mediator assists and persuades the disputing parties to arrive at an amicable settlement.

2.9 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 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".

2.10 Referring to the inter-relation between section 89 and Order X Rule 1 A, the Supreme Court pointed out that there is no inconsistency. Section 89 confers the jurisdiction on the court to refer a dispute to an ADR process, whereas Rules 1A to1C 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.

## 3. The Background to Section 89

3.1 Before proceeding further, we may refer to Statement of Objects and Reasons and Notes on Clauses attached to the Code of Civil Procedure (Amendment) Bill initiated in 1997.

> **Statement of Objects and Reasons:** "3. *(d) 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."*
>
> **Notes on clauses:**
>
> "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 the 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 to make it 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 alternative dispute resolution methods that the suit could proceed further. In view of the above, clause 7 seeks to insert a new section 89 in the Code in order to provide for alternate dispute resolution."*

3.2.1 **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 to deal with house rent/possession litigation as well as other litigations such as disputes as to inheritance/succession, partition, maintenance and wills which are usually between near relations. 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 endeavour 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".* The features of Conciliation Courts set up in Himachal Pradesh were then adverted to by the Commission. The Commission, with a view to remove the difficulty experienced by the Conciliation Court in H.P., in cases in which the parties do not appear in person before the court, 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:*
>
> > *"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:*
>
> > *"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".'*

3.2.2 With these additions, the Law Commission was of the opinion that the scheme will be very effective and must be made obligatory in all courts, while removing the limitations that are implicit in rule 5B of Order XXVII in the matter of application of the procedure to suits other

than those set out therein. In fact, the scheme must apply to all suits of a civil nature coming before the civil courts, it was observed.

130

## 4. Drafting Errors in Section 89 - *Afcons Infrastructure* Case

4.1. Section 89 enacted with a lofty objective has revealed manifest drafting errors which in turn gave rise to complexities in understanding its true scope and purpose. The Supreme Court aptly observed in *Afcons Infrastructure* case that the correct interpretation and understanding of the provision has become "a trial judge's nightmare".

4.2 The first and foremost incongruity (which has also been pointed out by the Supreme Court in *Afcons* case) is related to sub-section (1) of section 89, especially the words *"shall formulate the terms of settlement"*. The sub-section requires the court to formulate the terms of settlement and place them before the parties *"for their observations"* and then reformulate the terms of a possible settlement in the light of their observations. A literal reading further shows that on such reformulation, the court shall have to refer the dispute for one of the five ADR methods, which is really meaningless. The language of section 73(1) of the AC Act has been borrowed and practically transplanted into section 89 without appreciating the intended scope and purpose of section 89. As pointed out by the Supreme Court in *Afcons* case, the formulation and reformulation of the terms of settlement by the court is wholly out of place at the stage of pre-ADR reference. At paragraph 16, the Supreme Court extracted section 73(1) of the AC Act and section 89 of the CPC (**Annexure I**) to highlight the absurdity and commented: *"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"*. The resultant situation has been graphically explained by the learned Judges in the following words:

> *"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/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the*

*mediator or the Lok Adalat, 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 the terms of settlement at pre-reference stage?"*

In this context, it may be mentioned that the Supreme Court in *Salem Advocates Bar Association vs. UOI*[3] had equated the words "terms of settlement" to "summary of disputes" in an apparent attempt to resolve the anomaly.

4.3 "*How Section 89 should be interpreted*", was the next question addressed by the Supreme Court in *Afcons* case. The learned Judge, after referring to the principles of interpretation in support of the proposition that the language of a statute can be modified in exceptional cases to obviate an anomaly, laid down the legal position thus:

> *"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 admissions/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 five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes."*

4.4 Secondly, the Supreme Court very rightly exposed the other obvious drafting error in mixing up the terms "judicial settlement" and "mediation". The Supreme Court pointed out that in order to give proper meaning to section 89, the said two words should be interchanged. "Mediation" should find place in clause (c) of section 89 (2) and "judicial settlement" should be transferred to clause (d) in place of "mediation". Otherwise, as succinctly pointed out by the

[3] (2005) 6 SCC 344

apex Court, the anomaly would persist. This anomaly has been explained in the following words:

*"The first anomaly is the mixing up of the definitions of "mediation" and judicial settlement" under clauses (c) and (d) of sub-section (2) of Section 89 of the Code. Clause (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Clause (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court,, as "mediation", as is done in clause (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 clause (c)."*

4.5 In tune with the above discussion, the Supreme Court propounded the amendments in the following terms:

*"In view of the foregoing, 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 court. Firstly, it is not necessary for the court, before referring the parties to an ADR process, to formulate or reformulate 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 Lok Adalat and all the provisions of the Legal Services Authorities 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 "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."*

133

4.6 The Supreme Court then declared: *"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."* (emphasis supplied)

## 5. Changes Considered Broadly

5.1 In the light of the above observations, we are proposing amendments to section 89 as well as the allied provisions substantially similar to those suggested by the Supreme Court.

5..2 The Chairman, in the company of some other learned Members tried to get responses from the judicial officers at Visakhapatnam and Delhi whether they experienced or envisaged any practical difficulties in giving effect to the law laid down by the Supreme Court in *Afcons Infrastructure* case. Most of the judicial officers and even advocates did not express any particular difficulty. However, some have guardedly said that it is only in course of time, it will be known whether any problem would crop up in implementing the section in its altered form. This qualificatory statement was more with reference to the category of cases described as fit or not fit for adjudication by alternative methods. The Commission is of the view that the view taken by the Supreme Court on a careful analysis of the section in the light of its purpose and intendment is unexceptionable and meant to remove the ambiguity in section 89. It is high time that the section is recast on the lines suggested by the Supreme Court. In other words, the judge-made law has to be followed up by legislative action on the same lines. However, while recasting section 89, the Commission in the interests of clarity and aptness, has deviated a little from what has been suggested by the Supreme Court in *Afcons Infrastructure* case.

5.3 We shall briefly advert to the **areas of deviation** from the observations of the Supreme Court in the aforementioned case. Interchanging clauses (c) & (d), as indicated by the learned Judge in *Afcons* case, will no doubt give some sense to the provisions as they stand now. However clause (c) dealing with mediation would still be inappropriate. There is no particular reason nor rationale in treating the mediator as Lok Adalat and investing the status of Lok Adalat. award to the agreement reached in the course of mediation. A mediator can only facilitate dispute resolution between the parties and draw up the terms of settlement arrived at. It would be inappropriate to regard it as an award passed by Lok Adalat by means of a deeming fiction and in doing so there is no particular advantage. In fact, the appropriate course has been indicated by the learned Judge at paragraph 39 of the judgment in the following words: *"Where the reference is to a neutral third party ("mediation" as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as the* court *retains its control*

*and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal."* Therefore, the more appropriate course would be to require the mediator to submit the terms of settlement reached as a result of mediation to the court so that the court, after due scrutiny, can pass a decree in accordance with the compromise arrived at between the parties. **Accordingly, we propose to recast the provision relating to mediation. Secondly, it is not necessary to provide that the award of Lok Adalat or the settlement arrived at through conciliation should be forwarded to the referring court for passing a decree on the same lines, notwithstanding certain observations made by the Hon'ble Supreme Court in paragraph 38 of *Afcons* to the following effect:** *"Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings. As the court continues to retain control and jurisdiction over the cases which it refers to conciliation, or Lok Adalat, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms."* As for the award of the Lok Adalat passed on the basis of agreed settlement, the award is deemed to be a decree of a civil court by virtue of section 21 of the LSA Act. The Lok Adalat is presided over by a retired or sitting judicial officer and further scrutiny by referring court would really be unnecessary. Further, if a provision is made in section 89, the award of Lok Adalat should be made a decree of the court concerned, it would introduce conflict with section 21. So also, if the settlement agreement authenticated by the conciliator has to be transformed into a decree of the court, it would conflict with section 74 of the AC Act. Section 74 enjoins that the settlement agreement has the same status and effect as an arbitral award on agreed terms as if it is rendered by an arbitral tribunal under section 30 of the AC Act. To say that it shall have effect as a decree of the civil court would not be consistent with the existing provisions in the AC Act. To avoid these complications, the Legislature need not necessarily take the course of action indicated by the Supreme Court. Section 89 will serve its purpose even if the further step of passing a decree in terms of the award of Lok Adalat or conciliation agreement is not taken. On enquiry from some District Judges/Secretaries, LSAs, the Chairman of the Commission has come to know that as per the existing practice, the referring court, on receipt of intimation from Lok Adalat, records the factum of settlement leading to

award of Lok Adalat and closes the case in the presence of parties or their counsel. No formal order or decree is being passed. There could possibly be no objection in legitimizing such procedure. We may clarify that "mediation" being non-statutory stands on a different footing. The *imprimatur* of the Court is required to make it effective.

Section 89 and Order X, Rule 1A – the Reference Procedure

5.4 An important question discussed by the Supreme Court is whether reference to ADR process is mandatory. In this regard, before we advert to the views expressed by the Supreme Court in *Afcons Infrastructure* case, we may refer to what was said in *Salem Bar Assn.* case which considered the aspect of apparent conflict between the language of section 89 and Order 10 Rule-1A. This is what the learned Judges said:

> "*The intention of the legislature behind enacting Section 89 is that where it appears to the 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 the other of the said modes. Section 89 uses both the words 'shall' and 'may' whereas Order X Rule 1-A 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 the ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarized in the terms of settlement formulated or reformulated in terms of Section 89.*" (underlined for emphasis)

5.5 This is how the two provisions have been reconciled. The underlined words give rise to an element of ambiguity in understanding the said observations. However, in *Afcons Infrastructure* case, the Supreme Court clarified the legal position more aptly by stating thus:

> '*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 1-A 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 processes, 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 cases reference to ADR process is a must'.*

5.6 Then, the Supreme Court went on categorizing the cases, considered suitable or not suitable for ADR process. It was observed that the following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

*"(i) Representative suits under Order 1 Rule 8 CPC which involve 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 section after enquiry, as for example, suits or 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 sections, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.*

*(vi) Cases involving prosecution for criminal offences."*

5.7 The Supreme Court also proceeded to enumerate the cases (whether pending in civil courts or special tribunals), suitable for ADR processes. Such cases are classified under five broad headings:-

(i) All cases relating to trade, commerce and contracts;

(ii) All cases arising from strained relationship, such as matrimonial cases;

(iii) All cases where there is a need for continuation of the pre-existing relationship, such as disputes between neighbour and members of societies;

(iv) All cases relating to tortuous liability, including motor accident claims; and

(v) All consumer disputes.

5.8 Having thus categorized the cases normally 'suitable' and 'not suitable' for ADR process, the Supreme Court made it clear: *"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".*

5.9 The Supreme Court also clarified:

*"Neither Section 89 nor Rule 1-A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, Section 89 of the Code makes it clear that two of the ADR processes – arbitration and conciliation, will be governed by the provisions of the AC Act and the two other ADR processes – Lok Adalat settlement and mediation... will be governed by the Legal Services Authorities Act. As for the last of the ADR processes – judicial settlement... Section 89 makes it clear that it is not governed by any enactment and the section will follow such procedure as may be prescribed (by appropriate rules)."*

5.10 In this context, the 'Summary' given by the Supreme Court at paragraphs 43 & 44 of the judgment in *Afcons Infrastructure* case, is appended to this Report as **ANNEXURE II.**

5.11 At the same time, the apex Court once again administered the caution that the procedure and consequential aspects referred to in paragraphs 43 & 44 are intended to be general guidelines subject to such changes as the court concerned may deem fit with reference to special circumstances of a case. The sum and substance of what the court discussed elaborately is stated in paragraph 45 thus:

> *"...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 Judge–assisted settlement only in exceptional or special cases."*

140

## 6. Amendments Proposed

6.1 In the light of the foregoing discussion, the Commission recommends the following amendments to the relevant provisions of CPC dealing with alternative dispute resolution and section 16 of the Court-fees Act, 1870.

6.2 The following shall be substituted in the place of existing section 89 of the Code of Civil Procedure, 1908:

**"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 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".

6.3 The existing rule 1B of Order X of the Code of Civil Procedure, should be deleted. In the place of existing Rules 1-A and 1-C of Order X, the following rules shall be substituted:

**"1A. Direction of the court to opt for any one mode of alternative dispute resolution. -**

At the stage of framing issues or the first hearing of the suit, the court shall direct the parties to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89 and for this purpose may require the parties to be personally present and in case of non-attendance without substantial cause, follow the procedure for compelling the attendance of witness. The court shall fix the date of appearance before such forum or authority or persons as may be opted by the parties or chosen by the court."

**"1B Appearance before the court consequent upon the failure of efforts of conciliation . -**

Where a suit is referred under rule 1A and the presiding officer of conciliation forum or authority or the person 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, in view of the stand taken by the respective

142

parties, it shall refer the case back to the court who shall direct the parties to appear before it on the date fixed and proceed with the suit."

### 6.4.1 Section 16, Court-fees Act, 1870

There is one more provision regarding which the Commission would like to focus the attention of the Government. That is section 16 of the Court-fees Act, 1870, which was inserted by the same CPC Amendment Act by which section 89 was introduced. Section 16 which was thus added to the Court-fees Act reads thus:

**"16. Refund of fee.-**

*Where the section 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."*

6.4.2 Here again, there is a clear drafting error which gives rise to conflict with section 21 of the Legal Services Authorities Act, 1987. The LSA Act provides that the court-fees paid in a case placed before the Lok Adalat shall be refunded in the manner provided under the Court-fees Act, 1870 only if a compromise or settlement has been arrived at between the parties. However, Section 16 of the Court-fees Act, as the language stands, goes further and says that the court-fee is refundable merely on a reference by court to any ADR process. This would mean that virtually the court-fee paid in most of the suits will have to be refunded. What will happen if the reference to conciliation, mediation or Lok Adalat does not end in a settlement and the parties come back to the court for adjudication? If the court-fees paid had already been refunded to the plaintiff when the reference was made, adjudication of the suit becomes free, there being no provision for collecting fresh court-fees. Obviously such a situation would not have been intended. This aspect was highlighted by Shri Justice R.V. Raveendran in his lecture at NJA Bhopal[4]. The provision obligating the section to refund the entire court-fees paid on a mere reference is also liable to be abused by the plaintiff. In fact, the Chairman of the Commission heard such reports from the District Judges in some parts of the country. It was not intended by the Government (while introducing the Bill) or by the Legislature that the court-fees shall be refunded to the plaintiff once the reference is made to ADR process, irrespective of its outcome

[4] Supra Note 2

or the conduct of the plaintiff or petitioner. We may, in this context, refer to clause 35 of the 'Notes on Clauses' accompanying the CPC (Amendment) Bill, 1997. It reads as follows:

> *"Clause 35.- (Amendment to the Court-fees Act, 1870).*
>
> *The proposed amendment is consequential to the new section 89 of the Code of Civil Procedure, 1908 proposed to be inserted vide clause 7 of the Bill so as to enable the party to claim refund of court-fee in case the matter in dispute is settled outside the section".*

It clearly reflects the intention of the introducer of the Bill. However, the actual wording in the section is quite different. It does not appear that any conscious departure was intended at the time of enactment of the provision. It is clearly a case of draftsman employing the language which does not accord with the intention behind the clause in the Bill. It is, therefore necessary to amend the provision in the Court-fees Act, 1870 so as to bring it in conformity with section 21 of the LSA Act, keeping in view the intendment and rationale of the provision. It may be mentioned that the Court-fees Act of 1870 (Central enactment) does not have application in all States. Almost all the States have their own court-fee enactments. Section 16 is thus enforceable only in some Union Territories. However, some Judges, without being aware of this factual position, have been following section 16 of the Court-fees Act, though there is no similar provision in the State enactment. Be that as it may, section 16 of the Court-fees Act, 1870, wherever it is applicable, needs to be suitably amended.

6.4.3 In the place of the existing section 16 of the Court-fees Act, 1870, the following needs to be substituted:

> **"Where the court refers the parties to the suit or other proceeding to any one of the modes of settlement of dispute referred to in section 89 of the Code of Civil Procedure and as a result thereof a compromise or settlement has been arrived at between the parties, the court-fees paid in such a case shall be refunded."**

143A

## 7. Recommendations

7 Section 89 of the Civil Procedure Code which provides for settlement of disputes outside the court is inappropriately worded, as pointed out by the Supreme Court in the case of *Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) LTD.*[5] The language adopted has created difficulty in giving effect to the provision. Section 89 should be recast as indicated in paragraph 6.2. Secondly, the allied provisions, namely, Order X, rules 1A to 1C need recasting. The proposed amendment of the said rules in Order X is set out in paragraph 6.3. Thirdly, section 16 of the Court-fees Act, 1870 is required to be recast in order to ensure that unintended benefit does not go to the plaintiff. The proposed amendment is set out in paragraph 6.4.3.

(Justice P.V. Reddi)
Chairman

(Justice Shiv Kumar Sharma)
Member

(Amarjit Singh)
Member

(Dr Brahm Agrawal)
Member-Secretary

[5] Supra Note 1

144

**ANNEXURE I**

**EXTRACT OF SECTION 73(1) OF AC ACT AND SECTION 89 of CPC**

73. Settlement agreement.

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2)...

(3) ...

(4)...

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 observation 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; or

(d) mediation.

(2) Where a dispute had been referred-

(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 Authority 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 Authority 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.

**ANNEXURE II**

**PARAGRAPHS 43 & 44 OF THE JUDGMENT IN *AFCONS INFRASTRUCTURE* CASE**

"43. We may summarize the procedure to be adopted by a court under section 89 of the Code as under:

(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 AC 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 AC 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). If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order 23 Rule 3 of the Code. 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 unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

44. 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. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a court annexed mediation centre which is under the exclusive control and supervision of a judicial officer, the original file may be made available wherever necessary."