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THE EMERGING TRENDS AND IMPRACTICALITIES IN ENFORCING SEC. 89, C.P.C., 1908

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Abstract
The term law denotes the set of rules and regulations which acts as an effective means of social control. This article mainly deals about the emerging concept of Alternate Dispute Resolution, which is still at its infancy in India, though it is in vogue for more than a decade, drawing inspiration from the developed countries of the world. This article also endeavors to critically analyze the practical inabilities in implementing Sec.89 of Code of Civil Procedure Code, 1908 , where difficulties creeps out for the judges in giving the soul to the said provision and ultimately ends up with the litigant's crying need for his justice , as ex debitojustitiae, which seems to be a farfetched one . These are discussed in light of the landmark decisions of the Apex Court in resolving the ambiguities involved in the said provision.

Keywords: Alternate Dispute Resolution ;CPC; Section 89.

Introduction
In the modern welfare state, legislations are enacted which attributes to the betterment of the society and upliftment of the same and it obviously remains a paramount consideration. The concept of economical, speedy justice and litigant friendly approaches has to be adhered to and has become the need of the hour for the modern era litigants.

As Sec.89, C.P.C. 1908, had been hastily drafted , drawing just the inspiration from the developed countries of the world, where almost 90 percentage of cases are settled through A.D.R. processes, regard was being had only to the towering pendency of cases, it had finally reflected upon the workability of the said provision, which had become a herculean task. I would like to proceed further, with the words of Abraham Lincoln,
"Discourage Litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser…. In fees, expenses and waste of time. As a peace maker, the lawyer has a superior opportunity of being a good man….." **[1]**

Thus , it is widely felt by the community at large that the procedural laws and its implementation mechanisms should be one which would be simple, clear and less time consuming ones, which would finally witness a broad smile in the face of the litigants as "Justice must not only be done, but also be seen to be done"

Historical background of section 89 civil procedure code, 1908
The Sec.89 was enacted by way of code of civil procedure (Amendment) Act 1999. The clause 7 of bill 1999, enumerates the objects and reasons for implement Sec. 89 Civil procedure code. Wherein it states that it provides for settlement mechanisms outside the court , which is again based on the recommendations of Law commission of India – 129th report and the Malimath committee reports.

As the laws are dynamic and not static always, the urgent need of the alternate dispute resolution mechanism was felt with a view to implement the 129th report of Law Commission of India, in order to make the A.D.R. methods workable in India, and to give them the much needed support, it was suggested by the way of recommendations to make it obligatory on the part of the courts to refer disputes through A.D.R. mechanisms. If

parties fail in their attempt to resolve dispute it may be referred back to courts. This was the suggestion/recommendation.

Clause 7 provides for settlement outside court based on recommendation by law commission of India Malimath committee report for suggesting the courts of law to settle disputes by resorting the popular modes of A.D.R. mechanisms as Arbitration, Conciliation, Mediation, Judicial settlement or through Lok Adalat . In view of above , Clause 7 seeks to insert new Sec. 89 in Civil procedure code, 1908 to provide for alternate dispute resolution.

Hence the tracing of Historical background of the systemic shaping of Sec.89 and Order X Rule 1A to 1C of CPC, 1908 which are the twin provisions were dealt.

Analysis of Sec.89 CPC and Order X Rule 1(A to C) of CPC

For better understanding of Sec. 89 C.P.C. it has to be clubbed along with Order X Rule 1 (A to C) of CPC Sec.89 provides for the settlement of disputes by the courts of law, by taking recourse to either mode of 1) Arbitration 2) conciliation (3) Judicial settlement including settlement through Lok Adalat or (4) Mediation when the parties agree to it, which would further impose on the courts to formulate the possible settlement terms.

The referred dispute would be governed by The **Arbitration and conciliation Act, 1996**, The legal services Authority Act, 1987, and the mediation rules which were framed to cater the needs of the system.

Order X Rule 1 A of CPC directs the court to opt for any one mode of alternative dispute resolution.

Order X Rule 1 B of CPC provides for the appearance before the conciliatory authority.

Order X Rule 1 C of CPC provides for the appearance before the court consequent to failure of efforts of conciliation. [2]

Furthermore the modus operandi in implementingSec.89 and Order X Rule 1 (A), (B), and (C) is that, when the process of submission of pleadings are complete, the admissions of parties and their denials after being recorded, and before the framing of issues, courts of law, shall have recourse to Sec.89CPC. Such recourse requires courts to consider and record nature of dispute, inform litigants about the options and take note of preferences and refer them to A.D.R processes.

Anomalies / Lacunae in Sec. 89 CPC as laid down in afcons infrastructure case law

The haphazard, disorderly drafting of Sec. 89 of CPC was reflected by the comments of supreme court as the correct interpretation and understanding of provision has become a “trial judges’ nightmare “. The first primary disability in implementation of Sec. 89 of CPC, 1908 as pointed out by the apex court in Afcons case is with respect to Sec.89 (1)of CPC with the words “Shall formulate the terms of settlement”. Obligates the courts of law to frame the points of settlement and place them before the concerned litigants for their perusaland then reformulate the terms of a possible settlement in light of their observations. Hence the language of Sec. 73 of Arbitration and Conciliation act has been barrowed and fitted in the Sec.89 of CPC.

Meanwhile the two primary issues which arose in Afcons infra structure case is

i) What method is to be followed while implementing the Sec.89 r/w order 10 rule 1A,B,and C of C.P.C., 1908.

ii) Whether consent of parties to suit is necessary for reference to Arbitration under Sec. 89 of CPC.

In this juncture, the S.C in **Salem Advocates Bar Association Vs Union of India** altered the words “ **terms of settlement**” to “ **Summary of Disputes**” in consequent endower to resolve the lacunae.

Thus the apex court upheld the validity of Sec.89 CPC with the roaring disabilities in the existed form by adopting purposive interpretation in this case. [3]

Hence S.C traced out the defects in legislation whereby the mixing up of definitions of

Mediation and the judicial settlement as laid down in Sec. 89(2) (c and d) of C.P.C., and the words in the sec, which says the courts shall refer the disputes which might arose between the parties to a Lok Adalat.
Furthermore Sec. 89(d) enumerates for the effecting of a compromise by adopting to the procedures established when reference is for mediation. Hence the S.C. had rightly pointed out that the compromises effected by courts of law as Mediation , as mentioned in clause (d) and the references made by courts to the suitable institution or a person in arriving at a settlement as mentioned in (c) does not qualify for the apt terms used nor it is correctly matched.

Hence the Hon'ble S.C. has propounded the amendments as indicated below.

- The interpretation of Sec.89 if it has to be unambiguous needs to be corrected which otherwise formulate the settlement terms between the parties, instead it is sufficient for the courts to just refer the dispute which have arisen and to work for the settlement.
- The Sec. 89 (2) (c & d) needs to be intermingled to rectify the drafting error. Thus the Hon'ble Apex Court had categorically declared that the changes mentioned aforesaid shall remain in force till it is being attended to by the legislature in correcting the practical errors, thereby Making Sec. 89 effective and keeping it live in operation.

Conflict between Sec. 16 court fees act 1870 and sec. 21 legal services authorities act, 1987

Yet another provision, regarding the Sec.16 of court fees act 1870 which was inserted by CPC amendment Act by which Sec. 89 was introduced had to be analyzed.

Sec. 16 of the Court Fees Act 1870 says that when the dispute has been referred to the modes of settlement as in Sec.89 of C.P.C., the plaintiff therein , would be entitled to the refund of full amount of court fee paid in respect of that plaint.

Thus, one could sense the prima facie error apparent in the words of the Sec.16 of Court Fees Act, which is again in disharmony with the Sec.21 of the Legal Services Authorities Act, 1987, which in turn provides for the refund of court fee paid , only if the settlement or compromise has been entered into between the parties. Hence, by drawing an analogy between the two provisions, the Sec.21 of the Legal Services Authorities Act, 1870 is drafted more sensibly than the Sec.16 of the Court Fees Act, 1870, which was implemented by way of CPC,(Amendment Act 1999) [5]

Practical difficulties faced in implementing Sec.89 C.P.C. – From the advocate's point of view

Having analysed the draftsman error, the apex court's judgments through its landmark decisions in wiping out the lacunae, some unaddressed difficulties which advocates and litigants face, has to be mentioned.

- Though it's a welcome move to encourage the out of court settlements, litigants might slowly loose their hope and belief towards the most important pillars of democracy, the Judiciary, which would ultimately result in the interference of the unscrupulous third parties in the disputes of the poor litigants, which undermines the sanctity of the judicial system.
- The very survival of the advocates, would get tampered with if out of court settlements are widely encouraged ,and if it becomes the order of the day. Many experts also advocate for a "**Pre Litigative**" out of court settlement measure to be adopted for the quick disposal of cases, which might have an adverse effect on the advocacy profession and disturbs the very fabric of the profession.
- Nextly, most of the litigants, sue before the court of law as the earlier efforts to iron out differences which arose between them and the opposite parties would have turned futile. Hence, the point of referring those parties to out of court settlements, obviously would remain meaningless and furthermore it accelerates to the process of delay in administration of justice, and pendency of cases.

- Finally, when the sitting Judicial officers heads the panel for A.D.R. mechanisms, the litigants directly confront with them, which might even result in the litigants acting in a way which causes disrespect to the judiciary.

Conclusion

Thus, Sec.89 of C.P.C., which provides for out of court settlement, is one which lacks clarity and is ambiguous, when it finally comes to workability. It lacks the pivotal aspects due to which it could not take a shape as an "Institutionalized set up". But times are not very far, where India would effectively march upon along with the rest of the developed countries, by encouraging A.D.R. in an effective form, wiping out all lacunae it would suffer from.

I would conclude my article by mentioning the words of M.K. Gndhi, who could rightly be called as "**Father of A.D.R. processes** ", apart from being the "**Father of our nation**" by being a pioneer in the streamlining the A.D.R. process in India, as rightly expressed by M.K. Gandhi, that the process of Alternate Dispute Resolution would finally make both the parties to the case happy, which even made him feel that in his 20 years of esteemed practice as a lawyer, he had not lost anything, but had certainly gained the enormous strength and the mental satisfaction in arriving at the compromise between the litigants. He had also learnt an essential lesson from the delighted parties that neither of them won nor lost, and that he had gained his soul. [6]

The '**win-win situation**' among the litigants should finally blossom among the minds of the litigants in the forthcoming years

References

[1] . Collected works of Abraham Lioncoln edited by Roy P. Basler
[2] Law Commission of India – Report No.238
[3] Salem Bar Association vs. Union of India (2003 (1) scc 49.
[4] Afcons Infrastructure Ltd. Vs. Cherian Verkey Construction Co. (p) Ltd. (2010) 8 scc 24,
[5] Civil Procedure Code , 1908 – C.K. Takwani.
[6] The collected works of Mahatma Gandhi (CWMG), VOL 44.

Abbreviations:

1. CPC. – Civil Procedure code
2. S.C. – Supreme Court
3. Sec. – Section.
4. A.D.R.- Alternate Dispute Resolution.
5. Vs - Versus