

GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

**Amendment of Section 89 of the Code of Civil Procedure, 1908 and
Allied Provisions**

Report No. 238

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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)

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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 – <i>AFCONS INFRASTRUCTURE CASE</i>	14 -17
5. CHANGES CONSIDERED BROADLY	18 -23
6. AMENDMENTS PROPOSED	24 -27
7. RECOMMENDATIONS	28

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 <i>AFCONS</i> <i>INFRASTRUCTURE</i> CASE	31 - 33

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

²Justice 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.

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.”

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.”

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

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 Bhopal⁴. 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.”

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

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.

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 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.

(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.”