



## Selection of appropriate ADR process under section 89 CPC: Diverse perspectives

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### Abstract

The present research paper seeks to scrutinize the selection of appropriate process under section 89 of the Civil Procedure Code, 1908 from five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and LokAdalat settlement including various aspects like Merits & Demerits of Process, Consent of Parties, Settlement in ADR Process-Bindingness, Procedure Under Section 89, Preliminary Hearing, Consideration of Case, Reference to ADR Process, Settlement in light of Settlement within and Beyond Submission and the Consequential Aspects.

**Keywords:** ADR, civil procedure code (CPC), lok adalat

### 1. Introduction

The object of section 89 <sup>[1]</sup> 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 1A 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 1996 Act and two other ADR Processes - LokAdalat 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 court will follow such procedure as may be prescribed (by appropriate rules).

### 2. How to Decide the Appropriate ADR Process under Section 89?

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 LokAdalat settlement.

- 1. Merits & Demerits of Process:** Of all the alternative methods suggested in Sec.89 these amendments give a new push to the method of Arbitration as an ADR tool. Among all the 5 methods of ADR, suggested Arbitration is the most efficient one. The other methods have their own limitations. Like in conciliation, a conciliator can never build a binding decision. Sec.74 provides that a settlement agreement reached in the conciliation proceeding has the status and effect of arbitral award only in respect of agreed terms on the substance of the dispute <sup>[2]</sup>.
- 2. Consent of Parties:** 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.

### a) Arbitration

Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the 1996 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 1996 Act, and there would be no need to have recourse to arbitration under section 89 of the Code.

Section 89 therefore pre-supposes that there is no pre-existing arbitration agreement. 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 1996 Act will apply to the arbitration, and as noticed in *Salem Bar-I* <sup>[3]</sup>, the case will go outside the stream of the court permanently and will not come back to the court. 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 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 <sup>[4]</sup>. 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. It was held in *Rajus' Case* <sup>[5]</sup> the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The position was reiterated by the Apex Court in *Chanders' Case*. <sup>[6]</sup> 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.

#### b) Conciliation

Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of 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 AC Act followed by appointment of conciliator/s as provided in section 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation' <sup>[7]</sup>.

#### c) LokAdalat, Mediation and Judicial Settlement

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 (LokAdalat, Mediation and Judicial 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, necessarily the court will have to choose between reference to LokAdalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. If the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, LokAdalat 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.

#### 3. Settlement in ADR Process-Bindingness

When the court refers the matter to arbitration under Section 89 of the Act, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal <sup>[8]</sup>. 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 <sup>[9]</sup>.

#### 4. Procedure under Section 89

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 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.

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 <sup>[10]</sup>.

#### 5. Following the Consequential Aspects

The Court should also bear in mind the consequential aspects, while giving effect to Section 89 of the Code <sup>[11]</sup>.

#### 6. Concluding Observations

The Apex Court said that the procedure and consequential aspects referred to above are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. The Apex Court referred to the procedure and process rather elaborately as it found 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 LokAdalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases.

Rule 1A 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 1A to IC 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.

#### 4. References

1. Section 89-Settlement of Disputes Outside the Court (Inserted by Act No. 46 of 1999 (w.e.f. 30-12-1999). Where it appears to the Court that there exist elements of 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 settlement and refer the same for-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 Arbitration and Conciliation Act, 1996 (26 of 1996) 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 disputes were referred to a Lok Adalat under the provisions of that Act.(d) for mediation, the Court shall effect a between the parties and shall follow such procedure as may be prescribed
2. CV Nagarjuna Reddy- "*Role of Arbitration in the wake of CPC Amendment Act, 1999*".on ficci.com. It is to be noted that neither the statements recorded nor concessions made during the course of conciliation proceedings can be used as evidence in arbitral or other proceedings. Despite these hindrances even if the parties concur for the conciliation proceedings on their failure to reach a settlement agreement they may opt for arbitration. Thus the method of conciliation may be employed by parties as a lead-up to arbitration. As regard the other two methods viz., Judicial Settlement such as LokAdalat and Mediation, it is difficult to resolve serious disputes through these methods. They are handier to settle disputes such as payment of compensation under Legal Services Act and Motor Vehicle Act which would not normally be subject matters of arbitral proceedings. Thus with the new amendments in CPC, the arbitration field is sure to reach its peak and take up the centre stage in the resolution of disputes in the private law field. In future one will not amazed to notice that the arbitration cases to cross the civil suits in term of these numbers.
  3. In *Salem Bar (I)*, Apex Court held: 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 LokAdalat or mediation. 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.
  4. <sup>1</sup> In *Salem Bar - (II)*, the Apex Court held: Some doubt as to a possible conflict has been expressed in view of used 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. 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 summarized in the terms of settlement formulated or reformulated in terms of Section 89.
  5. Anand Gajapathi P, Raju VPVG. The Court further held: 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. 2000; (4):539.
  6. Jagdish Chander V, Ramesh Chander. The Court held accordingly: 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. 2007 (5):719.
  7. 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 court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.
  8. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of 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.
9. 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 LokAdalat, the LokAdalat 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 LokAdalat 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 LokAdalats, the settlement agreement in conciliation or the LokAdalat award will have to be placed before the court for recording it and disposal in its terms. 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 LokAdalat, as 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. 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 AC Act (in respect of conciliation settlements) or Section 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a LokAdalat or a Mediator). Only then such settlements will be effective.
10. The Apex Court summarized the procedure to be adopted by a court under section 89 of the Code as under: (1) Preliminary Hearing: 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. (2) Consideration of Case: 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. (3) Reference to ADR Process: 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. (a) Arbitration 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. (b) Conciliation: 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. (c) Other Three ADR Process: 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: i) LokAdalat; ii) Mediation by a neutral third party facilitator or mediator; and iii) A judicial settlement, where a Judge assists the parties to arrive at a settlement. (i) LokAdalat: 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 LokAdalat. (ii) Mediation: In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. In the judgment of the Supreme Court of India in Salem Bar-II, the Supreme Court has requested prepare model rules for Alternative Dispute Resolution and also draft ROM-Rules of Mediation<sup>1</sup> under section 89(2)(d) of Code of Civil Procedure, 1908. (iii) Judicial Settlement: 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. (4) Settlement: 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. (a) Making a Decree: 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. (b) Settlement Beyond Submission: 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 LokAdalat or by mediation which is a deemed LokAdalat). 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, (c) Illegal Terms in Settlement: 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.

11. (a) Consent in Arbitration/Conciliation: 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. (b) Merit in Other ADR Process: 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 LokAdalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference. (c) Brief Reference: 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. (d) Avoid Bias: 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. (e) Keep Track of The Matter: 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. (f) Sending the Record of Case: In general, 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.