

Judicial Settlement under Section 89 C.P.C.

A Neglected Aspect.

By: **Justice S.U.Khan**¹

Section 89 C.P.C.

"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;

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(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."

(Corresponding Rules being Order 10 Rules 1-A, 1-B & 1-C)

Section 89 C.P.C. and the corresponding Rules were inserted by Act No. 46 of 1999 (w.e.f. 1.7.2002). However the section contained some glaringly anomalous drafting errors due to clerical or typographical mistakes. Supreme Court in *Afcons Infrastructure Limited v. Cherian Varkey Construction Company Private Limited 2010 (8) SCC 24*, hereinafter referred to as *Afcon* under compulsion of circumstances rewrote the provision.

Part of Para 9 and paras 15 and 25 are quoted below:

"9. If Section 89 is to be read and required to be implemented in its literal sense, it will be a trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2).....

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

then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

25. In view of the foregoing, it has to be concluded that proper interpretation of Section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or reformulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of Section 89(2) of the Code will read as under when the two terms are interchanged:

(c) for 'mediation', the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for 'judicial settlement', the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that Section 89 is not rendered meaningless and infructuous.”

In respect of judicial settlement it was observed in *Afcon* that ‘judicial settlement is a term in vogue in USA referring to a settlement of a Civil case with the help of a judge who is not assigned to adjudicate upon the dispute’ (para 12).

In the case of *Salem Advocate Bar Association v. Union of India* validity of amendments made in C.P.C. in 1999 and 2002, (both enforced w.e.f. 1.7.2002) including Section 89 was challenged. The first order was passed by the Supreme Court on 25.10.2002 reported in *AIR 2003 SC 189* hereinafter referred to as *Salem ABA* first order. Through the said order a committee was formed to devise inter alia,

‘rules and regulations which should be followed while taking recourse to the ADR referred to in section 89. The model Rules which are formulated may be adopted by the High Courts concerned for giving effect to section 89 (2) (d)’ para 12.

Earlier the para 9 it had been observed that '*section 89 (2)(d), therefore contemplates appropriate rules being framed with regard to mediation*.. (Underlining supplied)

In the end the matter was directed to be listed after 4 months to consider the report of the committee.

The requisite report was submitted which was considered in the second order reported in *AIR 2005 SC 3353* hereafter referred to as *Salem ABA* second order. The report was in three parts, report no. 2 dealt with Model ADR and Mediation Rules and was considered in paras 55 to 69. In para 69, covering more than 9 pages of AIR the entire Rules prepared by the committee were reproduced. In para 73 it was hoped 'that the High Courts in the country would be in a position to examine the aforesaid rules expeditiously and would be able to finalize the Rules within a period of four months.'

Thereafter various High Courts adopted the Rules almost in verbatim including the High Courts of West Bengal (2006), Maharashtra (2007), Bihar (2008) & U.P. (2009). The Rules were framed / adopted exercising power under Section 89 and 122 C.P.C.

ADR Rules framed by Allahabad High Court define judicial settlement under Rule 2(g) as follows:

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

Rule 6 dealing with ‘Procedure for Reference by the Court to the different modes of settlement provides under Sub-rule (c) as follows:

6(c) *“Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the court within thirty days of the direction under sub-rule (b) of Rule 3 and then the Court shall, within thirty days of the application, refer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and thereafter the provisions of the Legal Service Authority Act, 1987 (39 of 1987) which are applicable after the stage of making of the reference to Lok Adalat under that act, shall apply as if the proceedings were referred for settlement under the provisions of that Act.”*

Corresponding Rules of ADR Rules framed by Bihar, Maharashtra and West Bengal are word by word same.

It is strange that neither in first nor second order of *Salem ABA* the drafting errors in section 89, as pointed out subsequently by *Afcon* were noticed. As in para 9 of first order it was held that section 89 (2) (d) required framing of rules with regard to mediation,

supra, hence the committee did not frame any appropriate rule with regard to judicial settlement. Even though the Rules use the words 'judicial settlement' but they relate to Lok Adalat alone due to drafting error in Section 89 (undetected till then) under which the Rules were framed.

These Rules (in respect of Judicial Settlement) have become meaningless after correction of Clause (d) of sub section (2) of Section 89 by *Afcon*, supra in bold letters.

In fact section 89, as corrected by *Afcon*, require framing of Rules only in respect of judicial settlement as is evident from its last clause i.e. clause (d) of sub-section (2) as per corrections affected by *Afcon*, supra in bold letters.

If the definition of judicial settlement given in para 12 of *Afcon*, supra, is to be fully incorporated in the section then until framing of proper Rule, it will remain a dead letter. In view of the definition given in *Afcon* no Court before whom the case is pending can by itself attempt judicial settlement and without proper Rule such Court has got no power to send the matter to other court for Judicial Settlement. Neither C.P.C. nor General Rules Civil warrant it. If the file is sent to District Judge on administrative side he will also feel the same inhibition. Moreover it will be quite difficult for the District Judge to decide that to which Court/ Judge such matter should be sent. All these requirements may be supplied by the Rules.

However in my opinion there is no need to completely debar the hearing judge from attempting judicial settlement. The section does not warrant such approach. In *Afcon* also even though it was repeatedly stated that for judicial settlement matters should preferably be sent to some other judge but absolute bar was not prescribed vide para 44 (iv) infra:

“(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.”

In *Afcon*, it was held that framing and reframing of terms of settlement by the trial judge, even though matter of settlement etc. is to be referred to some other authority / agency, will be his nightmare (para 9) and it is not necessary (para 25). In para 44 (iii) it was observed that:

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that the court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.”

However it was not explored that there might be some purpose not properly expressed for which such exercise was prescribed in the very first sentence of the section. Here also there is a drafting error. Such exercise is required only for judicial settlement and not

when matter is to be referred for other modes of ADR provided in the section.

If this interpretation is correct then it cannot be assumed that the section imposes absolute bar on the trial judge to attempt judicial settlement.

The correct approach and interpretation will be that the trial judge may, at any stage of the suit, either before settlement of issues or even after hearing arguments in part, try to persuade the parties to settle the dispute amicably or may send the matter for the said purpose to some other judge, if Rules in this regard are framed. (However it shall not be done during continuance of oral examination as it may be used as a tool to delay, para 41 of *Afcon*) Same exercise may be done by the appellate Court also with greater chances of success as a judgment will already be there making each party realize the worth of his case to some extent. Section 89 uses the word 'Court' and not the words 'Trial Court'. It is utmost essential that if the judge finds that the learned counsel for both the parties, and the parties if present, are showing some interest in settlement, however faint or strong it may be, the proposed terms as come in the mind of the judge are reduced in writing on the order sheet and the parties are given two or three days time to consider the same. The counsel must be either supplied free copy of the said order sheet or be permitted to copy the order at once. The judges have to develop the skill of persuasion by practice.

This is how I interpreted judicial settlement in section 89 C.P.C. and as Allahabad High Court judge attempted judicial settlement in about one thousand writ petitions, applying the principle of Section 89 C.P.C. My success ratio was about one third.

If the judge concerned considers that in attempting judicial settlement lot of time may be consumed, he may avoid that and persuade the parties to have recourse to other modes of ADR.

If the judge hearing a case attempts judicial settlement but fails, he may request the District Judge to transfer the case to some other judge only if one of the parties, request for the same otherwise there is no need for it. However in *Afcon* para 44 (iv), supra it has been directed otherwise.

If the terms of settlement formulated or reformulated in writing by Court have been accepted by parties and such acceptance, conveyed through their learned counsel has been recorded in the order sheet by the Court, there is no need to ask the parties to file formal compromise in terms of Order 23 Rule 3 C.P.C. This aspect also requires to be taken care of by Rules adverted to in Section 89(2)(d). However as far as U.P. is concerned, there is no need for separate Rule in this regard as by virtue of Allahabad High Court Amendment (31.8.1974) the following Explanation has been added to Rule 3 of Oder 23:

“Explanation – The expression “agreement” and “compromise”, include a joint statement of the parties concerned or their counsel recorded by the court, and the expression “Instrument” includes a statement of the plaintiff or his counsel recorded by the court”.

In this regard second sentence of para 39 and first sentence of para 40 are also quoted below:

“39.....Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it.

40. Whenever such settlements reached before non-adjudicatory ADR fora are placed before the court, the court should apply the principles of Order [23](#) Rule [3](#) of the Code and make a decree/order in terms of the settlement, in regard to the subject-matter of the suit/proceeding.....”

Clause (d) of sub section (2) of section 89 C.P.C. even after correction by *Afcon* (supra, in bold letters) requires further correction. It mandates that ‘court shall effect compromise’. Through judicial settlement compromise cannot be forced upon the parties. It may be read as follows:

(d) for ‘judicial settlement’, if the parties accept the suggestion of the court for settlement of dispute, the court shall effect.....

In *Afcon* also it was observed in para 43 (h) as follows:

“(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.”

To the same effect is order 10 Rule 1-c, *infra*:

“1-C. Appearance before the court consequent to the failure of efforts of conciliation. Where a suit is referred under Rule 1-A and the presiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.”

As a topping to the title reference is made to the underlined part of the following portion of para 45 of *Afcon*:

45. “.....We have referred to the procedure and process rather elaborately as we find that Section 89 has been a non-starter with many courts. Though the process under Section 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge-assisted settlement only in exceptional or special cases.” (underlining supplied)

It is submitted with respect that judicial settlement, if used judiciously and tactfully, can do wonders and become most effective of all the five ADRs referred to in Section 89.

In the end it is suggested that after 14 years of introduction of section 89 C.P.C., an impact assessment exercise may be done. Either High Courts from all the districts of their States or the Supreme Court from all the districts of the Country may get the following information in respect of suits instituted in a particular year say 2014:

- i. Total number of suits instituted
- ii. Number of suits in which any of the ADRs under Section 89 was attempted, and their split subject wise and ADR wise
- iii. Number of suits in which attempted ADR succeeded and their split subject wise and ADR wise
- iv. Number of suits in which attempted ADR failed and their split subject wise and ADR wise
- v. Number of suits in which attempted ADR are pending and their split subject wise and ADR wise

(For subject wise split only broad categories, 4 or 5 in number may be chosen)

Result of the survey may help in better implementation of the provision.