

**IV WORKSHOP FOR JUDICIAL OFFICERS IN
THE UNIT OF SRIKAKULAM DISTRICT**

TOPIC

**SETTLEMENT OF DISPUTES OUTSIDE THE
COURT**

FIRST HEARING

**CH.VIVEK ANAND SRINIVAS,
ADDL.SENIOR CIVIL JUDGE,
SRIKAKULAM.**

INTRODUCTION

1. In every civilized society there are two sets of laws that govern the lives of citizens– (i) substantive laws and (ii) procedural laws. While the substantive laws determine the rights and obligations of citizens, procedural laws provide for the framework for enforcement of the same. Despite the fact that substantive laws are comparatively more important, but the efficacy of substantive laws is contingent upon the qualitative deliverance of procedural laws. The latter needs to be efficient, simple, expeditious and inexpensive, lest the substantive provisions fail in fulfillment of their purpose and object.

2. Throughout the history of civilized states, it has been determined that for proper dispensation of justice the procedural and substantive law have to work hand in hand. The same cannot be held to contradict each other, as one provides the manner of realization of the objective of the other. As such, both streams of law work in consonance with each other, wherein neither exceeds the scope, which is determined to be in the other's field.

3. The Code of Civil Procedure, 1908 (*hereinafter* the Code) is a consolidated document that is the primary procedural law relating to all civil disputes in India. The Code is a collection of all the laws that relate to the procedure adopted by civil courts and parties appearing thereunder. After three different formulations that governed the British colony of India in the late 19th century, the Code in its present form was formally brought into force in 1908. Over the years a number of amendments have been passed to ensure the Code is more efficient and justice oriented but still a judicial lag exists in India. The number of cases keep on rising day by day while the adjudicators are limited. In light of the same, a provision is provided under Section 89 of the Code which calls for settlement of disputes outside courts.

4. The long drawn nature of litigation which ironically subverts the ends of justice due to delay makes it viable for parties to resort to alternate dispute resolution would indeed curb delays and the limitations of the traditional system, such as limited number of judges, voluminous number of cases etc. The provision under Section 89 is an attempt to bring about resolution of disputes between parties, minimize costs and reduce the burden of the courts. It is provided for with

the sole objective of blending judicial and non-judicial dispute resolution mechanism and bringing alternate dispute mechanism to the centre of the Indian Judicial System.

5. The long drawn process of litigation, the costs incurred by both parties for the same have and limited number of adjudicators have made Alternate Dispute Resolution an important aspect of the Judicial system to ensure swifter and speedier justice.

Section 89 of the Code of Civil Procedure, which gives the Court the power to refer the dispute for settlement or conciliation was introduced with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. However, the issue is that even after more than a decade of its implementation, the provision provided for ADR under Section 89 suffers from many anomalies. The constitutional validity of this section was upheld but the frequency with which ADR is utilized for resolution of disputes remains minute, which arises due to lack of knowledge about the same or on account of the reluctance of the parties. The Law Commission in its 129th Report advocated the need for amicable settlement of disputes between parties and the Malimath Committee recommended to make it mandatory for courts to refer disputes, after their issues having been framed by courts, for resolution through alternate means rather than litigation/trials. The alternate forums accorded under Section 89 are economically more viable as there are relatively lesser amount of transaction costs and thus, there is a need to make people aware about the same. However, the provision under Section 89 is right in its essence but its purpose is defeated due to legal intricacies, draftsmen's error and lack of awareness among individuals. It has been provided under S.89 of the Code which was introduced by the amendment of 1999 based on the recommendations of the Law Commission and the Malimath Committee.

1. The main object behind this provision is to provide for alternate methods of dispute resolution.
2. S.89 states that where the court is of the opinion that there exist certain

elements of settlement between the parties, which are acceptable to the parties, the court shall formulate terms of settlement based on the same and send them to the parties for their observations.

3. After receiving such observations, the court shall reformulate these terms of settlement and refer the same for arbitration, conciliation, judicial settlement including through Lok Adalat and mediation.
4. With respect to arbitration and conciliation, the provisions of the Arbitration and Conciliation Act shall apply.
5. With respect to Lok Adalats, the court shall refer the matter to a Lok Adalat under the Legal Services Authority Act.

With respect to mediation, the court shall strike a compromise between the parties and follow such other procedure as may be prescribed.

HISTORY AND BACKGROUND OF THE SECTION

1. Section 89 of the Code of Civil procedure was introduced with a purpose of amicable, peaceful and mutual settlement between parties without intervention of the court. In countries all of the world, especially the developed few, most of the cases (over 90 per cent) are settled out of court. The case/ dispute between parties shall go to trial only when there is a failure to reach a resolution. Section 89 of the Code of Civil Procedure States that:

(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.]

2. Section 89 came into being in its current form on account of the enforcement of the CPC (Amendment) Act, 1999 with effect from 1/7/2002. At the commencement of the Code, a provision was provided for Alternate Dispute Resolution. However, the same was repealed by the enactment of the Arbitration Act (Act 10 of 1940) under Section 49 and Sch. 10. The old provision had reference only to arbitration and its procedure under the Second Schedule of the Code. It was believed after the enactment of the Arbitration Act, 1940, the law had been consolidated and there was no need of Sec 89. However, the Section was revived with new alternatives and not only restricted to arbitration. A new Section 89 came to be incorporated in the Code by Section 7 of the CPC Amendment Act, 1999 to resolve disputes without going to trial and pursuant to the recommendations of Law Commission of India and Malimath Committee report.

3. Section 89 along-with rules 1A, 1B and 1C of Order X of First schedule have been implemented by Section 7 and Section 20 of the CPC Amendment Act and cover the ambit of law related to Alternate Dispute resolution. The clauses under Order X are specified to ensure proper exercise of jurisdiction by the court. Sub-

Section (1) refers to the different mediums for alternate resolution and sub-section (2) refers to various Acts in relation to the mentioned alternate resolutions.

4. The changes brought in by the CPC Amendment Act, 1999 have no retrospective effect and *shall not affect any suit in which issues have been settled before commencement of Section 7 of CPC Amendment Act, 1999 and shall be dealt as if Section 7 and 20 of CPC Amendment Act never came into force.*

5. The decision of the forums specified under Section 89 shall be as effective, having same binding effect, as court orders/decrees and arrived at a relatively cheaper cost and within a short span of time. The rules inserted under Order X provide for when court may direct to take recourse to alternate means to resolve disputes, the duty of parties to appear before such forums and the responsibility of the presiding officer to act in interest of justice and return the suit if better suited for the court.

MALIMATH COMMITTEE REPORT AND THE 129TH LAW COMMISSION REPORT

1. The enormous arrears of cases, multiple appeals/revisions, procedural shackles and the adversarial system, all result in creating a judicial lag of sorts and an effective remedy against the same is settlement through alternate forums. The same was brought to light in the Malimath Committee and the 129th Law Commission report.

The Law Commission in its 129th Report advocated the need for amicable settlement of disputes between parties and the Malimath Committee recommended to make it mandatory for courts to refer disputes, after their issues having been framed by courts, for resolution through alternate means rather than litigation/trials. Malimath committee called for a “*legal sanction to a machinery for resolution of disputes and resort thereto is compulsory*” which the sole objective of reducing the large influx of commercial litigation in courts of civil nature, number of appeals to higher courts lessened and the efficiency of courts revitalized by such implementation.

2. The Law Commission recommended the establishment of Conciliation

Courts all over the country *to with the authority to initiate conciliation proceedings in all cases at all levels*. The aims of both these committees were to further the cause of justice and ensure efficient working of the judicial system. The Commission called for a replication of the Himachal Pradesh High Court's Conciliatory practices before, during and post trial for litigants which majorly covered issues related to partition, inheritance, wills etc. The positive results from the experiment in Himachal Pradesh paved the way for revival of alternate forums. Furthermore, it may be stated that it is the duty of the judges to assist parties in arriving at settlements in certain suits, as has been elucidated under Rule 5-B of Order XXVII and Rule XXIII-A of the Code of Civil Procedure. The conciliation process casts a duty on judges to take appropriate steps, where there is scope of settlement, to bring about reconciliation in certain suits and to come up with a conclusive resolution on an expeditious basis.

3. The aim and objective of reviving Section 89, as stated in the Statement and Objects of the Bill Code of Civil Procedure (Amendment) Bill initiated in 1997, was to ensure effective implementation of Conciliation schemes, following recommendations of the 129th Law Commission and make it obligatory for courts to refer to disputes to alternate forums. Initiation of suits in courts shall be the last resort of parties if all other alternatives fail. The resuscitated Section 89 incorporated Conciliation, Judicial Settlement including Lok Adalats and Mediation in addition to Arbitration.

ANALYSIS OF SECTION 89

1. Delay, one of the major inadequacies present in our legal system, is said to have been overcome by ADR. ADR was formulated with a purpose of reducing the burden of the burdened system and render expeditious justice. Section 89 was introduced to empower different forums and was more practically applicable than any other option of reducing judicial lag, such as increasing number of judges or infrastructure.

2. The language of the Section clearly states that there are 4 alternate resolution forums, including arbitration and all the 4 forums are treated identically and as such there is no distinction mentioned in the Section. In arbitration, the decision binding

on parties is taking by a private judge (Arbitrator) while in the other 3 mediums party autonomy in final decision is still maintained. Amongst the five specified alternate forums, (arbitration, conciliation, judicial settlement, Lok Adalats and mediation), the most sought after is arbitration while at the all five are at the same footing in the eyes of the law. Arbitration is a process only available at the consent of the parties.

3. Arbitration or conciliation can only be on account of the consent of parties to a dispute and it is not within the powers of the court to refer disputes for arbitration in absence of consent of parties. Moreover, notwithstanding the fact that a government is one of the parties to arbitration agreement, a court functions in accordance with the jurisdiction conferred in on them. Judicial settlement, as under Sec 89(1)(c) and Sec 89 (2) (c), could only be in terms of Legal Services Authority Act. Lok Adalats derive power from the aforementioned Act and the power to issue an award by court is only on account of consent of parties towards the same. The Lok Adalats lacks authority to adjudicate on any aspect and its awards are not binding, as mentioned under Section 19 of LSLA.

4. To proceed towards alternate means of resolution, the court must identify that there exist scope of resolution/ settlement and the same may be acceptable to parties. Court is given powers to surpass the decision of litigants under Section 89 but the same must be invoked only in those cases where there is scope for settlement and the parties to the dispute are open to the idea of settlement. The incorporation of the word ‘*may be acceptable to parties*’ in the Section is with a purpose to take all essentials/stakeholders into consideration. The term “*may*” in Section 89 governs aspect of reformulation of the terms of a possible settlement and its reference to one of AR methods. The court must also consider the eccentric and peculiar nature of the dispute and nature of the parties to the dispute before proceeding towards alternate means of resolution. The Court must guide the litigants towards which course or means to resolve a dispute, taking into consideration the legal acumen and knowledge of the judges and the appropriate forum for the dispute, only after the above stated element are taken into consideration. A senseless recourse to Section 89 may turn out to be counter productive and add to further delays in implementation of justice in the legal system. Courts, may take a recourse to ADR as a statutory duty, in case of a number

of cases arising out of matrimonial dispute or in a suit for partition within the family, to separate issues to be dealt by ADR's and those adjudicated upon by Courts.

5. The legal position with regard to ADR practices was cleared in the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Consturction Co. (P) Ltd.* Arbitration was referred to as a means of ADR is undertaken on account a prior agreement between parties to resolve disputes by arbitration or by filing an application/joint memo before the court, the latter occurs in the case of no arbitration agreement before hand. The award of the Arbitrator, the presiding officer, is binding as a decree of the court or any settlement arrived at by parties during arbitration proceedings shall also have the same effect.

6. In cases of Arbitration, the cases is moved out of the court (Arbitration and Conciliation Act, 1996 will be applicable) but resorting to conciliation or judicial settlement or mediation won't result in the same as courts retain control/jurisdiction over such matters as 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. When matter is settled through conciliation or Lok Adalats, both are as effective as a decree of a court as has been specified in the relevant statutes. The controversy under Sectin 89 lies in the distinction between mediation and conciliation. Many referring to the former as a case in which the conciliator is a trained professional mediating the dispute and the latter is a case in which a third party, inexperienced and not trained, insists on parties to arrive at a settlement. Such a distinction may be incorrect. However, these are one of the few anomalies of this section which shall be discussed later. Judicial Settlement as defined under Black Law's Dictionary is "the settlement of a civil case with the help of a Judge who is not assigned to adjudicate the dispute." In India, it may be deemed to a negotiated deal arrived at by the assistance of the court overlooking the matter or by reference to another judge.

RELOOK AT SECTION 89- ANOMALIES

1. Even after more than a decade of its implementation, the provision provided for ADR under Section 89 suffers from many anomalies. The constitutional validity of this section was upheld but the frequency with which ADR is utilized for

resolution of disputes remains minute, which arises due to lack of knowledge about the same or on account of the reluctance of the parties.

2. The Section in itself suffers from many anomalies which need to be looked at to ensure the objective of the Section is achieved and there is swifter and speedier form of justice. The drafting of the Section 89 was said to be done in a haphazard manner and the interpretation of the Section was observed to be, in the *Afcons'* case, "A trial judge's nightmare." The wording of the Section 73(1) of the Arbitration and Conciliation Act is borrowed under this section defeating the objective with which the the section was revived as was observed by the Court in the *Afcons* case.

3. The terms "shall formulate the terms of settlement" specified under Section 89 (1) of the Code, imposes a heavy and unnecessary burden on the courts. The formulation and reformulation of the issues to be dealt with by the courts and specifying the method to be adopted may leave the provision meaningless and out of place at the pre-ADR stage. Formulation of terms of settlement for reference to ADR forums especially Arbitration would make the appointment of the Arbitrator hollow as the entire dispute is meant to be transferred to the Arbitrator and not the terms of settlement.

4. It is a redundant process which further burdens the court and strikes at the foundation of the ADR system. The right manner of interpretation of the Section 89 would be if it is read with Order X Rule 1-A where the Court may only direct the parties to refer to ADR forums and no need to formulate terms of settlement arises. Another error in drafting as observed by the Court in the *Afcons* case was intermingling of definitions of 'mediation' and 'judicial settlement'. "Mediation" should be replaced by "Judicial settlement" in clause (c) of section 89 (2) and the latter replaced by the former in clause (d). A agreement/ negotiated settlement by court being termed as *Mediation* is a misnomer and reference to another forum to arrive at a compromise should not be termed as a "*judicial settlement*". The court observed these as a draftsmen's error and the changes with regard to the same shall be kept in place till the legislature corrects the mistakes, so that Section 89 is not rendered meaningless and infructuous. Justice R.V Raveendran holds the view that Section 89 of the Code was drafted in a hurry. It is not happily worded. Supreme Court in Salem Advocate Bar Association, Tamil Nadu vs. Union of India was of

the view that there were some “creases” in Section 89 but it did not refer to anomalies. It felt that the creases could be ironed out by formulating appropriate rules and regulations to implement the section. In his article, the Hon’ble Justice puts forward some additional anomalies associated with Section 89.

5. Another anomaly occurs while making Mediation Rules under Section 82(2) (d) of the Code. Making Mediation Rules under Section 82(2)(d) is clearly applicable to conciliation by a third party (individual or institution), however Section 89(2)(d) is aimed at court-stimulated settlement. This leads to another anomaly wherein when mediator’s intervention leads to a settlement and such settlement is also authenticated by the mediator, still it is not regarded as a decree. Notwithstanding, when the same mediator is called as a conciliator, the settlement reached through him is regarded as a decree. Converting mandatory requirement into a directory provision also leads to an anomaly. Section 89(1) states that “where it appears to the court that there exists elements of a settlement which may be acceptable to parties”, this would necessarily mean that the Court will refer the matter to ADR processes only when it finds elements of settlement in the dispute and not otherwise. This however converts what was expected to be an obligatory provision as a discretionary provision. Another such example of anomaly occurs while importing final process of conciliation into pre-ADR reference. Section 89 of the Civil Procedure Code necessitates the court to formulate the terms of settlement and then provide them to parties to reflect upon the same and then again reformulate the terms of a potential settlement and then discuss the same for ADR processes. Many regard this as unnecessary and the conciliator or the mediator or members of the Lok Adalat should undertake such sort of a task when reference has been made to them respectively. By making the Court do so, the object of Section 89 is lost and it would most definitely obstruct a freely negotiated settlement.

6. However, the most consequential anomaly is related to Court fees. The Code of Civil Procedure (Amendment) Act, 1999 by which Section 89 was amended into the Code also amended a new Section 16 in the Court Fees Act, 1870 which states the following: Refund of fee: Where the court 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. However, this act is applied only in certain States. Other States have their own Acts governing court fees. There may also be some States who have yet not amended a corresponding provision for refund of court fees.

7. The main problem arise that when a dispute could not be resolved by ADR processes and is brought back to the same Court, and there has already been refund of the Court fees before reference is made to ADR. There is no provision in the said circumstance to impose fresh Court fees and this creates a situation where the suit becomes free which is not possible.

NO COMPULSION UNDER SECTION 89

1. Section 89 of the Code of Civil Procedure does not create an obligation for the Court to necessarily conduct arbitration, but merely permits the Court to refer the dispute to arbitration or conciliation etc., where it is satisfied with respect to a reference to the dispute in a pending suit that there is a possibility of settlement of the same by way of arbitration or conciliation. However, The Government of India or any party can create a compulsion or obligation on the Civil Court to necessarily arbitrate the matter between the parties depending upon the nature of the agreement entered by the parties. The fact that Government is one of the parties to the arbitration agreement makes no difference. The mandate under Section 89 ought to be made to settle the matter and every endeavor should be made for amicable settlement. It appears from Section 89(1) of the code of Civil Procedure that a duty is cast upon the court to refer the dispute either by way of arbitration, conciliation, judicial settlement including settlement through Lok Adalats or mediation if it appears that there are elements of settlement. The constitutional validity of Section 89 of the Code was upheld by the Supreme Court of India in Salem Advocate Bar Association, Tamil Nadu vs. Union of India. All endeavours shall be made by the Court at the earliest point of time to settle the dispute under Section 89 of the Code through any of the mechanisms provided under it. However, the Court cannot compel a party to surrender to ADR if any of the part did not settle for settlement. Under the guise of this provision, a party cannot be allowed to prolong the litigation when the trail is in progress and more particularly when it is ready for disposal. The Parliament has not conferred the jurisdiction on any personal designate but on regular Courts properly constituted which must be held or

assumed to be held by competent trained officials. When a reference has been made for arbitration under Section 89(1) of the Code, it is to be kept in mind that it would thus bring the suit to a termination before that Court and such decision will certainly be amenable to challenge in revision even under Section 115 of the Code. However, the above mentioned situation will occur only if reasons are given and such reasons are considered by Superior Courts discharging revisional and supervisory jurisdiction.

APPLICABILITY OF PROVISIONS OF LOK ADALAT ACT

1. Section 89(2)(b) of the Code of Civil Procedure also provides that where a dispute has been referred to the Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-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 Lok Adalat. Parties are entitled to refunding of full Court fee where the parties settled the matter without the intervention of the Court. The Lok Adalats while resolving the disputes are guided by the principles of justice, equity and fair play, and aim to settle the dispute by explaining the pros and cons to the parties of their respective claims. Similar to the amendments made by the State Government in Central Court Fee Act by virtue of the amendments to the code, the State Government can also consider making similar amendments to State Court Fee Legislations.

238TH LAW COMMISSION REPORT

1. The 238th Law Commission Report advocated for the same changes as were specified in *Afcons* case and called for restructuring of the Section on the contours set out by the Supreme Court with certain reservations. The Commission stated it would be unsuitable to deem a Lok Adalat as a mediator and treating the Lok Adalat award as a mere agreement arrived at on account of the Mediator and stated that an appropriate course would be for 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.* The Report was deemed it be unwise to refer the award of Lok Adalat arrived at through conciliation to be referred to a Court, which would be

empowered to pass a decree in consonance with the compromise arrived at. Such sort of an implementation, as prescribed under paragraph 38 of the *Afcons* case, would be in contravention with Section 21 of the LSA Act and further review by courts is considered unwarranted. Such sort of a recommendation would even hamper the conciliatory practices and go against the validity of settlement agreement as provided for under Section 76 and 30 of the Arbitration and Conciliation Act. The objective of Section 89 shall be served if the *further step of passing a decree* with regard to Alternate forums is not undertaken. The Report called for a revamp of the current section to incorporate certain changes as had been highlighted in the *Afcons* case such as court shall record its opinion in favor of ADR before setting the issues to be dealt with in order to reduce the burden of the court. Copies of settlement agreement need be provided to the courts by Conciliators to rectify any mistakes or errors in the same with the consent of parties. (Recommendations 6.2)

2. The more important recommendation was with respect to rules under Order X, as the committee recommended the removal of Rule 1B of Order X which calls for attendance of parties before alternate forums. (Recommendation 6.3) The Law Commission dealt with the problem of court fees as the literal interpretation of Section 16 of the Court-fees Act may render the trial of a suit free of cost. The said section, introduced along with section 89 of the Code by the same Act, provides for court fees to be refunded to the plaintiff when recourse to alternate forums is avoided. The problem lies in the fact that, there may be no settlement or resolution by alternate forums and the matter may be reverted back to the court and the suit may move on to trial proceedings without any fees or cost incurred by the plaintiff. Such a provision is also in conflict section 21 of the Legal Services Authorities Act, 1987 as it provides for court fees being refunded only when a settlement is arrived at between parties. Thus, parties while initiating proceedings, to avoid costs, could abuse the provision under Section 16 and a need to make this section in consonance with other such provisions such as Section 20 of the LSLA act is paramount. The court fees must only be refunded when the matter has been resolved outside court through alternate forums prescribed under Section 89. It may be draftsmen's error which has caused such a anomaly to arise but there is a need to alter the same. (Recommendation 6.4.3)

CONCLUSION

Section 89 is an important part of the Code of Civil Procedure and is an effective method to resolve dispute between parties where there is scope for the same. The section is right in its spirit as the objective has been to reduce the burden of the court, ensure a compromise is arrived at between parties and move towards speedier/ effective method of administrating justice. Alternate Dispute Resoluituon is a means of increasing access to justice without decreasing the quality of justice. [lii] However, as has been highlighted in the entire paper, the Section suffers from many anomalies, which have reduced its efficiency and act as a hindrance in delivering justice to the people. The recommendations of the 238th Law Commission report strike at the heart of the matter and there is a need for amendments specified by the Report. Apart from the legal aspect of the inefficiency of the provision, another major reason for section failing to fulfil its purpose is the lack of legal knowledge among the people. Rather than going for Alternate means which are much more cheaper and les time consuming, citizens continue to go for trial hoping to secure a larger award from the Court. The alternate forums accorded under Section 89 are economically more viable as there are relatively lesser amount of transaction costs and thus, there is a need to make people aware about the same. Hence, the provision under Section 89 is right in its essence but its purpose is defeated due to legal intricacies, draftsmen's error and lack of awareness among individuals.

First hearing

- i. After a suit is instituted with the plaint and a written statement is given by

the defendant there comes a stage called first hearing. But what does the first hearing comprise of? What exactly happens when summons which were served to both parties appear to the court? All these are important questions and it is equally important to understand its object and at the same time why issues are so important.

ii. Basically after the presentation of plaint by the plaintiff and filing of written statement by the defendant, there arrives a stage called first hearing. Order 14 of the Code of Civil Procedure, 1908 deals with the first hearing. The word first hearing as such is nowhere defined in the Code, but the literal meaning of the term is the day on which the court goes into the pleadings of parties in order to understand their contentions. While Order 10 of the Code enjoins the court to examine parties with a view to ascertain matters in controversy in the suit. It has been held by the Supreme Court that First hearing is the day on which the court applies its mind to the case either for framing issues or for taking evidence.^[1]

iii. The Order X Rule 1 provides that the court shall, at the first hearing of the suit, ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or in the written statement, if any, of the opposite party. After recording admissions and denials, the court shall direct the parties to the suit to settle out of court through conciliation, arbitration, mediation or Lok Adalat. If there is no settlement, the case will again be referred to the court. Rule 2 further provides that for oral examination of parties to the suit with a view to elucidating matters in controversy in the suit. The court, thus, ascertain with precision the propositions of law or fact on which the parties are at variance and on such questions issues are required to be framed. The main purpose behind these rules is to understand and inform the parties about their real dispute so that the area of conflict can be dealt with between the parties at the same time, later on if any party come to realise about these issues, it would not be surprise to them.

iv. Therefore, on the first hearing, the main task of framing of issues is done. Issue means a point in question or some important subject of discussion. Issues are points of contradictory averments made by the parties and decide by the court. When one fact is asserted by the party and the same is denied by other, that is oppositions, such per se facts, which will be called material propositions will constitute issues. Order X Rule 1(2) and 1(3) provides that material propositions are those propositions of law or fact which a plaintiff must allege in order to show a

right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other shall form the subject-matter of a distinct issue.

v. Basically the framing of issues requires some conditions and material which is inclusive of mainly three things. Firstly, the allegations made on oath by the parties, or by any persons present on their behalf, or statements made by the pleaders appearing for the parties. Secondly, the allegations made in pleading or in answers to interrogatories and thirdly, documents produced by the parties.[2] Therefore their importance has been realised appropriately in leading judgement in *State of Gujarat v. Jaipalsingh Jaswantsingh Engineers and Contractors*[3] wherein it was stated that “such framing of issues in the first instance would facilitate the applicant to lead necessary evidence in support of the claim and the reliefs prayed pursuant thereto. In the second instance, it will avail the opponent an opportunity to confront and contradict the particular witness and thereafter to lead the evidence if he so desires to bring home the defence pleaded, and in the third instance, enlighten the trial court to test and appreciate the same in proper perspective to enable it to reach a just decision. It is hardly required to be told that issues are backbone of a suit. They are also the lamp-post which enlightens the parties to the proceedings, the trial court and even the appellate court- as to what is the controversy, what is evidence and where the way to truth and justice lies.”

vi. Therefore the framing of issues is the duty of the court since only the court can frame the issues in a suit. They are decided by the Presiding Officer of the court that is the Judge. At the same time, parties and their pleaders thereof must also assist the court in framing the issues wherever required. While issues are supposed to be clear and specific, vague and evasive issues create irregularities in the administration of justice. Order X also provides that the court may examine witnesses or inspect documents before framing issues, to amend the issues or to frame additional issues or to strike out issues that may appear to the court to be wrongly framed.

vii. But in circumstances wherein there is the omission of court to framing of issues, such is not considered fatal to the suit. But in case, such omissions lead to affect the disposal of suits on merits then the case must be remanded to the trial court for fresh trial. While on the other hand, it was held that where the parties

knew that certain point of proposition would have been an issue and yet its disposition would not be fatal to the suit, such omission of court on framing issue is acceptable provided it has caused no prejudice or substantial injustice.[4] Order 15 deals with various situations where a suit can be disposed off on the first hearing itself. Therefore, issues are extremely important for a proper proceeding of a suit and right decision of the case[5] and omission thereto can be caused, bearing valid reasons and while if framed properly, all issue must be normally decided at one and same time.[6] This constitutes all we need to know about first hearing.
