Critical Analysis of the Case of *Salem Advocates Bar Association v. Union of India* (2005) 6 SCC 344

**Facts of the Case:**
The Salem Advocate Bar Association v. Union of India 2005 (6) SCC 344 is basically an aftermath of the original case [*Salem Advocates Bar Association, Tamil Nadu. v. Union of India*] AIR 2003 SC 189. The Honorable Judges presiding over the case were Y. K. Sabharwal, D. M. Dharmadhikari and Tarun Chatterjee. The subject is basically related to Constitution and is a case of civil nature. In the former case there were certain amendments made to Code of Civil Procedure, 1908 by the Amendment Acts of 1999 and 2002. The following amendments were made:

(i) In Section 26(2) and Order 6 Rule 15(4) of Code of Civil Procedure, 1908 in this the affidavit filed under Section 26(2) and Order 6 Rule 15(4) would not be evidence for purpose of trial.

(ii) *Written statement* – Order 8 Rules 1 and 10 of Code of Civil Procedure, 1908: There was a limitation for filing written statement. There was restriction regarding extension of time for filing written statement. It was held that the limitation provided under Rule 1 is only directory and finally Court empowered to extend time limit in exceptional cases.

(iii) *Execution of decree* – Section 39 (4) and Order 21 Rules 3 and 48: Section 39 does not authorize the Court to execute decree outside its jurisdiction but it does not dilute other provisions giving such power on compliance of conditions stipulated therein. Order 21 Rules 3 and 48 would not be affected by Section 39(4).

(iv) *Sale of attached property* – Sections 64 (1) and 64 (2) of Code of Civil Procedure, 1908: Sale of attached property on basis of registered contract such a sale is protected under Section 64(2). But the protection is available only to sale affected in pursuance of contract entered prior to attachment. Sale on basis of unregistered contract not protected under Section 64 (2).

(v) *Notice* – Section 80 of Code of Civil Procedure, 1908 – Central and State Governments directed to appoint an Officer in charge of replying notices received by it under Section 80 or under other similar provisions. In case notice has not been replied or reply is evasive and vague and has been sent without proper application of mind. Court shall ordinarily award heavy cost against Government and direct it to take appropriate action against concerned Officer including recovery of costs from him.

(vi) *Alternative Dispute Resolution* – Section 89 of Code of Civil Procedure, 1908 and Sections 82 and 84 of Arbitration and Conciliation Act, 1996: Procedure for option to arbitration among four ADRs is not contemplated by Act of 1996. Under Sections 82 or 84 no application where parties agree to go for arbitration under Section 89. The act of 1996 would apply only from stage after reference and not before stage of reference if reference to arbitration made under Section 89 - Judge who makes reference not disqualified to try suit afterwards if no settlement is arrived at between parties.

The former case which created the abovementioned amendments was rejected by this Court but it was noticed in the judgment that modalities have to be formulated for the
manner in which section 89 of the Code and, for that matter, the other provisions, which have been introduced by way of amendments, may have to be operated. For this purpose, a Committee headed by a former Judge of this Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the Alternate Disputes Resolution (ADR) referred to in section 89. It was also observed that the model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to section 89(2)(d) of the Code. Further, it was observed that if any difficulties are felt in the working of the amendments, the same can be placed before the Committee which would consider the same and make necessary suggestions in its report.

Issue involved in the Case
Whether the amendments made in the Code of Civil Procedure, 1908 by the Amendment Act of 1999 and 2000 were Constitutionally valid?

Judgment
The report is in three parts. Report 1 contains the consideration of the various grievances relating to amendments to the Code and the recommendations of the Committee. Report 2 contains the consideration of various points raised in connection with draft rules for ADR and mediation as envisaged by section 89 of the Code read with Order X Rule 1A, 1B and 1C. Report 3 contains a conceptual appraisal of case management.

Report I

1. Amendment inserting Sub-section (2) to Section 26 and Rule 15(4) to Order VI Rule 15.

Prior to insertion of aforesaid provisions, there was no requirement of filing affidavit with the pleadings. These provisions now require the plaint to be accompanied by an affidavit as provided in Section 26(2) and the person verifying the pleadings to furnish an affidavit in support of the pleading [Order VI Rule 15(4)]. It was sought to be contended that the requirement of filing an affidavit is illegal and unnecessary in view of the existing requirement of verification of the pleadings. The affidavit required to be filed under amended Section 26(2) and Order VI Rule 15(4) of the Code has the effect of fixing additional responsibility on the deponent as to the truth of the facts stated in the pleadings. It is, however, made clear that such an affidavit would not be evidence for the purpose of the trial. Further, on amendment of the pleadings, a fresh affidavit shall have to be filed in consonance thereof.

2. Order VIII Rule 1 & 10

Order VIII Rule 1, as amended by Act 46 of 1999 provides that the defendant shall within 30 days from the date of service of summons on him; present a written statement of his defence. The rigour of this provision was reduced by Amendment Act 22 of 2002 which enables the Court to extend time for filing written statement, on recording sufficient reasons therefore, but the extension can be maximum for 90 days.
The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written statement within the said period have not been provided for in Order VIII Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time even in an exceptionally hard case. It has been common practice for the parties to take long adjournments for filing written statements. The legislature with a view to curb this practice and to avoid unnecessary delay and adjournments has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the legislature. The consequences which may follow and whether the same were intended by the legislature have also to be kept in view. In *Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur* [1965] 1 SCR 970, a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. The object which is required to be served by this provision and its design and context in which it is enacted has to be ascertained. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice. In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90
days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1.

3. Section 39
Section 39(1) of the Code provides that the Court which passed a decree may, on the application of the decree-holder send it for execution to another court of competent jurisdiction. By Act 22 of 2002, Section 39(4) has been inserted providing that nothing in the section shall be deemed to authorize the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction. The question is whether this newly added provision prohibits the executing court from executing a decree against a person or property outside its jurisdiction and whether this provision overrides Order XXI Rule 3 and Order XXI Rule 48 or whether these provisions continue to be an exception to Section 39(4) as was the legal position before the amendment. Order XXI Rule 3 provides that where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more courts, any one of such courts may attach and sell the entire estate or tenure. Likewise, under Order XXI Rule 48, attachment of salary of a Government servant, Railway servant or servant of local authority can be made by the court whether; the judgment-debtor or the disbursing officer is or is not within the local limits of the court's jurisdiction. Section 39 does not authorize the Court to execute the decree outside its jurisdiction but it does not dilute the other provisions giving such power on compliance of conditions stipulated in those provisions. Thus, the provisions, such as, Order XXI Rule 3 or Order XXI Rule 48 which provide differently, would not be affected by Section 39(4) of the Code.

4. Section 64(2)
Section 64(2) in the Code has been inserted by Amendment Act, 22 of 2002. Section 64, as it originally stood, has been renumbered as Section 64(1). Section 64(1), inter alia, provides that where an attachment has been made, any private transfer or delivery of property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. Sub-section (2) protects the aforesaid acts if made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment. The concept of registration has been introduced to prevent false and frivolous cases of contracts being set up with a view to defeat the attachments. If the contract is registered and there is subsequent attachment, any sale deed executed after attachment will be valid. If unregistered, the subsequent sale after attachment would not be valid. Such sale would not be protected.

5. Section 80
Section 80 (1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two months period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and
prescribed period therefore, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. Proper reply can result in reduction of litigation between State and the citizens. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of section 80.

**Report II**

The amendment brought into the code related to the Alternative Dispute Resolution Mechanism (Amendment 6) is provided in Report 2.

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 given 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 (26 of 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 (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 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.

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 the 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 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."

Some doubt as to a possible conflict has been expressed in view of use 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 and use of the word 'shall' in Order X, Rule 1A when it states
that 'the Court shall direct the parties to the suit to opt either mode of settlements outside
the Court as specified in Sub-section (1) of section 89'. As can be seen from section 89, its
first part uses the word 'shall' when it stipulates that the 'court shall formulate terms of
settlement. The use of the word 'may' in later part of section 89 only relates to the aspect of
reformulating the terms of a possible settlement. The intention of the legislature behind
enacting section 89 is that where it appears to the Court that there exists 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
other of the said modes. Section 89 uses both the word 'shall' and 'may' whereas Order X,
Rule 1A 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. 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 '1996 Act') shall apply as if the
proceedings for Arbitration or Conciliation were referred for settlement under the
provisions of 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties to
Arbitration where there is arbitration agreement. As held in *P. Anand Gajapathi Raju and
Ors. v. P. V. G. Raju (Dead) and Ors* [2000] 2 SCR 684, the 1996 Act governs a case where
arbitration is agreed upon before or pending a suit by all the parties. 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. For the purposes of section 89 and Order X, Rule 1A, 1B and
1C, the relevant Sections in Part X of the Code enable the High Court to frame rules. 1996
Act in relation to Conciliation would apply only after the stage of reference to Conciliation.
The 1996 Act does not deal with a situation where after suit is filed, the court requires a
party to choose one or other ADRs including Conciliation. Thus, for Conciliation also rules
can be made under Part X of the Code for purposes of procedure for opting for
'Conciliation' and upto the stage of reference to Conciliation. The 1996 Act comes into
play only after the stage of reference upto the award.

A doubt has been expressed in relation to Clause (d) of section 89 (2) of the Code on the
question as to finalization of the terms of the compromise. The question is whether the
terms of compromise are to be finalized by or before the mediator or by or before the court.
It is evident that all the four alternatives, namely, Arbitration, Conciliation, judicial
settlement including settlement through Lok Adalat and mediation are meant to be the
action of persons or institutions outside the Court and not before the Court. Order X, Rule
1C speaks of the 'Conciliation forum' referring back the dispute to the Court. In fact, the
court is not involved in the actual mediation/conciliation. Clause (d) of section 89(2) only
means that when mediation succeeds and parties agree to the terms of settlement, the mediator will report to the court and the court, after giving notice and hearing the parties, 'effect' the compromise and pass a decree in accordance with the terms of settlement accepted by the parties. The Judge who makes the reference only considers the limited question as to whether there are reasonable grounds to expect that there will be settlement and on that ground he cannot be treated to be disqualified to try the suit afterwards if no settlement is arrived at between the parties. The question also is about the payment made and expenses to be incurred where the court compulsorily refers a matter for conciliation/mediation. Considering large number of responses received by the Committee to the draft rules it has suggested that in the event of such compulsory reference to conciliation/mediation procedures if expenditure on conciliation/mediation is borne by the government, it may encourage parties to come forward and make attempts at conciliation/mediation. On the other hand, if the parties feel that they have to incur extra expenditure for resorting to such ADR modes, it is likely to act as a deterrent for adopting these methods.

Report III

Report No.3 deals with the Case Flow Management and the Model Rules. The case management policy can yield remarkable results in achieving more disposals of the cases. Its mandate is for the Judge or an officer of the court to set a time-table and monitor a case from its initiation to its disposal. The Committee on survey of the progress made in other countries has come to a conclusion that the case management system has yielded exceedingly good results. Model Case Flow Management Rules have been separately dealt with for trial courts and first appellate subordinate courts and for High Courts. These draft Rules extensively deal with the various stages of the litigation. The High Courts can examine these Rules, discuss the matter and consider the question of adopting or making case law management and model rules with or without modification, so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice.

Conclusion

This case is a landmark case in the history of Indian Judiciary. This set of two cases, former one, laying down the amendments and the latter one providing a report on the amendment's feasibility have laid down the foundation of providing quick, financially accessible and proper justice. This basically intends to reduce the number of suits filed in the courts every year. The case has been referred to in numerous cases of civil nature after the amendments by the Act of 1999 and 2002. Moreover, the model provided to be followed by the trial court is an easily practicable model and does show the 'bright light of proper and speedy justice in the darkness of innumerable cases'. The rules provided in the model are appropriate for the system of Indian Judiciary and hence should be properly followed.