CHAPTER VI
ALTERNATIVES TO ADJUDICATION IN THE CODE OF CIVIL
PROCEDURE, 1908

The Code of Civil Procedure, 1908 contains several provisions that help litigants and legal practitioners to settle various kinds of disputes at an early stage itself without prolonging it endlessly by resorting to protracted trial proceedings. Some of these provisions were there in the original Code itself and some others were incorporated by way of amendments. A detailed analysis of extant provisions will be very helpful at this juncture, when one sees the system of delivery of justice in a new outlook and with a fresh approach. A re-reading of the Code of Civil Procedure in a different perspective will enable all those who are concerned with the administration of justice to see it as one that helps amicable settlement in a speedy and less expensive manner.

It is generally believed that the Code provides an adversarial system\(^1\) in which the litigating parties are agitating like rivals and the role of the judge is only that of an umpire and whoever conducts his case well will ultimately win.

The adversarial system, which is one of the great legacies of the British rule in India, has worked reasonably well for centuries. However, in view the docket explosion, the faith and confidence in the Judiciary has undergone substantial erosion. The functioning of the system is also being questioned in different quarters having regard to the procedural wrangles, enormous costs and inordinate delay involved in it.\(^2\)

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1 See: Courts and International Journal of Legal Information, 36(2) The Official Journal of the International Association of Law Libraries (2008); Global Challenges & the Indian Legal System, Article 8,3-2-(2009); Justice B. N. Srikrishna, The Indian Legal System, “India follows the adversary system of legal procedure. This means that the judge acts as a neutral arbiter holding the balance between the contending rivals without actively taking part in the forensic debate in the court,” p.242.

2 S.B. Sinha, “Alternatives”, delhimediationcentre@nic.in.
The attitude of judges, lawyers and all who are connected with civil litigation is that the Code of Civil Procedure provides an adversarial system in which the court is only a battlefield where the enemies will fight and finally the umpire will decide and declare who won the war.\(^3\) It is now generally accepted that the attitude has resulted in docket explosion and mounting arrears.\(^4\) The attitude had been cultivated for more than a century, probably because of historical reasons. It now seems to have become highly necessary that there shall be a re-look at the Code as a justice delivery system rather than as an adversarial system. Because, looking at the Code in such an angle will tend to change the attitude and enable one to solve problems in the delivery of justice to a certain extent. For this purpose, one has to analyse the following provisions of the code which were in existence even before the 1999 and 2002 amendments.\(^5\)

6.1. Settlement outside the Court

The Civil Procedure Code (Act VIII of 1859) in sections 312 to 327 contained provisions for reference of cases to arbitration. It was a step towards reference of cases to arbitration without the involvement of court. There were provisions for proceedings on agreement by parties in sections 328 to 331. All the above provisions enabled parties to settle disputes out of court. But the procedure was still not totally free from interference of the court, without which a proper solution was not totally guaranteed. The Code was re-enacted

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\(^3\) See I.P. Massey, “Conciliation Through Subordinate Courts in Himachal Pradesh” VIII (1 and 2), Legal Aid News Letter(1987), 16-17. The author says that the rationale which speaks for the ongoing of this institution is that an adversary adjudication ending up in one party being declared the victor and the other the vanquished does not remove the dispute from the society and may lead to further disputes or social tensions. Even twenty five years after enforcement of this article there is no considerable change in the situation.

\(^4\) See R. Dhavan, The Supreme Court of India: A Socio Legal Analysis of Its Juristic Technics (1977), p.116. The author says: “…the introduction of adversary system of justice has really engulfed the Indian Judiciary in external and internal difficulties. It has been going through a lot of problems and difficulties. The courts are badly engulfed in arrears. More and more cases are being filed and the piles of arrears continue to mount. They seem like a tide- a tide of paper and dockets that cannot be stopped.”

\(^5\) Ibrahim Khalifulla, Lecture delivered on 23.02.2013, at the Tamil Nadu Judicial Academy, Chennai for Newly Recruited Civil Judges 2012 (Batch II), p.6.
as the Code of Civil Procedure, 1882 with certain modifications. Afterwards, the present Code of Civil Procedure, 1908 was enacted.

In the Code of Civil Procedure 1908 (in Order 23 Rules 1 and 3) there existed provision for a settlement out of court and for drawing a compromise decree. The provision was amended in the 1976 amendment of the Code of Civil Procedure. Section 89 of the 1908 Act provided for arbitration. The procedure relating to reference to arbitration was embodied in the second schedule to the Code. However, the provision for arbitration under the section was repealed by the Arbitration Act, 1940 (Act 10 of 1940).

From the above facts it is evident that the provisions for amicable settlement of disputes out of court between parties have existed in the Code of Civil Procedure itself for more than the past 140 years. However, there was some impediment in the subsequent growth, development and acceptance of the out of court mechanism. Unfortunately the lack of attention or less importance and thrust given to the amicable way of settlement of disputes, and lack of awareness about these provisions in the Code to the litigating public may probably be the reasons for increasing number of litigations in the country in unmanageable proportions as already explained. Our attitude for about one and a half century towards amicable settlement of disputes appears to be negative and this might be the reason for lack of result in amicable settlement. We looked upon the code of civil procedure only as an adversarial proceeding rather than as a justice delivery system. This attitude resulted in looking upon the parties to litigation as rivals- thereby closing the door for amicable settlement- and it continued and contributed to the multiplicity of litigations adding more and more to the never pending adjudications and ever increasing arrears.

6.2. Dismissal of Suit for Non Appearance

First of all let us see what will happen if a party settles his case out of court immediately after instituting it before a civil court. Order IX that deals

6 Ibid. at 32.
with appearance of parties and consequence of non-appearance speaks about this. Rule 1 of the above order states that “on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the court”. Rule 3 of this order says that “where neither party appears when the suit is called on for hearing, the court may make an order that the suit be dismissed”. In *State Bank of India v. Kumar Apparel Industries* the Supreme Court held that this provision is applicable only where neither party do not appear when the case is called for hearing however dismissal of suit for non-prosecution is not warranted under Rule 3. The word ‘may’ in this rule postulates that it is not mandatory for the court to dismiss the suit. It is only discretionary. In fact this provision enables parties to settle their disputes out of court at an early stage anytime once the suit is instituted before the court. Once the matter is settled out of court the parties can jointly decide not to appear before the court. Generally this may not occur because it is possible that the personality conflicts of the involved parties may not bring this about. Therefore, a case may be unnecessarily continued ad nauseam only because of this personality conflicts. This will only lead to hardship to parties and add to the court arrears of cases. At such situations the involvement of a trained neutral third party can help in bringing about a settlement. This might help reducing the burden of the parties as well as the court.

**6.3. Settlement before Framing of Issues**

The second important provision in this respect lies in Order X of the Civil Procedure Code which relates to the examination of parties by court. The examination of parties by the court is aimed at to find out at an early stage itself whether the dispute between the parties still persists. If the dispute still persists then the court will have to frame issues under Order XIV Rule 1 for conducting the trial. Issues have to be framed under Order XIV Rule 1 only

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when material proposition of fact or law is affirmed by one party and denied by the other. When there is no such denial, the court is competent to pronounce judgement at once under Rule 1 of Order 15.\(^8\) This goes to show that there is a chance to settle the dispute at this stage before going into the trial stage. Therefore the Supreme Court rightly said that “Order X is an enabling provision, it does not place any bar on the powers of the Court to seek clarification from a party in any case at any date earlier than one fixed for framing of issues as to advance the cause of justice”.\(^9\) Here again the Court underlines the importance of settling the dispute at an early stage before framing of issues. A plain reading of Rule 1 of Order X reveals that:

At the first hearing of the suit the court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The court shall record such admissions and denials.

In *Annie v. Babal*\(^10\) the Court held that “the purpose of this provision is to find out the real points in controversy between the parties by way of clearing up the pleadings and removing any ambiguity therein and to ascertain the exact points of difference and to find out how far the parties are prepared to admit each other’s case”.

In *Ramakrishna v. Ram Janaki*\(^11\) and in *Sewaram v. Munna*\(^12\) the Courts held that if one makes proper use of the rule waste of much time and money could be avoided and the judge could also proceed with the trial more intelligently. The Court had reminded us to avoid wastage of time by utilizing the provision in a diligent manner. In a suit for recovery of amount from the two defendants paid as sale consideration, the plaintiff pleaded that the

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\(^11\) A.I.R. (1952) All. 344.

\(^12\) A.I.R. (1959) M.P. 5.
defendant No. 1 had authorized the defendant No. 2 to sell the property on his behalf but the defendant No. 1 denied his signature on any such writing and also on the written statement and the vakalatnama. It was held that “dismissal of the suit by the trial court on protracted trial was illegal. The court could decide the case at this stage by comparing his signatures”. In this ruling also the Supreme Court makes everyone beware of avoiding protracted trial. In *Tamina Misra v. Pradeep Kumar Patnaik* the Court said that “If the pleader pleads his inability either to make admission or denial in respect of a particular question of fact, then the question of appearance of the party concerned becomes necessary.” The rule in fact permits the pleader also to make admissions or denials. It was held in *Annie v. Babal* that “the oral statement is not a substitute for a pleading.” This means that the pleading shall only be in writing. Where admissions and denials were contained in the pleading itself summoning the defendant for admission and denial was not necessary.

In order to increase the scope for settlement of cases at the earliest second opportunity the CPC (Amendment) Act 1999 (46 of 1999) (w.e.f.1-7-2002) has inserted new Rules 1 A, 1 B, and 1 C in Order X. The insertion of the rules is consequential to the insertion of sub-section (1) of section 89 making it obligatory upon the court to refer the dispute for settlement by way of arbitration, conciliation, and judicial settlement including settlement through *Lok Adalat* or mediation. According to Rule 1 A after recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of 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.

These new rules, namely Rules 1A, 1B, and 1C have been inserted by amending the Act. The settlement can be made by adopting any of the modes

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specified in the new section 89 of the Code inserted by the Amendment Act. As per Rule 1A, the parties to the suits are given an option for settlement of the disputes outside the court. When the parties have exercised their option the court shall fix the date of appearance before such person as may be opted by the parties. As per Rule 1B where a suit is referred under Rule 1A, the parties are required to appear before such forum opted by them. Rule 1C provides that where a suit is referred under Rule 1A to a forum for settlement and the presiding officer of the 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 back to the court and direct the parties to appear before the court on the date fixed by it.

6.4. Settlement by Admissions

The third important provision may be found in Rule 1 of Order XII which provides that “any party to a suit may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.” This Order deals with admissions by notice. All notices must be in writing.\textsuperscript{17} Admissions need not be proved unless the court directs otherwise.\textsuperscript{18} Admission in pleading is to be taken in its entirety.\textsuperscript{19} Sub rule (1) of Rule 6 of this Order says that “where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions”. Sub rule (2) says that “whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgement was pronounced.” This is also a very useful provision that may be

\textsuperscript{17} Section 142 of CPC.
\textsuperscript{18} O.8 R.5 of CPC and section 58 of the Indian Evidence Act.
made use of for settlement out of court. In some of the cases with banks the defendants very often use this provision.

6.5. Settlement by Agreement

The fourth one that has a bearing towards settlement of cases lies in Rules 6 and 7 of Order XIV. Rule 6 states that “where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the court in the affirmative or the negative of such issue:

a) A sum of money specified in the agreement or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

b) Some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

c) One or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute”.

The rule provides for a question of fact or law being stated in the form of an issue and being referred to the finding of the court. Such a reference implies an agreement to abide by the decision of the court and not to appeal against the decree given. The principle of the rule applies when the parties agree to refer a certain issue to a commissioner appointed by the court. But there is contrary view in Shugan v. Judayal where it was held that appeal lay in such matters.

Rule 7 of the Order says that “where the Court is satisfied, after making such inquiry as it deems proper,-

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21 (*1886*) A WN 233.
a) that the agreement was duly executed by the parties,
b) that they have a substantial interest in the decision of such question as aforesaid, and
c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court, and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow”.

Rules 6 and 7 provide for adjustment or compromise of a suit not absolutely as does Order 23, Rule 1 but contingently upon the opinion of the court upon a certain issue of fact or law to be submitted to the court by the parties. Upon the finding of that issue, the adjustment or compromise becomes absolute and it is the duty of the court under Rule 7 to pronounce judgement accordingly.22

From the above it is very clear that there lies a very good opportunity for the parties to come to a conclusion of their case by a proper settlement.

6.6. Settlement at First Hearing

The fifth opportunity for parties to a suit to settle the suit could be found in Order XV that deals with disposal of the suit at the first hearing. Rule 1 state that, “where at the first hearing of a suit it appears that the parties are not at issue on any question of law or fact, the court may at once pronounce judgement.” The court is competent to pronounce at once the judgement when parties are not at issue on any question of law or fact. Procedure under Order 20 need not be followed in such a case.23 Order 20 of the code deals with the elaborate procedure for pronouncing a judgement and drawing a decree. The court must be satisfied as to the good faith or identity of the parties before

22 Gokuldas Co. v. Scott, 16 B 202, 216.
pronouncing judgement. In a suit for specific performance for sale of land belonging to a co-operative society, reliance was placed on the resolutions passed by the general body and the managing committee. The passing of these resolutions was admitted in the written statement. So it was not necessary to frame an issue on this question. When a decree was passed on the basis of this admission and on hearing the counsels for both sides, no appeal lay, this was held in *Desi Kedari v. Huzurabad Cooperative Marketing Society*. In a suit for eviction, the defendant in his written statement admitted all facts mentioned in the plaint like the fact of tenancy, arrears of rent and receipt of notice of termination of tenancy. In such a case the plaintiff need not adduce any evidence and can ask for a judgement on the basis of the admissions by the defendant. Where issues have already been framed in the case, but the plaintiff is not ready to proceed with the case, the courts should proceed under Order IX Rule 8 and not under Order 15, Rule 1. Order IX Rule 8 says that “where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder. The ruling in *Prasant Vagaskar v. Municipal Corporation of Greater Bombay* seems to be supportive for a settlement environment. When the plaintiff is not interested to continue a case and if the defendant has no counter claim then the defendant need not again be dragged for a protracted proceeding. Where plaintiff’s claim is admitted by the defendant as such, there is no dispute between the parties, reference to Legal Services Authority is abdication of jurisdiction vested in court, and court should proceed under

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24 *Bank of Bengal v. Currie*, 12 WR 432.
Order XV, Rule 1 and decree the suit. This view of the court seems to be appropriate.

Rule 2[(1)] of the above Order provides that where there are more defendants than one, and any of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants. Where one or some of the defendants admit the claim, judgment may at once be passed against him or them. But where there are several joint debtors, judgment against some does not bar the prosecution of the suit against others.

Under, Rule 3(1) it is stated that “where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as herein before provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit. Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects”. Sub Rule (2) provides that “where finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for production of such further evidence, or for such further argument as the case requires”.

Rule 3 applies only to the disposal of a suit on the date of first hearing, viz. on the date when issues are framed on the basis of the materials available on that date if the court is satisfied that no further argument or evidence than the parties can at once adduce is required, and as a result of proceeding; with

29 Rule 2 renumbered as sub-rule (1) by CPC (Amendment ) Act 104 of 1976, section 65, (w.e.f. 1-2-1977).
the suit forthwith no injustice will result. The words ‘at once’ and ‘forthwith’ support the above view. The proviso to sub Rule (1) makes it clear that in those cases where summons has been issued for settlement of issues only a decision under Rule 3 can be given if the parties or their pleaders are present and none of them objects. If there is any objection by a party the court cannot dispose of the suit on the day fixed for settlement of issues. When admission of fact made by a pleader is sufficient to dispose of the case, court may at once pronounce judgement under Rule 1 and Rule 3. Where defence raises crucial issues, disposal of suit on the first date of hearing is not proper.

Broadly speaking, the hearing of a suit may be regarded as falling under two parts, viz. the first hearing when the issues are determined, and the other further hearing when evidence is taken. The object of the first hearing is to draw out by oral examination the real points in controversy between the parties. No evidence is generally taken nor any attempt made to ascertain what is to be the evidence in the case. All that is done at the first hearing of the suit is to determine whether the matters in dispute between the parties still exist or not. A party may refuse to make admissions, but any admissions made by a party at the first hearing are conclusive against him. There is a general duty on the Court to examine parties at the first hearing in order to ascertain what allegations are admitted or denied. The statement of a party unless substantiated by his evidence in the witness-box, cannot be used against the opposite party.

Therefore, one may say that this provision in the Code of Civil Procedure is also helpful to conclude a matter by settlement. The above rulings make it clear that the object of first hearing is to help the parties to attain a judgment at the earliest.

6.7. Withdrawal of Suits

Withdrawal of suits under Order XXIII of the Code is another very important provision to dispose of a suit arriving at a settlement. A plaintiff may find after the institution of a suit that he has no chance of success. In such a case he may withdraw the suit instead of proceeding with it and incurring further costs. If he withdraws the suit, the suit will be dismissed with costs, and he will be precluded from bringing a fresh suit in respect of the subject-matter of the suit so withdrawn.

A plaintiff, again, may find that he has a good chance of succeeding on the merits of the case, but that his suit must fail by reason of some formal defect. In such a case he may apply to the Court for leave to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter thereof, and such leave may be granted upon such terms as to costs as the court thinks fit.

At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim [O. XXIII R. 1(1)].

The language of Order XXIII Rule 1(1) gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit is sought under Rule 1(2), the plaintiff becomes liable for such costs as the court may award and becomes precluded from instituting any fresh suit under Rule 1(3). There is no provision in the Code which requires the court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is possible that different considerations may arise where a set-off may have been claimed under Order VIII, or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.\textsuperscript{32}

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6.7.1. Grounds for withdrawal

Where the Court is satisfied,

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit in respect of the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim [O. XXX, R. 1(2)]. A formal defect is a defect of form which is prescribed by rules of procedure such as misjoinder of parties or causes of action, nonpayment of proper court fee, failure to disclose the cause of action and so on. The expression "sufficient grounds" is not to be construed *ejusdem generis* with formal grounds or those analogous thereto.  

Order XXIII deals with withdrawal and adjustment of suits and is a very important provision that helps the settlement and disposal of cases at an early stage itself. The provision may be utilized when an out of court settlement is arrived at soon after the suit is instituted. Rule 1(1)  

provides that at any time after the institution of the suit, the plaintiff may, as against all or any of the defendants, abandon his suit or abandon a part of his claim: *Provided* that where the plaintiff is a minor or such other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court. Sub Rule (2) of Rule 1 says that an application for leave under the proviso to sub Rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person. Sub Rule (3) permits the

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34 Substituted by CPC (Amendment) Act 104 of 1976.
plaintiff to institute a fresh suit in the following circumstances, where the
court is satisfied- (a) that a suit must fail by reason of some formal defect, or
(b) that there are sufficient grounds for allowing the plaintiff to institute a
fresh suit for the subject matter of a suit or part of a claim, it may, on such
terms as it thinks fit, grant the plaintiff permission to withdraw from such suit
or such part of the claim with liberty to institute a fresh suit in respect of the
subject matter of such suit or such part of the claim. Sub Rule (4) precludes
the plaintiff from instituting any fresh suit. Where the plaintiff (a) abandons
any suit or part of claim under sub-Rule (1), or (b) withdraws from a suit or
part of a claim without the permission referred to in sub-Rule (3), he shall be
liable for such costs as the court may award and shall be precluded from
instituting any fresh suit in respect of such subject-matter or such part of the
claim. As per sub Rule (5) nothing in the Rule shall be deemed to authorise the
court to permit one of several plaintiffs to abandon a suit or part of claim
under sub-Rule (1) or to withdraw, under sub-Rule (3), any suit or part of a
claim, without the consent of the other plaintiffs.

This Rule gives power to the court to allow the plaintiff at any time to
withdraw his suit unconditionally or to withdraw from the suit on the
fulfilment of certain conditions. There is no general power in the code to allow
withdrawal except under this Rule. The object of this Rule is not to allow a
plaintiff the opportunity to commence the trial afresh after he has failed to
conduct the suit with care and diligence and to substantiate his case by
evidence but to prevent the defeat of justice on technical grounds. Bar
imposed by Rule 1 applies to suits but not to defences. When the petitioner is
desirous to withdraw the petition, and is not pressing the same, in the absence
of any extraordinary circumstances warranting refusal, the Court should grant
permission. Sub Rule (1) gives an unqualified right to a plaintiff to withdraw
from (now ‘abandoned’) a suit and if no permission to file a fresh suit is

35 Nathuni v. Sheo, 3 PLJ 460.
sought under sub Rule (2) [ now sub -Rule 3] the plaintiff becomes liable for such costs as the court may award and becomes precluded from instituting any fresh suit in respect of that subject- matter under sub Rule (3) [now sub Rule (4)] the plaintiff has an unqualified right to withdraw a suit simplicitor as per the provision of Order XXIII, Rule 1, sub Rule 1 of the CPC which contains no provision which requires the Court to refuse permission to withdraw the suit and compel the plaintiffs to proceed with it, especially when no set-off has been claimed by the defendants nor any counter claim has been raised by them.

Where the plaintiff has settled the matter with the defendant and wants to withdraw the suit unconditionally the court has no jurisdiction to refuse unconditional withdrawal. But for such grant, formal order of granting permission is not required to be passed, especially when the defendant present consents to the withdrawal purshis. For the purpose of O. XXIII Rule 1, the ‘person’ includes counsel, or agent of the party. A power-of-attorney holder of the defendant can be a party to the application for withdrawal of the suit. If it is insisted that the party himself should personally sign the agreement or compromise, it would often cause undue delay, loss and inconvenience. A party can always act through his duly authorized representative. If a power of attorney holder can enter into an agreement or compromise on behalf of his principal, so can the counsel, possessed of the requisite authorization by vakalatnama, act on behalf of his client. Not to recognize such capacity not only causes much inconvenience and loss to the parties personally, but also delays the progress of proceedings in court. A compromise in writing and signed by the counsel representing the parties but not signed by the parties in

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person, is valid and binding on the parties and is executable even if the compromise relates to matters concerning the parties.\(^{42}\)

As soon as the plaintiff informs the court about the withdrawal of the suit, the withdrawal is complete, any order of status quo or injunction order passed by the court thereafter would be illegal, an error of law and failure on the part of the court to exercise discretionary jurisdiction properly.\(^{43}\) Plaintiff has right to withdraw his suit unconditionally, withdrawal is complete as soon as the plaintiff communicates his intention to the court to withdraw the suit, and withdrawal is not dependent on court's order.\(^{44}\) The Court has been conferred with discretion to permit a plaintiff to withdraw suit with “liberty to file fresh suit only if sufficient ground is shown warranting such permission\(^{45}\). When an issue is raised as to the existence of an adjustment or satisfaction, courts shall enquire as to whether there is such an adjustment or satisfaction. Courts shall consider no other questions, while adjudicating the existence of such an adjustment or satisfaction.\(^{46}\)

If the court permits withdrawal of a suit and allows filing fresh suit on the same subject matter by adding any relief, court should see that there is no repetition of the claim so as to avoid the question of res judicata.\(^{47}\) Appellate court is competent to grant permission to withdraw the suit to institute a fresh one on same cause of action.\(^{48}\) Once the suit has been permitted to be withdrawn, all proceedings taken therein including the judgment passed by the trial court will be wiped out.\(^{49}\) Bar to file fresh suit in case of withdrawal of suit without seeking permission to file fresh suit is based on public policy and applies even to writ proceedings and to special leave petitions.\(^{50}\)


\(^{43}\) *Prakash Chandra Mishra v. Rajendra Prasad Gupta*, 2004 AIHC:3239 ,3240 (All)


\(^{47}\) *Mani v Tata Tea Ltd.*, 2006(2)K.L.T. 310,312.


principle under Order XXIII, Rule 1(3) is founded on public policy to prevent institution of suit again and again on the same cause of action. The principle is not the same as the rule of res-judicata, but discourages the litigant from indulging in bench hunting tactics.\textsuperscript{51} An order permitting withdrawal of suit simpliciter need not be a speaking order.\textsuperscript{52} Where plaintiff wants to withdraw the suit to file fresh suit on a different cause of action, leave of the court is not required.\textsuperscript{53} The permission of the court is necessary only when the plaintiff wants to file a fresh suit in respect of the abandoned claim.\textsuperscript{54} When the plaintiff does not want to institute a fresh suit on the cause of action, there is no impediment to withdraw the suit; one of the defendants who is not a party to the compromise and who is debarred from adducing any evidence cannot insist that the plaintiff should continue the suit against him.\textsuperscript{55}

An application to withdraw a suit with liberty must either be allowed or refused \textit{in toto}. If liberty is refused, the suit should not be dismissed but retained in the file for trial.\textsuperscript{56} Order granting permission to the Bank to withdraw case with liberty to file fresh suit, passed by the arbitrator under section 98 of the Kerala Co-operative Societies Act, 1969 was held within competence.\textsuperscript{57} Where the plaintiff is granted permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject matter of such suit, the court granting such permission under sub-Rule (3) of R. 1 of O. XXIII, CPC has no jurisdiction to keep alive any interim order passed in the suit. The suit from which the plaintiff is permitted to withdraw comes to an end on the passing of an order under sub-Rule (3) of R. 1 of O. XXIII, CPC.\textsuperscript{58} The expression "on such terms at it thinks fit" in sub-Rule (3) of R. 1 of O. XXIII, CPC does not enable the court to pass an order keeping alive any

interim order passed in the suit. The provisions of O XXIII, Rule 1 and 3[now Rules 1 and 4] also apply in the same manner to withdrawal of appeals. Where by compromise decree, the judgement debtor has agreed to pay liquidated damages, in execution of the decree he would not be allowed to urge that the damages are penal in nature.

Order 23 Rule 3 of CPC is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order 23 provides that if the court is satisfied that a suit has been adjusted wholly or partly by and lawful agreement or compromise, the court shall pass a decree in accordance to that. Order 23, Rule 3 gives mandate to the Court to record a lawful adjustment or compromise and pass a decree in terms of such compromise or adjustment. But the compromise decree has to be read as a whole, to gather the intention of the parties. The compromise should also not be recorded in a casual manner, but the court must apply its judicial mind while examining the terms of the settlement before the suit is disposed of in terms of the agreement. There is a responsibility cast on the court to satisfy itself about the lawfulness and genuineness of the compromise.

6.8. When Government is a Party

Settlement of cases where the government is a party is another provision that helps the private litigants and the government to get an early relief from the labyrinth of civil proceedings. In India the government is the largest litigant. The suits instituted by or against the government are one among the biggest contributions of arrears of cases and pendency. The 1976 amendment of the Code of Civil Procedure inserted a new rule to Order XXVII that is Rule 5B. As per this new rule, a duty is cast upon the courts to promote settlement of cases in the first instance, in suits in which government

59 Ibid.
60 Haji P. Abdul Rahman v. K.P. Narayanan, 1997 AIHC 1164, 1165 (Ker).
63 Banvari Lal v. Chano Dev, AIR 1993 SC 1139
or a public officer in official capacity is a party. Sub- Rule (1) of Rule 5B says that in every suit or proceeding to which the Government, or a public officer acting in his official capacity, is a party, it shall be the duty of the court to make, in the first instance, every endeavour, where it is possible to do so consistently with the nature and circumstance of the case, to assist the parties in arriving at a settlement in respect of the subject- matter of the suit. Sub-Rule (2) says that if in any such suit or proceeding, at any stage, it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit, to enable attempts to be made to effect such a settlement. The next sub- Rule states that the power conferred under sub-Rule (2) is in addition to any other power of the court to adjourn proceedings.

Section 80(1) of Code of Civil procedure lays down that no suit shall be instituted against the government or public officer unless a notice has been delivered at the government office stating the cause of action name etc. the object of this provision is to give the government sufficient information about the ensuing case and if it so interested can settle it forthwith without entering into a litigation.⁶⁴

The object behind the provision is that in suits to which the Government is a party and the Government now under the Constitution undertaking economic activities in a vast and widening public sector is being increasingly involved in disputes with private individuals. If such positive efforts at settlement are made at early stage of litigation reasonable adjustments would be feasible in many cases and the state as well as citizens involved in the disputes will be saved from avoidable wastage of time and money. The state is no ordinary party trying to win a case against one of its citizens by hook or by crook and will not resort to technical objections to avoid just liability or secure unfair advantage but as a virtuous litigant would

meet honest claims regardless of motivations which move private individuals to fight. This is an enabling provision in the Code, and if diligently used, can very well reduce the burden of courts and mounting arrears.

6.9. Matters Relating to Family

The Code of Civil Procedure has given much priority for settlement of cases relating to family matters. O XXXII A deals with suits relating to matters concerning the family. Rule 3 casts a duty upon the court to make efforts for settlement. The sub-Rule (1) says that, in every suit or proceeding to which the Order applies, an endeavour shall be made by the court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit. Sub-Rule (2) provides that if, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement. Sub-Rule (3) adds that the power conferred by sub-Rule (2) shall be in addition to, and not in derogation of, any other power of the court to adjourn proceedings.

The provisions of Order XXXII are applicable to suits or proceedings relating to matters concerning family, in particular and without prejudice to the generality of the provisions of sub-Rule (1), the provisions of the Order shall apply to the following suits or proceedings concerning the family, namely:

(a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person;

(b) a suit or proceeding for a declaration as to the legitimacy of any relationship;

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66 Inserted by CPC Amendment Act 104 of 1976, section 79 (w.e.f 1-2-1977).
67 Rule 1 Order XXXII A.
(b) a suit or proceeding in relation to the guardianship of the person or the
custody of any minor or other member of the family, under a disability;
(c) a suit or proceeding for maintenance;
(d) a suit or proceeding as to the validity or effect of an adoption;
(e) a suit or proceeding, instituted by a member of the family relating to
wills, intestacy and succession; and
(f) a suit or proceeding relating to any other matter concerning the family in
respect of which the parties are subject to their personal law.

So much of the Order as relates to a matter provided for by a special
law in respect of any suit or proceeding shall not apply to that suit or
proceeding. (sub–Rule (3)

This new Order has been inserted to deal with certain suits and
proceedings concerning the family. The ordinary conventional judicial
procedure dominated by the adversary system is not apposite for disputes
concerning the family. For this sensitive area of personal relationship special
approach is needed, keeping in forefront the objective of family counselling,
as a method of achieving the ultimate object of preservation of the family.
Hence, as far as the Code is concerned, some special provisions have been
inserted in this Order highlighting the need for adopting a different approach
when matters concerning the family are at issue, including the need for efforts
to bring about an amicable settlement.\(^{68}\)

So far as cl (f) is concerned, it may be noted that its provisions have
been restricted to a suit or proceeding instituted by a member of the family so
that suit or proceeding filed by a third party might be governed by the ordinary
procedure. O. XXXIIA is applicable to a suit or proceeding instituted by a
member of the family relating to wills, intestacy and succession.\(^{69}\) Where the

\(^{68}\) See Law Commission of India 54th Report, p. 234.
A peculiar kind of provision that helps to dispose of the case without much hardship can be found in Order XXXVI of the Code. This Order provides for a special case in which parties can seek the opinion of the court.

Sub- Rule 1 of Rule 1 says that parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing

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stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the court with respect to such question:

a) a sum of money fixed by the parties or to be determined by the court shall be paid by one of the parties to the other of them; or

b) some property, movable or immovable, specified in the agreement shall be delivered by one of the parties to the other of them; or

c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the court to decide the question raised thereby.

Where more than one person enter into an agreement for seeking opinion of the court, the case of each individual shall be registered as a separate case. Where the agreement for reference has not been framed according to rules of O. XXXVI, the court cannot assume jurisdiction under section 96. The decree passed by the court under section 90 is only revisable. Rule 2 states that where the agreement is for the delivery of any property, of for the doing, or the refraining from doing any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement. Sub- Rule 1 of Rule 3 says that if the agreement, if framed in accordance with the rules hereinbefore contained, may be filed [with an application] in the court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement. According to sub-Rule 2 [The application], when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as

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74 Ibid.
75 Ibid.
defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom [the application was presented].

The procedure provided in O. XXXVI is rarely invoked, probably it does not furnish any additional inducement to the litigant. In order to make a distinction between an ordinary suit instituted by a plaint with payment of court-fee and special case originating in an agreement, the Rule has been amended so that the special case can be initiated by an application. Rule 4 provides that where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the court and shall be bound by the statements contained therein. According to sub- Rule 1 of Rule 5 the case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of the Code shall apply to such suit so far as same are applicable. Sub Rule 2 says that where the Court is satisfied after examination of the parties, or after taking such evidence as it thinks fit:
(a) that the agreement was duly executed by them,
(b) that they have a bona fide interest in the question stated therein, and
(c) that the same is fit to be decided,
it shall proceed to pronounce judgment thereon, in the way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow. Where there is a special tribunal with effective powers for proper determination of a dispute, the case cannot be one "fit to be decided" under the Rule. The court has to try and determine the case according to the regular procedure under Order XVIII. According to Rule 6 no appeal shall lie from a decree passed under Rule 5.

6.11. Summary Proceedings

Summary procedure is another one to conclude the case in a quick manner. Order XXXVII of the Code provides for summary procedure in certain types of cases. According to Rule 1 of the Order, the High Courts, city civil courts and courts of small causes; and other courts, in certain categories
of suits, may order for summary trial. The proviso to the Rule states that in respect of the other courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of the Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of the Order as it deems proper.76

Sub- Rule (2) says that Subject to the provisions of sub-Rule (7), the Order applies to the following classes of suits, namely:-

(a) suits upon bills of exchange, hundis and promissory notes;
(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,—
   (i) on a written contract; or
   (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
   (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only. The underlying public policy behind Or. XXXVII is the expeditious disposal of suits of commercial nature.77 In Kerala State, though by notification dated 9.6.1959, Order XXXVII was omitted, but by CPC (Amendment), 1976, a new Order 37 was substituted, with effect from 1.2.1977, and so Order XXXVII is in force in Kerala from that date.78

In a summary suit filed under O XXXVII of the CPC the plaintiff is entitled at any time to abandon or give up a part of the claim unilaterally. This, the plaintiff may do by making a statement to be recorded by the court and without the necessity of the plaintiff making a formal application for the same withdrawing the summons for judgment, amending the plaint and thereafter

76 CPC Order XXXVI Rule 1 (1),see also Rules, 2 and 3.
78 P.P. Aravindakshan v. K. Sukumaran, 2000 AIHC 2190, 2196(Kerala).
taking out a fresh summons for judgment or otherwise. At the hearing of the summons for judgment, it will be open to the court to pass a decree for a part of the claim and grant unconditional leave to defend the suit in respect of rest of the claim. In such an order it would follow that in the event of the defendant failing to comply with the condition, he would suffer the consequences mentioned in O. XXXVII qua only that part of the claim for which conditional leave to defend has been granted and not in respect of the part of the claim for which unconditional leave has been granted. Summary suit for recovery of money on the basis of an agreement between the parties pursuant to a compromise arrived at before the police is maintainable.

6.12. 1999 and 2002 Amendments

The amendments brought in the years in 1999 and 2002 are intended to cut short delays at various levels. The delays were believed to be by reason of procedural formalities and technicalities of the adversary system. The procedure considered to be handmaid of justice. Unfortunately the procedure became a hurdle in the delivery of justice and invited the attention for a detailed survey upon the various provisions of the Code of Civil Procedure. Justice Malimath Committee studied this problem in detail and considering those recommendations the Parliament brought the above amendments to the Code. The most important among the amendments made is the one to section 89. This section was already repealed by the Arbitration Act, 1940, (Act 10 of 1940); section 49 and Sch. III. Section 89 had reference to arbitration, the procedure relating to which was embodied in the Second Schedule to the CP.

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80 Ibid. at 187.
81 Ibid.
83 See R. Dhavan, The Supreme Court of India: A Socio Legal Analysis of Its Juristic Technics (1977), p.116. The author says : “The introduction of adversary system of justice has really engulfed the Indian Judiciary in external and internal difficulties. It has been going through a lot of problems and difficulties. The courts are badly engulfed in arrears. More and more cases are being filed and the piles of arrears continue to mount. They seem like a tide- a tide of paper and dockets that cannot be stopped”.
Code. There being now an independent enactment relating to Arbitration, the law has been consolidated in that Act. But the CPC (Amendment) Act, 1999 (46 of 1999) w.e.f. 1-7-2002 brought a new provision. The section has been introduced in the Code for the first time for settlement of disputes outside the court. As per the section, it is now made obligatory for the court to refer the dispute after issues are framed for settlement either by way of:

(a) Arbitration;
(b) Conciliation;
(c) Judicial settlement including settlement through Lok Adalat; or
(d) Mediation.

Where parties fail to get dispute settled through any of the alternative dispute resolution methods, the suit could proceed further in the court in which it was filed. The procedure to be followed in matters referred for different modes of settlement is spelt out in sub-section (2). Clause (d) of sub-section (2) of section 89 empowers the Government and the High Courts to make rules to be followed in mediation proceedings to effect the compromise between the parties.

The amendment provides for settlement of disputes outside the court. Any party to the suit or proceedings can now appear in person with a view to arriving at an amicable settlement of dispute between them and make an attempt to settle the dispute amicably. It is only when they get their disputes settled through any of the alternative dispute resolution methods that the suit could proceed further. In view of the above a new section 89 has been inserted in the Code in order to provide for alternative dispute resolution. Section 89 has been inserted pursuant to the recommendations of Law Commission of India and Malimath Committee. It has no retrospective effect.85

85 The Statement of Objects and Reasons appended to the Amendment Bill states as follows: "With a view to implement the 129th Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the
It seems the special provision has been introduced in order to help the litigant to settle his dispute outside the court instead of going through the elaborate process of court trial. This is a special procedure for settling dispute outside the courts by a simpler and quicker method. The decision rendered by the different forums shall have the same binding effect as if made by a civil court after regular trial.

The litigant institution of the suit or proceeding may request the court to refer the disputes and if the court feels that there exists element of settlement which may be acceptable to the parties, it may refer them to any of the forums mentioned above at any stage of the proceedings. In order to facilitate this, new rules have been inserted in O. X by the Amendment Act, 1999. The amended provisions were challenged in certain cases before the Supreme Court of India outlined below:-

In *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, the Supreme Court held that section 89 had to be read with Rule 1A of Order X which required the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter for settlement. As per the rule the court is neither required to formulate the terms of settlement nor make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. In view of this the Court concluded that proper interpretation of section 89 of the Code required two changes from a plain and literal reading of the section. First, 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.

suit shall proceed further in the court in which it was filed." [Para 3(d)](emphasis supplied).

(2010)8 S.C.C.24
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 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 "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.87

Having regard to the tenor of the provisions of Rule 1A of Order X of the Code, in certain recognized excluded categories of cases, the civil court may choose not to refer to an ADR process. If the court finds a case unsuited for reference to any of the ADR process, it will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other cases reference to ADR process is a must.88

The Supreme Court said that there was no inconsistency in section 89 and Rule 1A of Order X. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to 1C of Order X 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

88 *Ibid.* at 34.
them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.\textsuperscript{89}

From the provisions of the Arbitration and Conciliation Act it is evident that if there is no agreement between parties for reference to arbitration, the court cannot refer the matter to arbitration under section 89 of the Code. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement.\textsuperscript{90}

Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of the Arbitration and Conciliation Act. If both parties do not agree for conciliation, there can be no 'conciliation'. As a consequence, as in the case of arbitration, the court cannot refer 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.\textsuperscript{91}

If the parties are not agreeable for either arbitration or conciliation, the court has to consider which of the other three ADR processes (\textit{Lok Adalat}, 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 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, \textit{Lok Adalat} 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.\textsuperscript{92}

\textsuperscript{89} \textit{Ibid}.
\textsuperscript{90} \textit{Ibid} at 37.
\textsuperscript{91} \textit{Ibid} at 38.
\textsuperscript{92} \textit{Ibid}.
According to the Supreme Court, 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 is 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.93

While giving effect to section 89 of the Code the court should also bear in mind the following consequential aspects: i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet. (ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference. (iii) The requirement in section 89 (1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process. (iv) If the Judge-in-charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge. (v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of

93 Ibid. at 40.
the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings. (vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.94

In *B.P. Moideen Sevamandir v.A.M. Kutty Hassan*95 the Supreme Court held that when a case referred to the *Lok Adalat* for settlement, two courses were open to it; (a) if a compromise or a settlement was arrived at between the parties, to make an award, incorporating such compromise or settlement (which when signed by the parties and countersigned by the members of the *Lok Adalat*, had the force of a decree); or (b) if there was no compromise or settlement, to return the record with a failure report to the court. There can be no third hybrid order by the *Lok Adalat* containing directions to the parties by way of final decision, with a further direction to the parties to settle the case in terms of such directions. In fact, there cannot be an 'award' when there is no settlement. Nor can there be any 'directions' by the *Lok Adalat* determining the rights/ obligations/title of parties, when there is no settlement. The settlement should precede the award and not vice versa. When the *Lok Adalat* records the minutes of a proceeding referring to certain terms and directs the parties to draw a compromise deed or a memorandum of settlement and file it before the court, it means that there is no final or concluded settlement and the *Lok Adalat* is only making tentative suggestions for settlement; and such a proceeding recorded by the

95 *(2009) 2 S.C.C.198.*
Lok Adalat, even if it is termed as an 'award', is not an 'award of the Lok Adalat'.

The Supreme Court held in B.S. Krishna Murthy v. B.S. Nagaraj\(^6\) that, lawyers should advise their clients to try mediation to resolve disputes, especially where relationships, like family relationships business relationships, were involved- otherwise, litigation drags on for years and decades often ruining both the parties. Lawyers as well as litigants should follow Mahatma Gandhi’s advice in the matter and try for arbitration/mediation – this was also the purpose of section 89 of the Code Of Civil Procedure.

Section 107(2) of the code states that the Appellate Court shall have the same powers and shall perform as nearly as may be, the same duties as are conferred and imposed by the code on courts of original jurisdiction in respect of institution of suits instituted thereon. All these provisions promoting ADR will be applicable to courts of appellate jurisdiction as well and is not restricted to Trial Courts alone.


The law commission of India in its 238\(^{th}\) report\(^7\) has made some recommendations to rectify the anomalies encountered in the 1999 and 2002 amendments of section 89 of the Code of Civil Procedure. Along with this it has recommended amendments in the Court fee Act, 1870 also.

By this amendment if it appears to the court by considering the nature of the dispute involved in the suit or other proceeding that the dispute is fit to be settled by one of the non adjudicatory ADR processes such as conciliation, judicial settlement, settlement through Lok Adalat or mediation the court shall, preferably before framing the issues, record its opinion and direct the parties to attempt the resolution of dispute through one of the said processes which the parties prefer or the court determines.

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\(^6\) 2011(1) SCALE 431,[2011]1SCR387.

Where the parties prefer conciliation, they shall furnish to the court the name or names of the conciliators and on obtaining his or their consent, the court may specify a time limit for the completion of conciliation. Thereupon, the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996, as far as may be, shall apply and to this effect, the court shall inform the parties. A copy of the settlement agreement reached between the parties shall be sent to the court concerned. In the absence of a settlement, the conciliator shall send a brief report on the process of conciliation and the outcome thereof.

When the dispute is referred for judicial-settlement, the Judicial Officer shall endeavour to effect a compromise between the parties and shall follow such procedure as may be prescribed.

When it is referred to Lok Adalat, the provisions of sub-sections (3) to (7) of section 20, sections 21 and 22 of the Legal Services Authorities Act, 1987 shall apply in respect of the dispute so referred and the Lok Adalat shall send a copy of the award to the court concerned and in case no award is passed, send a brief report on the proceedings held and the outcome thereof.

In case of mediation, the court shall refer the same to a suitable institution or person or persons with appropriate directions such as time-limit for completion of mediation and reporting to the court.

The report also recommends that on receipt of copy of the settlement agreement or the award of Lok Adalat, the court, if it finds any inadvertent mistakes or obvious errors, it shall draw the attention of the conciliator or the Lok Adalat who shall take necessary steps to rectify the agreement or award suitably with the consent of parties.

With regard to arbitration it recommends that Without prejudice to section 8 and other allied provisions of the Arbitration and Conciliation Act, 1996, the court may also refer the parties to arbitration if both parties enter into an arbitration agreement or file applications seeking reference to arbitration during the pendency of a suit or other civil proceeding and in such
an event, the arbitration shall be governed, as far as may be, by the provisions of the Arbitration and Conciliation Act, 1996. Then the suit or other proceeding shall be deemed to have been disposed of accordingly.

The Commission recommends for the deletion of the existing rule 1B of Order X of the Code of Civil Procedure. In the place of existing Rules 1-A and 1-C of Order X, its recommendation suggests that the court shall at the stage of framing issues or the first hearing of the suit direct the parties, to opt either mode of the settlement outside the court as specified in sub-section (1) of section 89 and for this purpose may require the parties to be personally present and in case of nonattendance without substantial cause, follow the procedure for compelling the attendance of witness. The court shall fix the date of appearance before such forum or authority or persons as may be opted by the parties or chosen by the court.

Once the attempt for settlement fails it becomes the duty of the person or forum where the case was referred under rule 1A to refer the case back to the court on satisfaction that it would not be proper in the interest of justice to proceed with the matter further, in view of the stand taken by the respective parties and then the court shall direct the parties to appear before it on the date fixed and proceed with the suit.

In addition to the recommendation to amend Section 89 the Commission it recommends for the amendment of Section 16 of the Court Fee Act to rectify the drafting error. In place of the existing section 16 of the Court fees Act 1870 it recommends to substitute the following.

Where the court refers the parties to the suit or other proceeding to any one of the modes of settlement of dispute referred to in section 89 of the Code of Civil Procedure and as a result thereof a compromise or settlement has been arrived at between the parties, the court fee paid in such a case shall be refunded.

The present position is that the parties are entitled for refund of court fees even if the case is not settled. Merely on reference for settlement they
can claim for court fee paid. This provision is liable to be abused by the plaintiff.

**6.14. Some Proposals**

In spite of all those provisions that exist in the Code to resolve a case at a very early stage itself, the CPC has been vehemently criticized for its technicalities. The procedures embodied in the Code are intended to ensure fairness and not to drag the litigants in to a labyrinth. But, unfortunately the good intention of the draftsman was defeated. It was the fault of the people at the helm of the affairs. For the last one and a half century we have cultivated an adversarial culture. Now, it is high time to change the attitude. One has to look at the CPC as a wonderful tool for justice delivery. From the above pages it is very clear that the Code itself provides ample opportunity for the parties and lawyers for the promotion of a culture for settlement of disputes. Here again the role of Bar Associations are very great. By way of continuing legal education, sensitization programmes for lawyers, legal aid and awareness activities to the litigants, promotion of ADR etc. the associations can foster such a culture in the society.

**6.15. Conclusion**

Therefore one can conclude that in fact there is no dichotomy in docket clearing and delivery of justice. Dockets are to be cleared but it shall not affect delivery of proper justice. The only thing that one has to take abundant caution is about the settlement of disputes. It shall be carried in a systematic manner to the best satisfaction of the parties. It shall not be a hurried one. Nowadays mediation is gaining more and more importance. Establishment of more mediation centres, creation of awareness among people including lawyers about mediation, and fostering of a culture of mediation rather than an adversarial culture may help all the stakeholders in delivery of justice. This might enable the nation to achieve more economic development and thereby create more demand for legal professionals in the days to come. Huge

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pendency of cases in courts has been cited as one of the key reasons for India’s low rank on the World Bank’s Index of ‘Ease of Doing Business’. India was ranked 142 among 189 countries in 2014.99 Promotion of mediation, arbitration and other hybrid forms of ADR may not devalue the adjudication system. On the other hand, it is not unlikely that it will increase the overall efficiency of the justice delivery system. Strengthening the judiciary by appointment of more judicial officers as recommended in the 245th Law Commission Report and giving them proper training with a new outlook on CPC are the need of the hour.

99 Times of India (17.1.2015)