Strengthening Arbitration and its Enforcement in India – Resolve in India

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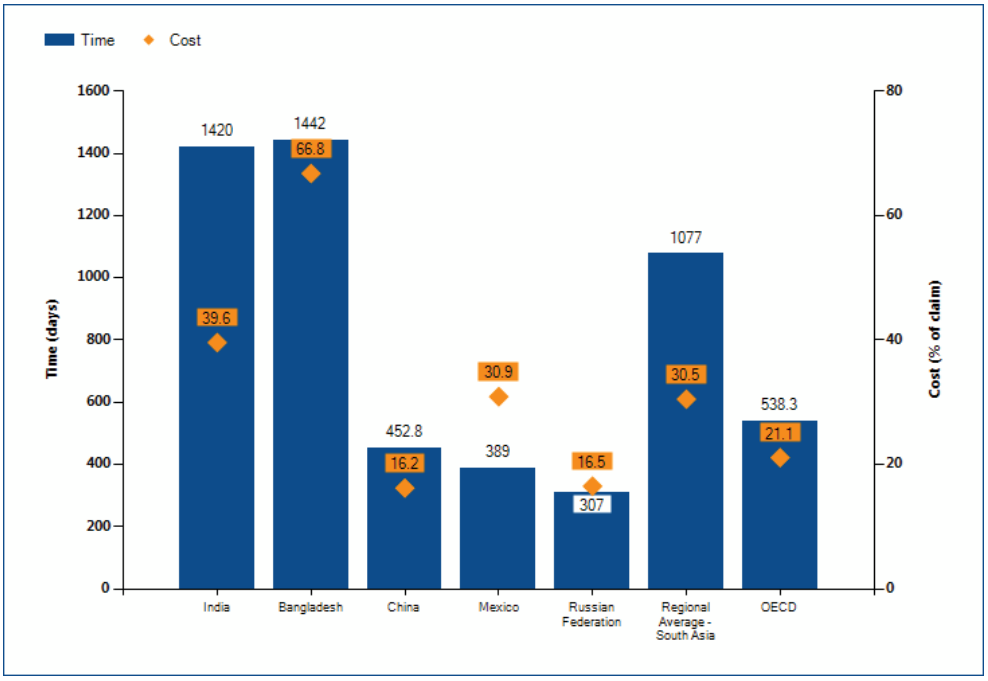
Background on Dispute Resolution in India

India has an estimated 31 million cases pending in various courts. As of 31.12.2015 there were 59,272 cases pending in the Supreme Court of India, around 3.8 million cases pending in the High Courts and around 27 million pending before the subordinate judiciary. 26% of cases, more than 8.5 million, are more than 5 years old. It has been estimated that 12 million Indians await trial in criminal cases throughout the country. On an average it takes twenty years for a real estate or land dispute to be resolved.

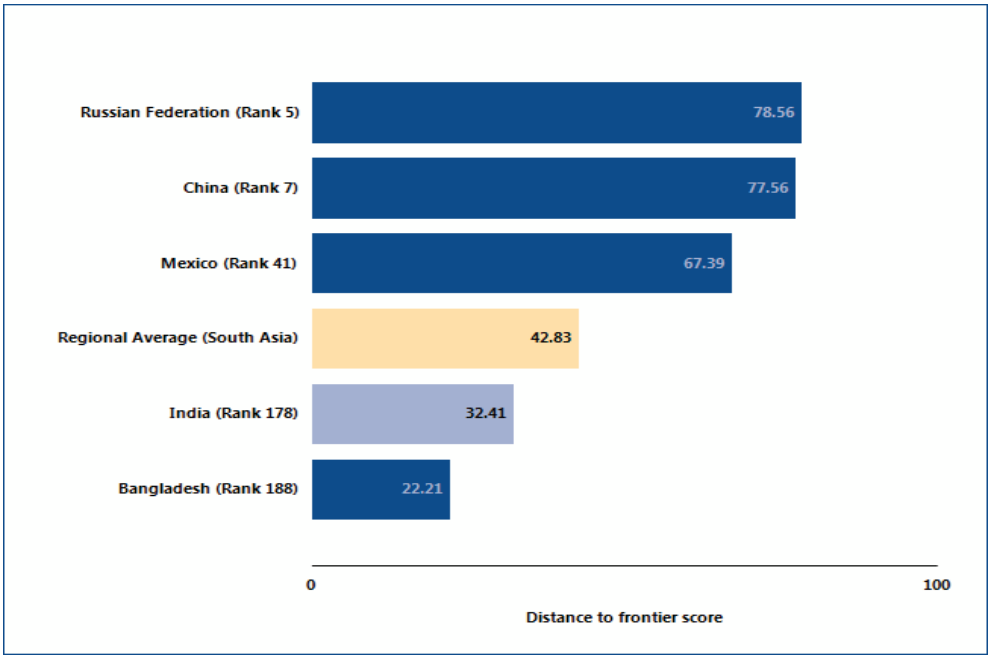
The dispute resolution process has a huge impact on the Indian economy and global perception on "doing business" in India. This is clearly indicated by World Bank rating on Ease Of Doing Business 2016 which has ranked India 131 out of 189 countries on how easy it is for private companies to follow regulations. The study notes that India takes as much as 1,420 days and 39.6% of the claim value for dispute resolution. The table below shows comparative data on both the time and cost for resolving disputes.



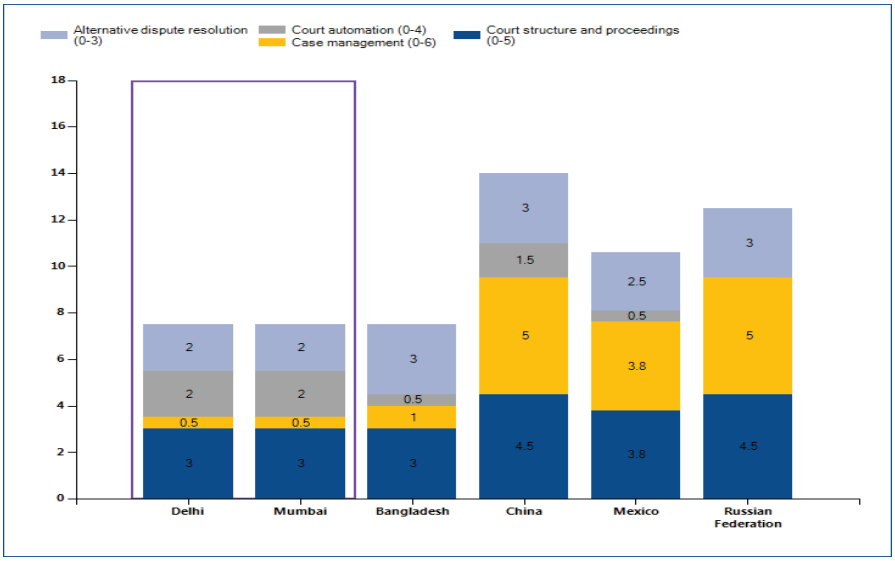
This is higher than that of OECD countries as well as that of South Asia"s regional averages. Globally, India stands at 178 in the ranking of 189 economies on the ease of enforcing contracts (*see table below)*

[1] Member, Niti Aayog.
[2] OSD, Niti Aayog.

How India and comparator economies rank on the ease of enforcing contracts



So far as the quality of judicial processes is concerned (court structure and proceedings, case management, court automation and alternative dispute resolution), once again, India has a poor ranking.



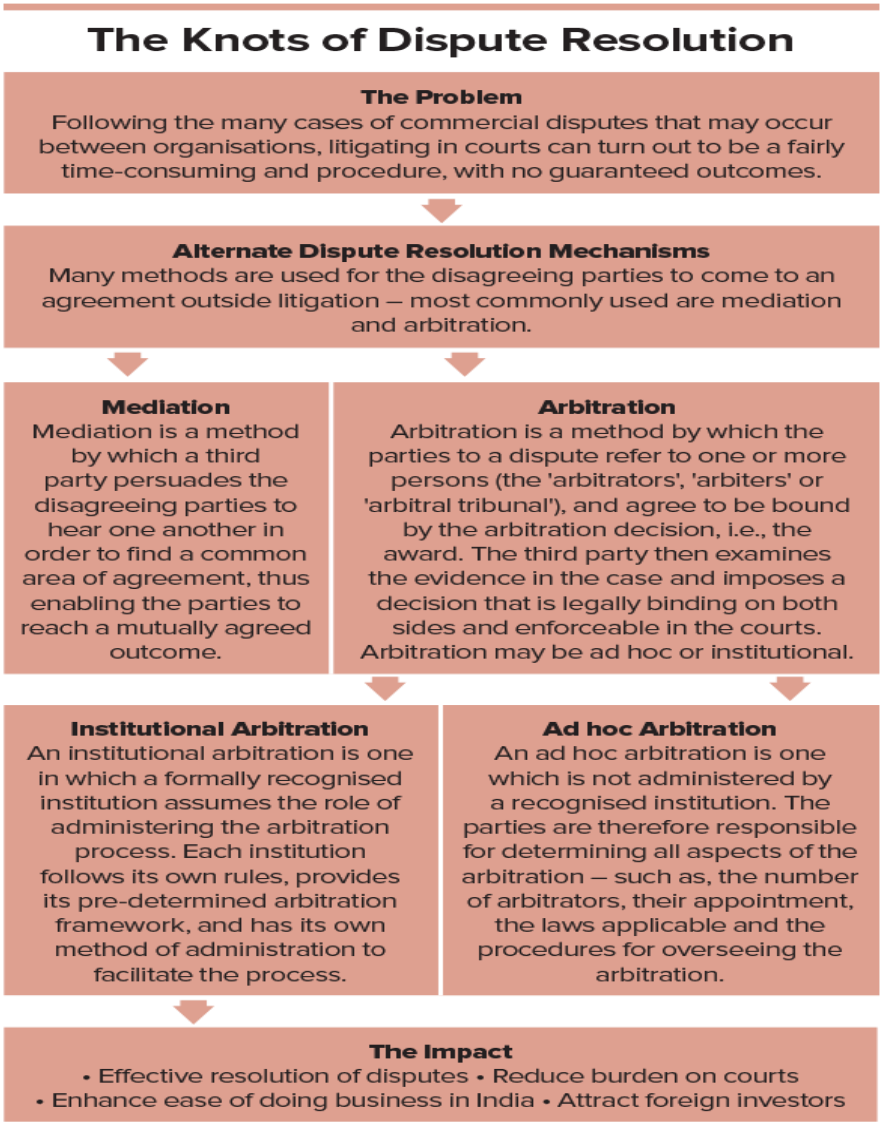
Note: *The score on the quality of judicial processes index is the sum of the scores on these 4 sub-components. The index ranges from 0 to 18, with higher values indicating better, more efficient judicial processes.*

Glimmer of Hope: Various Forms of Alternate Dispute Resolution

The above statistics reiterate the need for reforms not only in speeding up dispute resolution, but also having a strong in-country mechanism for out of court dispute resolution. Legally, this process is known and is practiced in the forms of arbitration, negotiation conciliation and mediation.

The difference between all these "alternate dispute resolution mechanisms" lies in the process and mode of resolving the dispute. Broadly, in arbitration, the arbitrator hears evidence and makes a decision. Arbitration is like the court process, where parties provide testimony and give evidence, as in a trial. However, it is usually less formal. In mediation, on the other hand, the process is a negotiation with the assistance of a neutral third party where mediators do not issue orders. Instead they help parties reach a share opinion and reach settlement. Conciliation is another dispute resolution process that involves building a positive relationship between the parties to the dispute. Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. As per the Merriam Legal Dictionary, conciliation is "the settlement of a dispute by mutual and friendly agreement with a view to avoid litigation". Although this sounds strikingly similar to mediation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. The fourth mode of ADR, i.e negotiation, is a process where parties (or their attorneys) can try to work out a solution that they are both satisfied with, often giving offers and counter-offers without legal counsel.

The present paper focuses on the first and internationally the largest mode of dispute resolution, that is, Arbitration. However, prior to looking at how arbitration functions in the country, it would be useful to understand the process of arbitration.



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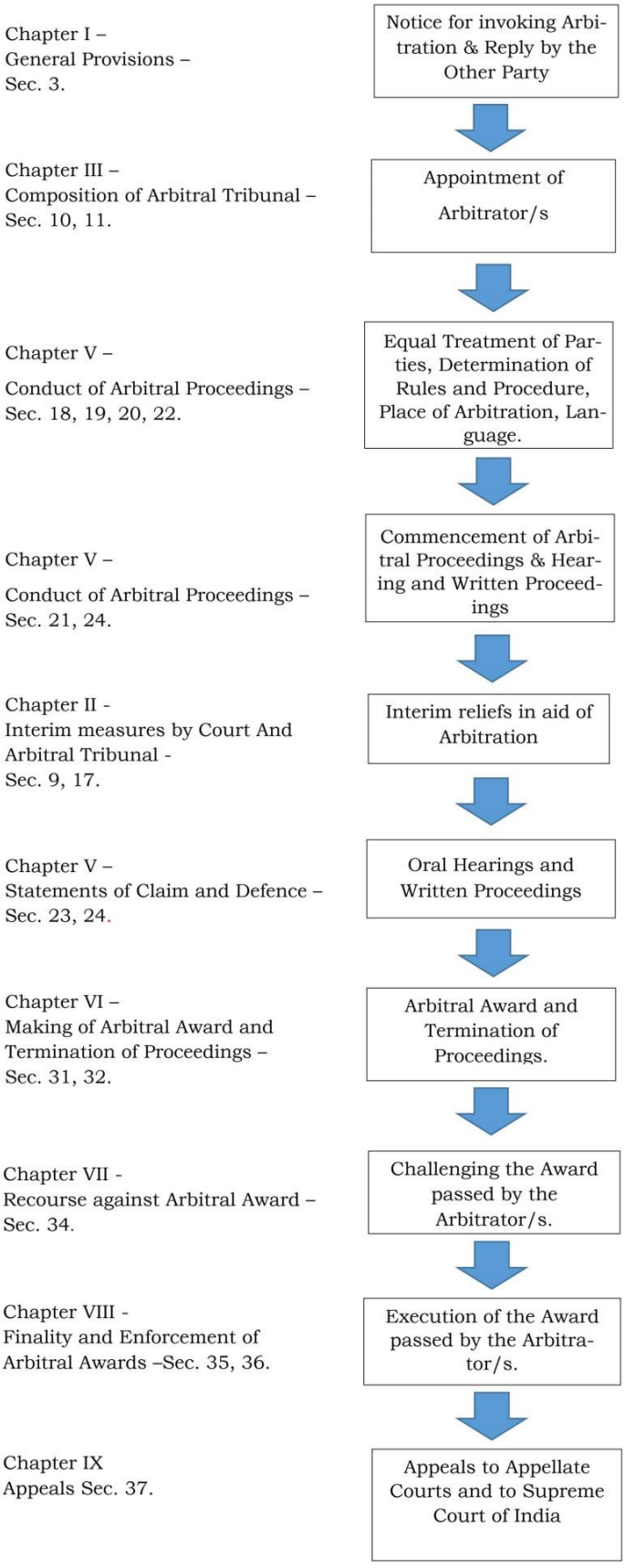
Process of Arbitration

Arbitration works as under: while entering into a contract, parties agree that in case of a conflict the matter would be sought to be resolved by an arbitrator. Often the name of the potential arbitrator, agreed upon by both the parties, is mentioned in the contract itself. In case a dispute arises, the first step is issuing of an arbitration notice by either of the parties. This is followed by response by the other party and subsequently appointment of an arbitrator, decision on rules and procedures, place of arbitration and language. Once the arbitration proceedings commence, there are formal hearings and written proceedings. The arbitrator, if the matter so requires, issues interim reliefs followed by a final award which is binding on both parties. The tricky part arises if either of the parties, unhappy with the award, challenges it before the court. This can be before the appellate court or the Supreme Court depending upon the matter.

[3] http://www.cfo-india.in/article/2015/10/07/case-arbitration

Stages of Arbitration Proceedings

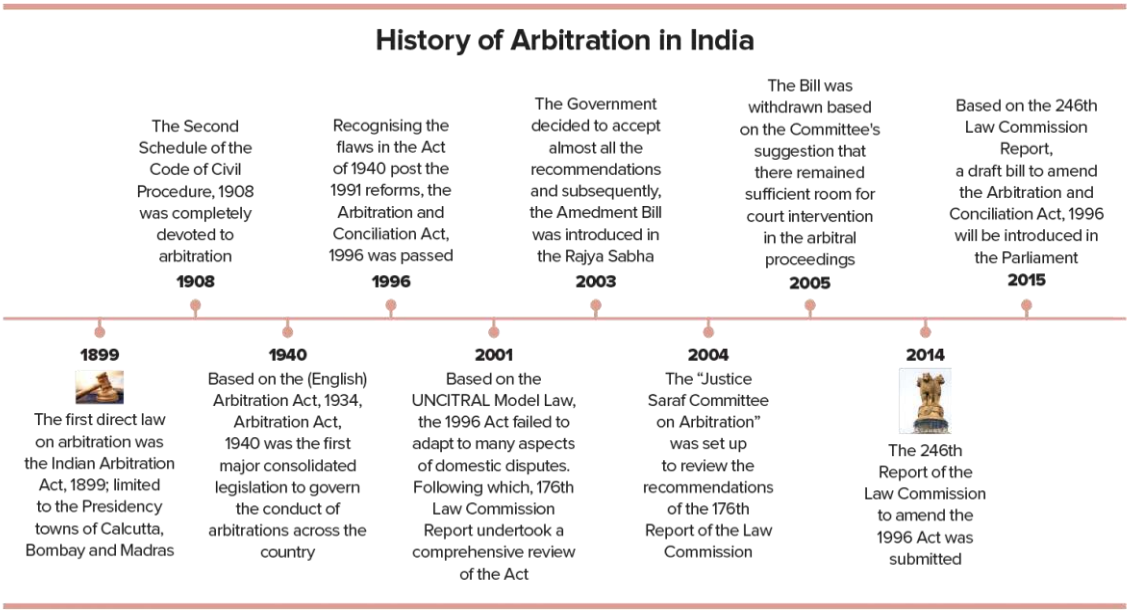
Arbitration and Arbitration Agreement (Sec 2 (a), & Sec 7)



Tracing the History of Arbitration in India

India has had a long tradition of arbitration. The settlement of differences by tribunals chosen by the parties themselves was well known in ancient India. There were in fact, different grades of arbitrators with provisions for appeals in certain cases from the award of a lower grade of arbitrators to arbitrators of the higher grade.

Ancient texts of Yajnavalka and Narada refer to three types of popular courts (Puga, Sreni, Kula). Besides at the village level, Panchayats have also been a prevalent form of alternate dispute resolution.



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In the British era, the Bengal Regulation of 1772, 1780, 1781 and the Cornwallis Regulation of 1787 recognised and encouraged arbitration. Thereafter, the Bengal Regulation of 1793, the Madras Regulation of 1816 and the Bombay Regulation of 1827 provided for arbitration. It was finally in 1859 that the Civil Code of the courts was codified with provisions for arbitration. This was followed by Codes for Civil Procedure of 1877 and 1882. However, there was no notable change in law relating to arbitration in these amendments. Next came the Indian Arbitration Act of 1899. This did not apply to disputes which were subject matters of suits. It dealt with arbitration by agreement without the intervention of the court and that too only in Presidency towns. Further, it did not permit arbitration in disputes which were being adjudicated through a suit. The Civil Procedure Code was later amended in 1908 removed the limit of arbitration to only Presidency Towns. In the mid-1920s, the Civil Justice Committee, appointed to report on the machinery of „civil justice in the country", also made suggestions for modification of arbitration laws. However, owning to anticipation of taking cues from the British Arbitration Laws which was expected, it was finally in 1938 that the Government of India

[4] http://www.cfo-india.in/article/2015/10/07/case-arbitration

appointed an officer to revise the Arbitration Law. As a result the first Arbitration Act of the country was enacted in 1940.

The 1940 Act however, did not deal with enforcement of foreign awards. In fact a separate law, Foreign Awards (Recognition and Enforcement) Act, 1961 applied to the enforcement of awards under the Geneva Convention, 1927 and New York Conventions to which India was a signatory. Over time, the working of this Act was found to be unsatisfactory due to too much court intervention. In 1977, the functioning of the 1940 Act was questioned and examined by the Law Commission of India on grounds of delay and hardship caused due to clogs that affect smooth arbitral proceedings. The Commission recommended amendment of certain provisions of the Act rather than reworking the entire framework. Consequently, the Arbitration and Conciliation Act, 1996, based on the 1985 United Nations International Commission on International Trade Law (UNICTRAL) model law and rules, was enacted.

However, the working of the 1996 Act also led to various practical problems. Various Committee reports like the 176th report of the Law Commission (2001), Justice B.P. Saraf Committee (2004), the report of the Departmental Related Standing Committee On Personnel, Public Grievances, Law And Justice (2005) and the 246th report of the Law Commission (2014) highlighted these challenges. Ultimately, in December last year, the Arbitration and Conciliation (Amendment) Act, 2015 brought in crucial changes to the 1996 statute to overcome the shortcomings.

Key Highlights of Arbitration and Conciliation (Amendment) Act 2015

The Arbitration and Conciliation (Amendment) Act 2015 brought about certain noteworthy modifications which would be critical in supporting international arbitration in the country. One of these is the provision permitting arbitral institutions to create their own rules consistent with the Act to ensure that arbitrations are swift and effective. Coupled with this is the express inclusion of "communication through electronic means" for formulating the arbitration agreement[5] and a model fee schedule to curb exorbitant fee of tribunals and arbitrators (however for international commercial arbitration and institutional arbitration, the fee limit is not applicable)[6]. One of the most widely debated amendments is the fixing of a one year time limit for resolving arbitral matters[7]. This timeline may be extended by a period of six months with the consent of the parties. Interestingly, timely disposal within six months is incentivised by increasing the fee of the arbitral tribunal and delay is penalised by up to 5% per month for each month of delay. The amendment also provides for „fast track proceedings" under which parties can consent for resolving the dispute within six months with only written pleadings and without any oral hearing or technical formalities[8]. Further, an arbitrator has to be appointed within six months and a challenge to an award has to be iwithin one year. The costs for the proceedings are to be

[5] Section 7(4)(b) ibid
[6] See Fourth Schedule ibid
[7] See section 29A ibid
[8] See section 29B ibid

determined on the basis of the parties conduct and other facets[9]. This would play an important role in dis-incentivising dilatory tactics. The tribunal has been now empowered to impose a higher rate of post award interest and to hold day to day hearings as far as possible[10]. The arbitrator can confer high costs in case a party seeks unreasonable adjournments. With respect to the involvement of courts, the amendment provides that an arbitration tribunal can be constituted within 90 days of interim protection of the court and has limited the powers of the court once the tribunal has been constituted[11]. Even the tribunal has been given powers similar to those of the court in granting interim protection[12]. So far as regulating the arbitrator is concerned, the amendments has built inclusions to ensure that the arbitrator has sufficient time for arbitrations that they take up[13]. Another significant amendment is inclusion of neutrality in promoting proceedings. This has been done through prescribing International Bar Association guidelines (Under fifth and seventh schedule) on conflict of interest as a schedule to the Act. Under this employees of a party to the case cannot be appointed as an arbitrator.

Making India the Global Arbitration Hub

With growing international commercial trade and agreements, international arbitration is growing manifold. One key reason for this is that parties from different jurisdictions and countries are reluctant to subject themselves to jurisdiction of other countries. To develop India as a global hub for international arbitration it is important that we open ourselves to the outside world and incorporate best practices for creating word class Institutional and legal procedure. Recently, NITI Aayog, along with other supporting institutions, organised a three day Global Conference on "National Initiative towards Strengthening Arbitration and Enforcement in India". The following section on ways to making Indian the Global Arbitration hub draws largely upon the takeaways from this conference.

In the backdrop of evolution of arbitration along with the present legislative and institutional framework in the country, there are three fronts on which intervention is needed: *first*, streamlining the governance framework for arbitration. Under governance, restructuring would be needed on legislative, executive and judicial fronts. Once the governance related aspects are resolved, the next step would be to create a suitable positive infrastructure to promote arbitration. This would include both physical infrastructure as well as human capital. Having resolved the above, the last step would be promoting both domestic arbitration and making India as preferred international Arbitration venue. Within each of these, measures are needed on several individual fronts. These are discussed in the following sections.

I. RESTRUCTURIING ARBITRAL INSTITUTIONS:

[9] See section 31A ibid
[10] See section 24(1) ibid
[11] See section 9(3) ibid
[12] See section 17 ibid
[13] See Section 12(1)(b), Fourth Schedule and Sixth Schedule ibid

The restructuring of arbitral institutions can be broken down into several steps. Though these are listed step wise, the intent is not to say that one has to precede two.

Step I: Institutional Setup

Setting up of arbitration institutions with international standard with hearing centres on widened jurisdiction of India is one of the foremost challenges. The decision to be made is whether arbitration across the nation has to be governed through a single centre or should there be multiple centres across cities. For instance, China has 230 arbitral institutions while other countries such as Singapore have only one institution. In case having centres across the country are preferred, then choice of cities and the criteria for their selection becomes critical. During the course of above discussed conference, the unanimous suggestion was India needs to have one central arbitral institution with regional offices in key commercial cities such as Mumbai, Delhi, Bangalore, Hyderabad etc.

Further another aspect which needs deliberation is whether the centres should be government funded or be private. The Singapore International Arbitration Centre (SIAC) was set up as a not for profit non-governmental organisation in 1991. Though it was funded by the Singapore government at its inception, SIAC is now entirely financially self-sufficient. The Hong Kong International Arbitration Centre (HKIAC), on the other hand was established in 1985 by a group of leading businesspeople and professionals with funding support from the Hong Kong Government. It now operates as a company limited by guarantee and a non-profit organisation. International Chamber of Commerce (ICC) based in Paris was founded in 1919 and is operating as a non-profit Chamber and the London Court of International Arbitration (LCIA) was set up in 1883. Like all other institutes it is also a private, not-for-profit company not linked to, or associated with, the government of any jurisdiction. In India a number of arbitral institutions are operation. Foremost amongst there is the International Centre for Alternative Dispute Resolution (ICADR) which was founded as a society in 1995. It is an autonomous organization working under the aegis of the Ministry of Law & Justice, Govt. of India. ICADR has its head office in Delhi and two regional offices in Hyderabad and Bangalore. In Southern India, the Nani Palkhiwala Arbitration Centre in Chennai is a private institution incorporated as a Company. Another institution is the Indian Council for Arbitration (ICA) which was set up in 1965 at the national level under the initiatives of the Govt. of India and apex business organizations like FICCI. Recently, the Government of Maharashtra and the domestic and international business and legal communities have set up a non profit centre called the Mumbai Centre for International Arbitration (MCIA). International Institutions, SIAC, LCIA, ICC and KLRCA also have set ups in India. SIAC has a liaison office in Mumbai and ICC in Delhi. LCIA did start a facility in India but recently its closure was announced. There are other micro level institutions as well functioning to promote arbitration. However there is no single arbitral seat or institution in the country which is a centre with global repute.

Step II: Upgrading Institutional Infrastructure

Establishing a stable and vibrant eco-system for the arbitral institution is the next significant consideration. The institutions in themselves should be credible, independent, efficient and transparent which is a challenge in India looking at its diversity. Further, the leadership of the institution should be vibrant and should be supported by well-trained support staff for qualitative arbitration and library apart from physical and technological infrastructure. Effective use of Technology such as e-filing, creating database of cases, big data analytics, Online Dispute Resolution, video conferencing needs to be scaled up and be put to extensive use in the process of arbitration. One example being video conferencing as no adjournment would be required, cases can be registered on line, voluminous papers can be instantly transmitted, and testimony of experts can be recorded through video conferencing.

Having strong and credible arbitral institution is essential since institutes serve as centres of learning for establishing a culture think-tank for discussion. This would be useful for students, professionals and perhaps even for the judiciary to discuss and deliberate on the subject through seminars, journals and case-law. This in turn would help in developing journals on the subject, on creation of a bar, evolution of best practices and honing of rules on the subject –all of which would contribute to the „soft law".

Step II: Scaling Human Capital

Creation of physical infrastructure in itself would be insufficient without a pool of professional arbitrators who are able, conflict free and above all, non-partisan. The arbitrators should be competent, technically sound and specialized in their field. Therefore arbitrators who serve on a tribunal, in effect as a party"s counsel should be avoided and their partial views should be ignored.

As on date, Indians fare extremely poorly in appointment as international arbitrators. As per LCIA data for 2015, out of 449 appointment of arbitrators last year, there were no Indians. Similarly, even though most Indian arbitrations are seated in Singapore, SIAC report for 2015 records that out of 126 arbitrator appointments, only 3% were Indians. This is a clear case in point showing that Indians are excluded from the system of international arbitration

In order to develop a pool of arbitrators focus on five aspects would be crucial: *one,* training of the arbitrators especially for the ones not having any judicial background so that the awards passed by them can withstand judicial scrutiny; *two,* developing a system of blacklisting of arbitrators who try to overstretch the process and delve upon those issues on which they do not have expertise, *three* setting up of dedicated arbitral bar, *four* setting up of designated and specialized Arbitral Tribunals in the same manner as commercial benches and courts, at High Courts and District level and *five* having designated institutions in place to appoint arbitrators as is done in Hong Kong and U.S.A. For instance, in California there is an arrangement where every Court has a panel of Arbitrators attached with it. India can follow the above model or alternatively judicial academies in India can maintain a panel of trained arbitrators that can work at grass root level with the Courts.

Experts of appropriate fields may be made Member of the Arbitral Tribunal besides the Judicial Member. In the context of Singapore the competitive environment that has made the arbitral institution perform even better. There are mostly young lawyers and case managers from different countries who are part of SIAC exposing them to cross cultural inputs and experiences and it is they who are the front line soldiers.

Step III: Institutionalising Arbitration

Presently in the Indian context, arbitrations are not conducted in a structured matter. The Law Commission of India has in its 246th Report has noted that *ad hoc* arbitrations usually devolve into the format of a court hearing with the result that adjournments are granted regularly and lawyers too prefer to appear in court rather than completing the arbitration proceeding. What is therefore recommends is that India needs to promote institutional arbitration where a specialized institution with a permanent character aids and administers the arbitral process. Such institutions may also provide qualified arbitrators empaneled with the institution, lay down the fee payable and the mode of submission of documents. This would entail a perception of autonomy (i.e. freedom from government control) with the end users with sources of income to sustain their autonomy. In all the set ups it is not that the arbitral institution is totally immune from government control and there are government institutions and Boards to be dealt with. However, the institution should enjoy some immunities and privileges. The operational funding is to be provided by an agency at the outset and thereafter, the institution should operate so as to self-generate the development funding.

Another crucial aspect on institutionalizing arbitration is whether one institution or more than one institutions are to be established and with what objective i.e. undertaking domestic arbitration or international arbitration. Looking at the size of the country that is India domestic arbitration in itself would be huge. Apart from this, international arbitration that is going outside India should also be brought to be held in India. For instance, in Hong Kong the arbitral mechanism is installed by the business houses whereas in Singapore it is a government initiative and in Malaysia it is an international body.

Step IV: Setting up a Dedicated Bar

Institutionalising arbitration would also have to be supported by a dedicated bar comprising of professionals competent to conduct arbitration in accordance with the rules of the institutions and provide competent, viable services. Rules of the dedicated arbitration bar would help it adhere to timelines and not mirror court proceedings. The body of qualified arbitrators would also help strengthen the arbitral institutions and help institutionalise arbitration. One example of such a bar is the International Bar Association Arbitration Committee (the IBA Committee) which focuses on laws, practice and procedures relating to arbitration of transnational disputes. In the Indian context, the recently enacted Insolvency and Bankruptcy Code, 2016 also provides for "Insolvency Professionals" and "Insolvency Professional Agencies" who are enrolled with the Board. Taking cur from the IBA Committee and the „insolvency professional" what is perhaps a must for strengthening arbitration in India is promoting a similar cadre of „arbitrators".

This would help in not only having specialised professionals but would also ensure that arbitration does not take a back seat as compared to litigation in court.

Step V: Awareness Generation

Strengthening of arbitration in the country would have to be coupled with promoting arbitration as a mode for dispute resolution. This would include preventing tendency of private players to rush to the courts without resorting to the relevant provisions of arbitration in the contract whereby the commencement/continuation of the work was stalled. This can be done through creating awareness as to better understanding of commercial matters and an eco-system wherein the awards were passed by neutral umpires to ensure that it is a win-win situation for all the stake holders leaving a limited scope of the award being challenged under Section 34 of the Arbitration Act, 1996.

II. ADDRESSING POLICY ISSUES

In addition to restructuring the arbitration setup as discussed above, there are a few issues that need to be addressed at the policy level.
Foremost amongst these is ensuring disposal of proceedings in time and ensuring that the project under dispute should not stall as a consequence of the difference. It has often been observed that work under contract gets stalled due to disputes particularly in government infrastructure projects. Two main reasons for this are lack of decision making strength with officials in resolving the arbitration proceedings and apprehension that they may be hauled up or may face the vigilance proceedings. In such cases not only the disputes needed to be nipped in bud considering the money value over time but also the proceedings should not be allowed to linger on any account. One suggested way of fast tracking of disputes in case of government contracts is having an independent settlement committee consisting of a retired High Court Judge, Secretary of the concerned Ministry and another member which could be approached by the stake holders at any stage of proceedings for resolution of disputes.

The *second* issue is converging between the legal regimes for international arbitration and domestic arbitration. The domestic regime for arbitration should follow the principles of the international regime and equal standards should be applied to both the regimes.

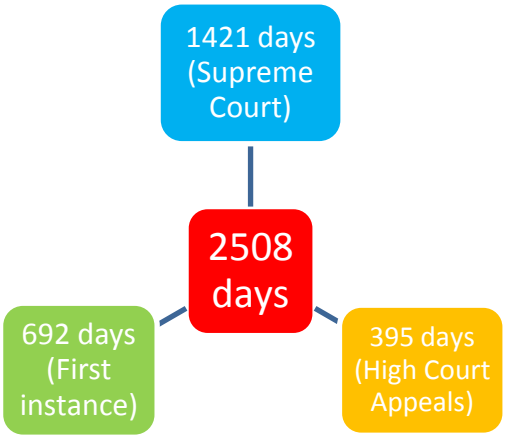
The *third* is the scope of challenging the arbitration award before courts. Under Section 34 of the Indian Arbitration and Conciliation Act, 1996 (the Act) an award would be considered to be in conflict with the public policy in India only of "(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 or (ii) it is in contravention with the fundamental policy of Indian law or (iii) it is in conflict with the most basic notions of morality or justice, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Challenging arbitral awards on grounds of „public policy" has

become an Achilles heel for arbitration in India: a means by which losing parties can attack arbitral awards, on much broader grounds than are permitted in other countries.

This has been a source of conflicting opinion between the Law Commission and interpretation by the Supreme Court on what constitutes public policy. When considering the enforcement of foreign awards, the courts have adopted a narrower approach[14] and as far as domestic awards are concerned, the courts have upheld a broad view of public policy. In 2003, the Supreme Court in *ONGC v Saw Pipes*[15] upheld reviewing the merits of an arbitral awards on grounds that a tribunal had made an error in applying Indian law. In 2014, this was confirmed two other Supreme Court decisions. In *ONGC –v- Western Geco*[16], the Supreme Court upheld the above approach and directed that a court could assess whether a tribunal: (i) has applied a "judicial approach" i.e. has not acted in an arbitrary manner; (ii) has acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and (iii) has avoided reaching a decision which is so perverse or irrational that no reasonable person would have arrived at it. Subsequently, in Associate Builders -v- DDA[17], the Supreme Court stated that section 34 does not normally permit the courts to review findings of fact made by arbitrators. It therefore restored the arbitral award. However, the Supreme Court only clarified, and did not restrict, the law concerning public policy. In particular, the Supreme Court said an award can be set aside if it is contrary to the fundamental policy of Indian law, contrary to the interest of India, contrary to justice and/or morality or patently illegal. The decisions of the Supreme Court were reconsidered by the Law Commission in its 246th Report and it recommended restricting of the definition of public policy by Courts. It held that an award can be set aside on public policy grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice". Accordingly, amendments made in 2015 to Section 34 have added explanations as to what would be public policy. In the present context, the interpretation of the recent amendments by Court is critical for ensuring that challenges to arbitral awards are not admitted by Court on grounds of being against public policy. Until and unless there is a prima facie case justifying the need for an elaborate argument on the objection petition, there should be a provision of their dismissal at the inception stage. A circular has been issued by the Government of India whereby 75% of the amount was required to be deposited as a guarantee for the purpose of enforcement of award while the same was under challenge before the courts of law under Section 34 of the Arbitration Act. Further, as a matter of policy, Government of India is not challenging arbitral awards, passed on sound grounds unless a legal advice to the contrary is given. It is claimed that objections are being filed only in around 20% of the arbitral awards while rest 80% are finally disposed at the arbitration stage alone.

[14] Shri Lal Mahal Ltd -v- Progeto Grano Spa (Civil Appeal No. 5085 of 2013)
[15] ONGC Ltd. –v- Saw Pipes Ltd. 2003 (5) SCC 705
[1616] ONGC Ltd. –v- Western Geco International Ltd. 2014 (9) SCC 263
[17] Associate Builders –v- Delhi Development Authority 2014 (4) ARBLR 307

However, what remains a cause of concern is the time taken to resolve challenges filed under section 34 of the 1996 Act. A study has estimated that it takes 24 months to resolve challenges under section 34 at the in lower courts, 12 months in High Courts and 48 months in Supreme Court. In all it takes around 2508 days on an average to decide applications filed under Section 34.



III. LEGISLATIVE CONCERNS

Updated arbitral legislation with certainty and flexibility are key aspects that help parties in deciding upon the seat in an international arbitration. While the recent 2015 amendments have made the requisite, on the legislative front, Indian is in a position to be a preferred seat for international arbitration. However, there is one key aspect of settling arbitration proceedings within twelve months under Section 29-A of the Arbitration Act which has been subject to debate and varying viewpoints particularly in complex international cases where the arbitral proceedings become lengthy. It has been argued that though routine matters can be completed within the prescribed time frame, the question of extension may be considered in cases of international arbitration. On the other hand it has also been argued that the introduction of this provision has brought in accountability in arbitrators which in turn brings discipline and accountability in lawyers as well as litigants.

Though both arguments for and against making delivery of arbitral awards time bound are valid, it is important that that efforts to abide by this amendment are undertaken and only after passage of a reasonable period of time if it is felt that 12 months is too short a period that legislative changes to this may be sought. In the meanwhile institutions should take over the management of time limit and the case management of the arbitration proceedings and should evolve techniques to control the arbitration proceedings which would make the entire system more transparent. While deciding the time limit, due regard should be given to the number of witnesses, number and complexity of issues involved, volume of record, the stakes involved and the number of arbitrators. Further, guidelines can be framed for providing time slabs for deciding the matters, keeping in view the considerations given above. Perhaps, the consent for extension of time by further six months as provided in Section 29 B should also be taken from the parties at the start of the arbitration proceedings.

V. NEED FOR JUDICIAL SUPPORT

In addition to the local legislation of a country which guides the arbitration process therein, the courts of that jurisdiction play a pivotal role in exercising supervisory jurisdiction over arbitration and in marking an arbitral institution into a "good seat". Though Arbitration involves parties" autonomy, but judicial co-operation is vital to give effect to the law of arbitration. Therefore, an effort is to be made to identify those steps which would make good balance between judiciary and arbitration, at pre, during and post arbitral proceedings. This would entail court intervention in upholding/restraining arbitral awards, providing timely court assistance when needed, recognising party autonomy in the arbitral process.

In the Indian context, interference by courts was identified as one of the major reasons for delay in arbitrations. An award in *White Industries Vs. Republic of India* in 2011, is a case in point. In this matter, an Australian company successfully claimed compensation, equivalent to the amount of award, from the Indian government on account of judicial delay. There are two issues that emerge from the above award: one is interference by courts and two delay in arbitration. With respect to interference by courts, it is well debated and agreed that judiciary should minimize its intervention into the arbitration, as is being done in various other jurisdictions. In China for instance, the Supreme Court alone can interfere in arbitration matters. This helps in lowering and limiting the impediments in arbitral awards.

Another issue that has been recognised as a cause of concern is lack of consistency in decisions by Indian judiciary on arbitration and decisions taken by arbitral authorities. Judicial supervision lacks uniformity in so far as owing to the federal structure of States and Central relations in India and each State having its own Judiciary, the perspective of individual Courts to the objections filed under Section 34 of Arbitration and Conciliation Act vary as per local conditions. This calls for action on the part of judicial academies which should be asked to impart training to judges on how to deal with cases challenging and seeking setting aside of arbitral award and other related issues, besides ensuring that frequent transfer of judges holding such courts should be avoided.

Heavy reliance on retired judges as arbitrators has also been identified as being problematic. This affects the proceedings in two ways. One, it is believed that with retired judicial members as arbitrators, the case acquires a rather languid pace, with traditional hierarchy taking precedence in the matter. Coupled with this is the exorbitant fee charge for arbitration by retired judges which is seen to have a discouraging impact on the parties. It has been suggested that of fixing a lump sum fees for the Arbitrators instead of provision of per hearing remuneration would perhaps be a solution to this issue. Presently, the law is silent on this issue as to who can be appointed arbitrator, generally arbitrators are being appointed from judicial background. There is a need to expand the base of arbitration not only from judiciary but members of Bar should also be got involved in this field.

Another aspect of concern is the low support of civil courts in referring matters for arbitration. Section 89 of the Civil Procedure Code (CPC) provides: "Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for – arbitration, conciliation, judicial settlement including settlement through Lok Adalat; or mediation". There is a need to sensitise judges to refer civil disputes for arbitration on one hand and upholding the arbitral awards/their implementation

Assistance of Court is needed during arbitration proceedings particularly for enforcement of awards within a time frame and for initiation of contempt proceedings in case of non-compliance of interim arbitration orders. This would include that arbitral orders under section 17(2) may be treated as court orders and recourse may be taken to the provisions Section 25 (5) of the Act along with Order 39 Rule 2-A of CPC.

Clearly, there is a need to sensitize the judges and the consumers of justice that the parties should be bound by arbitration and there is need to enforce trust in arbitrators. The fact that the petition is termed as a "suit" in various states in the country, necessarily implies that the proceedings are continued as a suit thus resulting in delay. The court should interfere only in rare cases and the concept of public policy under section 34 of the Act should not be interpreted too broadly. When it comes to enforcing an arbitration agreement, courts must hold parties to their agreement to resolve issues through the agreed mode of dispute resolution –arbitration. For instance, in U.K., there are only two narrow grounds for challenging the arbitration award: (a) whether arbitration tribunal lacked jurisdiction and the very constitution of arbitration tribunal was not valid and (b) injustice caused by serious irregularity or a situation where arbitrator has gone so wrong. Clearly, though the ground of „public policy" is also recognized in UK, but courts there have been given very restricted interpretation to it.

The judiciary and the arbitration proceedings should be supportive roles to each other- when the arbitrator decides the merits of a case, the court should support the decision and its implementation. Broadly, the courts should support arbitration in the following ways: Where it is mandatory to refer the matter to the arbitration; in case of interim measures, which assume importance in absence of any provision for appointment of emergency arbitrators and the role of the court becomes all the more important; in case of application under Section 11 reference may be made to designated institutions rather than individual arbitrators; court may ensure effective arbitration by constituting special/designated benches.

VI. MAKING INDIA THE PREFERRED INTERNATIONAL ARBITRATION SEAT

India has diverse and useful human resources in law as well as other disciplines which can help support and sustain the domestic arbitration ecosystem in India. Legal

reforms are certainly a step in the right direction to strengthen the arbitration. However it also needs further support on few other fronts. First amongst these is the need to decentralise dispute resolution mechanism as a private market based solution. Parties can resolve privately through constituted tribunals without reaching out to courts. This would need a vibrant arbitration bar as well respected pool of the seasoned arbitrators who build enough confidence amongst the „potentially litigant" community that they seek resolution through arbitration rather than judiciary. It would also need an administrative mechanism to ensure that arbitration matters would have to handle separately and efficiently. For this, the government would need to create an enabling framework for institutional arbitration including arbitration events, training and conferences. In addition there is a call for demonstrating to the world that Indian arbitral institutions are homogenised with the world and can deliver an effective arbitration work at lower cost. Major Indian cities have the necessary Infrastructures like communication with other facilities to help international arbitrators. Taking a cue from the exponential growth of SIAC, what is needed to make India the global hub of international arbitration is ensuring that arbitration in India be less time consuming and more cost effective as compared to arbitration elsewhere across the globe. It also needs a commitment by institutions to accord primacy to the agreement to arbitrate. This includes primacy not only to conduct arbitration but also to implement the arbitral award without interference, except on public interest considerations.

India is on the track of establishing confidence in its legal system which is the fundamental condition for any country to become an international arbitration venue. Needless to say that regular amendment in the Arbitration laws to keep abreast with economic changes would be needed. However, given that India has already done the needful in this regard recently, the present need is reforms in the implementation of the legislative changes by the judiciary along with building of institutional capacity in the country. Only then would we be able to "resolve in India".

CASE MANAGEMENT THROUGH COURT ANNEXED MEDIATION AND OTHER DEVELOPMENTS

Madan B. Lokur

Judge, Supreme Court of India[*]

The foremost reason for India to introduce case management in its courts is without doubt the ever increasing number of cases pending at all levels in the judiciary. The last quarter of 2015 closed with 2.7 million cases pending in the district courts, 38,75,014 cases pending in the High Courts (these are constitutional courts) and 34,502 cases in the Supreme Court (59,272 if connected matters are included).[1] With an increase in institution of cases and a significant number of vacant judicial posts in all courts across the country,[2] case management is indispensable.

Experience in dealing with a vast population and limited resources has resulted in the realization that real access to justice can be achieved only if adversarial mindsets are relaxed and the justice delivery system is supplemented. Therefore, coupled with case management, the necessity of introducing effective alternative dispute resolution mechanisms is important.

However, the goal of case management and ADR systems should not only be to expedite the delivery of justice - delays in resolution of disputes have an unequal impact on the parties - but also to improve the efficiency in decision making in the courts. Therefore, case management and ADR systems must be

[*] Research Assistance by Ms. Rupam Sharma.

[1] http://supremecourtofindia.nic.in/courtnews/Supreme%20Court%20News%20Oct-Dec%202016.pdf. Last accessed on 08.07.2016, 1:56PM.

[2] 4501 in the district judiciary, 420 in the High Courts as on 31.12.2015 and 2 in the Supreme Court as on 08.07.2016. Ibid.

viewed in combination as an effort to provide real access to justice and not merely as a tool for disposal of cases.

Challenges and attempts to overcome them

Apart from an overload of cases pending in courts, an absence of a case management system and a generally ineffective ADR system, the courts in India are witness to a disorganized manner of progression of cases and the fate of hearings depend heavily on lawyers rather than on any other participant in the justice delivery process. Additionally, the overload of cases makes it virtually impossible for the judges and the administrative court staff to track cases, schedule meaningful dates of hearings and calendaring of events. These challenges need to be looked at from a broader and pan-India perspective and long term solutions ought to be found and not *ad hoc* or tentative solutions.

In his study on the challenges faced by the Indian judiciary, Justice M. Jagannadha Rao, former judge of the Supreme Court of India identified various practical aspects of court functioning in India in the context of the evident mismanagement which could easily be rectified to save time, costs and efforts. For example, he mentioned the system of calling of cases (not ready for final disposal) merely listed for determining procedural adherences like service of notice or summons, identification and removal of procedural defects, filing of affidavits, completion of pleadings etc. He noted that judges themselves monitor each such stage of a case and thereby lose significant working hours. Another aspect pointed out by Justice Rao was the failure of the courts to impose costs. Often, successful

parties are not awarded costs and there is no predictability regarding factors which might result in grant of costs by the judge.[3]

The first step: Pre-dating the views of Justice Rao, the Parliament in India amended the Civil Procedure Code (or the CPC) in 1999 and 2002. The amendments were the first effort to bring some semblance of organization in procedural laws and introduce case management practices in civil trials by reducing causes of delays and providing statutory time frames for various procedural stages and modifying the requirements of certain others. For the purposes of the present discussion, the insertion of section 89 by The Code of Civil Procedure (Amendment) Act 1999 and its subsequent enforcement from 01.07.2002[4] is a significant development as this provision mandates efforts at settlement by the courts. The section reads as follows:

> **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 give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for –
>
> a) arbitration;
>
> b) conciliation;
>
> c) judicial settlement including settlement through Lok Adalat; or

[3] Justice M. Jagannadha Rao, Case Management And Its Advantages, http://lawcommissionofindia.nic.in/adr_conf/Mayo%20Rao%20case%20mngt%203.pdf Last accessed on 10.07.2016, 9:16 AM.

[4] See the Press Release of 01.07.2002 by the Ministry of Law, Justice and Company Affairs at http://pib.nic.in/archieve/lreleng/lyr2002/rjul2002/01072002/r010720022.html Last accessed on 10.07.2016, 9:31 AM.

d) mediation

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authorities Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

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

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

The Supreme Court upheld the constitutional validity of the amendments to the CPC and observed, with respect to section 89, that the obvious reason for such an introduction in the statute books is the realization that all cases filed in the court need not necessarily result in a trial in view of the overburdened system and the growing pendency.[5] Not content with this, the Supreme Court thought it necessary to inquire into the viability of the amendments and directed the establishment of a Committee with a specific mandate to formulate a case management framework

[5] ***Salem Advocate Bar Association versus Union of India***, (2003) 1 SCC 49.

which should be adopted (with or without modification) by the High Courts.[6] Taking a step back, the fact that the constitutionality of the amendments to the CPC, including Section 89 thereof, was challenged by a Bar association is an indication of the resistance to change within the legal fraternity.

Pursuant to the direction of the Supreme Court, a Committee headed by Justice Rao was constituted and which gave its Report comprising of three parts. Reports 2 and 3 are the relevant parts for the present discussion. [Report 1 dealt with specific amendments to the CPC]. Report 2 comprised of draft rules for alternative dispute resolution and Report 3 comprised of draft rules on case flow management. This Report was filed by the Committee before the Supreme Court which considered and accepted it in ***Salem Advocate Bar Association, Tamil Nadu versus Union of India***[7]. The Supreme Court further directed that a copy of the judgment be circulated to all High Courts, the Central and State Governments/Union Territories expressing a hope of expeditious follow up action.

Civil Procedure Mediation Rules, 2003 contained in Report 2

The Rules provide for the appointment of a mediator. They provide, *inter alia*, that parties can appoint their mediator(s) on the condition that the person does not suffer from any of the disqualifications stipulated in these rules. The court can appoint a mediator if the parties fail to arrive at a unanimous decision.[8] The High Courts as well as the courts of Principal District and Sessions Judge should maintain a panel of mediators.[9] Persons like retired judges of the Supreme Court, High Courts, District and Sessions Courts, legal practitioners with at least 15 years of standing at the Bar, experts or other professionals with 15 years of standing,

[6] Ibid.
[7] ***Salem Advocate Bar Association, Tamil Nadu versus Union of India,*** (2005) 6 SCC 344 **[Salem II]**.
[8] Rule 2, Civil Procedure Mediation Rules laid down in the Committee Report (as reproduced in Salem II)
[9] Rule 3, ibid.

institutions that are themselves experts in mediation were eligible for empanelment.[10] Persons declared insolvent or of unsound mind, those with pending criminal charges or convictions or disciplinary proceedings, interested parties, a legal practitioner who represented or is representing the parties in any proceedings is disqualified for the purposes of empanelment.[11] The mediator is under an obligation to inform the parties in writing of any information which might create a doubt to the mediator's neutrality.[12] The parties may agree on the procedure to be followed in mediation and the model rules provide a procedure in case the parties are unable to agree upon the same.[13] The mediators are not bound by the provisions of the CPC or the Evidence Act 1872.[14] The court can take action in the form of imposition of costs against a party who does not appear in the mediation proceedings without sufficient cause.[15] The role of the mediator is envisaged as merely facilitative in nature and it is clarified that a settlement cannot be imposed upon the parties.[16] Sixty days is the time stipulated for completion of mediation which can be extended by the court for a further maximum period of thirty days *suo moto* or upon request by the mediator or any of the parties.[17] Complete confidentiality and separation of the court and mediation proceedings is envisaged.[18]

Model Case Flow Management Rules contained in Report 3

The first substantive effort towards introducing case flow management in courts in India was in the form of the draft rules formulated by the Committee on

[10] Rule 4, ibid.
[11] Rule 5, ibid.
[12] Rule 8, ibid.
[13] Rule 11, ibid.
[14] Rule 12, ibid.
[15] Rule 13, Ibid.
[16] Rule 16, 17, ibid.
[17] Rule 18, ibid.
[18] Rules 20-23, ibid.

the directions of the Supreme Court in Salem (II). The draft rules were framed for both the district courts as well as the High Courts with further sub classifications. The general idea gathered from these rules is as follows:

Cases can be classified in tracks on the basis of the complexity of the dispute involved and fixing of time for disposal for each track which shall be supervised by the appointed judge(s). Stipulating a period of time for completion of each stage of the trial is also envisaged.[19] The draft rules mention referral to mediation under section 89 of the CPC[20] and then proceed to prescribe rules of case flow management to be followed in the event of a failure of mediation.[21] The imposition of costs should be liberal (both in terms of frequency and quantum; the latter should consider the actual costs resulting from the conduct of the party).[22] The practice of calling of cases with the aim of merely ensuring attendance should be discontinued[23] and the prescribed limit on adjournments to three should be strictly adhered to.[24] Miscellaneous applications should not be allowed to delay the suit unless the court deems fit to grant time.[25] Officers can be made personally responsible in the event a public authority before the court is seen to be conducting itself unreasonably.[26] Generally speaking, Justice Rao linked mediation with case flow management in the draft rules submitted by him.

Implementation of section 89 of the CPC and Mediation

Mediation, arbitration and conciliation are not new concepts in the Indian legal system. Arbitration was always a part of an alternative dispute resolution

[19] Rule 1, Model Case Flow Management Rules laid down in the Committee Report (original suit). (as reproduced in Salem II)
[20] Rule 5, ibid.
[21] Rule 6, ibid.
[22] Rule 8, ibid.
[23] Rule 3, ibid.
[24] Rule 10, ibid
[25] Rule 11, ibid.
[26] Part VI, ibid (trial courts and first appellate subordinate courts).

system[27] while mediation and conciliation were introduced through the Industrial Disputes Act, 1947 which mentions that conciliation officers are "charged with the duty of mediating in and promoting the settlement of industrial disputes"[28]. However, serious efforts to introduce mediation as an alternative were made only in the mid-1990s when the then Chief Justice of India A.M. Ahmadi constituted a team to study expediting justice delivery in India. This led to a visit to the United States by an Indian team sponsored by the Institute for Study and Development of Legal Systems (ISDLS), a San Francisco based non-profit NGO. Eventually, Parliament accepted the need for mediation as a possible additional alternative to the conventional method of dispute resolution through the court system. As mentioned above, the CPC was amended and Section 89 introduced to include mediation as a dispute resolution mechanism.

There were several subsequent visits back and forth between India and the United States, with the ISDLS taking the lead in these meetings and discussions. Programmes were held to train lawyers in the nuances of conflict resolution and even judges from the Supreme Court of the United States such as Justices Sandra Day O'Connor and Stephen Breyer visited India to encourage mediation - but to no real effect.[29] It was evident that notwithstanding the efforts of individuals, Parliament and the Supreme Court, mediation did not seem to take off as an alternative dispute resolution mechanism. This was due to the absence of any institutional mechanism to carry it forward. It was also clear that these *ad hoc* efforts towards popularizing mediation would not be able to bear fruit without institutional support.[30]

[27] Arbitration is provided for in Section 89 of the Code of Civil Procedure, 1908 as it originally stood.
[28] Industrial Disputes Act of 1947 section 4.
[29] http://aryme.com/getdoc-2-4-30.php Last accessed on 10.07.2016, 10:55 AM.
[30] For example, a lawyer Mr. Niranjan Bhatt established the Institute for Arbitration Mediation Legal Education and Development (AMLEAD) in Ahmedabad in Gujarat.

Acknowledging the ground reality that the provision introducing mediation to the justice delivery system was not being given meaningful effect to, the then Chief Justice of India R.C. Lahoti constituted the Mediation and Conciliation Project Committee (MCPC) in April 2005 with the intention of encouraging the amicable settlement of disputes through a court annexed mediation process.[31] Under the initiative of the MCPC a pilot project was launched in Delhi's District Courts in August 2005 so that cases pending in the courts could be resolved through an institutional mechanism. In other words, the MCPC appreciated the qualitative difference between cases that could be resolved through a vastly popular Lok Adalat (or People's Court) process and cases that should be referred to court annexed mediation.

Mediation and Conciliation Project Committee

The purpose of launching such a pilot project at the grass-root level was to try and inculcate a 'settlement culture' among litigants and lawyers. This would not only benefit the litigants in terms of saving on litigation expenses and time spent in courts but would also benefit the justice delivery system by reducing appeals and the time taken in recording evidence as well as eliminating (to the extent possible) other procedures thereby expediting justice delivery. The project has been more than successful with the Delhi Mediation Centre clocking in over 160,000 referrals over the last decade, with a settlement rate nearly touching 70 per cent.[32] Today the Delhi Mediation Centre has established court annexed mediation centres in six district court complexes located in different parts of the city,[33] with referrals pouring in for disputes on a variety of issues ranging from family matters to property disputes. The Delhi Mediation Centre is also receiving references of

[31] The author has been a member of the Mediation and Conciliation Project Committee since its inception.
[32] http://www.delhimediationcentre.gov.in/statistical.htm Last accessed on 10.07.2016, 11:02 AM.
[33] http://www.delhimediationcentre.gov.in/location.htm Last accessed on 10.07.2016, 11:07 AM.

compoundable offences of a minor nature thereby helping in reducing the burden on the magistrates. Although case management was also an intended consequence of court annexed mediation, it was not given much thought despite the Report of Justice Rao and its acceptance by the Supreme Court.

In addition to the Delhi Mediation Centre, mediation centres established from grants given by the Thirteenth Finance Commission in metropolitan cities in the States of Haryana, Jharkhand, Kerala, Maharashtra and Punjab have been faring rather well with lawyers and judges being given exclusive training in conflict resolution. Notwithstanding the liberal financial grants, there are space-and-resource constraints in the mediation centres, but considerable success has nevertheless been achieved. Unfortunately, no accurate assessment of the impact of the efforts to encourage mediation as an alternative dispute resolution system has been possible vis-à-vis case management but it is expected that sustained wide spread efforts will certainly help the courts to better manage their human resource, facilitate dispute resolution and popularize harmonious resolution that will change the deeply rooted adversarial mindset prevalent in the country and promote social harmony.

The MCPC is encouraging mediation as an alternative by employing a three pronged strategy. Firstly, it is sending its trained mediators and trainers to different parts of the country to spread awareness about the concept and technique of mediation and its advantages, namely, expeditious and affordable justice as well as imparting finality to a dispute. Secondly, it is training lawyers and judges to become mediators through a sustained training programme. After lawyers and judges are trained as mediators and are convinced of the benefits of mediation, they can instill confidence in the litigants to try out the alternative available to them. Finally, the MCPC is coaching and mentoring mediators by associating

recognized mediators with them through mediation sessions. By adopting this capacity-building and confidence-building technique, the mediators can improve their skills and become 'better' mediators. In the venture of encouraging mediation, the Government of India has made sufficient funds available to the States through the National Legal Services Authority (NALSA). Further, considerable amounts for promotion of mediation in the country have also been made available by the Thirteenth and the Fourteenth Finance Commissions. [34]

The MCPC is not substituting the widespread Lok Adalat system with court annexed mediation (given the figures involved, it certainly cannot), but is supplementing it, particularly in respect of cases that require greater time and effort to resolve.

Another significant development encouraging mediation in the recent past has been the establishment of the Delhi Dispute Resolution Society (DDRS) in Delhi - an attempt by the Government of Delhi to resolve disputes without the disputing parties having to approach a court. The mission of the society is to ensure timely and responsive justice and also to provide the people of Delhi with easy access to justice.[35] The DDRS has slowly built up a citizen's movement of community dispute resolution. It has established nine mediation centres and one mediation clinic in Delhi which are managed by the coordinators who are paid by the Delhi Government. Among the large variety of disputes dealt with by the mediation centres of the DDRS are petty disputes of a recurring nature that occur in a community, such as disputes between a landlord and a tenant, differences

[34] The Finance Commission is constituted by the President of India under Article 280 of the Constitution. It makes recommendations to the President, inter alia, as to the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them and the allocation between the States of the respective shares of such proceeds.

[35] The Citizens Charter of the DDRS. http://delhi.gov.in/wps/wcm/connect/doit_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/Citizen+Charter Last accessed on 10.07.2016, 11:14 AM.

arising from parking of vehicles, noisy celebrations, neighbourhood nuisance etc. These mediation centres have resolved over 10,000 cases over the last few years.[36] Providing an avenue for such dispute resolution fosters, among other things, social equilibrium and harmony.

Apart from these success stories, it is evident that mediation as an efficacious alternative dispute resolution mechanism is slowly gaining ground since some mediators are gradually shifting away from court annexed mediation to private mediation. Though the number of such 'professional' mediators is very limited, there is a perceptible change in the mindset of some lawyers, apart from some disputants who are willing to try out an alternative.

Challenges and Solutions recognized in Regional Conferences on Mediation

Between 2015 and 2016, the MCPC organized five regional conferences on issues relating to court annexed mediation and encouraging it as a viable ADR system. These regional conferences were held between August 2015 and January 2016. All the High Courts in the country participated in the regional conferences. They were represented by those judges who are members of the Mediation Committee of the participating High Court, the Member Secretary of State Legal Services Authority, Coordinators of certain Mediation Centres, mediators and trainers were also among the participants. All the participating High Courts presented the progress made in encouraging mediation, the ongoing efforts to improve access to mediation as an ADR mechanism, the challenges faced by them and certain plausible measures which could prove to be significant in increasing the success rate of settlements through mediation.

[36] The figures made available to the author are that as on 31.03.2016. The DDRS mediation centres had received 36,889 references and 14,241 disputes had been settled.

The presentations made by the participating High Courts across the country reflect various common issues faced by them with respect to dispute resolution through mediation. The top three issues are briefly mentioned below.

1. Lack of Awareness: The one most basic reason for the slow acceptance of dispute resolution through mediation is simply that most litigants are not aware of the advantages and benefits of the process of mediation and what it entails or the possibility of resolving a dispute through a non-adversarial approach. Lack of awareness is more pronounced in the rural areas as most of the infrastructure related developments in mediation are concentrated in the urban areas. Moreover, there is a possibility that concerted efforts to promote other ADR mechanisms like Lok Adalats by the Legal Services Authority might be adversely impacting on the resort to mediation as an equally viable dispute resolution mechanism.

Solutions: It is important to ensure that the benefits of mediation are adequately publicized and its advantages promoted by the higher judiciary in the country. The Bar too needs to be sensitized to promote its participation in out of court settlement processes like mediation. Similarly, there is a need of frequent seminars and meets for referral judges to keep them sensitized regarding the need to increase referrals to mediation and to activate them to do so. Electronic and print media should be exploited to its fullest in spreading awareness regarding mediation. While the most popular campaigning methods are advertisements and jingles on radio and television, they can be made more interactive. Assistance from professional agencies can be availed of in the dissemination of information regarding mediation as well as conducting empirical research so as to enable better implementation and supervision. The emerging popularity of social media makes it easier and more economical to spread awareness among the public. The aim should

be to reach out to all parts of the country and not be confined to the urban areas where information is easier to transmit and receive.

2. Lack of Incentives: The next obstacle to the growth of mediation is that the stakeholders find the process to be lacking in adequate incentives. Mediators, Lawyers, Referral Judges and the parties to the dispute themselves are the major stakeholders in the mediation process. The information gathered from various mediation centres in all parts of the country suggests that there are not enough incentives for the stakeholders to make efforts towards promotion of the process. Lawyers are apprehensive that out of court resolutions will adversely impact their private practice, parties are not confident enough of the final relief they would get, judges might view it as a dilution of their say over a matter while mediators have much to complain about in matters relating to adequate remuneration and accreditation of mediators. Parties might have real apprehensions regarding the binding nature of the settlement arrived through mediation. Therefore, it is witnessed that parties with adequate resources and social standing do not usually opt for mediation. Mediation is not a full time engagement and therefore mediators might view it as their secondary obligation. Low referral rates might be a result of the ‘points system’ where conclusion of cases through mediation brings lower ‘points’ to the referral judges.

Solutions: Continuous interaction among different regions of the country and different stakeholders for the purpose of learning from the challenges faced, possible solutions and successes is important for not only motivating the concerned High Courts to ensure proper implementation, supervision and the required adaptations and revisions but also for evolving a more certain and uniform framework of mediation for all regions to the extent their peculiarities allow. In addition to the High Court mediation committee, district monitoring committees can be established to ensure that changing trends in mediation in a district are

available for analysis and provide a base for required policy changes. The four main stakeholders in the process can be assured of certain incentives. First, the parties could be refunded the court fee paid irrespective of the stage of referral to mediation and at the same time be assured of the enforceability of their settlements. Second, the referral judges should be assured a gradation point for cases resolved through cases referred by them. Third, the High Courts can also encourage judicial officers to participate in mediation trainings.

3. Absence of Legislation: A large body of problems in mediation can be resolved by enacting legislation. Unlike arbitration and Lok Adalats (the more popular dispute resolution processes) mediation lacks a statute governing the various aspects involved in the process. The absence of legislation is felt most acutely in the supervision and organization of mediators. Moreover, there is no mechanism in place to encourage attendance of the parties to mediation sessions. A statute might also prove to be a guide to the referral judges by laying down criteria for proper identification of cases suitable for settlement through mediation. In numerous cases, mediation does not succeed because of improper identification and referrals. Overall, there is an overwhelming uncertainty in the process due to the want of a binding code.

Solutions: There is a need for an institutional and legal framework for mediation at all levels from the national to the district level. A statute governing mediations could incorporate budgetary provisions for allocation of funds to cater to the requirements of a mediation centre. The statute might provide for compliance of a mediation settlement by the parties. The legislation could also be ‘expansionist’ by encouraging referrals from fora such as consumer commissions, motor accident claims tribunals, debt recovery tribunals etc. Standard protocol addressing issues such as use of video conferencing, direct notice to the parties

regarding the sessions and other incidental issues relating to mediation, supervision by the referral judge, etc. could be laid down.

Court annexed mediation can be more successful: Experience gained over the last more than ten years of active participation in activities relating to mediation in India, suggests that the challenges faced by the MCPC can easily be overcome through strategic planning.

In this direction, one of the important decisions taken by the MPCP is to encourage mediation in two metropolitan cities in every State. Once the 'mediation culture' is accepted in two metropolitan cities, its acceptance in other cities and towns in the State becomes that much easier. The stakeholders come to know, through word of mouth or through information made available through the social media or the print media, that mediation has been successful in a relatively close-by metropolitan city. This strategy has worked rather well in at least six States in the country. Even in these States, there is still a long way to go but at least some firm beginning has been made.

One of the positive results of adopting this strategy is that the number of mediators who have completed successful mediations has increased tremendously. Their suitability to become trainers is being assessed through the Mediation Committee of the concerned High Court and through a capsule course conducted for them to assess their potential for becoming trainers. After the basic formalities are completed in this regard and the mediators successfully complete the capsule course, they are put through a Training of Trainers programme. This has proved to be extremely successful and as of now there are a little more than 100 mediation trainers available in India. The MCPC has proposed to utilize their services to impart 40-hour training to those interested in becoming mediators and also to conduct refresher courses for existing mediators. While this may take some time

to achieve results, I am quite hopeful that there will be light at the end of the tunnel.

National Court Management Systems

As will be evident from the above discussion, case management through mediation has not been given any importance in the justice delivery system in India. This is despite the painstaking efforts of Justice Rao and legislative intervention. What is the reason? There is no answer to this, except perhaps a lack of interest in the judicial leadership to bring about effective judicial reforms. An exception to this disinterest was an idea conceptualized by Justice S.H. Kapadia, the then Chief Justice of India in consultation with the Minister of Law and Justice, Government of India. The Chief Justice established a committee called the National Court Management Systems (NCMS) in May, 2012. The terms of reference of the NCMS consisted of six policy issues[37] with one of them being to introduce a system of Case Management to enhance the user friendliness of the judicial system.

A Policy and Action Plan prepared by the NCMS in consultation with an advisory committee was released by the Chief Justice of India in 2012 with reference to ADR under its 'case management' action plan.[38] A sub-committee headed by Justice A.M. Khanwilkar (then Judge of the Bombay High Court) formulated an advisory report on case management on the basis of suggestion from various High Courts in the country as well as experts on the subject. It included a discussion on aspects like best practices, experiences of other countries, a five-year development plan for management, computerization of the processes, determination of judge-staff and judge-case ratio, development of performance index for judicial officers, determination of time limits for various stages in a case

[37] http://supremecourtofindia.nic.in/judges/sjud/ncms27092012.pdf Last accessed on 10.07.2016, 11:31 AM.
[38] Ibid.

among many others. The advisory report reiterated the significance of implementation of section 89 of the CPC and development of alternative dispute mechanisms.[39]

Notwithstanding this, case management in India has not received the consideration that it deserves and these two significant developments on the subject have remained in the nature of recognition or acknowledgement of the necessity of case management and nothing more. Unfortunately, preparing a concrete framework and then implementing it does not seem to appear on the horizon. The only aspect of case management that appears to be getting some consideration is ADR (generally) but even that is not viewed through the lens of case management. Developments in ADR are as necessary as developments in case management but the tragedy is that the twain do not meet.

Each legal system must formulate a tailor made case management mechanism for it to be successful. For instance, in India certain significant policy decisions might have to be taken before a case flow management mechanism is introduced. Due to the work load, judges may not be able to undertake the constant monitoring required under case management and new posts may have to be sanctioned. This would require serious consideration on many aspects such as the qualifications of the personnel who would be undertaking this task, the cost involved etc. The sheer bulk of case load in the courts in India makes any manual case flow management virtually impossible and therefore requisite software will have to be put in place for constant monitoring, supervision, updation of cases. This is being done through the e-Committee of the Supreme Court. This seemingly easy task has finer considerations like training staff, inculcating acceptability of new technology, providing access to internet etc. Further, attorney compliance,

[39] http://www.sci.nic.in/Case%20Management%20System.pdf Last accessed on 08.07.2016, 11:30 PM.

especially in the district courts might prove to be a significant impediment in any effort towards a case management system.

Conclusion

The reason for the failure of most potentially good efforts in introducing case management through mediation and other prevailing ADR systems and towards improving the existing conditions (be it arrears, mismanagement, alternative dispute resolution) is rooted in behavioural concerns of the stakeholders. It might be an apprehension of the unknown, insecurity or simply some vested interests which make implementation of novel ideas difficult. Therefore, each jurisdiction has to recognize such fundamental impediments and work towards their elimination or resolution. Small steps in the form of pilot introductions and sufficient engagement with the stakeholders can result in gradual reforms and the aim should be to not cease trying. The question is: Can this be achieved in a specified time-frame in India? Is there a will and commitment to bring about the changes required? That is the real challenge.

ADR and Access to Justice: Issues and Perspectives

Hon'ble Thiru Justice S.B.Sinha, Judge Supreme Court of India

Introduction

Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for generations down the line. Preamble to our Constitution reflects such aspiration as "justice-social, economic and political". Article 39-A of the Constitution provides for ensuring equal access to justice. Administration of Justice involves protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.

The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition with delay, cost, procedure speak out the need of better options, approaches and avenues. Alternative Dispute Resolution mechanism is a click to that option.

Mahatma Gandhi had put in correct words as : "I had learnt the true picture of law. I had learnt to find out the better side of human nature and to enter men's heart. I realised that the true function of a lawyer was to unite partie riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromised of hundred of cases. I lost nothing thereby-not even money-certainly not my soul."

Can't we strive for better 'Access to Justice'?

This has been rightly said that: 'An effective judicial system requires not only that just results be reached but that they be reached swiftly.' But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as a life time, and some times litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from suffering harassment. Thus, there is a chain reaction of litigation process and civil cases may even give rise to criminal cases. ***Speedy disposal of cases and delivery***

of quality justice is an enduring agenda for all who are concerned with administration of justice.

In this context, there is an imminent need to supplement the current infrastructure of courts by means of Alternative Dispute Resolution (ADR) mechanisms. Apart from bringing efficiency in working of the judiciary, measures are being taken all over the world for availing ADR systems for resolving pending disputes as well as at pre-litigation stage. Efforts towards ADR have met with considerable success and good results elsewhere in the world, especially in the litigation-heavy United States, where professional teams of mediators and conciliators have productively supplemented the dispute resolution and adjudication process.

In 1995 the International Center for Alternative Dispute Resolution (ICADR) was inaugurated by Shri P.V.Narasimha Rao, the Prime Minister of India had observed:

> While reforms in the judicial sector should be undertaken with necessary speed, it does not appear that courts and tribunals will be in a position to hear the entire burden of the justice system. It is incumbent on government to provide a reasonable cost as many modes of settlements of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution sot hat the court system proper would be left with a smaller number of important disputes that demand judicial attention.

Problems of Formal Legal system:

Awareness: The lack of awareness of legal rights and remedies among common people acts as a formidable barrier to accessing the formal legal system.

Mystification: The language of the law, invariably in very difficult and complicated English, makes it unintelligible even to the literate or educated person. Only few

attempts have been made at vernacular sing the language of the law and making it simpler and easily comprehensible to the person.

Delays: The greatest challenge that the justice delivery system faces today is the delay in the disposal of case and prohibitive cost of litigation. Alternative dispute resolution wads thought of as a weapon to meet this challenge. The average waiting time, both in the civil and criminal subordinate courts, can extent to several years. This negates fair justice. To this end, there are several barricades. The judiciary in India is already suffering from a docket explosion. In fact, as on 31st October 2005, the number of cases pending before the Supreme Court was 253587003. The huge backlog of cases only makes justice less accessible. The delay in the judicial system results in loss of public confidence on the confidence on the concept of justice.

Expenses and Costs: We are all aware of the ineffectiveness of our cost regime-even the successful litigant is unable to recover the actual cost of the litigation. The considerable delay in reaching the conclusion in any litigation adds to the costs and makes the absence of an effective mechanism for their recovery even more problematic.

What is Alternative Dispute Resolution system?

ADR is not a recent phenomenon as the concept of parties settling their disputes themselves or with the help of third party, is very well-known to ancient India. Disputes were peacefully decided by the intervention of Kulas (family assemblies), Srenis (guilds o men of similar occupation), Parishad, etc.,

The primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of “access of justice” for all. ADR system seeks to provide cheap, simple, quick and accessible justice. ADR is a process distinct from normal judicial process. Under this, disputes are settled with the assistance of third party, where proceedings are simple and are conducted, by and large, in the manner agree3d to by the parties. ADR stimulates to resolve the disputes expeditiously with less expenditure of time, talent money with the decision making process towards substantial justice, maintaining to confidentiality of subject matter. **So, precisely saying, ADR aims at**

provide justice that not only resolves dispute but also harmonizes the relation of the parties.

What are the mechanisms of ADR?

- Arbitration
- Mediation
- Conciliation/Reconciliation
- Negotiation
- Lok Adalat

ADR can be broadly classified into two categories; court-annexed options (it includes mediation, conciliation) and community based dispute resolution mechanism (Lok-Adalat).

What are the functions of ADR?

1. ADR is not to supplant altogether the traditional legal system, but it offers an alternative form to the litigating parties.
2. ADR tends to settle the disputes in a neutral and amicable fashion
3. ADR can be seen as integral to the process of judicial reform signifying the "access to justice approach".
4. The very raison d'etre of the ADR is an effort towards the etiology of malise and its elimination rather than treatment of its symptoms. That means, this approach seeks for a better and longer lasting solution.
5. ADR can be viewed as a compromise where non loses or wins, but everyone walks out a winner.

Advantage of ADR

Justice warren Burger, the former CJI of American Supreme Court had observed:

"the harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of Judges in numbers never before contemplated. The notion-that ordinary people want black robed judges well-dressed lawyers, fine paneled court rooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible". The benefits or advantages that can be accomplished by the ADR system are summed up here briefly:

1. Reliable information is an indispensable tool for adjudicator. Judicial proceedings make halting progress because of reluctance of parties to part with inconvenient information. ADR moves this drawback in the judicial system. The truth could be difficulty found out by making a person stand in the witness-box and he pilloried in the public gaze. Information can be gathered more efficiently by an informal exchange across the table. Therefore, ADR is a step towards success where judicial system has failed in eliciting facts efficiently.

2. In Mediation or Conciliation, parties are themselves prodded to take a decision, since they are themselves decision-makers and they are aware of the truth of their position, the obstacle does not exist.

3. The formality involved in the ADR is lesser than traditional judicial process and costs incurred is very low in ADR

4. While the cost procedure results in win-lose situation for the disputants

5. Finality of the result, cost involved is less, the time required to be spent is less, efficiency of the mechanism, possibility of avoiding disruption.

An analysis on Evolution of ADR mechanisms in Indian Judiciary

ADR was at one point of time considered to be a voluntary act on the apart of the parties which has obtained statutory recognition in terms of CPC Amendment Act, 1999, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002. The Parliament apart from litigants and the general public as also the statutory authorities Like Legal Services Authority have now thrown the ball into the court of the judiciary. What therefore, now is required would be implementation of the Parliamentary object. The access to justice is a human right and fair trial is also a human right. In some countries trial within a reasonable time is a part of the human right legislation. But, in our country, it is a Constitutional obligation in terms of Art.14 and 21. Recourse to ADR as a means to have access to justice may, therefore, have to be considered as a human right problem. Considered in that context the judiciary will have an important role to play.

Even before the existence of Section 89 of the Civil Procedure Code (CPC), there were various provisions that gave the power to the courts to refer disputes to mediation, which sadly have not really been utilized. Such provisions, inter alia, are in the Industrial Disputes Act, the Hindu Marriage Act and the Family Courts Act and also present in a very nascent form via Section 80, Order 32 A and Rule 5 B of Order 27 of the CPC. A trend of this line of thought can also be seen in *ONGC Vs. Western Co. of Northern America and ONGC Vs. Saw Pipes Ltd.*

Industrial Disputes Act, 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes.

Section 23(2) of the **Hindu Marriage Act, 1955** mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance, make an endeavor to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case.

For the purpose of reconciliation the Court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with the direction to report to the court as to the result of the reconciliation. [section 23(3) of the Act].

The **Family Court Act, 1984** was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matter connected therewith by adopting an approach radically different from that ordinary civil proceedings. *[K.A.Abdul Jalees v. T.A.Sahida (2003) 4 SCC 166].*Section 9 of the Family Courts Act, 1984 lays down the duty of the family Court to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter.

The Family Court has also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility.

Section 80(1) of Code of Civil Procedure lays down that no suit shall be instituted against government or public officer unless a notice has been delivered at the government office stating the cause of action, name, etc. The object of Section 80 of CPC – the whole object of serving notice u/s 80 is to give the government sufficient warning of the case which is of going to be instituted against it and that the government, if it so wished can settle the claim without litigation or afford restitution without recourse to a court of laws. ***[Ghanshyam Dass v. Domination of India, (1984) 3 SCC 46].*** The object of s.80 is to give the government the opportunity to consider its or his legal position and if that course if justified to make amends or settle the claim out of court. - ***[Raghunath Das v. UOI AIR 1969 SC 674]***

Order 23 Rule 3 of CPC is a provision for making an 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 proves 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 term of such compromise or adjustment.

Order 27 Rule 5B confers a duty on court in suit against the government or a public officer to assist in arriving at a settlement. In a suit where Government or public officer is a party it shall be the duty of the Court to make an endeavor at first instance, where it is possible according to the nature of the case, to assist the parties in arriving at a settlement.

If it appears to the court in any stage of the proceedings that there is a reasonable possibility of a settlement, the court may adjourn the proceeding to enable attempts to be made to effect settlement.

Order 32A of CPC lays down the provision relating to "suits relating to matter concerning the family". It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigations involving affairs of the family seem to require special approach in view of the serious emotional aspects involved. In this circumstances, the objective of family counseling as a method of achieving the object of preservation of family should be kept in forefront. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement.

The provisions of this Order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession, etc.,

Rule 3 imposes a duty on the Court to make an effort of settlement by way of providing assistance where it is possible to do so. The Court may also adjourns the proceeding if it thinks fir to enable attempt to be made to effect a settlement where there is a reasonable possibility of settlement. In discharge of this duty Court may take assistance of **welfare expert** who is engaged in promoting the welfare of the family. [Rule 4]

The concept of employing ADR has undergone a sea change with the insertion of S.89 of CPC by amendment in 2002. As regards the actual content, s.89 of CPC lays

down that where it appears to the court that there exists element of settlement, which may be acceptable to the parties, the Court shall formulate the terms of the settlement and give them to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer it to either:- Arbitration, Conciliation; Judicial Settlement including settlement through Lok Adalats; or Mediation. As per sub-section (2) of Section 89, when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act will apply. When the Court refers the dispute of Lok Adalats for settlement by an institution or person, the Legal Services Authorities, Act, 1987 alone shall apply.

Supreme Court started issuing various directions as so as to see that the public sector undertakings of the Central Govt. and their counterparts in the States should not fight their litigation in court by spending money on fees on counsel, court fees, procedural expenses and waiting public time. (see Oil and Natural Gas Commission v. Collector of Central Excise, 1992 Supp2 SCC 432, Oil and Natural Gas Commission v. Collector of Central Excise, 1995 Supp4 SCC 541 and Chief Conservator of Forests v. Collector, (2003) 3 SCC 472).

In *ONGC v. Collector of Central Excise, [1992 Supp2 SCC 432],[ONGC I]* there was a disputes between the public sector undertaking and GOI involving principles to be examined at the highest governmental level. Court held it should not be brought before the Court wasting public money any time. In *ONGC v. Collector of Central Excise, [1995 Supp4 SCC 541] (ONGC II)* dispute was between govt. dept and PSU. Report was submitted by cabinet secretary pursuant to SC order indicating that instructions has been issued to all depts. It was held that public undertaking to resolve the disputes amicably by mutal consultation in or through or good offices empowered agencies of govt. or arbitration avoiding litigation. GOI directed to constitute a committee consisting of representatives of different depts. To monitor such disputes and to ensure that no litigation comes to court or tribunal without the Committee's prior examination and clearance. The order was directed to communicate to every HC for information to all subordinate courts. In ***Chief Conservator of Forests v. Collector (2003) 3 SCC 472 ONGC I AND II*** were relied on and it was said that state/union govt. must evolve a

mechanism for resolving interdepartmental controversies- disputes between dept. of Govt cannot be contested in court.

In ***Punjab & Sind Bank v. Allahabad Bank, 2006(3) SCALE 557*** it was held that the direction of the Supreme Court in **ONGC III** [(2004) 6 SCC 437], to the govt. to set up committee to monitor disputes between government departments and public sector undertakings make it clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee.

In the judgment of the Supreme Court of India in ***Salem Bar Association vs. Union of India (2005) 6 SCC 344,*** the Supreme Court has requested prepare model rules for ADR and also draft rules of mediation under section 89(2)(d) of Code of Civil Procedure, 1908. The rule is framed as "Alternative Dispute Resolution and Mediation Rules, 2003".

Rule 4 of the Alternative Dispute Resolution and Mediation Rules, 2003", lays down that the Court has to give guidance to parties (when parties are opting for any mode of ADR) by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their opinion as to the particular mode of settlement, namely;

(i) it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;

(ii) where there is **no relation between the parties** which requires to be presented it will be in the interests of the parties to seek reference of the matter to arbitration as envisaged in clause (1) of sub-section (1) of sec.89.

(iii) where there is a **relationships between the parties which requires to be preserved,** it will be in the interests of the parties to seek reference of the matter to **conciliation or mediation**, as envisaged in clauses (b) or (d) of sub-section (1) of sec.89.

The Rule also says that Disputes arising in **matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.**

(iv) where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section(1) of section 89.

According to **Rule 8,** the provisions of these Rules may be applied to proceedings before the Courts, including Family courts constituted under the Family Courts (66 of 1984), while dealing with matrimonial, and child custody disputes.

Different modes of justice delivery mechanism of ADR:

The Constitution of India calls upon the state to provide for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic inability. India socio-economic conditions warrant highly motivated and sensitized legal service programs as large population of consumers of justice (heart of the judicial anatomy) are either poor or ignorant or illiterate or backward, and as such, at a disadvantageous position. The State, therefore, has a duty of secure that the operation of legal system promotes justice on the basis of equal opportunity. Alternative dispute resolution is, neatly, worked out in the concept of Lok Adalat. It has provided an important juristic technology and vital tool for easy and early settlement of disputes. It has gain proved to be a successful and viable national imperative and incumbency, guest suited for the larger and higher section so the present society of Indian system. The concept of legal services which includes Lok Adalat is a **"revolutionary evolution of resolution of disputes".** Lok Adalats provide speedy and inexpensive justice in both rural and urban areas. They cater the need of weaker sections of society.

The object of the Legal Services Authority Act, 1987 was to constitute legal services authorise is for providing free and competent legal services to the weaker sections of the society; to organise Lok Adalats to ensure that the operations of the legal system promoted justice on a basis of equal opportunity.

Under the Act permanent Lok Adalat is to set up for providing compulsory pre-litigation mechanism for conciliations and settlement of cases relating too public utility services.

The concept of Lok Adalat is no longer an experiment in India, but it is an effective and efficient, pioneering and palliative alternative mode of dispute settlement which is accepted as a viable economic, efficient, informal, expeditious form of resolution of disputes. It is hybrid or admixture of mediation, negotiation, arbitration and participation. The true basis of settlement of disputes by the Lok Adalat is the principle of mutual consent, voluntary acceptance of conciliation with the help of counselors and conciliation. It is a participative, promising and potential ADRM. It revolves round the principle of creating awareness amongst the disputants to the effect that their welfare and interest, really, lies in arriving, at amicable, immediate, consensual and peaceful settlement of the disputes.

*Shri M.C.Setalvad,*former Attorney General of India has observed: "....equality is the basis of all modern systems of jurisprudence and administration of justice... in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal ...Unless some provision is made for assisting the poor men for the payment of Court fees and lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice."

The great advantage of arbitration is that it combines strength with flexibility. Strength because, it yields enforceable decisions and is backed by judicial framework which , in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose the procedure which fit nature of the dispute and the business context in which it occurs. Arbitration Act, 1940. Arbitration acknowledged the pivotal role of the partie sin resolving their disputes. But this Act did not fulfill the essential functions of ADR The extent of Judicial Interference under the Act defeated the very purpose of speedy justice. The Act 1996 came into effect to remove few of its difficulties and judicial intervention was limited to some extent. But Arbitration had some ailments: (I) traditional adversarial system is run in a arbitration proceedings; (II)

proceedings are delayed as both parties take lot o time presenting their submissions; (III) the cost of arbitration is much more than the order ADR process, thereby, it does not attract the poor litigants; (IV) participatory role of the parties are neglected as the submissions are mode by the party counsels.

Mediation can be defined as a process to resolve a dispute between two or more parties in the presence of a mutually accepted third party who through confidential discussion attempts to help the parties in reaching a commonly agreed solution to their problems. The biggest advantage of mediation is that the entire process is strictly confidential. Mediation saves time and financial and emotional cost of resolving a dispute, thereby, leads to reestablishment of trust and respect among the parties.

Other advantages are:

An interest-based procedure is followed as distinct from a right-based procedure adopted by a court

Emotions and feelings between parties can be preserved causing minimum stress and heartache.

There is possibility of resolving multiple disputes.

A properly conceived mediation as method of alternative dispute resolution will ensure wide access to justice for all sections of the people. This system has assumed a great importance as Lok Adalats are regular features in various parts of the country. Except litigants who stand to gain by delaying the process of justice, others do not perhaps enjoy taking recourse of litigation that consumes innumerable number of years and considerable amounts by way of expenses. *Martin Luther King* had said "The bank of Justice shall not be bankrupt" . This is only possible if we develop effective and efficient mechanism of alternate dispute resolution by setting up of extra mediation centers at all level in the country.

There is a subtle difference between mediation and conciliation. While in meditation, the third party, neutral intermediary, termed as mediator plays more active role by giving independent compromise formulas after hearing both the parties; in conciliation, the third neutral intermediary's role, mainly is to bring the parties together in a frame of mind

to forget their animosities and be prepared for an acceptable compromise on terms mid-way between the stands taken before the commencement of conciliation proceedings.

Three reasons why mediation or conciliation is not gaining momentum:

Lack of institutionalization
Lack of case management
Excessive interlocutory appeals

Out of the methods of ADR, mediation and conciliation are the most suited methods for a country like India because by and large people in India at least in the rural areas would like to settle their disputes amicably. But in urban areas case is different where in commercial disputes, litigants want quick disposal of cases, would like the same to be done under a legal framework and with the intervention of professionals and so, these litigants prefer arbitration.

Not many Indians can afford litigation. This kind of state of affairs makes common people, especially rural people, cynical about judicial process.

We must take the ADR mechanism beyond the cities. Gram Nayalas should process 60 to 70 percent of rural litigation leaving the regular courts to devote their time to complex civil and criminal matters. With a participatory, flexible machinery available at the village level where non-adversarial, settlement-oriented procedures are employed, the rural people will have fair, quick and inexpensive system of dispute settlement.

Rent and eviction constitute a considerable chunk of litigation in urban courts and they take on an average time period of three years or more than that. The Law Commission felt that an alternative method for these disputes is imperative.

Panchayati Raj or self-governance at the village level is in revolutionary process in our democratic governance. Along with powers of administration, system of self-government dispute resolution can also be delegated to these institutes. If the object of judicial reform is fair, quick and inexpensive justice to the common people, there can be no better way to pursue the objective than to invoke participatory systems at the grass root

level for simpler disputes so that judicial time at higher levels is sought only for hard and complex litigation.

According to Law Commission recommendation a very simple procedure envisaging quick decision, informed by justice, equity and good conscience. The CPC and Evidence Act not to be applied to proceedings before those. In respect of jurisdiction, the Commission preferred criminal jurisdiction covering boundary disputes, tenancies, irrigation disputes, minor property disputes, family disputes, wage disputes irrespective of pecuniary value of the dispute. It would be wise to avoid to confer criminal jurisdiction of Gram Nyayalayas in the initial stage. In districts, towns and other urban areas where the nature of disputes are quantitatively different form rural areas, the litigations are of money suits, suits on mortgage, succession and inheritance suits, rent and eviction suits, matrimonial disputes. The staggering number if pendency of suits seeks for an alternative.

Few maladies and its ailments:

We have already examined in the "evolution of ADR mechanisms" that initially the ADR mechanisms were tried to be implemented with much emphasis on Statutes by way of inserting the ADR clauses in those statutes. But these process and policy was not of that much success. Thereby, the trend is the imposition of responsibility and duty on Court and in this process Courts are authorised to give directives for the adoption of ADR mechanisms by the parties and for that purpose Court has to play important role by way of giving guidance, etc. Power is also conferred upon court so that it can intervene in different stages of proceedings.

But these goals cannot be achieved unless requisite infrastructure is provided and institutional frame work is put to place. A judicial impact assessment is carried out in U.K. by preparing a financial memorandum whenever a new Bill is introduced. The

Financial memorandum indicates the amount of expenditure that is likely to be incurred as a result of any statute or amendment in the existing statute.

Before bringing in S.89 of the CPC and other Statutes, no assessment was carried out as regards financial implications or the infrastructural requirements too make it effective. For example:

> For meditation, trained mediator will be required and expenses will have to be incurred for their training. Most of our courts do not have adequate space even for their existing work, and thus, it may not be possible to accommodate them to provide for suitable accommodation of the ADR regime all these have to be complied with and this is not too late to make these arrangement.
>
> Mediation/Conciliation/reconciliation is carried out in a matrimonial matter in child custody case. Usually in the Dist. Courts, there is no space available for children to meet his parents. Some meetings are held in the Chambers of the Judges not only at the district level but also at the High Court.
>
> Conciliation is provided for under the Industrial Disputes Act and it takes place in the office of the Conciliation Officer or in the premises of the management which does not give a fair chance to the workmen to negotiate. There should be a neutral space for such mediation or negotiation.

The institutional framework must be brought about at three stages. The first stage is to bring awarenesss, the second awareness and the third implementation.

Awareness: in view of this holding seminars, workshops, etc. would be imperative. A ADR literacy programme has to be done for mass awareness. Awareness camp should be to change the mindset of all concerned disputants, the lawyers and judges.

Our lack of awareness would be tested from the fact that how many of us are aware that in terms of Sec.7(hb) of the Notaries Act, 1952 one of the functions of a notary is to act as an arbitrator, conciliator, if so required.

Acceptance: In this regard training of the ADR practitioners should be made by some University together with other institution. Extensive training would also be necessary to be imparted to those who intend to act as a facilitator, mediators, conciliators.

Industrial dispute Act, 1947 provides for appointment of conciliator who although are "charged with the duty of mediating in the promoting the settlement of industrial disputes" failed in performing their duties as they do not have requisite training. Similarly matrimonial courts and family courts are unable to effectively settle the dispute as they do not have either the requisite training or the mindset there of.

Imparting of training should be made a part of continuing education on different facets of ADR so far as judicial officers and judges are concerned.

Implementation: for this purpose, judicial officers must be trained to identify cases which would be suitable for taking recourse to a particular form of ADR. In the decision of House of Lords in Dunnett V. Railtrack ill (In railway administration, [2002]2 All ER 850, the Court had noticed that: “the encouragement and facilitating of ADR by the court in an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and therefore, they have a duty to consider seriously the possibility of ADR procedures being utilized for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so.”

How to make ADR mechanisms more viable?

We cannot stop the inflow of cases because the doors of justice cannot be closed. But there is a dire need to increase the outflow either by strengthening (both qualitatively

and quantitatively) the capacity of the existing system or by way of finding some additional outlets. In this situation ADR mechanism implementation can be such a drastic step for which three things are required most:

- Mandatory reference to ADRs
- Case management by Judges
- Committed teams of Judges and Lawyers

Equal justice for all is a cardinal principle on which entire system of administration of justice based. It is too deep rooted in the body and spirit of common law as well as civil law jurisprudence that the very meaning which we ascribe to the word "justice" embraces it. We cannot conceive justice which is not fair and equal. Effective access to justice has thus come to be recognized as the most basic requirement, the most basic human right, in modern egalitarian legal system which purports to guarantee and not merely proclaims legal rights to all.

We should aim to achieve earlier and more proportionate resolution of legal problems and disputes by:

- Increasing advice and assistance to help people resolve their disputes earlier and more effectively;
- Increasing the opportunities for people involved in court cases to settle their disputes out of court; and
- Reducing delays in resolving those disputes that need to be decided by the courts.

To implement the noble ideas and to ensure the benefits of ADR to common people, the four essential players (government, bench, bar litigants) are required to coordinate and work as a whole system.

Case management includes identifying the issues in the case; summarily disposing of some issues and deciding in which order other issues to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence.

- **Government: G**ovt has to support new changes. If the govt support and implements changes, ADR institutes will have to be set up at every level from district to national level.
- **Bench:** unless mindset of the judges are changed, there will be no motivation for the lawyers to go to any of the ADR methods.
- **Bar:** the mindset of the members of the Bar is also to be changed accordingly otherwise it would be difficult it is difficult to implement ADR. The myth that ADR was alternative decline in Revenue or Alternative Drop in Revenue is now realizing that as more and more matters get resolved their work would increase and not decrease.
- **Litigants:** few parties are usually interested in delay and not hesitate in taking a stand so as to take the benefit if delay. Parties have to realize that at the end, litigation in court may prove very costly to them in terms of both cost and consequence.

Conclusion and suggestion:

ADR is quicker, cheaper, more user-friendly than courts. It gives people an involvement in the process of resolving their disputes that is not possible in public, formal and adversarial justice system perceived to be dominated by the abstruse procedure and recondite language of law. It offers choice: choice of method, of procedure, of cost, of representation, of location. Because often it is quicker than judicial proceedings, if can

ease burdens on the Courts. Because it is cheaper, it can help to curb the upward spiral of legal costs and legal aid expenditure too, which would benefit the parties and the taxpayers.

In this juncture, few things are most required to be done for furtherance of smooth ADR mechanisms. Few of them are:

Creation of awareness and popularizing the methods is the first thing to be done. NGOs and medias have prominent role to play in this regard.

For Court- annexed mediation and conciliation, necessary personnel and infrastructure shall be needed for which government funding is necessary.

Training programmes on the ADR mechanism are of vital importance. State level judicial academies can assume the role of facilitator or active doer for that purpose.

While the Courts have never tired of providing access to justice for the teeming millions of this country, it would not be incorrect to state that the objective would be impossible to achieve without reform of the justice dispensation mechanism. There are two ways in which such reform can be achieved- through changes at the structural level, and through changes at the operational level. Changes at the structural level challenge the very framework itself and requires an examination of the viability of the alternative frameworks for dispensing justice. It might required an amendment to the Constitution itself or various statutes. On the other hand, changes at the operational level requires one to work within the framework trying to indentify various ways of improving the effectiveness of the legal system.

Needless to say, this will considerably reduce the load on the courts apart from providing instant justice at the door-step, without substantial cost being involved. This is also avoid procedural technicalities and delays and justice will hopefully be based on truth and morality, as per acknowledged considerations of delivering social justice.

Lexis®PSL ARBITRATION

Indian Supreme Court strikes down pre-deposit requirement in arbitration agreement (M/S Icomm Tele v Punjab State Water Supply & Sewerage Board)

First published on Lexis®PSL Arbitration on 26/03/2019

Arbitration analysis: The Indian Supreme Court (the Court) held as arbitrary and unconstitutional, an arbitration clause mandating a contractor of a State's Water Supply and Sewerage Board (the State Board) to furnish a pre-deposit of 10% of the amount of its claim in arbitration at the time of invocation of arbitration. In doing so, the Court re-affirmed the primary purpose of arbitration as 'de-clogging the Court system.' The Court held that such a pre-deposit clause was itself a 'clog' on entering the arbitral process and would render the same impermissibly 'ineffective and expensive.' Siddharth Ratho, Senior Member and Moazzam Khan, head of the International Dispute Resolution Practice at Nishith Desai Associates consider the decision.

M/S Icomm Tele Ltd v Punjab State Water Supply & Sewerage Board & Anr Civil Appeal No 2713 of 2019 (arising out of SLP (Civil) No 3307 of 2018)

What are the key implications of this decision?

In the recent past, we have witnessed courts increasingly adopting a pro-arbitration approach by refraining from interfering in the arbitral process. This judgment however, is a unique example of a court forwarding the object of arbitration by in fact taking the bold step of 'interfering' and rectifying a commercial understanding between parties that was found to be arbitrary and discouraging towards the arbitration process.

Through this judgment, the judiciary has demonstrated the ideal way in which courts may play a guiding role in the arbitral process by stepping in constructively when parties may overstep the four corners of the constitution or may act against the very objective of arbitration, while maintaining utmost reverence for party autonomy, the very crux of alternative dispute resolution mechanism. Parties should be mindful that although commercial contracts may be protected from judicial scrutiny, they are still required to be fair, just and reasonable.

It will also be interesting to see if this judgment leads to development of a new jurisprudence around claiming exemplary costs and damages and the calculation thereof in cases of frivolous claims.

What was the background?

The State Board had issued a notice inviting tender for certain works related to augmentation of water supply, sewerage schemes, pumping stations and such. M/S Icomm Tele Ltd (the Contractor) was eventually awarded the tender. Accordingly, a formal contract was entered between the State Board and the Contractor with the notice inviting the tender forming part and parcel of the formal contract.

The arbitration clause in question read as follows:

> 'viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall **furnish a "deposit-at-call" for ten percent of the amount claimed**, on a schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t the amount claimed and the balance, if any, shall be forfeited and paid to the other party.'

When disputes arose and arbitration was subsequently invoked, the Contractor sought waiver of the pre-deposit of 10% of the claim amount. On such a request being denied, the Contractor approached the High Court of Punjab & Haryana challenging the validity of such a pre-deposit requirement. However, the High Court did not find the condition to be arbitrary or unreasonable, thereby refusing to strike it down. The Contractor accordingly approached the Supreme Court to decide whether such a clause was in fact arbitrary and/or discriminatory, violative of Article 14 of the constitution of India (Article 14) and therefore liable to be set aside.

Contractor's submissions

The Contractor argued that the arbitration clause amounts to a contract of adhesion since there is unfair bargaining power between itself and the State Board due to which it ought to be struck down in keeping with the principals laid down in *Central Inland Water Transport Corpn v Brojo Nath Ganguly (1986) 3 SCC 156* (not reported by LexisNexis® UK). The Contractor further argued that such a clause was arbitrary and violative of Article 14 as even if the award is in favour of a claimant, what would be refunded is only in proportion to the actual amount awarded with the rest being forfeited to a respondent, despite it having lost the case.

Lastly it argued that the 10% deposit requirement would amount to a clog on entering the arbitration process while attempting to discourage filing of frivolous claim, and that in any event, frivolous claims could always be compensated through heavy costs stipulated in the eventual award.

State Board's submissions

The State Board countered the above stating that there is no such infraction of Article 14 since the said clause would apply to both parties equally, and this being the case, the clause cannot be struck down as being discriminatory. It further submitted that *Central Inland Water Transport Corpn* which lays down that contracts of adhesion ie contracts in which there is unequal bargaining power between private persons and the State are liable to be set aside because they are unconscionable, does not apply where both parties are businessmen and where the contract is a commercial transaction.

What did the Indian Supreme Court decide?

Violation of Article 14

The Court held that a clause can be violative of Article 14 if it is found to be discriminatory or arbitrary. It agreed with the State Board's argument that the concept of unequal bargaining does not apply to commercial contracts and that therefore the said clause could not be said to be discriminatory. The reason being that businessmen ought to be aware of the nature of commercial transactions and therefore cannot use the argument of unequal bargaining power to their advantage. However, it placed reliance on *ABL International Ltd. v Export Credit Guarantee Corpn Of India Ltd, (2004) 3 SCC 553* (not reported by LexisNexis® UK) to hold that even within the contractual sphere, the requirement of Article 14 to act fairly, justly and reasonably by persons who are 'state' authorities or instrumentalities continues.

The Court thus opined that conditions laid down in the arbitration clause are arbitrary (even if not discriminatory) for the following reasons:

- there is no nexus between frivolous claims and the condition of 10% pre-deposit since the pre-deposit amount is a pre-condition regardless of whether the claim is frivolous or genuine. Frivolous claims can be avoided by imposing exemplary costs and therefore an arbitrary condition of pre-deposit such as in the clause in question need not be resorted to
- given the fact that the said clause envisaged refund only in proportion to the amount awarded, with the balance being forfeited to the other party, even though such a party may have lost the case, the same is certainly arbitrary and violative of Article 14, even if not discriminatory

Deterring a party from invoking arbitration is contrary to the object of de-clogging the court system

The Court emphasised that arbitration is to be encouraged because of high pendency of cases and costs of litigation. It pointed out that several judgments have reiterated that the primary object of arbitration is to reach a final disposal of disputes in a speedy, effective, inexpensive and expeditious manner. A deposit of 10% of a huge claim would be far greater than any court fee that may be charged for filing a suit, it observed. Considering this, the Court opined that deterring a party to an arbitration from invoking such an alternative resolution process by such a 'deposit-at-call' clause would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive.

Having considered the above, the Court went on to strike down the said clause and allowed the appeal of the Contractor.

The views expressed are not necessarily those of the proprietor.

Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.

(2018)6SCC287

Decided On: 15.03.2018

Judges/Coram: *Rohinton Fali Nariman and Navin Sinha, JJ.*

JUDGMENT

1. Leave granted.

2. The present batch of appeals raises an important question as to the construction of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the "Amendment Act"), which reads as follows:

Section 26. Act not to apply to pending arbitral proceedings.

Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

3. The questions raised in these appeals require the mentioning of only a few important dates. In four of these appeals, namely, **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.** (SLP(C) No. 19545-19546 of 2016), **Arup Deb and Ors. v. Global Asia Venture Co.** (SLP(C) No. 20224 of 2016), **M/s. Maharashtra Airports Development Co. Ltd. v. M/s. PBA Infrastructure Ltd.** (SLP(C) No. 5021 of 2017) and **UB Cotton Pvt. Ltd. v. Jayshri Ginning and Spinning Pvt. Ltd.** (SLP(C) No. 33690 of 2017), Section 34 applications under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "1996 Act") were all filed prior to the coming into force of the Amendment Act w.e.f. 23rd October, 2015. In the other four appeals, the Section 34 applications were filed after the Amendment Act came into force. The question with which we are confronted is as to whether Section 36, which was substituted by the Amendment Act, would apply in its amended form or in its original form to the appeals in question.

4. The relevant facts of the first appeal namely, **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.** (SLP(C) Nos. 19545-19546 of 2016), are as follows. A notice dated 18th January, 2012 was sent by Respondent No. 1 invoking arbitration under a franchise agreement dated 12th March, 2011. A Sole Arbitrator was appointed, who delivered two arbitral awards dated 22nd June, 2015 against the Appellant and in favour of the Respondents. On 16th September, 2015, the Appellants filed an application Under Section 34 of the 1996 Act in the Bombay High Court challenging the aforesaid arbitral awards. On 26th November, 2015, the Respondents filed two execution applications in the High Court for payment of the amounts awarded under the two awards, pending enforcement of such awards. These were resisted by two Chamber Summons filed by the Appellants dated 3rd December, 2015, praying for dismissal of the aforesaid execution applications stating that the old Section 36 would be applicable, and that, therefore, there would be an automatic stay of the awards until the Section 34 proceedings had been decided. The Chamber Summons were argued before a learned Single Judge, who, by the impugned judgment in Special Leave Petition (Civil) No. 19545-19546 of 2016, dismissed the aforesaid Chamber Summons and found that the amended Section 36 would be applicable in the facts of this case. This is how the appeal from the aforesaid judgment has come before us.

5. As aforementioned, the skeletal dates necessary to decide the present appeals in the other cases would only be that so far as two of the other appeals are concerned, namely, **Arup Deb and Ors. v. Global Asia Venture Co.** (SLP(C) No. 20224 of 2016) and **M/s. Maharashtra Airports Development Co. Ltd. v. M/s. PBA Infrastructure Ltd.** (SLP(C) No. 5021 of 2017), the Section 34 applications were filed on 27th April, 2015, and 25th May, 2015 respectively and the stay petitions or execution applications in those cases filed Under Section 36 were dated 16th December, 2015 and 26th October, 2016 respectively. In **U.B. Cotton Pvt. Ltd. v. Jayshri Ginning and Spinning Pvt. Ltd.** (SLP(C) No. 33690 of 2017), the Section 34 application was filed on 22nd February, 2013 and the execution application was filed in 2014, which was transferred, by an order dated 12th January, 2017, to the Commercial Court, Rajkot as Execution Petition No. 1 of 2017. In the other cases, namely, **Wind World (India) Ltd. v. Enercon GMBH through its Director** (SLP(C) Nos. 8372-8373 of 2017), **Yogesh Mehra v. Enercon GMBH through its Director** (SLP(C) Nos. 8376-8378 of 2017), **Ajay Mehra v. Enercon GMBH through its Director** (SLP(C) Nos. 8374-8375 of 2017), and **Anuradha Bhatia v. M/s. Ardee Infrastructure Pvt. Ltd.** (SLP(C) Nos. 9599-9600 of 2017), the Section 34 applications were filed after 23rd October, 2015, viz., on 7th December, 2016 in the first two appeals, on 6th December, 2016 in the third appeal and on 4th January, 2016 in the last appeal.

6. Section 36, which is the bone of contention in the present appeals, is set out hereinbelow:

PRE-AMENDED PROVISION

Section 36. Enforcement.

Where the time for making an application to set aside the arbitral award Under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

AMENDED PROVISION

Section 36. Enforcement.

(1) Where the time for making an application to set aside the arbitral award Under Section 34 has expired, then, subject to the provisions of Sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court Under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of Sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application Under Sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

…

17. Having heard extensive and wide ranging arguments on the reach of Section 26 of the Amendment Act, it will be important to first bear in mind the principles of interpretation of such a provision. That an Amendment Act does include within it provisions that may be repealed either wholly or partially and that the provisions of Section 6 of the General Clauses Act would generally apply to such Amendment Acts is beyond any doubt-See **Bhagat Ram Sharma v. Union of India**, MANU/SC/0611/1987 : 1988 (Supp) SCC 30 at 40-41. That such a provision is akin to a repeal and savings Clause would be clear when it is read with Section 27 of the Amendment Act and Section 85 of the 1996 Act, which are set out hereinbelow:

Section 27. Repeal and savings.

(1) The Arbitration and Conciliation (Amendment) Ordinance, 2015, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.

xxx xxx xxx

Section 85. Repeal and savings.--

(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,--

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all Rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

18. At this point, it is instructive to refer to the 246th Law Commission Report which led to the Amendment Act. This Report, which was handed over to the Government in August, 2014, had this to state on why it was proposing to replace Section 36 of the 1996 Act:

AUTOMATIC STAY OF ENFORCEMENT OF THE AWARD UPON ADMISSION OF CHALLENGE

43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition Under Section 34 has expired or after the Section 34 petition has been dismissed. In other words, the pendency of a Section 34 petition renders an arbitral award unenforceable. The Supreme Court, in National Aluminum Co. Ltd. v. Pressteel & Fabrications, MANU/SC/1082/2003 : (2004) 1 SCC 540 held that by virtue of Section 36, it was impermissible to pass an Order directing the losing party to deposit any part of the award into Court. While this

decision was in relation to the powers of the Supreme Court to pass such an order Under Section 42, the Bombay High Court in Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai MANU/MH/1398/2013 : 2014 (1) Arb LR 512 (Bom) applied the same principle to the powers of a Court Under Section 9 of the Act as well. Admission of a Section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor.

44. The Supreme Court, in *National Aluminium*, has criticized the present situation in the following words:

However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed Under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.

45. In order to rectify this mischief, certain amendments have been suggested by the Commission to Section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application Under Section 34.

So far as the transitory provision, so described by the Report, is concerned, the Report stated:

76. The Commission has proposed to insert the new Section 85-A to the Act, to clarify the scope of operation of each of the amendments with respect to pending arbitrations/proceedings. As a general rule, the amendments will operate prospectively, except in certain cases as set out in Section 85-A or otherwise set out in the amendment itself.

The Report then went on to amend Section 36 as follows:

Amendment of Section 36

19. In Section 36, (i) add numbering as Sub-section (1) before the words "Where the time" and after the words "Section 34 has expired," delete the words "or such application having been made, it has been refused" and add the words "then subject to the provision of Sub-section (2) hereof,"

(ii) insert Sub-section "(2) Where an application to set aside the arbitral award has been filed in the Court Under Section 34, the filing of such an application shall not by itself render the award unenforceable, unless upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of Sub-section (3) hereof;"

(iii) insert Sub-section "(3) Upon filing of the separate application Under Sub-section (2) for stay of the operation of the award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing."

(iv) insert proviso "Provided that the Court shall while considering the grant of stay, in the case of an award for money shall have due regard to the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908."

[NOTE: This amendment is to ensure that the mere filing of an application Under Section 34 does not operate as an automatic stay on the enforcement of the award. The Supreme Court in National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr., MANU/SC/1082/2003 : (2004) 1 SCC 540, recommends that such an amendment is the need of the hour.][1]

The transitory provision Section 85A was then set out as follows:

Insertion of Section 85A

A new Section Section 85A on transitory provisions has been incorporated.

Transitory provisions.-- (1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in the following situations-

(a) the provisions of Section 6-A shall apply to all pending proceedings and arbitrations. Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.

(b) the provisions of Section 16 Sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.

(c) the provisions of second proviso to Section 24 shall apply to all pending arbitrations.

(2) For the purposes of the instant section,--

(a) "fresh arbitrations" mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

(b) "fresh applications" mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

[NOTE: This amendment is to clarify the scope of operation of each of the proposed amendments with respect to pending arbitrations/proceedings.]

19. The debates in Parliament in this context were referred to by counsel on both sides. Shri T. Satpathy (Dhenkanal) stated:

You have brought in an amendment to Section 25 (a) saying that this Act will not be retrospective. When the Bill for judges' pension and salary could be retrospective, why can you not amend it with retrospective effect so that ONGC-RIL case could be brought under this Act and let it be adjudicated as early as possible within 18 months and let the people of this country get some justice some time. Let us be fair to them.

To similar effect is the speech of Shri APJ Reddy, which reads as under:

It is unclear whether the amended provisions shall apply to pending arbitration proceedings. The Law Commission of India, in its 246th Report, which recommended amendments to the Arbitration & Conciliation Act, 1996, had proposed to insert a new Section 85-A to the Act, which would clarify the scope of operation to each amendment with respect to pending arbitration proceedings. However, this specific recommendation has not been incorporated into the Ordinance. One of the reasons for bringing about this ordinance is to instill a sense of confidence in foreign investors in our judicial process, with regard to certainty of implementation in practice and ease of doing business. Therefore, it is strongly urged to incorporate Section 85A as proposed by the 246th Report of the Law Commission of India, where it clearly states the scope of operation of the amended provisions.

The Law Minister in response to the aforesaid speeches stated:

Nobody has objected to this Bill but some of our friends have observed certain things. They have said that the Bill is the need of the hour and that a good Bill has been brought. A few suggestions have been given by them. One of the suggestions was that it should have retrospective effect. If the parties agree, then there will be no problem. Otherwise, it will only have prospective effect."

20. Finally, Section 26 in its present form was tabled as Section 25A at the fag end of the debates, and added to the Bill. A couple of things may be noticed on a comparison of Section 85A, as proposed by the Law Commission, and Section 26 as ultimately enacted. First and foremost, Section 85A states that the amendments shall be prospective in operation and then bifurcates proceedings into two parts-(i) fresh arbitrations, and (ii) fresh applications. Fresh arbitrations are defined as various proceedings before an arbitral tribunal that is constituted, whereas fresh applications mean applications to a Court or Tribunal, made subsequent to the date of enforcement of the Amendment Act. Three exceptions are provided by Section 85A, to which the Amendment Act will apply retrospectively. The first deals with provisions relating to costs, the second deals with the new provision contained in Section 16(7) (which has not been adopted by the Amendment Act) and the third deals with the second proviso to Section 24, which deals, inter alia, with oral hearings and arguments on a day-to-day basis and the non-grant of adjournments, unless sufficient cause is made out.

21. What can be seen from the above is that Section 26 has, while retaining the bifurcation of proceedings into arbitration and Court proceedings, departed somewhat from Section 85A as proposed by the Law Commission.

22. That a provision such as Section 26 has to be construed literally first, and then purposively and pragmatically, so as to keep the object of the provision also in mind, has been laid down in **Thyssen** (supra) in paragraph 26 as follows:

26. Present-day courts tend to adopt a purposive approach while interpreting the statute which repeals the old law and for that purpose to take into account the objects and reasons which led to the enacting of the new Act. We have seen above that this approach was adopted by this Court in *M.M.T.C. Ltd. case* [MANU/SC/1298/1996: (1996) 6 SCC 716]. Provisions of both the Acts, old and new, are very different and it has been so observed in *Sundaram Finance Ltd. case* [MANU/SC/0012/1999 : (1999) 2 SCC 479]. In that case, this Court also said that provisions of the new Act have to be interpreted and construed independently and that in fact reference to the old Act may actually lead to misconstruction of the provisions of the new Act. The Court said that it will be more relevant, while construing the provisions of the new Act, to refer to the UNCITRAL Model Law rather than the old Act. In the case of *Kuwait Minister of Public Works* v. *Sir Frederick Snow and Partners* [MANU/UKHL/0014/1984: (1984) 1 All ER 733 (HL)] the award was given before Kuwait became a party to the New York Convention recognised by an Order in Council in England. The House of Lords held that though a foreign award could be enforced in England under the (U.K.) Arbitration Act, 1975 as when the proceedings for enforcement of the award were initiated in England Kuwait had

become a party to the Convention. It negatived the contention that on the date the award was given Kuwait was not a party to the New York Convention. (at pages 370-371)

Similarly, in **Milkfood Limited** (supra) at 315, this Court, while construing Section 85 of the 1996 Act, had this to say:

70. Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non obstante clause. Clause (a) of the said Sub-section provides for saving Clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act wherefore also necessity of < href="#" class="dictdataview">reference to Section 21 would arise. The court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression "commencement of arbitration proceedings" must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from *Shetty's Constructions* [MANU/SC/1070/1998 : (1998) 5 SCC 599] are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore.

23. All learned Counsel have agreed, and this Court has found, on a reading of Section 26, that the provision is indeed in two parts. The first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The question is what exactly is contained in both parts. The two parts are separated by the word 'but', which also shows that the two parts are separate and distinct. However, Shri Viswanathan has argued that the expression "but" means only that there is an emphatic repetition of the first part of Section 26 in the second part of the said Section. For this, he relied upon the Concise Oxford Dictionary on Current English, which states:

Introducing emphatic repetition; definitely (wanted to see nobody, but nobody).

Quite obviously, the context of the word "but" in Section 26 cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

24. What will be noticed, so far as the first part is concerned, which states, "Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree..." is that: (1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "...but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

25. That the expression "the arbitral proceedings" refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

Conduct of Arbitral Proceedings

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the Respondent, would also make it clear that it is these proceedings, and no others, that form the subject matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force.[2] In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings "in relation to" arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the

1996 Act. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings-arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

26. We now consider some of the submissions of learned Counsel for the parties as to what ought to be the true construction of Section 26. According to Shri Sundaram, the second part of Section 26 should be taken to be the principal part, with the first part being read as an exception to the principal part. This is so that Section 6 of the General Clauses Act then gets attracted to the first part, the idea being to save accrued rights. Section 6 applies unless a contrary intention appears in the enactment in question. The plain language of Section 26 would make it clear that a contrary intention does so appear, Section 26 being a special provision having to be applied on its own terms.

27. Thus, in **Transport and Dock Workers' Union and Ors. v. New Dholera Steamship Ltd., Bombay and Ors.** (1967) 1 LLJ 434, a Five Judge Bench of this Court held:

6. It was contended before us that as an appeal is a continuation of the original proceeding the repeal should not affect the enforcement of the provisions of the Ordinance in this case. Reliance is placed upon Section 6 of the General Clauses Act, 1897 wherein is indicated the effect of repeal of an enactment by another. It is contended that as the Payment of Bonus Ordinance has been repealed by Section 40(1), the consequences envisaged in Section 6 of the General Clauses Act must follow and the present matter must be disposed of in accordance with the Ordinance as if the Act had not been passed. It is submitted that there was a right and a corresponding obligation to pay bonus Under Section 10 of the Ordinance and that right and obligation cannot be obliterated because of the repeal of the Ordinance. This argument is not acceptable because of the provisions of the second Sub-section of Section 40. That Sub-section reads as follows:

40. *Repeal and saving.*

(1)***

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act as if this Act had commenced on the 29th May, 1965.

Section 6 of the General Clauses Act applies ordinarily but it does not apply if a different intention appears in the repealing Act. Here a different intention is made to appear expressly and the special saving incorporated in the repealing Act protects only anything done or any action taken under the Ordinance which is deemed to have been done or taken under this Act as if the Act had commenced on 29th May, 1965. Nothing had been done under the Ordinance and no action was taken which needs protection; nor was anything pending under the Ordinance which could be continued as if the Act had not been passed. There was thus nothing which was to be saved after the repeal of the Ordinance and this question which might have arisen under the Ordinance now ceases to exist.

In **Kalawati Devi Harlalka v. CIT** MANU/SC/0160/1967 : (1967) 3 SCR 833, a repeal and savings provision contained in Section 297 of the Income Tax Act, 1961 was held to evidence an intention to the contrary Under Section 6 of the General Clauses Act as follows:

14. The learned Counsel for the Appellant submits that Parliament had Section 6 of the General Clauses Act in view, and therefore no express provision was made dealing with appeals and revisions, etc. In our view, Section 6 of the General Clauses Act would not apply because Section 297(2) evidences an intention to the contrary. In *Union of India* v. *Madan Gopal Kabra* [MANU/SC/0053/1953 : 25 ITR 5] while interpreting Section 13 of the Finance Act, 1950, already extracted above, this Court observed at p. 68:

Nor can Section 6 of the General Clauses Act, 1897, serve to keep alive the liability to pay tax on the income of the year 1949-50 assuming it to have accrued under the repealed State law, for a "different intention" clearly appears in Sections 2 and 13 of the Finance Act read together as indicated above.

It is true that whether a different intention appears or not must depend on the language and content of Section 297(2). It seems to us, however, that by providing for so many matters mentioned above, some in accord with what would

have been the result Under Section 6 of the General Clauses Act and some contrary to what would been the result Under Section 6, Parliament has clearly evidenced an intention to the contrary.

28. Shri Sundaram's submission is also not in consonance with the law laid down in some of our judgments. The approach to statutes, which amend a statute by way of repeal, was put most felicitously by B.K. Mukherjea, J. in **State of Punjab v. Mohar Singh**, MANU/SC/0043/1954 : 1955 1 SCR 893 at 899-900, thus:

In our opinion the approach of the High Court to the question is not quite correct. Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the Section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving Clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case.

This statement of the law has subsequently been followed in **Transport and Dock Workers Union and Ors. v. New Dholera Steamships Ltd., Bombay and Ors.** (Supra) at paragraph 6 and **T.S. Baliah v. T.S. Rengachari**, MANU/SC/0238/1968 : 1969 3 SCR 65 at 71-72.

29. Equally, the suggested interpretation of Shri Viswanathan would not only do violence to the plain language of Section 26, but would also ignore the words "in relation to" in the second part of Section 26, as well as ignore the fact that Section 21 of the 1996 Act, though mentioned in the first part, is conspicuous by its absence in the second part. According to Shri Viswanathan, the expression "arbitral proceedings commenced" is the same in both parts and, therefore, the commencement of arbitral proceedings Under Section 21 is the only thing to be looked at in both parts. Thus, according to the learned senior Counsel, if arbitral proceedings have commenced prior to coming into force of the Amendment Act, the said proceedings, together with all proceedings in Court in relation thereto, would attract only the provisions of the unamended 1996 Act. Similarly, when arbitral proceedings have commenced Under Section 21 after the coming into force of the Amendment Act, those proceedings, including all courts proceedings in relation thereto, would be governed by the Amendment Act. This is not the scheme of Section 26 at all, as has been pointed out above. Further, this argument is more or less the conclusion reached by the report of the High Level Committee, headed by Justice B.N. Srikrishna, to amend the 1996 Act.[3] It can be seen from the report of the High Level Committee that an amendment would be required to Section 26 to incorporate its findings. Section 87 of the proposed Arbitration and Conciliation (Amendment) Bill, 2018 cannot be looked at, at this stage, for the interpretation of Section 26 of the Amendment Act for two reasons: (i) Section 87, as ultimately enacted, may not be in the form that is referred to in the press release; and (ii) a proposed Bill, introducing a new and different provision of law can hardly be the basis for interpretation of a provision of law as it now stands. Obviously, therefore, Shri Viswanathan's approach leads to an amendment of Section 26, as recommended by the Srikrishna Committee, and not interpretation thereof. For all these reasons, his argument must, therefore, be rejected. Shri Datar's argument is more or less the same as Shri Viswanathan's, and suffers from the same infirmity as Shri Viswanathan's interpretation. Shri A. Krishnan, in bringing in the concept of "seat", is again doing complete violence to the language of Section 26, as "place of arbitration" is a well-known concept contained in Section 20 of the 1996 Act, which finds no mention whatsoever in Section 26 of the Amendment Act. For these reasons, his interpretation cannot also be accepted.

30. Shri Neeraj Kishan Kaul, learned senior Counsel appearing on behalf of Respondents in SLP(C) Nos. 19545-19546 of 2016, has argued that the first part of Section 26 does not apply to Court proceedings at all, thereby indicating that the Amendment Act must be given retrospective effect insofar as Court proceedings in relation to arbitral proceedings are concerned. For this purpose, he relied on **Minister of Public Works of the Government of the State of Kuwait** (supra).

31. In that case, the question that arose was as to the correct construction of Section 7(1) of the U.K. Arbitration Act, 1975. The said Section was given retrospective effect in applying the New York Convention to arbitration agreements that were entered into before the convention was made applicable, for the reason that nobody had an accrued right/defence which was taken away. All defences available in a common law action on the award would be available and continued to be available. Hence, it was held that the award could always have been enforced by one form of procedure and that it subsequently became enforceable by an alternative form. This judgment can have no application to the present case, inasmuch as the Amendment Act, as applicable to Court proceedings that arose in relation to arbitral proceedings, cannot be said to apply to mere forms of procedure, but also includes substantive law applicable to such Court proceedings post the Amendment Act. Also, it is wholly fallacious to say that since the first part of

Section 26 does not refer to Court proceedings in relation to arbitral proceedings, the Amendment Act is retrospective insofar as such proceedings are concerned. The second part of Section 26 would then have to be completely ignored, which, as has been seen hereinabove, applies to Court proceedings in relation to arbitral proceedings only prospectively, i.e. if such Court proceedings are commenced after the Amendment Act comes into force. For these reasons, such an interpretation of Section 26 is unacceptable.

32. Shri Chidambaram, appearing on behalf of some of the Respondents, has argued that the interpretation accepted by this Court *supra* is the correct interpretation. He has also argued that, alternatively, the expression "in relation to arbitral proceedings" in the second part of Section 26 would also include within it arbitral proceedings before the arbitral tribunal, as otherwise Section 26 would not apply the Amendment Act to such arbitral proceedings. We are afraid that this alternative interpretation does not appeal to us, for the simple reason that when the first part of Section 26 makes it clear that arbitral proceedings commenced before the Amendment Act would not be governed by the Amendment Act, it is clear that arbitral proceedings that have commenced after the Amendment Act comes into force would be so governed by it, as has been held by us above. The negative form of the language of the first part only becomes necessary to indicate that parties may otherwise agree to apply the Amendment Act to arbitral proceedings commenced even before the Amendment Act comes into force. The absence of any reference to Section 21 of the 1996 Act in the second part of Section 26 of the Amendment Act is also a good reason as to why arbitral proceedings before an arbitral tribunal are not contemplated in the second part.

33. Shri Sibal has argued that Section 26 is not a savings Clause at all and cannot be construed as such. According to the learned senior Counsel, Section 26 manifests a clear intention to destroy all rights, vested or otherwise, which have accrued under the unamended 1996 Act. We are unable to accept these submissions as it is clear that the intendment of Section 26 is to apply the Amendment Act prospectively to arbitral proceedings and to court proceedings in relation thereto. This approach again does not commend itself to us.

34. Dr. Singhvi has, however, argued that the approach indicated by us above could be termed as an "intermediate approach", i.e. it is an approach which does not go to either of the extreme approaches of Shri Sundaram, Shri Viswanathan and Shri Datar or that of Shri Sibal. Further, according to the learned senior Counsel, this approach has the merit of both clarity, as well as no anomalies arising as a result, as it is clear that the Amendment Act is to be applied only prospectively with effect from the date of its commencement, and only to arbitral proceedings and to court proceedings in relation thereto, which have commenced on or after the commencement of the Amendment Act. We think this is the correct approach as has already been indicated by us above.

35. The judgment in **Thyssen** (supra), was strongly relied upon by counsel on both sides. It is, therefore, important to deal with this judgment in a little detail. In **Thyssen** (supra), Section 85 of the 1996 Act came up for consideration. What is clear is that Section 85(2)(a) had the expression "in relation to arbitral proceedings" in both parts of Sub-section (2)(a). When speaking of the repealed enactments, it stated that they will apply "in relation to" arbitral proceedings which commenced before the 1996 Act came into force, but that otherwise the 1996 Act shall apply "in relation to" arbitral proceedings, which commenced on or after the 1996 Act came into force.

36. The judgment in **Thyssen** (supra) construed Section 85 as follows:

23. Section 85(2)(*a*) of the new Act is in two limbs: (*1*) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (*2*) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two: (*a*) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (*b*) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of the widest import as held by various decisions of this Court in *Doypack Systems (P) Ltd.* [MANU/SC/0300/1988 : (1988) 2 SCC 299], *Mansukhlal Dhanraj Jain* [MANU/SC/0633/1995 : (1995) 2 SCC 665], *Dhanrajamal Gobindram* [MANU/SC/0362/1961 : AIR 1961 SC 1285: (1961) 3 SCR 1020] and *Navin Chemicals Mfg.* [MANU/SC/0571/1993 : (1993) 4 SCC 320] This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. The first limb of Section 85(2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act. (at page 369)

The judgment then goes on to refer to Section 48 of the Arbitration Act, 1940, which is set out therein as follows:

48. *Saving for pending references*.--The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall notwithstanding any repeal effected by this Act continue to apply. (at page 349)

Paragraph 33 goes on to state the difference between Section 85(2)(a) of the 1996 Act and the earlier Section 48 of the 1940 Act, as follows:

33. Because of the view of Section 85(2)(a) of the new Act which we have taken, it is not necessary for us to consider difference in the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act. We may, however, note that Under Section 48 of the old Act the concept is of "reference" while under the new Act it is "commencement". Section 2(e) of the old Act defines "reference". Then Under Section 48 the word used is "to" and Under Section 85(2) (a) the expression is "in relation to". It, therefore, also appears that it is not quite relevant to consider the provision of Section 48 of the old Act to interpret Section 85(2)(a). (at page 375)

Paragraph 25 specifically states that Section 6 of the General Clauses Act will not apply, inasmuch as a different intention does appear from the plain language of Section 85(2)(a). Ultimately, after stating seven conclusions in paragraph 22, this Court went on to state that enforcement of an award under the 1940 Act would be an accrued right for the reason that the challenge procedure Under Section 30 of the 1940 Act was wider and completely different from the challenge procedure Under Section 34 of the 1996 Act, and that to avoid confusion and hardship, it would be important to refer to the expression "in relation to" as meaning the entire gamut of arbitral proceedings, beginning with commencement and ending with enforcement of an award.

37. The judgment in **Thyssen** (supra) dealt with a differently worded provision, and emphasized the difference in language between the expression "to" and the expression "in relation to". In reference to the Acts which were repealed Under Section 85, proceedings which commenced before the 1996 Act were to be governed by the repealed Acts. These proceedings would be the entire gamut of proceedings, i.e. from the stage of commencement of arbitral proceedings until the challenge proceedings against the arbitral award had been exhausted. Similar was the position with respect to the applicability of the 1996 Act, which would again apply to the entire gamut of arbitral proceedings, beginning with commencement and ending with enforcement of the arbitral award. It is clear, therefore, that Section 85(2)(a) has two major differences in language with Section 26: one, that the expression "in relation to" does not appear in the first part of Section 26 and only the expression "to" appears; and, second, that "commencement" in the first part of Section 26 is as is understood by Section 21 of the 1996 Act. The second part of Section 85(2)(a) is couched in language similar to the second part of Section 26 with this difference, that Section 21 contained in the first part of Section 26 is conspicuous by its absence in the second part.

38. The judgment in **Thyssen** (supra) was followed in **N.S. Nayak** (supra). After setting out paragraph 32 of the judgment in **Thyssen** (supra) and paragraphs 22 and 23 of the aforesaid judgment, this Court concluded:

13. As stated in paragraph 22, Conclusion 1 without any reservation provides that the provisions of the old Act shall apply in relation to the arbitral proceedings which have commenced before coming into force of the new Act. Conclusion 2, in our view, is required to be read in context with Conclusion 1, that is to say, the phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree Under Section 17 thereof and also appeal arising thereunder. Hence, Conclusions 1 and 2 are to be read together which unambiguously reiterate that once the arbitral proceedings have started under the old Act, the old Act would apply for the award becoming a decree and also for appeal arising thereunder.

14. Conclusion 3 only reiterates what is provided in various Sections of the Arbitration Act, which gives option to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. The phrase "unless otherwise agreed by the parties" used in various sections, namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(a) etc. indicates that it is open to the parties to agree otherwise. During the arbitral proceedings, right is given to the parties to decide their own procedure. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. Reason being, the arbitrator is appointed on the basis of the contract between the parties and is required to act as per the contract. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement. The appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. It is also settled law that the right to file an appeal is accrued right that cannot be taken away unless there is specific provision to the contrary. There is no such provision in the new Act. In the present cases, the appeals were pending before the High Court under the provisions of the old Act and, therefore, appeals are required to be decided on the basis of the statutory provisions under the said Act. Hence, there is no substance in the submission made by the learned Counsel for the Appellant. (at pages 63-64)

The majority judgment in **Milkfood Limited** (supra), after referring to the judgments in **Thyssen** (supra) and **N.S. Nayak** (supra), concluded that, on the facts of that case, the 1940 Act will apply and not the 1996 Act. These judgments are distinguishable for the same reasons, as they only follow and apply **Thyssen** (supra).

39. From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made Under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted. But, what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions? To answer this question, we have necessarily to decide on what is meant by "enforcement" in Section 36. On the one hand, it has been argued that "enforcement" is nothing but "execution", and on the other hand, it has been argued that "enforcement" and "execution" are different concepts, "enforcement" being substantive and "execution" being procedural in nature.

40. At this stage, it is necessary to set out the scheme of the 1996 Act. An arbitral proceeding commences Under Section 21, unless otherwise agreed by parties, when a dispute arises between the parties for which a request for the dispute to be referred to arbitration is received by the Respondent. The arbitral proceedings terminate Under Section 32(1) by the delivery of a final arbitral award or by the circumstances mentioned in Section 32(2). The mandate of the arbitral tribunal terminates with the termination of arbitral proceedings, save and except for correction and interpretation of the award within the bounds of Section 33, or the making of an additional arbitral award as to claims presented in the proceedings, but omitted from the award. Once this is over, in cases where an arbitral award is delivered, such award shall be final and binding on the parties and persons claiming under them, Under Section 35 of the 1996 Act. Under Section 36, both pre and post amendment, such award shall be "enforced" in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court. It is clear that the scheme of the 1996 Act is materially different from the scheme of the 1940 Act. Under Section 17 of the 1940 Act, once an award was delivered, the Court had to pronounce judgment in accordance with the award, following which a decree would be drawn up, which would then be executable under the Code of Civil Procedure. Under Section 36 of the 1996 Act, the Court does not have to deliver judgment in terms of the award, which is then followed by a decree, which is the formal expression of the adjudication between the parties. Under Section 36 of the 1996 Act, the award is deemed to be a decree and shall be enforced under the Code of Civil Procedure as such.

41. This brings us to the manner of enforcement of a decree under the Code of Civil Procedure. A decree is enforced under the Code of Civil Procedure only through the execution process-see Order XXI of the Code of Civil Procedure. Also, Section 36(3), as amended, refers to the provisions of the Code of Civil Procedure for grant of stay of a money decree. This, in turn, has reference to Order LXI, Rule 5 of the Code of Civil Procedure, which appears under the Chapter heading, "Stay of Proceedings and of Execution". This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and Order LXI, Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards. This being the case, we need to refer to some judgments in order to determine whether execution proceedings and proceedings akin thereto give rise to vested rights, and whether they are substantive in nature.

42. In **Lalji Raja and Sons v. Hansraj Nathuram**, MANU/SC/0008/1971: (1971) 1 SCC 721 at 728, this Court was concerned with a judgment debtor's right to resist execution of a decree. Section 20(1)(*b*) of the Code of Civil Procedure (Amendment) Act, 1951 was extended to Madhya Bharat and other areas, as a result of which the judgment debtor's right to resist execution of a decree was protected. In this context, this Court held that the Amendment Act of 1951 made decrees, which could have been executed only by courts in British India, executable in the whole of India. Stating that the change made was one relating to procedure only, this Court held:

15. This provision undoubtedly protects the rights acquired and privileges accrued under the law repealed by the Amending Act. Therefore the question for decision is whether the non-executability of the decree in the Morena Court under the law in force in Madhya Bharat before the extension of "the Code" can be said to be a right accrued under the repealed law. We do not think that even by straining the language of the provision it can be said that the non-executability of a decree within a particular territory can be considered as a privilege. Therefore the only question that we have to consider is whether it can be considered as a "right accrued" within the meaning of Section 20(1)(*b*) of the Code of Civil Procedure (Amendment) Act, 1950. In the first place, in order to get the benefit of that provision, the non-executability of the decree must be a right and secondly it must be a right that had accrued from the provisions of the repealed law. It is contended on behalf of the judgment-debtors that when the decree was passed, they had a right to resist the execution of the decree in Madhya Bharat in view of the provisions of the Indian Code of Civil Procedure (as adapted) which was in force in the Madhya Bharat at that time and the same is a vested right. It was further urged on their behalf that that right was preserved by Section 20(1)(b) of the Code of Civil Procedure (Amendment) Act, 1950. It is difficult to consider the non-executability of the decree in Madhya Bharat as a vested right of the judgment-debtors. The non-executability in question pertains to the jurisdiction of certain courts and not to the rights of the judgment-debtors. Further the relevant provisions of the Code of Civil Procedure in force in Madhya Bharat did not confer the right claimed by the judgment-debtors. All that has happened in view of the extension of "the Code" to the whole of India in 1951 is that the decrees which could have been executed only by courts in British India are now made executable in the whole of India. The change made is one relating to procedure and jurisdiction. Even before "the Code" was extended to Madhya Bharat the decree in question could have been executed either against the person

of the judgment-debtors if they had happened to come to British India or against any of their properties situated in British India. The execution of the decree within the State of Madhya Bharat was not permissible because the arm of "the Code" did not reach Madhya Bharat. It was the invalidity of the order transferring the decree to the Morena Court that stood in the way of the decree-holders in executing their decree in that court on the earlier occasion and not because of any vested rights of the judgment-debtors. Even if the judgment-debtors had not objected to the execution of the decree, the same could not have been executed by the court at Morena on the previous occasion as that court was not properly seized of the execution proceedings. By the extension of "the Code" to Madhya Bharat, want of jurisdiction on the part of the Morena Court was remedied and that court is now made competent to execute the decree.

16. That a provision to preserve the right accrued under a repealed Act "was not intended to preserve the abstract rights conferred by the repealed Act.... It only applies to specific rights given to an individual upon happening of one or the other of the events specified in statute" -- See Lord Atkin's observations in *Hamilton Gell* v. *White*. [(1922) 2 KB 422]. The mere right, existing at the date of repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving Clause -- See *Abbot* v. *Minister for Lands* [(1895) AC 425] and *G. Ogden Industries Pvt. Ltd.* v. *Lucas*. [(1969) 1 All ER 121]

In Narhari Shivram Shet Narvekar v. Pannalal Umediram MANU/SC/0016/1976: (1976) 3 SCC 203 at 207, this Court, following Lalji Raja (supra), held as follows:

8. Learned Counsel appearing for the Appellant however submitted that since the Code of Civil Procedure was not applicable to Goa the decree became in executable and this being a vested right could not be taken away by the application of the Code of Civil Procedure to Goa during the pendency of the appeal before the Additional Judicial Commissioner. It seems to us that the right of the judgment debtor to pay up the decree passed against him cannot be said to be a vested right, nor can the question of executability of the decree be regarded as a substantive vested right of the judgment debtor. A *fortiori* the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retroactive in operation and the appellate court is bound to take notice of the change in law.

Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

43. The matter can also be looked at from a slightly different angle. Section 36, prior to the Amendment Act, is only a clog on the right of the decree holder, who cannot execute the award in his favour, unless the conditions of this Section are met. This does not mean that there is a corresponding right in the judgment debtor to stay the execution of such an award. Learned Counsel on behalf of the Appellants have, however, argued that a substantive change has been made in the award, which became an executable decree only after the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege in favour of the Respondents. It has been argued, relying upon a number of judgments, that since Section 36 is a part of the enforcement process of awards, there is a vested right or at least a privilege accrued in favour of the Appellants in the unamended 1996 Act applying insofar as arbitral proceedings and court proceedings in relation thereto have commenced, prior to the commencement of the Amendment Act. The very judgment strongly relied upon by Senior Counsel for the Appellants, namely **Garikapati Veeraya** (supra), itself states in proposition (v) at page 515, that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides specifically or by necessary intendment and not otherwise. We have already held that Section 26 does specifically provide that the court proceedings in relation to arbitral proceedings, being independent from arbitral proceedings, would not be viewed as a continuation of arbitral proceedings, but would be viewed separately. This being the case, it is unnecessary to refer to judgments such as **Union of India v. A.L. Rallia Ram**, MANU/SC/0003/1963 : (1964) 3 SCR 164 and **NBCC Ltd. v. J.G. Engineering (P) Ltd.**, MANU/SC/0013/2010 : (2010) 2 SCC 385, which state that a Section 34 proceeding is a supervisory and not an appellate proceeding. **Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corporation Ltd.**, MANU/SC/0030/2010 : (2010) 3 SCC 34 at 47-49, which was cited for the purpose of stating that a Section 34 proceeding could be regard as an "appeal" within the meaning of Section 7 of the Interest on Delayed Payments To Small Scale and Ancillary Industrial Undertakings Act, 1993, is obviously distinguishable on the ground that it pertains to the said expression appearing in a beneficial enactment, whose object would be defeated if the word "appeal" did not include a Section 34 application. This is made clear by the aforesaid judgment itself as follows:

36. On a perusal of the plethora of decisions aforementioned, we are of the view that "appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re-agitation of entire matrix of facts and law. We have already seen in *Abhayankar* [MANU/SC/0456/1969 : (1969) 2 SCC 74] that even an order passed by virtue of limited power of revision Under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving

such a wide meaning to the term "appeal", we are constrained to disagree with the contention of the learned Counsel for the Respondent Corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/decree. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application Under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council.

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40. It may be noted that Section 6(1) empowers the buyer to obtain the due payment by way of *any proceedings*. Thus the proceedings that the buyer can resort to, no doubt, includes arbitration as well. It is pertinent to note that as opposed to Section 6(2), Section 6(1) does not state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by the Arbitration Act. Hence, the right context in which the meaning of the term "appeal" should be interpreted is the Interest Act itself. The meaning of this term under the Arbitration Act or the Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that the Arbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term "appeal" in the Interest Act, and not in the Arbitration Act.

44. Learned senior Counsel appearing on behalf of the Respondents, has also argued that the expression "has been" in Section 36(2), as amended, would make it clear that the Section itself refers to Section 34 applications which have been filed prior to the commencement of the Amendment Act and that, therefore, the said Section would apply, on its plain language, even to Section 34 applications that have been filed prior to the commencement of the Amendment Act. For this purpose, the judgment in **State of Bombay v. Vishnu Ramchandra** MANU/SC/0068/1960 : (1961) 2 SCR 26, was strongly relied upon. In that judgment, it was observed, while dealing with Section 57 of the Bombay Police Act, 1951, that the expression "has been punished" is in the present perfect tense and can mean either "shall have been" or "shall be". Looking to the scheme of the enactment as a whole, the Court felt that "shall have been" is more appropriate. This decision was referred to in paragraphs 60 and 61 of **Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.**, MANU/SC/0305/1973 : (1973) 1 SCC 813 at 838 and the ratio culled out was that such expression may relate to past or future events, which has to be gathered from the context, as well as the scheme of the particular legislation. In the context in which Section 11A of the Industrial Disputes Act, 1947 was enacted, this Court held that Section 11A has the effect of altering the law by abridging the rights of the employer. This being so, the expression "has been" would refer only to future events and would have no implication to disputes prior to December 15, 1971. However, in a significant paragraph, this Court held:

63. It must be stated at this stage that procedural law has always been held to operate even retrospectively, as no party has a vested right in procedure....

45. Being a procedural provision, it is obvious that the context of Section 36 is that the expression "has been" would refer to Section 34 petitions filed before the commencement of the Amendment Act and would be one pointer to the fact that the said Section would indeed apply, in its substituted form, even to such petitions. The judgment in **L'Office Cherifien Des Phosphates and Anr. v. Yamashita-Shinnihon Steamship Co. Ltd.**, MANU/UKHL/0046/1993 : (1994) 1 AC 486 is instructive. A new Section 13A was introduced with effect from 1st January, 1992, by which Arbitrators were vested with the power of dismissing a claim if there is no inordinate or an inexcusable delay on the part of the claimant in pursuing the claim. This Section was enacted because the House of Lords in a certain decision had suggested that such delays in arbitration could not lead to a rejection of the claim by itself. What led to the enactment of the Section was put by Lord Mustill thus:

My Lords, the effect of the decision of the House in the Bremer Vulkan case, coupled with the inability of the courts to furnish any alternative remedy which might provide a remedy for the abuse of stale claims, aroused a chorus of disapproval which was forceful, sustained and (so far as I am aware) virtually unanimous. There is no need to elaborate. The criticisms came from every quarter. Several Commonwealth countries hastily introduced legislation conferring on the court, or on the arbitrator, a jurisdiction to dismiss stale claims in arbitration. The history of the matter, and the reasons why the question was not as easy as it might have appeared, were summarized in an Article published in 1989 by Sir Thomas Bingham (Arbitration International, vol. 5, pp. 333 et seq.), and there is no need to rehearse them here. Taking account of various apparent difficulties the Departmental Advisory Committee on Arbitration hesitated for a time both as to the principle and as to whether the power to dismiss should be vested in the court or the arbitrator, but the pressure from all quarters became irresistible and in 1990 the Courts and Legal Services Act inserted, through the medium of Section 102, a new Section 13A in the Arbitration Act, 1950. (at page 522)

The question which arose in that case was whether delay that had taken place before the Section came into force could be taken into account by an arbitrator in order to reject the claim in that case. The House of Lords held that given the clamor for change and given the practical value and nature of the rights involved, it would be permissible to look at delay caused even before the Section came into force. In his concluding paragraph, Lord Mustill held:

In this light, I turn to the language of Section 13A construed, in case of doubt, by reference to its legislative background. The crucial words are: "(a)... there has been inordinate and inexcusable delay... "Even if read in isolation these words would I believe be sufficient, in the context of Section 13A as a whole, to demonstrate that the delay encompasses all the delay which has caused the substantial risk of unfairness. If there were any doubt about this the loud and prolonged chorus of complaints about the disconformity between practices in arbitration and in the High Court, and the increasing impatience for something to be done about it, show quite clearly that Section 13A was intended to bite in full from the outset. If the position were otherwise it would follow that, although Parliament has accepted the advice of all those who had urged that this objectionable system should be brought to an end, and has grasped the nettle and provided a remedy, it has reconciled itself to the continuation of arbitral proceedings already irrevocably stamped with a risk of injustice. I find it impossible to accept that Parliament can have intended any such thing, and with due respect to those who have suggested otherwise I find the meaning of Section 13A sufficiently clear to persuade me that in the interests of reform Parliament was willing to tolerate the very qualified kind of hardship involved in giving the legislation a partially retrospective effect. Accordingly, I agree with Beldam L.J. that the arbitrator did have the powers to which he purported to exercise. I would therefore allow the appeal and restore the award of the arbitrator.

46. In 2004, this Court's judgment in **National Aluminium Co.** (supra) had recommended that Section 36 be substituted, as it defeats the very objective of the alternative dispute resolution system, and that the Section should be amended at the earliest to bring about the required change in law. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons.

47. Both sides locked horns on whether a proceeding Under Section 36 could be said to be a proceeding which is independent of a proceeding Under Section 34. In view of what has been held by us above, it is unnecessary for us to go into this by-lane of forensic argument.

48. However, Shri Viswanathan strongly relied upon the observations made in paragraph 32 in **Thyssen** (supra) and the judgment in **Hameed Joharan v. Abdul Salam**, MANU/SC/0444/2001 : (2001) 7 SCC 573. It is no doubt true that paragraph 32 in **Thyssen** (supra) does, at first blush, support Shri Viswanathan's stand. However, this was stated in the context of the machinery for enforcement Under Section 17 of the 1940 Act which, as we have seen, differs from Section 36 of the 1996 Act, because of the expression "in relation to arbitral proceedings", which took in the entire gamut, starting from the arbitral proceedings before the arbitral tribunal and ending up with enforcement of the award. It was also in the context of the structure of the 1940 Act being completely different from the structure of the 1996 Act, which repealed the 1940 Act. In the present case, it is clear that "enforcement" in Section 36 is to treat the award as if it were a decree and enforce it as such under the Code of Civil Procedure, which would only mean that such decree has to be executed in the manner indicated. Also, a stray sentence in a judgment in a particular context cannot be torn out of such context and applied in a situation where it has been argued that enforcement and execution are one and the same, at least for the purpose of the 1996 Act. In **Regional Manager and Anr. v. Pawan Kumar Dubey** MANU/SC/0464/1976: (1976) 3 SCR 540, at 544 it was held:

We think that the principles involved in applying Article 311(2) having been sufficiently explained in *Shamsher Singh's case* (supra) it should no longer be possible to urge that *Sughar Singh's case* (supra) could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to some conflict, it would, we think, vanish when the *ratio decidendi* of each case is correctly understood. It is the Rule deducible from the application of law to the facts and circumstances of a case which constitutes its *ratio decidendi* and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

49. For the same reason, it is clear that the judgment in **Hameed Joharan** (supra), which stated that execution and enforcement were different concepts in law, was in the context of Article 136 of the Limitation Act, 1963, read with Section 35 of the Indian Stamp Act, 1899, which is wholly different. The argument in that case was that Article 136 of the Limitation Act prescribes a period of 12 years for the execution of a decree or order, after it becomes enforceable. What was argued was that it would become enforceable only when stamped and Section 35 of the Stamp Act was referred to for the said purpose. In this context, this Court held:

And it is on this score it has been contended that the partition decree thus even though already passed cannot be acted upon, neither becomes enforceable unless drawn up and engrossed on stamp papers. The period of limitation, it has

been contended in respect of the partition decree, cannot begin to run till it is engrossed on requisite stamp paper. There is thus, it has been contended, a legislative bar Under Section 35 of the Indian Stamp Act for enforceability of partition decree. Mr. Mani contended that enforcement includes the whole process of getting an award as well as execution since execution otherwise means due performance of all formalities, necessary to give validity to a document. We are, however, unable to record our concurrence therewith. Prescription of a twelve-year period certain cannot possibly be obliterated by an enactment wholly unconnected therewith. Legislative mandate as sanctioned Under Article 136 cannot be kept in abeyance unless the selfsame legislation makes a provision therefor. It may also be noticed that by the passing of a final decree, the rights stand crystallized and it is only thereafter its enforceability can be had, though not otherwise. (at page 593)

It is for this reason that it was stated that enforceability of a decree under the Limitation Act cannot be the subject matter of Section 35 of the Stamp Act. Therefore, Section 35 of the Stamp Act could not be held to "overrun" the Limitation Act and thus, give a complete go-by to the legislative intent of Article 136 of the Limitation Act. Here again, observations made in a completely different context have to be understood in that context and cannot be applied to a totally different situation.

50. As a matter of fact, it was noticed that furnishing of stamp paper was an act entirely within the domain and control of the Appellant in that case, and any delay in the matter of furnishing the same cannot possibly be said to stop limitation, as no one can take advantage of his own wrong (see paragraph 13). As a matter of fact, the Court held that unless a distinction was made between execution and enforcement, the result in that case would lead to an "utter absurdity". The Court held, "absurdity cannot be the outcome of an interpretation of a Court order and wherever there is even a possibility of such absurdity, it would be a plain exercise of judicial power to repeal the same rather than encouraging it" (see paragraph 38).

51. Shri Viswanathan then referred us to this Court's judgment in **Akkayanaicker v. A.A.A. Kotchadainaidu and Anr.** MANU/SC/0793/2004 : (2004) 12 SCC 469, which, according to him, has followed the judgment in **Hameed Joharan** (supra). This judgment again would have no application for the simple reason that the narrow point that was decided in that case was whether the time period for execution of a decree Under Section 136 of the Limitation Act would start when the decree was originally made or whether a fresh period of limitation would begin after the decree was amended having been substantially scaled down by a Debt Relief Act. This Court held that as the original decree could not be enforced and only the amended decree could be enforced, 12 years has to be counted from the date of the amended decree. It is clear that this judgment also does not carry the matter further.

52. It was also argued that an award by itself had no legal efficacy, until it became enforceable, and that, therefore, until it could be enforced as a decree of the Court, it would continue to remain suspended. Here again, the judgment in **Satish Kumar** (supra) is extremely instructive. The question in that case was as to whether, under the 1940 Act, an award had any legal efficacy before a judgment followed thereupon and it was made into a decree. A Full Bench of the Punjab and Haryana High Court held that until it is made a Rule of the Court, such an award is waste paper. This Court strongly disagreed and followed its unreported decision in *Uttam Singh Dugal & Co. v. Union of India* as follows:

It seems to us that the main reason given by the two Full Benches for their conclusion is contrary to what was held by this Court in its unreported decision in *Uttam Singh Dugal & Co.* v. *Union of India* [Civil Appeal No. 162 of 1962--judgment delivered on 11-10-1962]. The facts in this case, shortly stated, were that *Uttam Singh Dugal & Co.* filed an application Under Section 33 of the Act in the Court of the Subordinate Judge, Hazaribag. The Union of India, Respondent 1, called upon Respondent 2, Col. S.K. Bose, to adjudicate upon the matter in dispute between Respondent 1 and the Appellant Company. The case of Uttam Singh Dugal & Co. was that this purported reference to Respondent 2 for adjudication on the matters alleged to be in dispute between them and Respondent 1 was not competent because by an award passed by Respondent 2 on April 23, 1952 all the relevant disputes between them had been decided. The High Court held inter alia that the first award did not create any bar against the competence of the second reference. On appeal this Court after holding that the application Under Section 33 was competent observed as follows:

The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference. As has been observed by Mookerjee, J., in the case of *Bhajahari Saha Banikya* v. *Behary Lal Basak* [33 Cal. 881 at p. 898] the award is, in fact, a final adjudication of a Court of the parties own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the fact of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive ... in reality, an award possesses all the elements of vitality, even though it has not been formally enforced, and it may be relied upon in a litigation between the parties relating to the same subject-matter". This conclusion, according to the learned Judge,

is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to the judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed.

This Court then held on the merits "that the dispute in regard to overpayments which are sought to be referred to the arbitration of Respondent 2 by the second reference are not new disputes; they are disputes in regard to claims which the Chief Engineer should have made before the arbitration under the first reference". This Court accordingly allowed the appeal and set aside the order passed by the High Court.

This judgment is binding on us. In our opinion this judgment lays down that the position under the Act is in no way different from what it was before the Act came into force, and that an award has some legal force and is not a mere waste paper. If the award in question is not a mere waste paper but has some legal effect it plainly purports to or affects property within the meaning of Section 17(1)(b) of the Registration Act.

(at pages 248-249)

53. Justice Hegde, in a separate concurring judgment, specifically stated that an award creates rights in property, but those rights cannot be enforced until the award is made a decree of the Court. The Learned Judge put it very well when he said, "It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps". The Amendment Act has only made an award executable conditionally after it is made, like a judgment of a Court, the only difference being that a decree would not have to be formally drawn following the making of such award.

54. Shri Viswanathan then argued, relying upon **R. Rajagopal Reddy v. Padmini Chandrasekharan** MANU/SC/0061/1996 : (1995) 2 SCC 630, **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.** MANU/SC/0329/2001 : (2001) 6 SCC 356, **Sedco Forex International Drill. Inc. v. CIT** MANU/SC/2079/2005 : (2005) 12 SCC 717 and **Bank of Baroda v. Anita Nandrajog** MANU/SC/1587/2009 : (2009) 9 SCC 462, that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that "for the avoidance of any doubt, it is clarified", this is not language that is conclusive in nature, but it is open to the Court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to learned senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being Saw **Pipes Ltd.** (supra) and **Western Geco** (supra), as has been held in paragraph 18 in **HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.**) MANU/SC/1066/2017, it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.

55. Learned Counsel for the Appellants have painted a lurid picture of anomalies that would arise in case the Amendment Act were generally to be made retrospective in application. Since we have already held that the Amendment Act is only prospective in application, no such anomalies can possibly arise. It may also be noted that the choosing of Section 21 as being the date on which the Amendment Act would apply to arbitral proceedings that have been commenced could equally be stated to give rise to various anomalies. One such anomaly could be that the arbitration agreement itself may have been entered into years earlier, and disputes between the parties could have arisen many years after the said arbitration agreement. The argument on behalf of the Appellants is that parties are entitled to proceed on the basis of the law as it exists on the date on which they entered into an agreement to refer disputes to arbitration. If this were to be the case, the starting point of the application of the Amendment Act being only when a notice to arbitrate has been received by the Respondent, which as has been stated above, could be many years after the arbitration agreement has been entered into, would itself give rise to the anomaly that the amended law would apply even to arbitration proceedings years afterwards as and when a dispute arises and a notice to arbitrate has been issued Under Section 21. In such a case, the parties, having entered into an arbitration agreement years earlier, could well turn around and say that they never bargained for the change in law that has taken place many years after, and which change will apply to them, since the notice, referred to in Section 21, has been issued after the Amendment Act has come into force. Cut off dates, by their very nature, are bound to lead to certain anomalies, but that does not mean that the process of interpretation must be so twisted as to negate both the plain language as well as the object of the amending statute. On this ground also, we do not see how an emotive argument can be converted into a legal one, so as to interpret Section 26 in a manner that would be contrary to both its plain language and object.

56. However, it is important to remember that the Amendment Act was enacted for the following reasons, as the Statement of Objects and Reasons for the Amendment Act states:

2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22nd December, 2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and Report. The said Committee, submitted its Report to the Parliament on 4th August, 2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule n the basis of which High Courts may frame Rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases.

57. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's press release dated 7th March, 2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment

Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons, "...have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act", and will now not be applicable to Section 34 petitions filed after 23rd October, 2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23rd October, 2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23rd October, 2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of Courts, which ultimately defeats the object of the 1996 Act.[4] It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to Court proceedings commenced on or after 23rd October, 2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated.

58. At the fag end of the arguments, Shri Viswanathan, in rejoinder, raised another point which arises only in Civil Appeals arising out of SLP(C) No. 8374-8375 of 2017 and 8376-8378 of 2017. According to him, the impugned judgment, when it dealt with the majority award in favour of Respondent Enercon GmbH, went behind the award in ordering execution of a portion of the award in favour of Enercon, when the majority award, in paragraph 331(3) (b), specifically ordered the 2nd and 3rd Defendants to pay to WWIL, which is a joint venture company, a sum of Rs. 6,77,24,56,570/-. The majority award of the tribunal had specifically stated, in paragraph 298, as follows:

Enercon's claim is first pleaded as damages payable by the Mehra directors directly to Enercon. It also pleads an alternative claim for such further or other relief as the Tribunal considers appropriate (paragraph 18 of the application of 13 December 2015 and paragraph 323.4 of its closing written submission dated 13 May 2016, as also its Statement of Claim of 30 September 2014, at paragraph 102(M).) In the Tribunal's view, given that WWIL is only part owned by Enercon (hence Enercon's pecuniary disadvantage resulting from the Mehra directors' wrongdoing is not the same as that of WWIL) and further that WWIL remains the person most immediately affected by such wrongdoing, the liability of the Mehra directors is best discharged by requiring them to deciding upon such relief in favour of WWIL (as distinct from direct relief in favour of Enercon), the Tribunal sees no material disadvantage to Enercon, and, as for the Mehra directors, no possible prejudice or other unfairness, whether as a matter of pleading, the form of relief or otherwise.

It is only thereafter that the Tribunal awarded the aforesaid amount in paragraph 331(3) (b) as follows:

(b) Jointly and severally-

(i) to pay to WWIL the sum of INR 6,772,456,570, being the profit made by Vish Wind on the sale of allotment rights to WWIL in the years ending 31 March 2011 and 2012 together with interest thereon at the rate of 3% over European Central Bank rate from those dates until the date of this Award.

(ii) To pay to the Claimants their legal and other costs in the sum of 3,794,970.

59. It is thus Shri Viswanathan's contention that it is the decree holder alone who can execute such decree in its favour, and that in the present case it is WWIL who is the decree holder, insofar as paragraph 331(3)(b) is concerned and, that, therefore, Enercon's Chamber Summons, to execute this portion of the award, is contrary to the Code of Civil Procedure as well as a number of judgments construing the Code.

60. On the other hand, the submission of the other side is that the Mehra brothers, who are the 2nd and 3rd Defendants in the arbitration proceedings, are in control and management of WWIL, and have wrongfully excluded Enercon from such control and management. WWIL, therefore, will never put this decree into execution. This being so, the interest of justice requires that we should not interfere with the High Court judgment as there is no person that would be in a position to enforce the award apart from Enercon.

61. We are of the opinion that even though the High Court may not be strictly correct in its appreciation of the law, yet it has attempted to do justice on the facts of the case as follows:

These last words are important. If what Mr. Mehta says is correct and the decree was in favour of WWIL and not Enercon, that necessarily posits a rejection of Enercon's claim for damages and, therefore, a material disadvantage to Enercon. But this is not what the Arbitral Tribunal did at all. It accepted Enercon's plea. It accepted its argument that the Mehras were guilty of wrongdoing. It accepted that the Mehras were liable to make good any advantage or benefit they have received. The Arbitral Tribunal merely changed the vehicle or direction by which that recompense, restitution or recovery was to be made. The nomenclature is immaterial. Given the nature of disputes, indeed, WWIL could never put this decree into execution. It never sought this relief. It could not have. This is not in fact, as paragraph 298, says a relief in favour of WWIL at all although WWIL may benefit from it. It is a relief and a decree in favour of and only of Enercon.

In this view of the matter, we do not think it appropriate, in the interest of justice, to interfere with the impugned judgment on this count.

62. In view of the above, the present batch of appeals is dismissed. A copy of the judgment is to be sent to the Ministry of Law and Justice and the Learned Attorney General for India in view of what is stated in paragraphs 56 and 57 supra.

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[1]As a matter of fact, the amended Section 36 only brings back Article 36(2) of the UNCITRAL Model Law, which is based on Article 6 of the New York Convention, and which reads as under:

36(2). If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

[2]Section 29A of the Amendment Act provides for time limits within which an arbitral award is to be made. In **Hitendra Vishnu Thakur v. State of Maharashtra** MANU/SC/0526/1994: (1994) 4 SCC 602 at 633, this Court stated:

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.
(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.
It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29A of the Amendment Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.

[3]Shri Tushar Mehta, learned ASG, referred to a press release from the Government of India, dated March 7th, 2018, after arguments have been concluded, in a written submission made to us. According to him, the press release refers to a new Section 87 in a proposed amendment to be made to the 1996 Act. The press release states that the Union Cabinet, chaired by the Prime Minister, has approved the Arbitration and Conciliation (Amendment) Bill, 2018 in which a new Section 87 is proposed to be inserted as follows:

A new Section 87 is proposed to be inserted to clarify that unless parties agree otherwise the Amendment Act 2015 shall not apply to (a) Arbitral proceedings which have commenced before the commencement of the Amendment Act of 2015 (b) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Amendment Act of 2015 and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015 and to court proceedings arising out of or in relation to such Arbitral proceedings.

The Srikrishna Committee had recommended the following:

The Committee feels that permitting the 2015 Amendment Act to apply to pending court proceedings related to arbitrations commenced prior to 23 October 2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. It may also not be advisable to make the 2015 Amendment Act applicable to fresh court proceedings in relation to such arbitrations, as it may result in an inconsistent position. Therefore, it is felt that it may be desirable to limit the applicability of the 2015 Amendment Act to arbitrations commenced on or after 23 October 2015 and related court proceedings.

Recommendations
1. Section 26 of the 2015 Amendment Act may be amended to provide that:

a. unless parties agree otherwise, the 2015 Amendment Act shall not apply to: (a) arbitral proceedings commenced, in accordance with Section 21 of the ACA, before the commencement of the 2015 Amendment Act; and (b) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the 2015 Amendment Act; and b. the 2015 Amendment Act shall apply only to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings.

2. The amended Section 26 shall have retrospective effect from the date of commencement of the 2015 Amendment Act.

The High-Level Committee recommended this after referring to divergent views taken by various High Courts. This included the interpretation given by the Calcutta High Court in **Electrosteel Castings Limited v. Reacon Engineers (India) Pvt. Ltd.** (A.P. No. 1710 of 2015 decided on 14.01.2016) and **Tufan Chatterjee v. Rangan Dhar**, (FMAT No. 47 of 2016 decided on 02.03.2016), the Madhya Pradesh High Court in **Pragat Akshay Urja Limited Co. v. State of M.P. and Ors.**, (Arbitration Case Nos. 48, 53 and 54/2014, decided on 30.06.2016), the Madras High Court in **New Tirupur Area Development v. Hindustan Construction Co. Limited**, (Application No. 7674 of 2015 in O.P. No. 931 of 2015) and the Bombay High Court in **Rendezvous Sports World**

v. BCCI (Chamber Summons No. 1530 of 2015 in Execution Application (L) No. 2481 of 2015, Chamber Summons No. 1532 of 2015 in Execution Application (L) No. 2482 and Chamber Summons No. 66 of 2016 in Execution Application (L) No. 2748 of 2015 decided on 08.08.2016).

In addition to this, the following decisions by various High Courts also deal with the applicability of the Amendment Act:

i. Calcutta High Court: **Nitya Ranjan Jena v. Tata Capital Financial Services Ltd.**, GA No. 145/206 with AP No. 15/2016, **West Bengal Power Development Corporation Ltd. v. Dongfang Electric Corporation**, MANU/WB/0519/2017,**Saraf Agencies v. Federal Agencies for State Property Management** MANU/WB/0189/2017 : AIR 2017 Cal. 65, **Reliance Capital Ltd. v. Chandana Creations**, 2016 SCC Cal. 9558 and **Braithwaite Burn & Jessop Construction Co. Ltd. v. Indo Wagon Engineering Ltd.** MANU/WB/0442/2017 : AIR 2017 (NOC 923) 314.

ii. Bombay High Court: **M/s. Maharashtra Airport Development Co. Ltd. v. M/s. PBA Infrastructure Ltd.,** MANU/MH/4332/2017, **Enercon GmbH v. Yogesh Mehra**, MANU/MH/0400/2017: 2017 SCC Bom 1744 and **Global Aviation Services Pvt. Ltd. v. Airport Authority of India**, Commercial Arbitration Petition No. 434/2017,

iii. Madras High Court: **Jumbo Bags Ltd. v. New India Assurance Co. Limited**, MANU/TN/0353/2016: 2016 (3) CTC 769.

iv. Delhi High Court: **ICI Soma JV v. Simplex Infrastructures Ltd.**, MANU/DE/2773/2016, **Tantia-CCIL (JV) v. Union of India**, ARB.P. 615/2016, **Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. and Ors.**, OMP (I) (COMM.) 23/2015, **Orissa Concrete and Allied Industries Ltd. v. Union of India and Ors.**, Arb. P. No. 174 of 2016, **Takamol Industries Pvt. Ltd. v. Kundan Rice Mills Ltd.**, EX.P. 422/2014 & EA No. 739/2016, **Apex Encon Projects Pvt. Ltd. v. Union of India and Anr.**, MANU/DE/4152/2017 and **Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Pvt. Ltd.**, MANU/DE/0944/2017.

v. Patna High Court: **SPS v. Bihar Rajya Pul Nirman Nigam Ltd.**, Request Case No. 14 of 2016 and **Kumar and Kumar Associates v. Union of India**, MANU/BH/0529/2016: 2017 1 PLJR 649.

vi. Gujarat High Court: **OCI Corporation v. Kandla Export Corporation and Ors.**, MANU/GJ/2796/2016 : 2017 GLH (1) 383, **Abhinav Knowledge Services Pvt. Ltd. v. Babasaheb Ambedkar Open University** MANU/GJ/1142/2017 : AIR 2017 (NOC 1012) 344 and **Pallav Vimalbhai Shah v. Kalpesh Sumatibhai Shah**, O/IAAP/15/2017.

vii. Kerala High Court: **Shamsudeen v. Shreeram Transport Finance Ltd.**, MANU/KE/2137/2016 : ILR 2017 Vol. 1, Ker. 370 and **Jacob Mathew v. PTC Builders**, MANU/KE/1876/2017 : 2017 (5) KHC 583.

viii. Tripura High Court: **Subhash Podder v. State of Tripura**, MANU/TR/0232/2016 : 2016 SCC Tri. 500. ix. Chhatisgarh High Court: **Orissa Concrete and Allied Industries Limited v. Union of India and Ors.**, Arbitration Application No. 34/2014.

x. Rajasthan High Court: **Dwarka Traders Pvt. Ltd. v. Union of India, S.B.**, Arbitration Application No. 95/2013 and **Mayur Associates, Engineers and Contractors v. Gurmeet Singh and Ors.**, S.B. Arbitration Application No. 74/2013.

xi. Himachal Pradesh High Court: **RSWM v. The Himachal Pradesh State Supplies Co. Ltd.**, Arb Case No. 104/2016 and **P.K. Construction Co. and Ors. v. Shimla Municipal Co. and Ors.**, Civil Writ Petition No. 2322/2016.

xii. Punjab & Haryana High Court: **Alpine Minmetals India Pvt. Ltd. v. Noble Resources Ltd.**, LPA No. 917/2017.

[4]These amendments have the effect, as stated in **HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.)** MANU/SC/1066/2017 of limiting the grounds of challenge to awards as follows:

...In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC v. Saw Pipes Ltd., MANU/SC/0314/2003: (2003) 5 SCC 705, has been expressly done away with. So has the judgment in ONGC v. Western Geco International Ltd., MANU/SC/0772/2014: (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Plant Co. Ltd. v. General Electric Co., MANU/SC/0195/1994 : (1994) Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein, viz., "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in Renusagar (supra). "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in Associate Builders v. Delhi Development Authority, MANU/SC/1076/2014 : (2015) 3 SCC 49. Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders (supra), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

Suresh Narayan Kadam and others v Central Bank of India and others

(2016)11 SCC 306

Bench: Madan B. Lokur, R.K. Agrawal, JJ.

Facts: The Maharashtra Housing and Area Development Authority (MHADA) had constructed some buildings for the lower and middle income groups in a complex known as Samata Nagar, Kandivli, Mumbai. Each building had

twenty flats. The Central Bank of India (for short 'the Bank') took possession of the land and ten such buildings on 16th August, 1982 with the intention of housing the families of a total of 200 employees. Pursuant thereto, the Bank issued Circulars on 15th September, 1982 and 25th May, 1983 relating to the policy of allotment of the flats to its Class III and Class IV employees. The Circular dated 15th September, 1982 provided that the flats would be allotted to employees under the jurisdiction of the Central Office, Bombay Main Office and the Bombay Metropolitan Regional Office. It also provided that the allotment would be as per the absolute discretion of the management and that the facility of allotment was not given as a condition of service nor did any right vest in any staff member. The Circular dated 25th May, 1983 made some minor modifications in the eligibility for allotment but the sum and substance, as far as the present proceedings are concerned, remained more or less the same.

Relevant paras of Judgement:

Held, land was leased out by the MHADA to the Bank for the purposes of housing middle income group employees or lower income group employees. As a result of the redevelopment plan, the Bank was intending to demolish the buildings and to construct luxury apartments for their managerial level officers, contrary to the lease agreement with MHADA. Assuming this to be so, if there is a violation of the provisions of the lease deed between the MHADA and the Bank, it is really for them to settle their differences, if any. The employees do not come into the picture at all. The various clauses in the lease agreement that have been referred to do not in any manner involve the employees and for them to raise an issue about any alleged violation of the provisions of the lease deed is totally inconsequential. This is not a public interest litigation where the rule relating to standing can be relaxed. SC is therefore not inclined to accept this submission of the employees that since the MHADA had leased out the land to the Bank for housing middle income group or lower income group employees, the Bank is disentitled from demolishing the buildings and constructing luxury apartments for their managerial level officers. Thus, there is no merit in these petitions and therefore decline to grant special leave to appeal and dismiss these petitions but with no order as to costs. SC grants them time to vacate the premises allotted to them on or before 31-3-2016. Order accordingly.

The Judgment was delivered by: Madan B. Lokur, J.

1. The proceedings in these petitions as indeed the proceedings in the Bombay High Court (out of which the present petitions have arisen) indicate a clear need for encouraging an amicable settlement process, preferably through mediation, in which the services of a mediator well- versed in the art, science and technique of mediation may be taken advantage of. The alternative, of course, is protracted litigation which may not be the best alternative for the contesting parties or for a society that requires expeditious justice delivery.

2. In his Foreword written on 12th April, 2011 to the first edition of "Mediation Practice & Law – The path to successful dispute resolution" written by Mr. Sriram Panchu, Senior Advocate and Mediator, Mr. Fali S. Nariman, a Senior Advocate of this Court and a respected jurist, writes:

"The same subject matter of disputation between two parties can be dealt with in two different ways, not necessarily exclusive: first, by attempting to resolve a dispute in such a way that the parties involved win as much as possible and lose as little as possible through the intervention of a third party steeped in the techniques of mediation; and second, (failing this) the dispute would be left to be resolved by each party presenting its case before a disinterested third party with an expectation of a binding decision on the merits of the case: a win-all lose-all, final determination".

The second alternative may not be the best alternative, as already mentioned by us.

3. The decision rendered by the High Court which is under challenge before us states that efforts were made to have the disputes between the contesting parties settled but it is clear that no institutional mechanism was invited to assist in the settlement process. The proceedings before us also indicate that several efforts were made to encourage the contesting parties to arrive at a settlement, and at one point of time the parties did reach an interim arrangement but that could not fructify into a final settlement only because of the absence of an intervention through an institutional mechanism. Appreciating this, this Court has consistently encouraged the settlement of disputes through an institutionalized alternative dispute resolution mechanism and there are at least three significant decisions rendered by this Court on the subject. They are: (i) Salem Advocate Bar Assn. (II) v. Union of India (2005) 6 SCC 344 2005 Indlaw SC 592 (ii) Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. (P) Ltd. (2010) 8 SCC 24 2010 Indlaw SC 688 (iii) K. Srinivas Rao v. D.A. Deepa (2013) 5 SCC 226 2013 Indlaw SC 110.

4. That apart this Court has, on several occasions, referred disputes for amicable settlement through the Mediation Centre functioning in the Supreme Court premises itself and Mediation Centres across the country in a large variety of disputes including (primarily) matrimonial disputes. In spite of the encouragement given by this Court, for one reason or another, institutionalized mediation has yet to be recognized as an acceptable method of dispute resolution provoking Mr. Fali S. Nariman to comment in the same Foreword in the context of the Afcon's decision that "Mediation must stand on its own; its success judged on its own record, un-assisted by Judges.

STATE OF M.P.VS. MADANLAL

2015(7) SCALE 261

Summary of Judgment

Facts

The Respondent as accused was sent up for trial for the offence punishable under Section 376(2) (f) Indian Penal Code before the learned Sessions Judge. The case of the prosecution before the Court below was that on 27.12.2008, the victim, aged about 7 years, PW1, was proceeding towards Haar from her home and on the way the accused, Madan Lal, met her and came to know that she was going in search of her mother who had gone to graze the goats. The accused told her that her mother had gone towards the river and accordingly took her near the river Parvati, removed her undergarment and made her sit on his lap, and at that time the prosecutrix shouted. As the prosecution story proceeds, he discharged on her private parts as well as on the stomach and washed the same. Upon hearing the cry of the prosecutrix, her mother, Ramnali Bai, PW2, reached the spot, and then accused took to his heels. The prosecutrix narrated the entire incident to her mother which led to lodging of an FIR by the mother of the prosecutrix. On the basis of the FIR lodged, criminal law was set in motion, and thereafter the investigating agency examined number of witnesses, seized the clothes of the Respondent-accused, sent certain articles for examination to the forensic laboratory and eventually after completing the examination, laid the chargesheet before the concerned court, which in turn, committed the matter to the Court of Session.

The learned trial Judge on the basis of the material brought on record came to hold that the prosecution had been able to establish the charge against the accused and accordingly found him guilty and sentenced him, however, the said judgment of conviction and order of sentence was in assail before the High Court.

The High Court, as is manifest, has converted the offence to one under 354 Indian Penal Code and confined the sentence to the period of custody already undergone.

Observation of the Court

In the instant appeal, as a reminder, though repetitive, first we shall dwell upon, in a painful manner, how some of the appellate Judges, contrary to the precedents and against the normative mandate of law, assuming a presumptuous role have paved the path of unbelievable laconicity to deal with criminal appeals which, if we permit ourselves to say, ruptures the sense of justice and punctures the criminal justice dispensation system.

It is mandatory for the appellate court to peruse the record which will necessarily mean the statement of the witnesses. In a case based upon direct eyewitness account, the testimony of the eyewitnesses is of paramount importance and if the appellate court reverses the finding recorded by the trial court and acquits the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 Code of Criminal Procedure

As it seems to us the learned Single Judge has been influenced by the compromise that has been entered into between the accused and the parents of the victim as the victim was a minor. The learned trial Judge had rejected the said application on the ground that the offence was not compoundable.

Supreme Court Held

A compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle.

Court relied on ***Shimbhu and Anr. v. State of Haryana*** (2014) 13 SCC 318 wherein it was held that

"We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error.

Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility.

Court opined that matter has to be remitted to the High Court for a reappraisal of the evidence and for a fresh decision. The consequence of such remand is that the order of the High Court stands lancinated and as the Respondent was in custody at the time of the pronouncement of the judgment by the trial Court, he shall be taken into custody forthwith by the concerned Superintendent of Police and thereafter the appeal before the High Court be heard afresh.

Vikram Bakshi and others v Sonia Khosla (Dead) By Lrs.

(2014) 15 SCC 80

Bench: Justice A. K. Sikri and Justice Surinder Singh Nijjar

The Judgment was delivered by: A. K. Sikri, J.

1. A spate of litigation between the two groups depicts a severe fight between them where settlement appears to be a distant dream, at least as of now, with tough positions taken and on each and every facet/ nuance of the disputes, they have joined issues. However, we are happy to find consensual approach on one aspect at least viz. the future course of action that needs to be adopted in these matters which have landed in this Court (albeit against interim orders) as the proceedings are still pending at different levels either in the Company Law Board or in the High Court. This much positive stance, aimed at cutting the corners and edging out the niceties for early resolution of the main dispute between the parties needs to be commended. For this reason, apart from stating the controversy involved in each of the matters, our purpose would be served in stating the course of action which needs to be adopted, as agreed between the parties, without going into the nitty-gritty of the issues involved. With this introduction we describe herein below the nature of the dispute in these petitions.

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2. When the two parties joined together for collaborative business venture, it is but natural that the relationship starts with mutual trust and faith in each other. At the time of fostering such a relationship, they expect that with joint efforts in the proposed business venture, they would be able to achieve unparallel milestones, which would otherwise be impossible with their individual efforts. The joining together is with the aim of making one plus one as eleven and not two. However, over a period of time, if due to unfortunate and unforeseen circumstances/ events, the relationship becomes bitter and the two collaborative partners fall apart, it results in a position where one minus one is not only reduced to zero but becomes negative. That perhaps is the story of the present litigation and if the disputes are not resolved early, either by adjudicatory process or amicably between the parties, the negative factor will keep growing and keep widening its fangs which may not be conducive to any of the litigants before us.

3. The respondents herein (Khosla Group) are the owners of the prime lands in Kasauli, District Solan, Himachal Pradesh. Legally, this land is owned by Montreaux Resort Pvt. Ltd. (MRL) and shareholding of the MRL was earlier exclusively held by the family members of the Khosla Group. It was their vision to develop this real estate into a tourist resort of repute. The Khosla group needed requisite finances and administrative expertise for this purpose.

The petitioners (Bakshi Group) extended its helping hand. In fact it was conceived as a dream project of both the groups. For this purpose MOU dated 21.12.2005 was entered into between Mr. Deepak Khosla, Mr. R.P. Khosla, MRL and Mr. Vikram Bakshi. The project was joint venture between the Khosla Group and Mr. Vikram Bakshi wherein the Bakshi Group was to pump in the necessary finances and to take charge of administration by managing the entire project. MRL was the special purpose vehicle for the execution of the project. The MOU envisaged transfer of shareholding in MRL by Khosla Group to Vikram Bakshi on certain demands made by the latter to the former.

4. Pursuant to the MOU dated 23.12.2005, Mr. Vinod Surah and Mr. Wadia Prakash (nominees of Mr. Vikram bakshi) were appointed as Additional Directors of MRL. An agreement dated 31.3.2006 was entered, for executing the proposed project, between the respondent, Ms. Sonia Khosla, wife of Mr. Deepak Khosla, Mr. R.P. Khosla, MRL and Mr. Vikram Bakshi. The agreement recorded that 51% shareholding in the company had been transferred to Mr. Vikram Bakshi. The said agreement, inter alia, provided that:

(a) Land for the project shall be purchased in the name of MRL.

(b) The responsibility of development of lands, managing the project and arranging finances would be that of Mr. Vikram Bakshi.

(c) Khosla's would be paid a total consideration of Rs. 6.44 crores on completion of different milestones of which an amount of Rs. 3.30 crores was to be as a loan bearing interest @ 12% per annum.

(d) Khosla's would sell their entire shareholding in MRL to Mr. Vikram Bakshi.

5. For some reasons (both the groups have their own version in this behalf with blame game against each other) the project did not kick off and ran into rough weather with the sowing of the seeds of mutual distrust and lack of faith. It led to filing of a petition u/s. 397 and 398 of the Companies Act by Ms. Sonia Khosla against Bakshi Group, though in that petition she impleaded some of the members of Khosla family also as respondents (may be performa respondents). Her allegation was that she held 49% shares in the Company which had been further reduced to 36% and that the affairs of the Company were being managed in a manner oppressive to the minority shareholders. In this petition she admitted that majority shareholding was with Mr. Vikram Bakshi.

6. The relief prayed for in the said petition, inter alia, was for passing an order for removal of the petitioners from the Board of Directors of the Company. Various miscellaneous applications came to be filed in the aforesaid petition. Notably among those was an application u/s. 8 of the Arbitration and Conciliation Act filed by Mr. Vikram Bakshi. Mr. Vineet Khosla also filed an application claiming himself to be the Director of the Company and alleging that Mr. Wadia Prakash and Mr. Vinod Surah had ceased to be the Directors of the Company on 30.9.2006 since they were not confirmed in the AGM of the Company and, therefore, the subsequent appointment of Mr. Vikram Bakshi by the Board was bad in law.

7. Another significant development which took place was that on 18.12.2007 purported meeting of the Company was held by Ms. Sonia Khosla and Mr. Vinay Khosla wherein Mr. Deepak Khosla and Mr. R.K. Garg were appointed as the Directors of the Company and in this meeting the Board of the Company allotted 6.58 lakhs equity shares to eleven persons of the Khosla Group. It hardly needs to be mentioned that the Bakshi Group contends that this alleged meeting on 18.12.2007 was of illegally constituted Board. The Bakshi Group also taken the position that Mr. Wadia Prakash and Mr. Vinod Surah continue to be legally appointed Directors and likewise appointment of Mr. Vikram Bakshi by the Board of the Company was also as per law.

8. The Company Law Board (CLB) passed orders dated 31.1.2008 directing the maintenance of status quo with regard to the shareholding and the Directors of the Company as it existed on the date of the filing of the petition i.e. 13.8.2007. Observations were made in this order that the respondent-Sonia Khosla had tried to overreach the CLB by changing it composition and to increase the share capital of the Company.

9. Aggrieved by this order of the CLB, Mr. R.P. Khosla filed the appeal in the High Court of Delhi. However, he sought permission to withdraw the appeal. On 11.4.2008, noticing that the parties had agreed that C.P. No. 114/2007 is to be withdrawn and the status quo as on the date of filing of the said petition would be maintained, the said C.P. was dismissed as withdrawn. Sonia Khosla had also filed appeal against the same very order dated 31.1.2008 of the CLB. This was also dismissed by the High Court on 22.4.2008, albiet on merits. Both Mr. R.P. Khosla as well as Sonia Khosla filed Review Petitions seeking review of orders dated 11.4.2008 and 22.4.2008 respectively. These Review Petitions were also dismissed on 6.5.2008.

10. As the things stood at that stage, the effect of the aforesaid proceedings was that the order dated 31.1.2008 passed by CLB continued to operate. It is at that stage, the litigation started taking a different turn altogether.

11. Ms. Sonia Khosla filed an application u/s. 340 of the Code of Criminal Procedure (Cr.PC) before the CLB alleging that forged documents were filed before the CLB. However, while this application is still pending before the CLB, in October, 2008 she filed another application u/s. 340 Cr. PC in the High Court of Delhi on the same very grounds which were taken in the application before CLB. She sought prosecution of the petitioners u/s. 195(i)(b)(ii) read with S. 340 Cr. PC alleging that the minutes of the AGM of the Company allegedly held on 30.9.2006 were forged. The reason given therein to approach the High Court was that she was forced to file the petition in the High Court as there was a complete inaction on the part of CLB on her application before it. She sought to rest her application on sub-s. 2 of S. 340 Cr. PC for its maintainability in the High Court. In this application orders dated 15.2.2010 are passed by the High Court and that order is the subject matter of challenge in the present proceedings. As can be easily discerned, the petitioners' main contention is that application u/s 340 Cr. PC is not maintainable.

SLP(C)No. 23796-98 of 2010

12. As mentioned above, in the Company Petition filed by Ms. Sonia Khosla interim orders dated 31.1.2008 were passed by the CLB directing the parties to maintain status quo with regard to shareholding and the Directors of the Company as it existed on the date of filing of the Company Petition i.e. 13.8.2007. The consequences thereof was not to give effect to the purported Board meeting of the Company on 14.12.2007 wherein Mr. Deepak Khosla and Mr. R.K. Garg were inducted as Directors and there was also an allotment of 6.58 lakhs equity shares to the persons of Khosla Group. Further, as mentioned above this order was challenged both by R.P. Khosla as well as Ms. Sonia Khosla by filing appeal in the High Court. Whereas appeal filed by Mr. R.P. Khosla was dismissed on 11.4.2008, the appeal of Ms. Sonia was dismissed on merits on 22.4.2008 and the Review Petitions filed by both of them were also dismissed on 6.5.2008. However, Mr. R.K. Garg who was taken as Director in the purported meeting held on 14.12.2007 also felt aggrieved by the order of the CLB. The effect of the status quo ante order was that he could not be treated as the Director of the Company during the subsistence of the said order. Mr. R.K. Garg challenged this order by filing a writ petition in the High Court of Delhi on 26.2.2008. In that writ petition orders of status quo were passed on 7.4.2008 However, on 9.4.2009, Mr. R.K. Garg (Respondent No. 1 herein) withdrew this petition as alternate remedy of filing appeal against the impugned order of the CLB is provided under Section 10F of the Companies Act. After withdrewing the writ petition the Respondent No. 1 filed Co. Appeal No. (SB) 23 of 2009. In this appeal the company judge of the High Court has passed orders dated 13.4.2010 issuing notice in the said appeal, in the application for condonation of delay as well as in the stay application. Simultaneously, the High Court has also stayed the operation of the orders dated 31.1.2008 passed by CLB in so far as it has cancelled the shareholding and Directorship of Respondent No. 1.

The instant present Special Leave Petition impugns the aforesaid order dated 13.4.2010 passed by the High Court, primarily on the ground that since the appeal is time barred till the delay is condoned there is no appeal in the eyes of law and, therefore, the High Court could not have passed interim orders.

13. Though the aforesaid two SLP's are the main proceedings before us, even in these proceedings Contempt Petitions and petitions u/s. 340 Cr. PC are filed. Moreover, narration of the events disclosed above would demonstrate that main proceedings are the Co. Petition filed by Ms. Sonia Khosla under

Section 397-98 of the Companies Act before the CLB where issues relating to the affairs of the Company are to be thrashed out. However, from this on case, number of other proceedings have sprung up. In fact, as of today more than 80 cases are pending between the parties. Most of these do not even touch the main dispute as they are in the nature of either Contempt Petitions, (Civil or Criminal) or petitions u/s. 340 Cr. PC etc.

14. As stated in the beginning of this order, though it was going to be collaborative efforts of the two groups in developing a dream project and for certain reasons the parties have drifted apart, one legal action which was triggered with the filing of the Company Petition by Ms. Sonia Khosla before the CLB, has today swollen into an acrimony of gigantic proportion. With all these incidental and peripheral proceedings, which are allowed to take centre stage, the main dispute which is the subject matter of company petition before the CLB has taken a back seat. There have been attempts made on different levels, during court proceedings, to see whether there could be amicable resolution of the disputes between the parties. However, as on date these attempts have been of no avail.

15. According to us it would have been more appropriate for the parties to atleast agree to resort to mediation as provided u/s. 89 if CPC and make an endeavour to find amicable solution of the dispute, agreeable to both the parties. One of the aims of mediation is to find an early resolution of the dispute. The sooner dispute is resolved the better for all the parties concerned, in particular, and the society, in general. For parties, dispute not only strains the relationship but also destroy it. And, so far as society is concerned it affects its peace. So what is required is resolution of dispute at the earliest possible opportunity and via such a mechanism where the relationship between individual goes on in a healthy manner. Warren Burger, once said:

"The obligation of the legal profession is... to serve as healers of human conflict... (we) should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."

MEDIATION is one such mechanism which has been statutorily brought into place in our Justice System. It is one of the methods of Alternative Dispute Resolution and resolves the dispute in a way that is private, fast and economical. It is a process in which a neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. It embraces the philosophy of democratic decision-making [Alfin, et al., Mediation theory & Practice, (2nd Ed. 2006) Lexis Nexis.

16. Thus, mediation being a form of Alternative Dispute Resolution is a shift from adversarial litigation. When the parties desire an on-going relationship, mediation can build and improve their relationships. To preserve, develop and improve communication, build bridges of understanding, find out options for settlement for mutual gains, search unobvious from obvious, dive underneath a problem and dig out underlying interests of the disputing parties, preserve and maintain relationships and collaborative problem solving are some of the fundamental advantages of mediation. Even in those cases where relationships have turned bitter, mediation has been able to produce positive outcomes, restoring the peace and amity between the parties.

17. There is always a difference between winning a case and seeking a solution. Via mediation, the parties will become partners in the solution rather than partners in problems. The beauty of settlement through mediation is that it may bring about a solution which may not only be to the satisfaction of the parties and, therefore, create a win win situation, the outcome which cannot be achieved by means of judicial adjudication. Thus, life as well as relationship goes on with Mediation for all the parties concerned and thus resulting into peace and harmony in the society. While providing satisfaction to the litigants, it also solves the problem of delay in our system and further contributes towards economic, commercial and financial growth and development of the country.

18. This Bench is of firm opinion that mediation is new dimension of access to justice. As it is one of the best forms, if not the best, of conflict resolution. The concept of Justice in mediation is advanced in the oeuvres of Professors Stulberg, Love, Hyman, and Menkel-Meadow (Self-Determination Theorists). Their definition of justice is drawn primarily from the exercise of party self- determination. They are hopeful about the magic that can occur when people open up honestly and empathetically about their needs and fears in uninhibited private discussion. And, as thinkers, these jurists are optimistic that the magnanimity of the human spirit can conquer structural imbalances and resource constraints.

Justice in mediation also encompasses external developments, beliefs about human nature and legal regulation. Various jurists are drawn to mediation in the belief that litigation and adversarial warring are not the only, or the best ways to approach conflict. And how optimistically and skeptically mediators assess the capabilities of individual parties and institutional actors to construct fair outcomes from the raw material of human conduct.

Mediation ensures a just solution acceptable to all the parties to dispute thereby achieving 'win-win' situation. It is only mediation that puts the parties in control of both their disputes and its resolution. It is mediation through which the parties can communicate in a real sense with each other, which they have not been able to do since the dispute started. It is mediation which makes the process voluntary and does not bind the parties against their wish. It is mediation that saves precious time, energy as well as cost which can result in lesser burden on exchequer when poor litigants are to be provided legal aid. It is mediation which focuses on long term interest and helps the parties in creating numerous options for settlement. It is mediation that restores broken relationship and focuses on improving the future not of dissecting past. It is based on an alternative set of values in which formalism is replaced by informality of procedure, fair trial procedures by direct participation of parties, consistent norm enforcement by norm creation, judicial independence by the involvement of trusted peers, and so on. This presents an alternative conceptualization of justice.

19. We have purposely stated the aforesaid advantages of mediation process in a hope that if not now, in near future the parties may agree on exploiting this mechanism to their advantage.

20. In this backdrop, Mr. Dushyant Dave, the learned Senior Counsel who appeared for Bakshi Group in SLP (C) No. 6873 of 2010 made a fervent plea before this Court to invoke the provisions of Art. 142 of the Constitution and put an end to the entire litigation between the parties pending in various courts by putting the parties to such terms, which this court finds to be equitable for both the parties. On behalf of Bakshi Group he also gave the offer to surrender/give 50% of land to the Khosla Group and also an amount of Rs. 6.40 Crores, He even submitted that if this Court finds the said amount to be inadequate the Court would be empowered to fix higher amount. However, that was not acceptable to the other side as according to them not only they are entitled to get the entire land which belongs to them but the amount of compensation which Bakshi Group is liable to pay to them would be many times more than the amount offered. Lest we be misunderstood, we are not blaming either side. We have indicated this, just to give a hint of the magnitude of imbroglio that has occurred between the parties. At the same time, as there are many cases of different nature pending in different courts it is not possible to exercise powers under Art. 142 of the Constitution and to resolve all those cases. However, we feel sad about the state of affairs. The dispute which has arisen, out of MOU/ collaboration agreement between the parties is not unique or unprecedented. Such type of differences do arise. Day in and day out there are litigations of the kind which is filed in the CLB by Ms. Sonia Khosla. However, what is unprecedented is the monstrous proportions which this litigation has assumed with the multiplication of proceedings between the parties today which arose out of one petition before the CLB.

21. In fact, though the learned Senior Counsel for the parties had argued the matters before us at length on the previous occasions, at the stage of conclusions of the arguments, the learned Senior Counsel Mr. Cama appearing for Khosla Group suggested for an early decision of the Company Petition before the CLB as a better alternative so that at least main dispute between the parties is adjudicated upon at an early date. He was candid in his submission that the issues which are subject matter of these two Special Leave Petitions and arise out of the proceedings in the High Court, have their origin in the orders dated 31.1.2008, which is an interim order passed by the CLB. He thus, pointed out that once the Company Petition itself is decided, the issues involved therein namely whether Board meeting dated 14.12.2007 was illegal or whether Board meeting dated 30.9.2006 was barred in law would also get decided. In the process the CLB would also be in a position to decide as to whether minutes of AGM of the Company allegedly held on 30.9.2006 are forged or not and on that basis application u/s. 340 Cr. PC which is filed before the Company Law Boared would also be taken care of by the CLB itself. Learned Senior Counsels appearing for the Bakshi Group immediately agreed with the aforesaid course of action suggested by Mr. Cama. We are happy that at least there is an agreement between both the parties on the procedural course of action, to give quietus to the matters before us as well. In view of the aforesaid consensus, about the course of action to be adopted in deciding the disputes between the parties, we direct the Company Law Board to decide Company Petition No. 114 of 2007 filed before it by Ms. Sonia Khosla within a period of six months from the date of receiving a copy of this order. Since, it is the CLB which will be deciding the application u/s. 340 Cr. PC filed by Ms. Sonia Khosla in the CLB, High Court need not proceed further with the Criminal Misc. (Co.). No. 3 of 2008. Likewise the question whether Mr. R.K. Garg was validly inducted as a Director or not would be gone into by the CLB, the proceedings in Co. Appeal No. (SB) 23 of 2009 filed by Mr. R.K. Garg in the High Court, also become otiose.

22. The only aspect on which some directions need to be given are, as to what should be the interim arrangement. The Bakshi Group wants orders dated 31.1.2008 passed by CLB to continue the interregnum. The Khosla Group on the other hand refers to orders dated 11.4.2008 as it is their submission that this was a consent order passed by the High Court after the orders of the CLB and, therefore, this order should govern the field in the meantime..

23. After considering the matter, we are of the opinion that it is not necessary to either enforce orders dated 31.1.2008 passed by the CLB or orders dated 11.4.2008 passed by the High Court. Fact remains that there has been a complete deadlock, as far as affairs of the Company are concerned. The project has not taken off. It is almost dead at present. Unless the parties re-concile, there is no chance for a joint venture i.e. to develop the resort, as per the MOU dated 21.12.2005. It is only after the decision of CLB, whereby the respective rights of the parties are crystallised, it would be possible to know about the future of this project. Even the Company in question is also defunct at present as it has no other business activity or venture. In a situation like this, we are of the opinion that more appropriate orders would be to direct the parties to maintain status quo in the meantime, during the pendency of the aforesaid company petition before the CLB. However, we make it clear that if any exigency arises necessitating some interim orders, it would be open to the parties to approach the CLB for appropriate directions.

24. Both these petitions are disposed of in the aforesaid terms. All other pending I.As including criminal contempt petitions and petitions filed u/s. 340 Cr. PC are also disposed of as in the facts of this case, we are not inclined to entertain such application. No costs.

K. Srinivas Rao v D.A. Deepa

(2013) 5 SCC 226 **Bench:** Ranjana Prakash Desai, Aftab Alam, JJ.

The Judgment was delivered by: Ranjana Prakash Desai, J.

Relevant parts of the Judgement

32. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation. S. 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Even if the Counsellors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties. Being trained in the skill of mediation, they produce good results.

33. The idea of pre-litigation mediation is also catching up. Some mediation centres have, after giving wide publicity, set up "Help Desks" at prominent places including facilitation centres at court complexes to conduct pre-litigation mediation. We are informed that in Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre, several matrimonial disputes are settled. These centres have a good success rate in pre-litigation mediation. If all mediation centres set up pre-litigation desks/clinics by giving sufficient publicity and matrimonial disputes are taken up for pre-litigation settlement, many families will be saved of hardship if, at least, some of them are settled.

34. While purely a civil matrimonial dispute can be amicably settled by a Family Court either by itself or by directing the parties to explore the possibility of settlement through mediation, a complaint under Section 498-A of the IPC presents difficulty because the said offence is not compoundable except in the State of Andhra Pradesh where by a State amendment, it has been made compoundable. Though in

Ramgopal & Anr. v. State of Madhya Pradesh & Anr. (2010) 13 SCC 540, this Court requested the Law Commission and the Government of India to examine whether offence punishable under Section 498-A of the IPC could be made compoundable, it has not been made compoundable as yet. The courts direct parties to approach mediation centres where offences are compoundable. Offence punishable under Section 498-A being a non-compoundable offence, such a course is not followed in respect thereof. This Court has always adopted a positive approach and encouraged settlement of matrimonial disputes and discouraged their escalation.

Afcons Infrastructure Limited and another v Cherian Varkey Construction Company

(Private) Limited and others

2010 Indlaw SC 688, (2010) 8 SCC 24

Judges: R.V. Raveendran, J.M. Panchal

The Judgment was delivered by: R. V. Raveendran, J.

1. Leave granted. The general scope of S. 89 of the Code of Civil Procedure ('Code' for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

2. The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20.4.2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1.8.2001. It is not in dispute that the agreement between the appellants and the first respondent did not contain any provision for reference of the disputes to arbitration.

3. The first respondent filed a suit against the appellants for recovery of Rs.210,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15.9.2004 in regard to a sum of Rs.2.25 crores. Thereafter in March 2005, the first respondent filed an application u/s. 89 of the Code before the trial court praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24.10.2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes u/s. 89 of the Code.

In the meanwhile, the High Court of Kerala by order dated 8.9.2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent u/s. 89 of the Code.

4. The trial court heard the said application u/s. 89. It recorded the fact that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application u/s. 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court. The High Court by the impugned order dated 11.10.2006 dismissed the revision petition holding that the apparent tenor of s. 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration.

The High Court also held that the concept of preexisting arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 ('AC Act' for short) was inapplicable to references u/s. 89 of the Code, having regard to the decision in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr. [2003 (5) SCC 531 2003 Indlaw SC 326]. The said order is challenged in this appeal.

5. On the contentions urged, two questions arise for consideration:

"(i) What is the procedure to be followed by a court in implementing s. 89 and Order 10 Rule 1A of the Code*?*

(ii) Whether consent of all parties to the suit is necessary for reference to arbitration u/s. 89 of the Code*?"*

6. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions.

7. If s. 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-s. (1). It has mixed up the definitions in sub-s. (2). In spite of these defects, the object behind s. 89 is laudable and sound. Resort to alternative disputes resolution (for short 'ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce S. 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits.

In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in Salem

Advocate Bar Association v. Union of India reported in [2003 (1) SCC 49 2002 Indlaw SC 1374 - for short, Salem Bar - (I)] but referred to a Committee, as it was hoped that s. 89 could be implemented by ironing the creases. In Salem Advocate Bar Association v. Union of India [2005 (6) SCC 344 2005 Indlaw SC 592 - for short, Salem Bar-(II)], this Court applied the principle of purposive construction in an attempt to make it workable.

What is wrong with s. 89 of the Code?

8. The first anomaly is the mixing up of the definitions of 'mediation' and 'judicial settlement' u/cls. (c) and (d) of sub-s. (2) of s. 89 of the Code. Cl. (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Cl. (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in cl. (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in cl. (c). "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute.

"Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'. (See : Black's Law Dictionary, 7th Edition, Pages 1377 and 996). When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in s. 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in S. 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in cls. (c) and (d) of S. 89(2). If the word "mediation" in cl. (d) and the words "judicial settlement" in cl. (c) are interchanged, we find that the said clauses make perfect sense.

9. The second anomaly is that sub-s. (1) of s. 89 imports the final stage of conciliation referred to in s. 73(1) of the AC Act into the pre-ADR reference stage u/s. 89 of the Code. Sub-s. (1) of s. 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes. If sub-s. (1) of S. 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

10. S. 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into s. 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions.

S. 73(1) of Arbitration and Conciliation Act, 1996 relating to the final stage of settlement process in conciliation.	S. 89(1) of Code of Civil Procedure relating to a stag before reference to an ADR process.
When it appears to the conciliator that there exist elements of a settlement which may be acceptable t the parties, he shall formulate the terms of a possib settlement and submit them to the parties for their observations. After receiving the observations of th parties, the conciliator may reformulate the terms of possible settlement in the light of such observation	Where it appears to the Court that there exist elements of a settlement which may be acceptable t the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of possible settlement and refer the same for (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.

Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

12. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing s. 89 of the Code. This Court therefore diluted this anomaly in Salem Bar (II) by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a 'summary of disputes' and not 'terms of settlement'.

How should s. 89 be interpreted?

13. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context: *"When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser."* (See : Shri Mandir Sita Ramji vs. Lt. Governor of Delhi - (1975) 4 SCC 298 1974 Indlaw SC 105).

There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

13.5. A classic example of correcting an error committed by the draftsman in legislative drafting is the substitution of the words 'defendant's witnesses' by this Court for the words 'plaintiff's witnesses' occurring in Order VII Rule 14(4) of the Code, in Salem Bar-II. We extract below the relevant portion of the said decision:

"Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order VII Rule (4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words 'plaintiff's witnesses, would be read as 'defendant's witnesses' in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature."

13.6. Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise "Principles of Statutory Interpretation" (12th Edn. - 2010, Lexis Nexis - page 144) from the decision of the House of Lords in Stock v. Frank Jones (Tipton) Ltd., [1978] 1 All E.R. 948 : [1978] 1 W.L.R. 231]:

".....a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

14. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to s. 89 of the Code. Therefore, in Salem Bar -II, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-s. (1) of section 89, is excluded or done away with by stating that the said provision

merely requires formulating a summary of disputes. Further, this Court in Salem Bar-II, adopted the following definition of 'mediation' suggested in the model mediation rules, in spite of a different definition in s. 89(2)(d):

"Settlement by 'mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."

All over the country the courts have been referring cases u/s. 89 to mediation by assuming and understanding 'mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

15. S. 89 has to be read with Rule 1-A of Order 10 which requires 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. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading S. 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to s. 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

16. In view of the foregoing, it has to be concluded that proper interpretation of s. 89 of the Code requires two changes from a plain and literal reading of the section.

Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate 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 cls. (c) and (d) of s. 89(2) shall have to be interchanged to correct the draftsman's error. Cls. (c) and (d) of s. 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 s. 89 is not rendered meaningless and infructuous.

Whether the reference to ADR Process is mandatory?

17. S. 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred u/s. 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed u/s. 89 of the Code.

Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process u/s. 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 case reference to ADR process is a must.

18. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts (including all money claims);
- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including

- disputes relating to matrimonial causes, maintenance, custody of children;
- disputes relating to partition/division among family members/co- parceners/co-owners; and - disputes relating to partnership among partners.

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies/associations/Apartment owners Associations;

(iv) All cases relating to tortious liability including

- claims for compensation in motor accidents/other accidents; and

(v) All consumer disputes including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or 'product popularity.

The above enumeration of 'suitable' and 'unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process. How to decide the appropriate ADR process under section 89?

20. S. 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of s. 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither s. 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987.

On the other hand, s. 89 of the Code makes it clear that two of the ADR processes - Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat

Settlement and Mediation (See : amended definition), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes - judicial settlement (See : amended definition), s. 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

21. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, s. 89 vests the choice of reference to the court. There is of course no inconsistency. S. 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

22. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

Arbitration

23. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an 'arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking s. 8 or s. 11 of the AC Act, and there would be no need to have recourse to arbitration u/s. 89 of the Code. S. 89 therefore pre-supposes that there is no pre-existing arbitration agreement.

Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court u/s. 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration u/s. 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in Salem Bar-I, the case will go outside the stream of the court permanently and will not come back to the court.

24. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration u/s. 89 of the Code. This is evident from the provisions of AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though s. 89 of the Code mandates reference to ADR processes, reference to arbitration u/s. 89 of the Code could only be with the consent of both sides and not otherwise.

24.3. The position was reiterated by this Court in Jagdish Chander v. Ramesh Chander [2007 (5) SCC 719 2007 Indlaw SC 1570] thus :

"It should not also be overlooked that even though S. 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under S. 89 CPC*, unless there is a mutual consent of all parties, for such reference."* (Emphasis supplied)

24.4. Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration u/s. 89 of the Code.

Conciliation

25. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in s. 62 of AC Act followed by appointment of conciliator/s as provided in s. 64 of AC 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 the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.

The other three ADR Processes

26. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (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 mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. It 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, 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. The court has used its discretion in choosing the

ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

"Whether the settlement in an ADR process is binding in itself ?"

27. When the court refers the matter to arbitration under S. 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to S. 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral

Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, u/s. 30 of the AC Act.

28. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non- adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to S. 74 read with S. 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such u/s. 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings.

As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party ('mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by S. 74 of AC Act (in respect of conciliation settlements) or S. 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective.

Summation

29. Having regard to the provisions of S. 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR processes under S. 89 before framing issues, nothing prevents the court from resorting to S. 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

30. Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements. Be that as it may.

31. We may summarize the procedure to be adopted by a court u/s. 89 of the Code as under :

a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded

category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeble for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with s. 64 of the AC Act.

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by S. 74 of the AC Act (if it is a Conciliation Settlement) or S. 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is ex facie illegal or unforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

32. The Court should also bear in mind the following consequential aspects, while giving effect to S. 89 of the Code:

(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 S. 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 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.

33. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that s. 89 has been a non-starter with many courts. Though the process under S. 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases. Conclusion

34. Coming back to this case, we may refer to the decision in Sukanya Holdings relied upon by the respondents, to contend that for a reference to arbitration u/s. 89 of the Code, consent of parties is not required. The High Court assumed that Sukanya Holdings has held that s. 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. Sukanya Holdings does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under s. 8 of the AC Act could be maintained even where a part of the subject matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to S. 89 are as under:

"Reliance was placed on S. 89 CPC *in support of the argument that the matter should have been referred to arbitration. In our view, S. 89* CPC *cannot be resorted to for interpreting S. 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under S. 89* CPC *and even if application under S. 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."*

The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under s. 8 of the Act, there can be a reference u/s. 89 to arbitration if parties agree to arbitration. The observations in Sukanya Holdings do not assist the first respondent as they were made in the context of considering a question as to whether s. 89 of the Code could be invoked for seeking a reference under s. 8 of the AC Act in a suit, where only a part of the subject- matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement. The first respondent next contended that the effect of the decision in Sukanya Holdings is that "s. 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration." There can be no dispute in regard to the said proposition as S. 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under S. 89 of the Code in regard to the said four ADR processes.

35. In the light of the above discussion, we answer the questions as follows:

"(i) The trial court did not adopt the proper procedure while enforcing S. 89 of the Code. *Failure to invoke S. 89 suo moto after completion of pleadings and considering it only after an application under S. 89 was filed, is erroneous.*

(ii) A civil court exercising power under S. 89 of the Code *cannot refer a suit to arbitration unless all the parties to the suit agree for such reference."*

36. Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The Trial Court will now consider and decide upon a non-adjudicatory ADR process. Appeal allowed.

2007 (97) DRJ 541

HIGH COURT OF DELHI

CS (OS) No. 139 of 2002 IA No. 579 of 2002 & IA No. 1860 of 2002

Bawa Masala Company.....Plaintiff

Versus

Bawa Masala Company Pvt. Ltd. & Anr.....Defendants

Sanjay Kishan Kaul, J.

Decided on 06.08.2007

Civil Procedure Code, 1908

Section 89 — Alternate Dispute Resolution — Appointment of mediators — Adoption of process known as — Early Neutral Evaluation — Confidential process adopted by Evaluators in which after considering the case of each of the parties the evaluators share there conclusions with the parties and if no settlement is possible the matter is referred back to court — Matter referred to Early Neutral Evaluation for exploring the possibilities of settlement.

[Paras 5, 6, 10 & 11]

PRESENT : Mr. Pravin Anand with Mr. A.K. Katoch, Advocates for the Plaintiff.

Mr. Siddharth Bambhar, Advocate for the Defendants.

Sanjay Kishan Kaul, J. (Oral)

CS (OS) No. 139/2002

IA No. 579/2002 (u/O 39 R 1 & 2 CPC) & IA No. 1860/2002 (u/S 8 of the Arbitration Act)

1. The legal dispute in the present case was referred for mediation. Mr. Rajiv Virmani, Advocate and Mr. Dalip Mehra, Advocate were the mediators. It is stated that there were a number of inter-linked disputes pending before the trial court and even they were called for mediation to the Delhi High Court Mediation & Conciliation Centre. The mediators were successful in resolving all the other disputes but unfortunately the dispute in the present case has not been resolved.

2. Learned counsels for the parties suggest that another effort should be made to resolve the disputes amicably by alternative dispute resolution mechanism. Learned counsels for the parties suggest that instead of the process of mediation, an endeavour be made through the process of 'Early Neutral Evaluation (ENE)'.

3. In order to appreciate this contention, it is necessary to examine this methodology of ENE. ENE is a process of alternative dispute resolution, which has been adopted in the United States of America. In the words of

Robert A. Goodin: "Early neutral evaluation is a technique used in American litigation to provide early focus to complex commercial litigation, and based on that focus, to provide a basis for sensible case management or offer resolution of the entire case, in the very early stages."

4. A senior counsel or a panel with expertise and experience in the subject matter of litigation are called upon to conduct ENE. Such persons are referred to as the Evaluator or a neutral person. A written brief is provided by the lawyers to such neutral evaluator, summarising the facts, legal arguments and authorities in support of each party's case. In a nutshell, the process would be same as would be required for making submissions in Court.

5. In the initial session before the evaluator, a decision-maker of each party accompanied by their lawyers would be present and a short concise presentation would be made by the counsels for each side referring to the documents and legal proposition. It is open to the evaluator to raise queries on the counsels for the parties and involve the decision-makers of the parties in the process. The neutral evaluator thereafter retires to prepare what according to the neutral evaluator is the central dispute in the case and what as per the neutral evaluator is the likely outcome on each of the issues/aspects. The evaluator also estimates the costs to each of the parties.

6. The evaluator thereafter shares his conclusion with the parties either at joint sessions or at private sessions, called caucuses. Said private caucuses are often useful as they may allow a more frank and free discussion about the strength and weaknesses of the respective parties. If no settlement is possible the matter is referred back to the Court without disclosing the reason for the failure of the process of ENE. Thus, the confidentiality and the principles of mediation are equally applicable to such ENE.

7. The aforesaid feature would show that such ENE is one of the choices in the ADR Multi Option Programme. It has the same features as a mediation process of being not binding, confidential and participative in nature. The difference is that in case of a mediation the solutions normally emerge from the parties and the mediator makes an endeavour to find the most acceptable solution by bridging the gap between the parties. In case of ENE, the evaluator acts as a neutral person to assess the strengths and weaknesses of each of the parties and discusses the same with the parties jointly or in caucuses, so that the parties are aware of the independent evaluation of the merits of their case. ENE is, thus, distinct from mediation being explicitly evaluative in nature and normally requires the expertise in the subject matter. It also focuses on procedure of law as opposed to interest of parties and it is not a process of discussion towards negotiated settlement.

8. The process of ENE is, however, distinct from arbitration as there is no testimony or oath or examination and such neutral evaluation is not

recorded. The process is confidential and cannot be used by any of the parties against the other. There is no award or result filed. It is really a judgement by the neutral evaluator on the basis of material on record without the judgement being binding and in a case of non-acceptance, the matter is referred back to the court without disclosure of reasons as in the case of a mediation.

9. Learned counsels for the parties state that since two person, who are advocates of standing and have spent time in the mediation process being familiar with the ramifications of the disputes between the two parties, it would be eminently appropriate, if they are jointly appointed as Early Neutral Evaluators.

10. ENE is, thus, a different form of alternate dispute resolution and I see no reason why this process cannot be resorted to towards the object of negotiated settlement in pursuance to Section 89 of the Code of Civil Procedure, 1908 specially when the parties volunteer for the same. The provisions of the said Section *inter alia* provide for Alternative Dispute Resolution Mechanism, which *inter alia* includes mediation. ENE also broadly follows the same process as a mediation, though the concept is not a negotiated settlement, but a neutral assessment.

11. In view of the aforesaid, I deem it appropriate that such neutral evaluation should take place by the two mediators/evaluators appointed aforesaid, now acting as neutral evaluators in terms of what has been explained hereinabove and the result of success or failure be communicated to this Court by the panel of the two neutral evaluators.

12. List for directions on 2.11.2007.

2007 (97) DRJ 543

HIGH COURT OF DELHI

Crl.M.C. No. 7309/2006 & Crl.M. No. 12453/2006

D.K. Modi.....Petitioner

Versus

K.C. Abraham, Enforcement Officer.....Respondent

A.K. Sikri, J.

Decided on 20,12.2006

Foreign Exchange Regulation Act, 1973

Section 56 — Prosecution for violation of provisions of Act — Adjudication proceedings arising out of same facts, exonerated the accused — Allegations made in complaint found to be same as in

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS. UNION OF INDIA (UOI)

(2005)6SCC344

Summary of Judgment

The challenge to the constitutional validity of amendments made to the Code of Civil Procedure by Amendment Acts of 1999 and 2002 was rejected by Supreme Court in ***Salem Advocates Bar Association, T.N. v. Union of India*** (AIR2003SC189), it was also noticed in the judgment that modalities have to be formulated with respect to the manner in which section 89 of the Code and, for that matter, the other provisions, which have been introduced by way of amendments, should 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 methods of Alternate Disputes Resolution (ADR) referred to in section 89. It was also observed that the model rules, with or without modification, that have been formulated, may be adopted by the High Courts concerned for giving effect to section 89(2)(d) of the Code.

Reports I, II and III submitted to the Supreme Court of India by the Committee.

Report I deals with clarifications on amendments to the Code of Civil Procedure 1908 made by the Amending Acts of 1909 and 2002.
Report II deals with clarifications on the responses to the Consultation Paper and Draft Rules relating to Alternative Disputes Resolution and Mediation as envisaged by section 89 of the Code of Civil Procedure.
Report III deals with Case Management procedures for use in the Courts.

The Hon'ble Supreme Court of India accepted the Reports I to III in its judgment in Salem Advocates Bar Association vs. Union of India 2005 (6) SCC 344.***The High Courts have been requested to frame rules as per the Report II*** and evolve case management procedures.