
THE PARADOX OF ALTERNATIVE DISPUTE RESOLUTION: EXPOSING STRUCTURAL INCONSISTENCIES IN SECTION 89 OF THE CODE OF CIVIL PROCEDURE, 1908

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ABSTRACT

Section 89 of the Code of Civil Procedure, 1908, was introduced to alleviate India's judicial backlog by integrating Alternative Dispute Resolution (ADR) into the formal legal system. However, this article argues that the provision is fundamentally flawed due to structural inconsistencies and drafting errors, such as the "definitional chaos" that interchanged the procedural requirements for mediation and judicial settlement. The framework further suffers from procedural overlaps with the Arbitration and Conciliation Act, 1996, and a confusing landscape of consent requirements where some ADR modes are mandatory while others require mutual agreement. While the Supreme Court's ruling in *Afcons Infrastructure* provided necessary interpretative clarity, the article concludes that judicial intervention cannot replace the need for a comprehensive legislative overhaul or dedicated statutes like the Mediation Bill 2021 to ensure effective dispute resolution.

Introduction

The introduction of Section 89 of the Code of Civil Procedure, 1908 through the Civil Procedure (Amendment) Act, 1999¹ marked what appeared to be a watershed moment in Indian dispute resolution jurisprudence. With its emphasis on alternative dispute resolution mechanisms, the provision sought to alleviate the mounting burden on an already overburdened judiciary.² However, more than two decades into its implementation, Section 89 has become emblematic of a more fundamental problem: the inadequacy of statutory frameworks when drafted with insufficient precision and practical consideration.³ This article examines the structural, procedural, and jurisdictional inconsistencies within Section 89 and between Section 89 and the existing ADR framework under the Arbitration and Conciliation Act, 1996.⁴ The analysis reveals that these inconsistencies have not merely created interpretative confusion but have effectively undermined the very objectives for which the provision was introduced.⁵

The Genesis of Section 89: Promise and Problems

When Section 89 was introduced, it reflected the legislative intent to encourage parties to pursue alternative dispute resolution before embarking on protracted litigation.⁶ The provision, read alongside Order X Rules 1A to 1C,⁷ created what was theoretically a comprehensive framework for encouraging settlement through four distinct mechanisms: arbitration, conciliation, Lok Adalat, and mediation. Yet the drafting itself harboured contradictions that would plague implementation for years to come.⁸

The provision begins with a familiar judicial call to peace: "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."⁹ On its face, this appears straightforward. In practice, it contains a fundamental misunderstanding of

¹ The Code of Civil Procedure, 1908, § 89(1) (Act 46 of 1999).

² *Salem Advocate Bar Association, T.N. v. Union of India*, (2005) 6 SCC 344.

³ *Afcons Infrastructure Ltd. v. Vayubudhu Builders & Developers (P) Ltd.*, (2010) 8 SCC 24.

⁴ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

⁵ Justice (Retd.) M. Jagannadha Rao, *Concepts of Conciliation and Mediation and their Differences*, Law Commission of India (2003).

⁶ *Salem Advocate Bar Association, T.N.*, *supra* 2.

⁷ The Code of Civil Procedure, 1908, Order X, Rules 1A, 1B & 1C.

⁸ *Afcons Infrastructure Ltd.*, *supra* 3.

⁹ The Code of Civil Procedure, 1908, § 89(1) (Act 46 of 1999).

the nature of ADR processes themselves.¹⁰

The First Inconsistency: Structural Confusion in Section 89(1)

The primary architectural flaw in Section 89(1) lies in its conflation of the court's pre-reference role with the substantive work of ADR mechanisms¹¹. The provision mandates that courts must formulate settlement terms and then, after receiving party observations, reformulate these terms before referring the matter to an ADR forum.¹² This represents a profound misunderstanding of how conciliation, mediation, and arbitration actually function.¹³

The Supreme Court has recognized this anomaly explicitly. In *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, the Court observed that Section 89(1) imports "the final stage of conciliation referred to in section 73(1) of the Arbitration and Conciliation Act into the pre-ADR reference stage"¹⁴. Section 73(1) of the 1996 Act, which deals with settlement agreements reached through conciliation, contemplates the conciliator formulating settlement terms.¹⁵ By contrast, Section 89(1) places this responsibility on the referring judge. The practical consequence is that courts waste judicial time and resources formulating settlement terms that will ultimately be irrelevant to the ADR process, since the conciliator, mediator, or arbitrator must independently formulate or reformulate these terms according to their own process.¹⁶

This inconsistency was not accidental but reflective of a more serious conceptual error: the drafters appear to have misunderstood the boundary between the court's jurisdiction to refer and the ADR mechanism's jurisdiction to resolve¹⁷. As Justice Jagannadha Rao's committee work later clarified, there should be a sharp distinction between what occurs at the pre-reference stage and what occurs within the ADR process itself¹⁸.

¹⁰ Justice R.V. Raveendran, *Section 89 CPC: Need for an Urgent Amendment*, (2010) 4 SCC (J) 23.

¹¹ Salem Advocate Bar Association, T.N., *supra* 2.

¹² CPC § 89(1), *supra* 9.

¹³ P.M. Bakshi, *The Code of Civil Procedure*, (14th ed., LexisNexis 2021).

¹⁴ *Afcons Infrastructure Ltd.* 2010, *supra* 3.

¹⁵ The Arbitration and Conciliation Act, 1996, § 73(1).

¹⁶ Justice R.V. Raveendran, *Section 89 CPC*, *supra* 10.

¹⁷ *Shahi Exp. (P) Ltd. v. Taneja Developers and Infrastructure Ltd.*, (2019) 256 DLT 341.

¹⁸ Law Commission of India, *238th Report on Amendment of Section 89 of the Code of Civil Procedure, 1908*, (December 2011).

The Definitional Chaos: Section 89(2) and the Interchanged Provisions

A closer examination of Section 89(2) reveals another layer of inconsistency: the definitions and governance provisions for different ADR mechanisms appear to have been interchanged¹⁹. The Supreme Court, in its detailed analysis in *Afcons*, noted that if one were to interchange the provisions relating to "mediation" and "judicial settlement" in clauses (c) and (d), the section would read with perfect logical coherence.²⁰

Under the present language, Section 89(2)(c) prescribes that 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."²¹ Section 89(2)(d) provides that for mediation, "the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."²² The logical error becomes apparent when one considers that mediation by definition cannot be "effected" by a court alone it requires active participation of a neutral third party.²³ Conversely, judicial settlement presupposes direct settlement efforts by the court itself, yet the provision directs courts to refer it out to another institution.²⁴

This definitional confusion has created substantive problems in practice. Courts and practitioners have struggled to distinguish between mediation and conciliation, with some courts even treating them interchangeably despite their distinct characteristics under the 1996 Act.²⁵ The Law Commission of India, recognizing this chaos, recommended through its 238th Report that these sections be recast to eliminate ambiguity.²⁶ However, even twenty years later, these amendments remain pending, and the confusion persists in courtroom practice.²⁷

The Mandatory Versus Discretionary Dilemma

Section 89(1) employs both the words "shall" and "may," creating a fundamental ambiguity

¹⁹ Justice R.V. Raveendran, *Section 89 CPC*, *supra* 10.

²⁰ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

²¹ The Code of Civil Procedure, 1908, § 89(2)(c).

²² The Code of Civil Procedure, 1908, § 89(2)(d).

²³ Sriram Panchu, *Mediation Practice and Law: The Path to Successful Dispute Resolution*, (2nd ed., LexisNexis 2015).

²⁴ *Salem Advocate Bar Association, T.N. v. Union of India*, (2005) 6 SCC 344.

²⁵ *Haresh Dayaram Thakur v. State of Maharashtra*, (2000) 6 SCC 179.

²⁶ Law Commission of India, *238th Report*, *supra* 18.

²⁷ Rakhi, 'Scope and Procedure of Section 89 CPC: (M/S Afcons Infra. Ltd. Vs. M/S Cherian)' (2023) 8(4) IJLMH 1830

about whether courts have a mandatory duty to refer or a discretionary power to do so.²⁸ The opening phrase "Where it appears to the court that there exist elements of a settlement" combined with the directive "the Court shall formulate the terms of settlement" creates interpretative tension²⁹. Does "shall" impose an absolute duty, or is it qualified and rendered discretionary by the initial conditional clause?³⁰

For years following Section 89's introduction, courts largely refrained from invoking the provision, partly due to this very ambiguity.³¹ Trial judges were uncertain whether they were permitted to decline referrals on their own assessment or whether they were obliged to refer unless they could clearly demonstrate the absence of settlement elements.³² This uncertainty translated into a de facto discretionary approach, effectively nullifying the mandatory referral intention.³³

It was the Supreme Court that eventually resolved this tension through interpretative intervention. In *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, the Court held that the language should be read to impose a mandatory duty on courts to "contemplate using ADR" but actual use is not required.³⁴ More specifically, the Court determined that reference to ADR is mandatory in all cases except those falling within a defined excluded category, primarily matters involving serious criminal allegations, complex fraud, and cases not suited for ADR by their very nature.³⁵

Yet even this judicial clarification has created its own inconsistencies. The Court's formulation of excluded categories remains somewhat open-ended and fact-specific, leaving room for divergent applications across different courts and jurisdictions.³⁶ Moreover, the obligation to "contemplate" is itself vague and resistant to judicial verification.³⁷

The Mutual Consent Conundrum: Unequal Treatment

Perhaps the most troubling inconsistency within Section 89 concerns the requirement of mutual

²⁸ The Code of Civil Procedure (Amendment) Act, 1999 (Act 46 of 1999).

²⁹ The Code of Civil Procedure, 1908, § 89(1).

³⁰ Justice R.V. Raveendran, *Section 89 CPC: Need for an Urgent Amendment*, (2010) 4 SCC (J) 23.

³¹ ADR Cell, Supreme Court of India, *Mediation Training Manual of India*, 11-14 (2017).

³² *Salem Advocate Bar Association* (2005), *supra* 24.

³³ Law Commission of India, *238th Report*, *supra* 18.

³⁴ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

³⁵ *Ibid.*

³⁶ *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 (regarding the 'fraud' exception complexity).

³⁷ *K.A. Anthique v. National Co-operative Bank Ltd.*, (2017) 2 KLJ 493.

consent³⁸. The Supreme Court has held that different ADR mechanisms have different consent requirements, yet they are all governed by the same section with no explicit differentiation.³⁹

For arbitration, the Court has been unequivocal: mutual consent of all parties is essential.⁴⁰ The reasoning is sound, arbitration requires an agreement to be bound by the arbitrator's decision, and absent the consent of all parties, compelling them to arbitration would violate principles of party autonomy⁴¹. Notably, this requirement exists under Section 89 despite the fact that Section 8 of the Arbitration and Conciliation Act, 1996 requires a pre-existing arbitration agreement.⁴² The Court has held that Section 89 can theoretically refer parties to arbitration even without a pre-existing agreement, provided all parties consent.⁴³

In the case of conciliation, the Supreme Court has consistently held that consent is a mandatory prerequisite for referral; however, the Law Commission of India has formally disagreed with this interpretation, arguing that such a requirement unnecessarily hampers the court's ability to facilitate settlement⁴⁴. The practical consequence is uncertainty in the profession about whether courts can compel conciliation in the absence of party agreement.⁴⁵

By contrast, for mediation, Lok Adalat, and judicial settlement, consent is not required.⁴⁶ Courts can mandatorily refer parties to these mechanisms without their express agreement⁴⁷. The reasoning appears to be that these mechanisms preserve party autonomy during the process (parties retain the freedom to agree or not agree on settlement) even if the reference itself is compulsory.⁴⁸

This differential treatment creates a perplexing jurisprudential landscape. A single court officer must apply Section 89 differently depending on which ADR mechanism is most appropriate

³⁸ Jeet Singh Mann, *Analysis of the Provisions of Alternative Dispute Resolution under Section 89 of Civil Procedure Code 1908*, 55(3) J. INDIAN L. INST. 356, 362 (2013).

³⁹ *Salem Advocate Bar Association, T.N. v. Union of India*, (2005) 6 SCC 344.

⁴⁰ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

⁴¹ *Jagdish Chander v. Ramesh Chander*, (2007) 5 SCC 719.

⁴² The Arbitration and Conciliation Act, 1996, § 8 (Act 26 of 1996).

⁴³ *P. Anand Gajapathi Raju v. P.V.G. Raju*, (2000) 4 SCC 539.

⁴⁴ Law Commission of India, *238th Report on Amendment of Section 89 of the Code of Civil Procedure, 1908*, (December 2011).

⁴⁵ Pardeep Singh, *ADR under Section 89 of CPC: A Critical Analysis*, 4(1) INT'L J. RES. 78, 82 (2016).

⁴⁶ Shruthi Chaitanya, *Alternative Dispute Resolution in India: A Study of Section 89 of the Civil Procedure Code*, 7(11) INT'L J. L. MGMT. & HUMAN. 1122, 1125 (2020).

⁴⁷ *M.R. Krishna Murthi v. New India Assurance Co. Ltd.*, (2019) 15 SCC 493.

⁴⁸ Sriram Panchu, *Mediation Practice and Law: The Path to Successful Dispute Resolution*, (2nd ed., LexisNexis 2015).

for the case, requiring consent for some while dispensing with it for others. More problematically, this creates incentives for parties with a strong negotiating position to object to referral for arbitration or conciliation while accepting mediation referrals.⁴⁹

Jurisdictional overlap with the Arbitration and Conciliation Act

An additional inconsistency emerges from the relationship between Section 89 CPC and the existing framework under the Arbitration and Conciliation Act, 1996⁵⁰. The two statutes proceed from different assumptions and create overlapping yet distinct pathways to arbitration and conciliation.⁵¹

Under Section 8 of the 1996 Act, when a dispute subject to an arbitration agreement arises, a party may apply to court for reference to arbitration⁵². The court, if satisfied that a valid arbitration agreement exists, must refer the matter⁵³. This requires a pre-existing agreement. Section 89 of the CPC, by contrast, permits reference to arbitration (with mutual consent) even in the absence of a pre-existing agreement⁵⁴. The Supreme Court has noted that "if a dispute can be referred to arbitration by invoking section 8 or section 11 of the Arbitration and Conciliation Act, there would be no need to have recourse to arbitration under section 89 of the Code."⁵⁵ In theory, this distinction makes sense. Section 8/11 applies when parties had contractually agreed to arbitration, while Section 89 addresses cases where they had not but are willing to do so later.⁵⁶

In practice, however, this distinction creates confusion. Practitioners must determine whether a given dispute is subject to Section 8 or Section 89.⁵⁷ The consequences differ: under Section 8, consent is not required; under Section 89, it is⁵⁸. Parties sometimes exploit this ambiguity, claiming the existence or non-existence of an arbitration agreement depending on their litigation strategy⁵⁹. The provision thus creates an incentive for gamesmanship rather than

⁴⁹ Justice R.V. Raveendran, *Section 89 CPC: Need for an Urgent Amendment*, (2010) 4 SCC (J) 23.

⁵⁰ The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

⁵¹ *Salem Advocate Bar Association, T.N. v. Union of India*, (2005) 6 SCC 344.

⁵² The Arbitration and Conciliation Act, 1996, § 8.

⁵³ *P. Anand Gajapathi Raju v. P.V.G. Raju*, (2000) 4 SCC 539.

⁵⁴ The Code of Civil Procedure, 1908, § 89(2)(a).

⁵⁵ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24.

⁵⁶ Justice R.V. Raveendran, *Section 89 CPC: Need for an Urgent Amendment*, (2010) 4 SCC (J) 23.

⁵⁷ O.P. Malhotra, *The Law and Practice of Arbitration and Conciliation*, (3rd ed., LexisNexis 2014).

⁵⁸ *Sukanya Chaturvedi v. Jayesh H. Pandya*, (2003) 5 SCC 531.

⁵⁹ *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*, (2011) 5 SCC 532.

good-faith dispute resolution.

Furthermore, the governance provisions are inconsistent. Section 89 explicitly provides that when disputes are referred to arbitration or conciliation under Section 89, the provisions of the 1996 Act shall apply⁶⁰. Yet Section 89 also prescribes specific procedural steps (formulation and reformulation of settlement terms) that have no counterpart in the 1996 Act and arguably contradict its streamlined approach⁶¹.

The Practical Reality

Despite the Supreme Court's interpretation of Section 89 as imposing a mandatory duty to consider ADR, empirical evidence suggests the provision remains severely underutilized. Trial courts have been inconsistent in invoking Section 89, and when they do, there is no systematic follow-up or accountability regarding outcomes.⁶² Moreover, even when cases are referred under Section 89, a significant proportion result in return to litigation rather than settlement.⁶³

The reasons are multifaceted. First, the inherent ambiguity and complexity of the provision itself discourage its consistent use. Trial judges, already overburdened, often find it administratively simpler to proceed with litigation than to navigate the procedural complexities of Section 89 referral⁶⁴. Second, the lack of penalty for parties who refuse to participate in good faith in mediation or conciliation undermines the process.⁶⁵ A party with a strong negotiating position can simply withdraw after the initial sessions and return to litigation, having lost nothing but time.⁶⁶ Third, the provision's inconsistency with regard to consent requirements means that strategically-positioned parties can manipulate whether referral occurs based on which ADR mechanism appears most favourable to their interests.⁶⁷

The Mediation Bill 2021: Attempted Legislative Correction

Recognizing the inadequacies of the existing framework, the Government introduced the

⁶⁰ The Code of Civil Procedure, 1908, § 89(2)(a) & (b).

⁶¹ Law Commission of India, *238th Report on Amendment of Section 89 of the Code of Civil Procedure, 1908*, (December 2011).

⁶² Daksh, *State of the Indian Judiciary: A Report on Delay, Arrears and Case Management*, (2016).

⁶³ Vidhi Centre for Legal Policy, *Strengthening Mediation in India: A Report on Court-Annexed Mediation*, (2016).

⁶⁴ Law Commission of India, *221st Report on Need for Speedy Justice – Some Suggestions*, (April 2009).

⁶⁵ *Salem Advocate Bar Association, T.N. v. Union of India*, (2005) 6 SCC 344.

⁶⁶ Jeet Singh Mann, *Analysis of the Provisions of Alternative Dispute Resolution under Section 89 of Civil Procedure Code 1908*, 55(3) J. INDIAN L. INST. 356, 368 (2013).

⁶⁷ Pardeep Singh, *ADR under Section 89 of CPC: A Critical Analysis*, 4(1) INT'L J. RES. 78, 85 (2016).

Mediation Bill 2021 in the Rajya Sabha with the aim of providing a comprehensive statutory framework for mediation in India.⁶⁸ The Bill seeks to establish a Mediation Council of India, standardize mediator qualifications and ethics, and provide for the enforcement of mediated settlement agreements.⁶⁹

Yet the Mediation Bill 2021 itself contains provisions that create potential inconsistencies with Section 89. The Bill proposes mandatory pre-litigation mediation in certain categories of cases, which would work alongside and potentially contradict the Section 89 framework.⁷⁰ The Bill's provision for court-imposed costs on parties who refuse to participate in good faith in mediation after two sessions represents a significant strengthening of enforcement compared to Section 89's current weakness.⁷¹ However, the Bill remains in parliamentary committee and its final form is uncertain.⁷² The fact that additional legislation is deemed necessary to clarify what Section 89 attempted to do suggests a fundamental failure of the original provision.⁷³

Conclusion

The accumulated inconsistencies within Section 89 of the Code of Civil Procedure and between Section 89 and the broader ADR framework reflect a deeper problem: the difficulty of creating effective dispute resolution mechanisms through generalist statutes rather than purpose-built legislation. Section 89 attempts to achieve too much bringing together arbitration, conciliation, mediation, and Lok Adalat under a single provision while providing insufficient guidance on how these distinct mechanisms should be applied and governed.

The inconsistencies identified herein the structural confusion about the court's role, the definitional chaos, the ambiguous mandatory versus discretionary language, the differential consent requirements, the jurisdictional overlap with the 1996 Act, and the enforceability gaps collectively ensure that Section 89 fails to achieve its stated objective of promoting efficient and amicable dispute resolution.

⁶⁸ The Mediation Bill, 2021, Bill No. XLIII of 2021 (as introduced in Rajya Sabha).

⁶⁹ Mohit Mokal, *A Critical Analysis of the Indian Mediation Bill, 2021 with Recommendations*, 3 NUJS J. ON DISPUTE RESOL. 42, 58 (2023).

⁷⁰ Standing Committee on Personnel, Public Grievances, Law and Justice, *117th Report on Mediation Bill, 2021*, (July 2022).

⁷¹ The Mediation Bill, 2021, cl. 15.

⁷² Note: The Bill was subsequently passed as The Mediation Act, 2023 (Act 32 of 2023) on September 15, 2023.

⁷³ Gracious Timothy Dunna, *The Mediation Act 2023: A New Dawn or a Missed Opportunity?*, 9(2) INDIAN J. ARB. L. 112 (2023).

The Supreme Court's interpretative interventions, while valuable in establishing some clarity, cannot substitute for legislative amendment. The Court's pronouncements in *Afcons Infrastructure* and related cases have attempted to iron out the worst inconsistencies through purposive interpretation. However, interpretation can only go so far. The fundamental solution requires a comprehensive legislative overhaul that either: (1) repeals Section 89 and replaces it with purpose-built legislation for each ADR mechanism, similar to the approach taken in the Mediation Bill 2021; or (2) substantially rewrites Section 89 to eliminate ambiguity, make consistent provision for consent requirements across mechanisms, clarify enforcement pathways, and align it more carefully with the 1996 Act.

Until such reform occurs, Section 89 will remain what it has been for more than two decades: a provision more honoured in the breach than in the observance, creating uncertainty rather than clarity, and offering the appearance of reform while failing to deliver the substantive change Indian dispute resolution urgently requires.