Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Co.

Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Co.

SooperKanoon Citation : sooperkanoon.com/730021

Court : Kerala

Decided On : Oct-11-2006

Reported in : 2007(1)ARBLR405(Kerala); 2007(1)KLT196

Judge : R. Basant, J.

Acts : Arbitration and Conciliation Act, 1996 - Sections 7, 8, 9, 82 and 84; Legal Services Authorities Act, 1987 - Sections 19, 20(1) and 22(C); Indian Telegraph Act - Sections 7B; Arbitration Act, 1940; Common Law Procedure Act, 1854 - Sections 3; Code of Civil Procedure (CPC) - Sections 11, 89, 89(1), 89(2) and 115 - Order 10, Rules 1A, 1B and 1C; Kerala Co-operative Societies Act - Sections 69; Constitution of India - Articles 21 and 141

Appeal No. : C.R.P. No. 1219 of 2005

Appellant : Afcons Infrastructure Ltd.

Respondent : Cherian Varkey Construction Co.

Advocate for Def. : B.S. Krishnan, Sr. Adv., K.L. Varghese,; Santha Varghese,;

Advocate for Pet/Ap. : M. Ramesh Chander, Adv.; Sreelal N. Warrier, Adv.

Disposition : Petition dismissed

Judgement :
ORDER

R. Basant, J.

1. Does the law, even after the introduction of amended Section 89 into the Code of Civil Procedure permit, tolerate or enable the court to compulsorily refer the parties to arbitration even without their consent and against their volition? This is the question that is mooted for consideration in this Revision.

2. When the question was raised initially by the learned Counsel, Sri K.L. Varghese, it was considered ridiculous and blasphemous that the court can even think of having such a power. Having heard the counsel in detail, I am satisfied that the question-deserves to be considered in depth.

3. To the vital facts first. The suit is one for realisation of money filed by the plaintiff, the first respondent herein. Defendants 1 and 2 in the suit are the petitioners before me. They had entered into an agreement with defendants 3 and 4 relating to the work of construction of Goshree Bridges to link Cochin City with the Vypeen Islands. They, i.e. defendants 1 and 2, had entered into an agreement with the plaintiff, under which the plaintiff was to perform some part of that work as sub contractors under defendants 1 and 2. The work was performed. Certain amounts were paid to defendants 1 and 2 by defendants 3 and 4. Some amounts were paid to the plaintiff by defendants 1 and 2 for the work done. There was a dispute about the amounts payable to the plaintiff by defendants 1 and 2. The plaintiff came to court with the plea that further amounts were due. Amounts were about to be paid by defendants 3 and 4 to defendants 1 and 2. Before such amounts were actually released, the plaintiff came to court with the suit. The plaintiff prayed that defendants 1 and 2 may be directed to pay amounts to him. He prayed that there may be an attachment prior to judgment pending the suit under Order 38 Rule 5. Interim ex parte order of attachment was granted. Defendants 1 and 2 entered appearance. Their prayer to vacate the interim order of attachment was rejected.

4. At that stage defendants 1 and 2 came to this Court and contended, inter alia, that the suit is not maintainable at all. They contended that the suit was liable to be referred for arbitration under Section 8 of the Arbitration and Conciliation Act, hereinafter referred to as 'the 1996 Act'. The plaintiff must get the dispute resolved

by arbitration. If at all any interim relief can be claimed, it can be claimed only under Section 9 of the 1996 Act, it was contended. The interim attachment was liable to be vacated, it was pleaded.

5. A Division Bench of this Court considered the challenge. The challenge was turned down and the F.A.O. was disposed of with directions. But certain observations were made. By then a fresh application had been filed by the plaintiff before the learned Subordinate Judge, under Section 89 of the C.P.C. for referring the parties for arbitration. The Division Bench disposed of the F.A.O. with certain observations. The order of attachment was modified, subject to conditions. That modification is not relevant for the purpose of this C.R.P. The Division Bench proceeded to make the following observations in paragraphs 4 to 6, which I extract below.

4. Then it is submitted that an application under Section 89 of the Code of Civil Procedure has been filed before the trial court. As per the arnended C.P.C. importance is given in civil cases for settlement outside the court. As per the said section after hearing both sides, if the trial court feels that the matter can besettled or can be referred to arbitration, conciliation etc. it mayorder so. We are told that an application under Section 89 is filed for referring the matter to the Arbitrator for adjudication.

5. Considering the fact that the case had arisen out of a work contract it is only just that such matters are decided by an Arbitrator. Therefore we feel that the court below shall consider the application filed under Section 89 in the true spirit so that it can give effect to the intention of the legislature under Section 89 of the C.P.C. Therefore the first appeal is disposed of with the following directions.

6. (1) xxx (4) xxx

(5) The court below is directed to consider the application filed under Section 89 of the C.P.C. for appointment of an Arbitrator keeping in mind the intention of the legislature behind the said section and the said application shall be disposed of within two months. (Conditions 1 to 4 are omitted as irrelevant for the purpose of this C.R.P.).

(Emphasis supplied)

6. After disposal of the F.A.O. the matter went back to the trial court. The learned Subordinate Judge took up the application under Section 89 C.P.C. for consideration. Earlier while considering the application for interim attachment it was the plea of defendants 1 and 2 that the matter must be referred for arbitration. But while considering the application under Section 89 there was a volte-face on their part and defendants 1 and 2 contended that they are not willing for arbitration. The learned Subordinate Judge considered the question and passed the impugned order. The order was passed under Section 89 referring the parties for arbitration. An Arbitrator was appointed.

7. Aggrieved by the order referring the parties for arbitration, the petitioners, i.e. defendants I and 2, have come before this Court. Arguments have been heard. At the outset I must note that there is no objection raised against the persona appointed as Arbitrator. There is also no dispute as to what shall be and who shall pay the Arbitrator's fee. The plaintiff accepts that burden. No other objections are raised. It occurs to me that in the absence of any such disputes, this is an eminently fit case where the only crucial question of law to be considered is whether the court Has jurisdictional competence to refer the parties to arbitration by a specified Arbitrator even when one of the parties is not amenable for such reference to Arbitration. This in turn calls for an indepth consideration of the import and scope of Section 89 of the Code.

8. The question is one of moment. Detailed arguments were heard. Counsel K.L. Varghese and Ramesh Chander have advanced detailed arguments. The arguments stretched over many days. As the concept is new, counsel were requested to research and assist the court. During that period I had occasion to hear Sri. Sreelal Warrier. Advocate, in a programme on the T.V. expressing confident opinion on the disputed question. He was requested to appear as Amicus Curiae and make his submissions also. He accepted the request of the court and has been good enough to express his point of view on the question of law after thorough research.

9. There was a contention earlier that there exists an Arbitration Agreement. Later, it was contended that during the pendency of the proceedings before the Division Bench there was an agreement to refer the parties for arbitration under Section 89 of the Code. No such dispute survives now after elaborate and threadbare discussions at the bar. Though there are indications that the parties after commencement of this lis had contemplated the idea of agreeing for an arbitration, there is nothing tangible to come to a specific conclusion that there was any such actual or specific agreement for reference to arbitration either for the purpose of Section 8 of the 1996 Act or for the purpose of Section 89 of the Code. Unmistakable indications are available that the idea of arbitration was considered at the stage of Section 89 C.P.C. also. On that aspect, no better indication need be sought. It is sufficient to refer to the order of the Division Bench in F.A.O. 249 of 2004, which I have extracted above. Suffice it to say, when the impugned order was passed by the learned Subordinate Judge, unmistakably the parties were not in specific agreement on the prospect of a reference on arbitration. The request for reference made is not under Section 8 of the 1996 Act also. Plaintiff was willing for a reference for Arbitration under Section 89 but the petitioners had never agreed specifically for such reference for arbitration.

10. Before proceeding to consider the question whether Section 89concedes to the court a power to refer the parties for arbitrationeven against their volition, it will be important to advert to thebackdrop and the scenario which obliged the Parliament to bring in Section 89 into the Statute book. The heavy and scandalous pendency of civil litigations in India and the possible remedial measures were drawing the attention and concern of the right thinking members of the polity. The Executive, the Legislature and Judiciary as also the academia have been involved in anxious efforts to identify methods as to how this colossal pendency of litigations can be liquidated. The Law Commission, the Malimath Commission etc. had rivetted their pointed attention on this aspect. I cannot attempt better to sketch the background. I shall hence extract paragraphs 9-12 of the decision in Salem Advocate Bar Association v. Union of India : ((I shall refer to it hereafter as SBA-I)

9. It is quite obvious that the reason why Section 89 has been inserted is to try and see that all the cases which are filed in court need not necessarily be decided by

the court itself. Keeping in mind the law's delays and the limited number of Judges which are available, it has now become imperative that resort should be had to alternative dispute resolution mechanism with a view to bring to an end litigation between the parties at an early date. The alternative dispute resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to mediation Section 89(2)(d) provides that the parties shall follow the procedure as may be prescribed. Section 89(2)(d), therefore, contemplates appropriate rules being framed with regard to mediation.

10. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial.

11. Section 89 is a new provision and even though arbitration or conciliation has been in place as a mode for, settling the disputes, this has not really reduced the burden on the courts. It does appear to us that modalities have to be formulated for the manner in which Section 89 and, for that matter, the other provisions which have been introduced by way of amendments, may have to be in operation. All counsel are agreed that for this purpose, it will be appropriate if a committee is constituted so as to ensure that the amendments made become effective and result in quicker dispensation of justice.

12. In our opinion, the suggestion so made merits a favourableconsideration. With the constitution of such a committee, any creaseswhich require to be ironed out can be identified and apprehensionswhich may exist in the minds of the litigating public or the lawyersclarified. As suggested, the Committee will consist of a Judge, sitting or retired, nominated by the Chief Justice of India and the other members of the Committee will be Mr. Kapil Sibal, Senior Advocate, Mr. Arun Jaitley, Senior Advocate, Mr. C.S. Vaidyanathan, Senior Advocate and Mr. D.V. Subba Rao, Chairman, Bar Council of India. This Committee will be at liberty to co-opt any other member and to take assistance of any member of the Bar or Association. This Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the ADR referred to in Section 89. The model rules, with or without modification, which are formulated may be adopted by the High Courts concerned for giving effect to Section 89(2)(d).

11. After the said Committee submitted the report, the seconddecision in Salem Advocate Bar Association v. Union of India was rendered by the Supreme court. (I shall hereafter refer to the same as SBA-1I). Paragraphs 54 - 56 of the said decision can be usefully extracted for the purpose of easy reference and clear understanding.

54. Some doubt as to possible conflict has been expressed in view of use of the word 'may' in Section 89 when it stipulates that 'the court may reformulate the terms of a possible settlement and refer the same for' and use of the word 'shall' in Order 10 Rule 1-A when it states that 'the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in Sub-section (1) of Section 89'.

55. As can be seen from Section 89, its first part uses the word 'shall' when it stipulates that the 'court shall formulate terms of ettlement'. The use of the word 'may' in later part of Section 89 only relates to the aspect of reformulating the terms of a possible settlement. The intention of the legislature behind enacting Section 89 is that where it appears to the court that there exists an elements of a settlement which may be acceptable to the parties, they, at the instance of the

court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or the other of the said modes. Section 89 uses both the words 'shall' and 'may' whereas Order 10 Rule 1-A uses the word 'shall' but on harmonious reading of these provisions it becomes clear that the use of the word 'may' in Section 89 only governs the aspect of reformulation of the terms of a possible settlement and its reference to one of ADR methods. There is no conflict. It is evident that what is referred to one of the ADR modes is the dispute which is summarised in the terms of settlement formulated or reformulated in terms of Section 89.

56. One of the modes to which the dispute can be referred is 'arbitration'. Section 89(2) provides that where a dispute has been referred for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (for short 'the 1996 Act') shall apply as if the proceedings for arbitration or conciliation rere referred for settlement under the provisions of the 1996 Act. Section 8 of the 1996 Act deals with the power to refer parties toarbitration where there is arbitration agreement. As held in P. Anand Gajapathi Raju v. P.V.G. Raju the 1996 Act governs a case where arbitration is agreed upon before or pending a suit by all the parties. The 1996 Act, however, does not contemplate a situation as in Section 89 of the Code where the court asks the parties to choose one or other ADRs including arbitration and the parties choose arbitration as their option. Of course. the parties have to agree for arbitration. Section 82 of the 1996 Act enables the High Court to make rules consistent with this Act as to all proceedings before the Court der the 1996 Act. Section 84 enables the Central Government to make rules for carrying out the provisions of the Act. The procedure for option to arbitration among four ADRs is not contemplated by the 1996 Act and therefore Section 82 or 84 has no applicability where parties agree to go for arbitration under Section 89 of the Code. As already noticed, for the purposes of Section 89 and Order 10 Rule 1-A, 1-B and 1-C, the elevant sections in Part X of the Code enable the High Court to rame rules. If reference is made to arbitration under Section 89 of the Code, the 1996 Act would apply only from the stage after reference and not before the stage of reference when options under Section 89 are given by the Court and chosen by the parties. On the same analogy, the 1996 Act in relation to conciliation would

apply only after the stage of reference to conciliation. The 1996 Act does not deal with a situation where after the suit is filed, the court requires a party to choose one or the other ADRs including conciliation. Thus, for conciliation also rules can be made under Part X of the Code for the purposes of procedure for opting for 'conciliation' and up to the stage of reference to conciliation. Thus, there is no impediment in the ADR Rules being framed in relation to the civil court as contemplated in Section 89 up to the stage of reference to ADR. The 1996 Act comes into play only after the stage of reference upto the award. Applying the same analogy, the Legal Services Authorities Act, 1987 (for short 'the 1987 Act') or the Rules framed thereunder by the State Government cannot act as impediment to the High Court in making rules under Part X of the Code covering the manner in which option to the Lok Adalat can be made being one of the modes provided in Section 89. The 1987 Act also does not deal with the aspect of exercising option to one of the four ADR methods mentioned in Section 89. Section 89 makes applicable the 1996 Act and the 1987 Act from the stage after exercise of options and making of reference.

(emphasis supplied)

12. Paragraph 64 refers to the rules framed by the Committee and its impact. As the same appears to be important, I extract the same below:

64. The draft rules have been finalised by the Committee. Prior to finalisation, the same were circulated to the High Courts, subordinate courts, the Bar Council of India, State Bar Councils and the Bar Associations, seeking their responses. Now, it is for the respective High Courts to take appropriate steps or making rules in exercise of the rule-making power subject to modifications, if any, which may be considered relevant.

13. I have extracted this paragraph only to ascertain the legal effect of the Draft Rules. No rules have been framed in Kerala on the basis of the said Model rules. The counsel were requested to research and it is stipulated that the Supreme Court has not stated anywhere that the draft rules are to hold the field till the rules are framed by the respective High Courts. There is no observation in SBA-I or SBA-II that the rules are enforceable until rules are framed by the respective High

Courts. It is also relevant to note that the Supreme Court has not considered the question whether these rules can be accepted or whether they are in conflict with any of the stipulations in Section 89.

14. The crucial or vital rule for the purpose of our consideration, would be the proviso to Rule 2(b) of the Model rules which appears in paragraphs 65 of SBA-II. I extract the same below:

Rule 2. Procedure for directing parties to opt for alternative modes of settlement - (a) The Court shall, after recording admissions and denials at the first hearing of the suit under Rule 1 Order 10 and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, formulate the terms of settlement and give them to the parties for their observations under Sub-section (1) of Section 89, and the parties shall submit to the Court their responses within thirty days of the first hearing.

(b) At the next hearing, which shall be not later than thirty days of the receipt of responses, the Court may reformulate the terms of a possible settlement and shall direct the parties to opt for one of the modes of settlement of disputes outside the Court as specified in clauses (a) to (d) of Sub-section (1) of Section 89 read with Rule 1-A of Order 10 in the manner stated hereunder:

Provided that the Court, in the exercise of such power, shall not refer any dispute to arbitration or to judicial settlementby a person or institution without the written consent of all the parties to the suit.

(emphasis supplied)

15. It will be apposite now to consider Section 89 of the Code.

Section 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 thorough Lok Adalat; or

(d) mediation.

(2) Where a dispute has been referred -

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of Sub-section (1) of Section 20 of the Legal Services Authorities Act 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

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

16. In the light of the language of the statutory provisions as explained in paragraph 55 of SBA-II extracted above, the amended Section 89 on analysis insists on the following:

(1) It must appear to the court that there exist elements of a settlement.

(2) It must appear to the court that such settlement may be (not are) acceptable to the parties.

(3) Terms must then be formulated and given to the parties for their observation.

(4) After receiving the observations of the parties, the court may reformulate the terms of a possible settlement and

(5) The court shall thereafter refer the parties to:

(a) Arbitration or

(b) Conciliation or

(c) Judicial settlement, including judicial settlement through Lok Adalath or

(d) Mediation.

17. The counsel were requested to research all binding and persuasive precedents on the point. My attention has been drawn only to four precedents on this aspect after the amended Section 89 came into force. They are:

(1) SBA-I (Salem Advocate Bar Association, T.N. v.Union of India

(2) SBA-II (Salem Advocate Bar Association. T.N. v. Union of India.

(3) Sukanya Holding Pvt. Ltd. v. Jayesh H. Pandya .

(4) Basheer and Ors. v. Kerala State Housing Board 2004 (2) KLJ949.

The crucial question to be decided, I repeat, is whether reference to Arbitrator can be made without the consent or volition of all the parties to a dispute pending before court.

18. The counsel have advanced detailed arguments. The learned Counsel for the petitioners, Sri. Ramesh Chander, formulated the following ten points in support of his contention, that no such reference for arbitration is possible unless the parties agree to such course.

19. Firstly it is emphatically asserted by Mr. Ramesh Chander that it is contrary to the fundamental concepts of law and justice in which we are groomed that a party

who wants resolution of his dispute by properly constituted courts can be driven out of court because his advisory or the court thinks that arbitration would be a proper and perhaps the best mode of resolution of the dispute. By the very concept arbitration is resolution of disputes by a private Judge. Such Judge is chosen purely because of the trust and confidence of the parties in the arbitrator or in his dispute resolution skills. Notwithstanding the fact that such person may be appointed by the Chief Justice or his designate under Section 11 even without the consent of the parties the concept remains that the arbitrator is a private Judge chosen by the parties. The process of resolution by arbitration, as well as the incumbent as arbitrator, must be opted and chosen by the parlies in their volition. Agreement of all the contestants is hence fundamental and inevitable in any arbitration. It is so fundamental that an attempt to appoint an arbitrator under Section 89 or to refer the matter for arbitration against the volition or consent of a party who has never agreed to such course must be repelled and resisted. This requirement is non negotiable, he contends.

20. Secondly Mr. Ramesh Chander submits that under Section 9 of the C.P.C. the courts have the power and the citizens have the option to approach the regularly constituted courts to resolve their disputes. It is improper to read the amended Section 89 in such a manner as to deny such power to the court or such right to the litigant. Such an interpretation would amount to infringement of the right to get disputes resolved through court. In that process it would also affect the right to life under Article 21 of the Constitution. This piece of law, if that is the interpretation, cannot pass the test of Article 21 which insists that any law must be just fair and reasonable and not fanciful, whimsical or arbitrary. Such an interpretation, which would lead to the conclusion that the statutory provision is unconstitutional, may and must be avoided, submits the learned Counsel.

21. Sri. Ramesh Chander thirdly contends that even assuming thatthe civil court has the power to refer the parties to conciliation,judicial settlement or mediation without their consent, such a power to refer the parties to arbitration without their consent cannot be assumed. By its very nature, the method of dispute resolution by arbitration must be considered to be different from dispute resolution by conciliation, reference to adalath and mediation. In all the three, the court and the

parties reserve the right for an adjudicated decision; whereas, when it comes to arbitration there is no exit route. If one were compelled to go for arbitration he has no method by which he can come back to the regular and ordinary method of dispute resolution through court. Whether it be conciliation, reference to Lok Adalath or mediation, the party continues to be the dominant one to take a decision whether settlement should be reached or not. If reference for arbitration were made, thereafter the procedure under the Arbitration and Conciliation Act 1996 will have to be followed and whether the parties consent or not an award after adjudication can be passed by the arbitrator leaving the litigant's option to return to the regular adjudicatory process unavailable to him. This method of depriving the party of the right to get his dispute resolved through regular adjudicatory process through court cannot be lightly read into Section 89. If that were the intention of the Legislature, certainly such a concept - a revolutionary concept inconsistent with established norms and notions, should have been expressed in better and clearer language by the Legislature. Such a power may not hence be assumed from the language of Section 89 as it now stands. The language of Section 89 does not permit such an extreme interpretation atleast in so far as arbitration, the first of the four methods of ADR is concerned, argues the counsel

22. Fourthly the learned Counsel relies on the provisions of Order 10 Rule 1-A, 1-B and 1-C, which have been introduced consequent to the amendment to Section 89. I extract the same below:

ORDER

1-A. Direction of the court to opt for any one mode of alternative dispute resolution: After recording the admissions and denials, the court shall direct the parties to the suit to opt either mode of the settlement outside the court as specified in Sub-section (1) of Section 89. On the option of the parties, the court shall fix the date of appearance before such forum or authority as may be opted by the parties.

1-B. Appearance before the conciliatory forum or authority - Where a suit is referred under Rule 1-A, the parties shall appear before such forum or authority for conciliation of the suit.

1-C. Appearance before the court consequent to the failure ofefforts of conciliation Where a suit is referred under Rule 1-A and thepresiding officer of conciliation forum or authority is satisfied that it would not be proper in the interest of justice to proceed with the matter further, then, it shall refer the matter again to the court and direct the parties to appear before the court on the date fixed by it.

Sri. Ramesh Chander contends that Order 10 Rule 1-A, 1-B and 1-C do not at all contemplate a reference for Arbitration by the court without the consent of the parties. A careful reading of Rule 1-A, 1-B and 1-C must lead to a further conclusion that the escape route to come back to the regular process of adjudication is always kept alive by these Rules. It does not at all contemplate a procedure which does not give the party the freedom not to agree to any enforceable settlement and to insist on an adjudicated settlement by courts, submits the counsel.

23. Fifthly Mr. Ramesh Chander further contends that the draft rules made by the Committee, even if it be held to be not binding, do give a clear inkling as to how the Supreme Court understood the law. The stipulations in the draft rules, including the proviso to Rule 2(b), must be considered by the court carefully and the conclusion thereupon appears to be inescapable that a compulsory reference without the volition and consent of the parties is impermissible and impossible. Atleast as a guide to the interpretation of Section 89 the model rules formulated by committee appointed by the Supreme Court may be taken into consideration, submits the counsel.

24. Sixthly Sri. Ramesh Chander contends that no rules have been framed under Section 89 and until proper rules are framed resort may not be made to the first option contemplated under Section 89 - i.e. reference to arbitration. In the absence of any clear guidelines as to how Section 89 in respect of arbitration is to operate, such a reference may not be made atleast till proper and adequate rules are made, contends the counsel.

25. Sri. Ramesh Chander seventhly contends that the decision of the Supreme Court in SBA-II must suggest to this Court that there can be no reference to arbitration at all without the consent of the parties. The learned Counsel

particularly relies on the sentence 'of course the parties have to agree for arbitration' appearing in paragraph 56 of SBA-II already extracted above. The counsel further relies on paragraph 10 of SBA-I extracted above, where also it is stated 'if the parties agree for arbitration then the provisions of the Arbitration and Conciliation Act will apply and the case will go out of the stream of the Court.' In view of these clear indications in the two judgments rendered by the Supreme Court on this aspect, the conclusion is inevitable that the first option of ADR - reference for arbitration - cannot be resorted to unless the parties to the dispute agree to that course.

26. Eighthly Sri. Ramesh Chander contends that it will be dangerous to read into Section 89 such a power to compel the parties to go for arbitration without their consent. Subordinate Courts incensed by a desire for spectacular statistical results may resort to the first option recklessly to the detriment of the interests of justice. In the absence of clear guidelines, as to in which cases and under what circumstances such compulsory reference can be made, clothing the subordinate courts with such unbridled power/discretion would work out injustice of the worst variety. Before reading into Section 89, such a power, the court may be alertly conscious of the adverse results, consequences, prejudice and injustice which may inevitably result by such a wide interpretation of Section 89, contends the counsel.

27. Ninthly Shri. Ramesh Chander contends that there can really be no reference to any Arbitrator under Section 89(1)(a) or 89(2)(a). There can only be a reference of the parties to Arbitration as contemplated under Section 8 of the 1996 Act. Under the 1996 Act if the parties are referred for Arbitration under Section 8 and they are not able to decide on the Arbitrator they will have to get the Arbitrator appointed under Section 11. Similarly after referring the parties for Arbitration under Section 89(1)(a) and 89(2) (a), the provisions of the 1996 Act will have to apply and the Arbitrator has to be appointed under Section 11 if the parties do not agree, argues counsel.

28. Lastly and tenthly coming back to the facts of the case Sri. Ramesh Chander contends that even assuming that such a power is there in courts, this is not a fit

case where such a power can or ought to be invoked. It is prayed that the impugned order may be set aside.

29. I shall now proceed to consider the ten contentions that have been raised by the learned Counsel to assail the impugned order as also to question the correctness of the interpretation canvassed that reference can be made even when the parties (or some of them) do not agree and are opposed to the idea of such a reference. I shall refer to the contentions and reply raised by the learned Counsel for the plaintiff, Sri. K.L. Varghese when I consider the 10 contentions referred above. In the interests of brevity, I feel that it is not necessary to enumerate the various contentions raised by the learned Counsel to resist the challenge on the above ten grounds.

30. Contentions 1 & 2: For the sake of convenience I shall refer to these contentions together. Section 89, it appears to me, is a bold initiative by the Legislature. A malady has been afflicting the Indian Judicial system. The scandalous delay in disposal has brought discredit to the system itself. An extra ordinary malady afflicts the system. Its proportions are gigantic. How do we eliminate the huge pendency of cases? The situation was extra ordinary. The malady was perceived by the Legislature, the Executive and the Judicial institution. Prescriptions of remedy for the malady had to be made. The Legislature was called upon to legislate. Bold innovations became necessary. The system cannot fight shy of bold experiments. We deserve to be bold in our task of legislation and interpretation. The courts cannot by interpretation stultify or frustrate the legislative intentions. The courts cannot fail to understand and perceive the need of innovation. The Supreme Court appears to have accepted the challenge. Sri. K.L. Varghese particularly relies on the observations in paragraph 55 of SBA-II, which I have already extracted above. He particularly relies on the observation that 'the intention of the Legislature behind enacting Section 89 is that where it appears to the court that there exists an element of a settlement which may be acceptable to the parties, they at the instance of the court shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the courts shall refer them to one or the other of the said modes.

31. Sri. K.L. Varghese submits that the Supreme Court has spoken its mind clearly about the manner in which Section 89 has to be understood. It is for the court to consider whether there are elements of a settlement. It is for the court to consider whether such settlement may be acceptable to the parties or not. It is for the court to wait for their response. The court is not a prisoner of such responses. Depending on the nature of the case, its facts, the contentions and the possible resolution, it is open to the court to come to the conclusion that even if the parties do not agree they can be referred to 'one or the other modes of the said modes' of dispute resolution. One of the modes undoubtedly is arbitration. What applies to the goose must apply to the gander also, contends the counsel. If Section 89 can be read to conclude that compulsory reference for mediation, conciliation and judicial settlement is possible without the consent of the parties, nothing can stand in the way of the court adopting an interpretation that arbitration is not beyond the ken of Section 89. The contention appears to be acceptable.

32. The learned Counsel further submits that the private Judge concept which was initially in force on the question of arbitration is slowly giving way to new and dynamic concepts. Law initially approached even the concept of an arbitration agreement with reservation and suspicion. Can the sovereign responsibility of the State to resolve disputes be taken away by private choice of the parties? Should such awards, i.e. 'decisions of the arbitrators' be enforced by the sovereign State using its might? A perusal of the history of arbitration in U.K. and Commonwealth countries reveals that the idea of a private Judge and the state enforcing his decision/award was resisted for a long time and legislatures had to intervene to bring about laws permitting resort to arbitration and enabling execution of such decisions of Arbitrators. The Indian Law had come a long way from the Panchayat system of compulsory arbitration before it reached the Arbitration and Conciliation Act, 1996, points out the counsel.

33. Sri. K.L. Varghese further submits that there is great transformation in the concept of arbitration. Private Judge concept - the concept of the arbitrator as a person of personal trust and faith is giving way to the concept of the arbitrator as a competent professional resolver of disputes. The arbitrator of yester years was not obliged to give a reasoned decision. Initially appointment of arbitrators without

consent of the parties by others or the court was frowned upon. Arbitration in the modern era is much more than the mere concept of choice of a private Judge. With the legislature making various stipulations in the procedure for Arbitration in various enactments culminating in the 1996 Act a see change has taken place in the concept of Arbitration. Arbitration is not any more the mere choice of a private Judge or surrender to the wisdom and good intentions of the chosen benovalent patriarch. How an Arbitrator can be chosen even when parties disagree, what procedure he has to follow, his obligation to remain non biased, his obligation to give reasons, his liability to be changed even pending arbitration, the avenues of challenge of his decisions are all prescribed by law. The winds of change and transformation in the concept of Arbitration cannot be ignored. It is no more the mere choice of a mere private Judge. It is the answer to the perceived need for an Alternative Dispute Resolution Mechanism, accepted and encouraged by the State which will ensure professional, competent, legal and lawful resolution of disputes between parties.

34. It must further be seen that no person under Section 9 of the Code has any invariable right to resolution of dispute by adjudication by regular courts. Instances are legion where in modem legislations compulsory reference of certain disputes to specified authorities other than regular courts is insisted. All that I intend to note is that it is not the law that the law cannot stipulate alternative procedures for dispute resolution taking them out of the main stream of adjudication by regular civil courts. Merely because resort to the procedure for dispute resolution under Section 9 C.P.C. is not available, the law cannot be held to be not fair, just and reasonable, nor fanciful, whimsical or arbitrary. A provision like Section 69 of the Kerala Co-operative Societies Act clearly shows that law can appoint arbitrators who can be invested with responsibility of resolving disputes by procedure akin to arbitration. It may not be strictly arbitration under 1996 Act or under its predecessor 1940 Act. The law permits and accepts the process of dispute resolution by reference to such specialised bodies, arbitrators or courts of arbitration. The counsel points out that Section 7B of the Indian Telegraph Act is another instance, where Arbitrator is appointed to resolve certain class of disputes by the statute itself. If that can be done by the statute, the counsel points out that, certainly such a reference can be made by the court in its discretion as permitted

under Section 89. The mere fact that the remedy under Section 9 will not be available cannot be held to vitiate the statutory provisions or persuade the court to hold that the statutory provision is not fair, reasonable or just or fanciful, arbitrary or whimsical. Consequently it cannot be urged that such interpretation cannot pass the test of Article 21 of the Constitution. I find merit in that submission.

35. The counsel were requested to enlighten this Court as to whether there is any specific instance of law, in our system of jurisprudence or under other systems, investing courts with power to refer parties to dispute resolution by arbitration even against their will, volition and consent. Sri. K.L. Varghese points out that Malimath Commission did certainly and specifically consider the obligation of the court to refer the disputes for alternative dispute resolution mechanism, including arbitration. The counsel also relies on Notes on Clauses of the C.P.C. 1999 (Amendment) Bill, which stated thus:

Clause 7 provides for the settlement of disputes outside the court. The provisions of Clause 7 are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate dispute resolution method that the suit could proceed further. In view of the above, clause 7 seeks to insert a new Section 89 in the Code in order to provide for. alternate dispute resolution.

(emphasis supplied)

36. Justice Malimath Committee in its report had stated thus:

If a law is enacted giving legal sanction to such machinery for resolution of disputes and resort thereto is made compulsory, much of the inflow of commercial

litigation in regular civil courts gradually moving up hierarchically would be controlled and reduced. The Committee recommends accordingly.

Compulsory reference to the four alternative ADR methods was certainly contemplated by Malimath Committee which heralded the amendment to Section 89. This is clear from the above observations in the report of the Malimath Committee as also in the Notes on Clauses (clause 7).

37. The idea of a compulsory reference for arbitration even when the parties do not agree for such a reference was certainly referred to in the 129th report on Urban Litigation submitted by the Law Commission. Paragraph 3.31 of the said report is relevant and I extract the same below:

When these disturbing figures were highlighted at the Seminar/Workshop, a suggestion was made whether the court can be mpowered to compel parties to go to arbitration. It may be recalled that the participants in the Seminar/Workshop included a number of High Court Judges, some City Civil Court Judges and Judges from other ranks. The suggestion was by a member of the Judiciary. As the provisions of Arbitration Act, 1940 today stand, before a party can e forced to resort to arbitration, there must be a subsisting arbitration agreement between the parties or even in a matter ending in the court, parties can resort to arbitration by consent of all the parlies involved in the dispute. In the absence of an arbitration agreement or in the absence of the consent being accorded, the court is powerless to force parties to go to arbitration. The Judges clearly were of the opinion that there are numerous cases in which arbitration would be a better mode of resolution of dispute than a proceeding in the court. The suggestion deserves serious consideration and amendment to the Arbitration Act may become a necessity. It is not possible to deal with the suggestion in this report but it would be worthwhile to have a separate report on the subject which the Law Commission, time permitting, would undertake.

This report was submitted in 1988 and it is after about a decade that the amendment to Section 89 in its present form was introduced. In the 163rd report submitted in 1998, the Law Commission had this to say about the idea of compulsory reference to the alternative dispute resolution methods, including

arbitration in paragraph 271:

The Law Commission is of the opinion that proposed Section 89 may be suitably modified to provide as under:(a) After the settlement of issues in every suit (when both the parties would have also filed their basic documents as required by the proposed provisions relating to filing of documents along with the pleadings), the suit shall be referred to a board of conciliators to explore whether there existed elements of settlement which were, acceptable to the parties and if it appeared to the board that such elements of settlement did exist, they shall refer the suit for arbitration, judicial settlement or settlement through Lok Adalat. Method of conciliation could be tried by the Board itself if found feasible. Such reference could be made either after reformulating the terms of possible settlement if the board found the same feasible and advisable or without such reformulation, as the case may be.

38. The counsel has further brought to my attention the Common Law Procedure Act which was in force in England, which shows that as early as in the mid 19th century the idea of a compulsory reference for arbitration was in force in England. Section 3 of the Common Law Procedure Act, 1854, is extracted in Commercial Arbitration by Sir Michael. Section 3 of the said Act reads as follows:

Section 3. Power of Court or judge to direct arbitration before trial: If it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties. or to an officer of the Court, or. in country causes, to the Judge of any country Court upon such terms as to costs and otherwise as such Court or Judge shall think reasonable: and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

(emphasis supplied)

The said Act is not now in force, it is evident. But the point is that the idea of compulsory Arbitration at the discretion of the Court, even when the parties do not agree was a concept acceptable to the English system even in those early days. The idea cannot be dubbed or totally unacceptable to norms and notions of justice. 'Compulsory Arbitration' is not a syllogism nor conceptual absurdity like a 'vegetarian Lion'. It is not an anathema to law certainly.

39. The Statement of objects and reasons in the 1999 Amendment Act in paragraph 3(d) makes reference to the 129th Report of the Law Commission (supra) and highlighted the important changes proposed to be made. Clause 3(d) reads as follows:

Para 3. Some of the more important changes proposed to be made are as follows:

XXX XXX XXX(d) with a view to implement the 129th Report of the Law Commission of India and to make conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court in which it was filed.

40. It will only be apposite briefly to refer to the circumstances under which the alternative dispute resolution mechanism has been pressed into service by the Legislature under Section 89. The purpose of all laws is the attainment of harmony among the polity. To attain harmony rights and liabilities as also the dispute resolution process must be specified. Social Scientists opine that the system of dispute resolution prevalent in any community retlects basically the culture of the system. It is an indicia of the culture and civilization of the polity. Humankind has been engaged in several experiments to identity the ideal method of dispute resolution. The establishment of courts - the concept of a higher and sublime Judge assisted by sublime counsel resolving the dispute is the process now accepted generally as the best available method of dispute resolution by the Anglo Saxon jurisprudence. This system which is accepted by the Indian system of jurisprudence has several advantages and has certainly inspired faith of the

members of the polity in the system of dispute resolution. But that is tar from saying that we have reached the ideal dispute resolution mechanism. Alternative dispute resolution methods are experiments in this journey to identity the ideal system of dispute resolution.

41. The present system of dispute resolution certainly suffers from four major inadequacies/deficiencies. Of all the inadequacies the worst and the most objectionable is the law's delays. Expeditious justice remains only a dream. Even a child in India today knows and repeats the adage 'justice delayed is justice denied'. So gross is the first inadequacy/deficiency. The second inadequacy is the huge expenses involved in the dispute resolution process. If justice is my birth right I should not have to pay a price tor the same, laments the enlightened polity. The third can be identified to be the complexity and technical nature of dispute resolution which become alien to the common sense of the community. If law is the quintessence of the common sense of the community, it cannot be complex or technical. The dispute resolution mechanism cannot be complex or technical. It will have to rhyme well with the trained common sense of the community. Lastly and finally the dispute resolution as we now have, it is not really contributing to harmony in as much as the end of first round of litigation is inevitably the commencement of the second round of litigation and harmony remains a distant dream. The mindset of the victor and vanquished after long drawn out legal battle is not conducive to the ideal of harmony at all.

42. Alternative dispute resolution modes have been stipulated and identified to get over these four inadequacies in our present system. The search for the ideal dispute resolution methodology continues. But Section 89 certainly emphasizes and addresses the first of these four inadequacies, namely elimination of delay. An anxious consideration of all the relevant inputs which led to the enactment of Section 89 must convey unmistakably that emphasis was made on the ability of ADR mechanisms to render expeditious justice and thus help to take away the burden on the over burdened system. Though the three other inadequacies may also in the process get remedied, it would not be correct according to me, to assume that Section 89 was introduced into the statute book with emphasis on any one of the three other objectives/inadequacies of the present system of

dispute resolution. The problem was very specific. Increasing the number of Judges and improving infrastructure remain a theoretical method of alleviation of the problem but not a practical immediate solution. Confronted with that problem the Legislature has prescribed the four methods of dispute resolution under Section 89 and the purpose is clear and evident - taking away the burden on the system and eliminating laws delays.

43. A fundamental question has been raised as to whether arbitration is at all an alternative dispute resolution mechanism? Can arbitration be held to be a settlement at all? Is it not only an alternate process of dispute resolution by adjudication? How can that be termed a settlement at all? These questions need not detain us any longer. The language of Section 89 unmistakably conveys that the Legislature has reckoned arbitration also as one of the four methods of ADRs available to the courts. The language of Section 89 must also disabuse any confusion as to whether it is a method of settlement. I take particular note of the language on Section 89, which conveys that all the four methods are alternative dispute resolution methods contemplated by Section 89 and they are methods of settlement also.

44. The fear that the party autonomy would be affected is certainly genuine. But as I have already adverted to, refined systems of law have accepted, though at a different point in the history of development of law, the option for compulsory reference of disputes for arbitration. It is not unknown to law. At least in England it was once accepted, as already referred to. The choice of the case for this method of resolution would not be whimsical or arbitrary as the court after applying its mind has to take a decision for arbitration.

45. If such an Arbitration agreement satisfying Section 7 of the 1996 Act were sine qua non for a reference under Section 89(1)(a), that would only be a reference under Section 8 of the 1996 Act and the words 'as if' in Section 89(2)(a) would become unnecessary and redundant. The language of Section 89(2)(a) makes it clear that the Arbitration contemplated under Section 89(1)(a) and 89(2)(a) is not a reference under Section 8 of the 1996 Act and hence the words 'as if' are used in Section 89(2)(a). Having considered all these aspects, I am persuaded to overrule

the objection raised on contentions 1 and 2 raised by Shri. Ramesh Chander.

46. The third contention raised is that the language of the section does not permit identical treatment of the four dispute resolution mechanisms. I am unable to accept this contention altogether. In fact it is the language of the section which is against the petitioner. The section uses such language that it does not distinguish at all between the four methods of ADR available. It would be artificial to read into the section any distinction between method (a) relating to arbitration and the other three methods of conciliation, judicial settlement and mediation. The language of Section 89(1) treats all the four dispute resolution mechanisms identically. Except the traditional notion of arbitration being adjudication by a private Judge - and I have already disagreed on that objection, there is nothing that suggests that the first mode of Arbitration deserves to be distinguished. I am unable to accept that the Legislature would have prescribed arbitration also as one of the methods unaware or ignorant about the distinction between these four methods of disputes resolution. It is clear as day light that Arbitration is different from the other three modes. In Arbitration, adjudication by the Arbitrator takes place. In all the other three methods the party autonomy in the matter of final decision is retained. Even a child can pick out the odd man (arbitration) out from this group of four ADR mechanisms. It would be imprudent to assume that the legislature was unaware of this distinction when all the four were dealt with identically - in the matter of compulsory reference without the consent of the contestants. Consciously they were included in one category. This distinction obviously was considered by the legislature to be irrelevant for the purpose of categorisation - the purpose of which evidently was to spare the regular system of its burden to tackle all cases that comes to it and to provide alternative mechanism to reduce the burden on courts. Except by holding Section 89 to be constitutionally unsustainable by judicial review-distinguishing arbitration from other methods by interpretation does not appear to be permissible or possible. The legislative wisdom of inclusion of all the four under one group cannot be questioned by any artificial interpretative process of exclusion of Arbitration. If we go by letter of the law, no doubt survives at all in my mind that all the four ADR mechanisms must be treated identically and therefore what applies to conciliation, judicial settlement and mediation can never be held not to apply to the first, viz. arbitration. Language of the section cannot

help the insistence on consent at all. Except the argument that arbitration by its nature is a process not available without the consent of the parties, no argument appears to be available against the course adopted by the court below. If insistence on consent can be made for arbitration, certainly the same argument can be adopted in the case of conciliation, judicial settlement and mediation and it is perfectly possible to hold that all these three can also be resorted to only if the parties consent. I have already extracted paragraphs 55 of SBA-1I in which the Supreme Court has held that reference can be made to one or the other four methods of dispute resolution. The third contention raised cannot also in these circumstances be of help to the petitioners.

47. The fourth contention raised is the one with the help of Order 10 Rule 1-A, 1-B and 1-C. I have already extracted the said rules. I have been taken through these rules in detail. I have considered them anxiously.

48. It would be apposite at the outset to note that if the substantive provision in the Code confers a power in the courts to make a reference, it would be improper and impermissible to argue against such provision in the statute with the help of the rules framed or not framed. That certainly cannot be the law. The decisions of the Supreme Court in Shree Vijay Cotton & Oil Mills Ltd. v. State of Gujarat and M.V. Elizabeth v. Harwan Investment and Trading Pvt. Ltd. (Para 64) 1993 Supp. (2) SCC 433 clearly lay down this proposition.

49. A careful reading of Rules 1-A to 1-C of Order 10 must leave one with the unmistakable impression that the rule making authority had not considered the possibility of the parties not agreeing for any one of the four methods available under Section 89. The rules do not contemplate the procedure that is to be followed by the court in the event of disagreement between the parties. Evidently Rule 1-A to 1-C deal only with former eventuality, where the parties agree to resort to the one of the four methods of dispute resolution. It considers only the possibility of an agreement in respect of conciliation, judicial settlement or mediation, because so far as arbitration is concerned, as rightly pointed out by the learned Counsel for the petitioners, there can be no course of the matter returning to the regular court for further adjudication. Order 10 Rule 1-A to 1-C therefore do

not cover the entire gamut of possibilities, which may arise under Section 89(1). It would therefore be myopic to come to any conclusion on the basis of Order 10 Rule 1-A to 1-C about the power of the court to make reference in the latter eventuality referred to in paragraph 55 of SBA-II, i.e. where the parties do not agree for any of the four courses. That Rule 1-A to 1-C do not speak of a compulsory reference against the volition and without consent of the parties to any one of the modes cannot be given any undue importance as those rules do not speak of compulsory reference for conciliation, judicial settlement and mediation also. Rule 1A assumes that the parties shall opt for one of the modes. The arguments laboriously built with the aid of Rule 1A to 1C of Order 10, cannot be reckoned as sufficient to sail to the conclusion that arbitration deserves to be treated differently from the other three methods of dispute resolution for the purpose of Section 89. The 4th contention raised cannot also in these circumstances succeed.

50. The 5th contention relates to Rule 2(b) and its proviso of the model rules referred to by the Supreme Court in SBA-II. I have already extracted the rule.

51. I must first of all note that either in SBA-I or SBA-II there is no stipulation that these rules shall hold the field until the rules are framed by the respective High Courts. I had requested the counsel to go through and I have myself tried to go through all the relevant observations of the Supreme Court. Significantly it is not mentioned anywhere that these rules are accepted by the Supreme Court. I must assume that the Supreme Court had carefully not expressed itself on the acceptability of the rules. The rules have to be made by the Rule Making authority and the committee appointed by the Supreme Court does not step into the shoes of the rule making authority. The rules made may at best be reckoned as expressions of opinion by a committee of very eminent persons. But that is far from saying that those rules have any incidents of enforceability. If there is substantive power under Section 89(1) to refer the parties for arbitration against their volition, even a rule made by a competent rule making authority cannot militate against such power available under Section 89(1). Unlike a rule making authority, a committee need not and may not necessarily take into account all the various eventualities as it is evident, and they must have known, that the

concerned rule making authority shall apply their mind and accept only the acceptable rules and not accept those that are not.

52. I find merit in the submissions of Sri. K.L. Varghese that there are indications to suggest that the Committee and the court had not undertaken such a detailed and exhaustive study of the draft rules. The Committee had made a distinction between arbitration and judicial settlement on the one side and conciliation and mediation on the other. The counsel rightly points out that the Committee appears to have assumed that judicial settlement also invariably leads to an adjudicated decision when the parties do not agree for a compromise/settlement. This certainly is not the law.

53. Under Section 89(1)(c) reference to judicial settlement including settlement through Adalath is contemplated. Section 89 2(c) speaks of the consequences when reference is made under Section 89(1)(c) for judicial settlement. Such reference for judicial settlement can only be in terms of the Legal Services Authorities Act. Such authority/Lok Adalat can have only the power of Lok Adalath under the L.S.A. Act. It is by now trite that jurisdiction of the Lok Adalath to pass an award stems only from agreement/consent of the parties. The Lok Adalat has no authority whatsoever to adjudicate on any aspect. The Lok Adalat constituted under Section 19 of the Legal Service Authorities Act does not at all have any power for adjudication. The expert committee, it appears to me, had assumed that judicial settlement to the Lok Adalat or the person/institution to which reference is made and which would exercise powers of Lok Adalat has the power and jurisdiction to settle disputes and pass awards even when the contestants are not in agreement. That is certainly an erroneous assumption as rightly pointed out by Sri. K.L. Varghese.

54. I must alertly note that Section 89(1)(c) and 89(2)(c) read together make it clear that the reference can only be to a Lok Adalat or a deemed Lok Adalath and not to a Permanent Lok Adalat which after the amendment to the Legal Services Authorities Act has been invested with some power tor adjudication also as per Section 22(C) of the Legal Service Authorities Act. I am, in these circumstances, unable to understand why the Committee chose to group judicial settlement along

with arbitration and not along with conciliation or mediation. There appears to be force in the submission of the learned Counsel that there was some confusion of thought and it was assumed that a reference to judicial settlement as contemplated under Section 89(1)(c) and 2(c) may result in passing of the award even when the parties do not agree to such course. That assumption I respectfully note does not appear to be correct or justified by the terms of the Legal Services Authorities Act.

55. The mere fact that the Supreme Court has suggested in SBA-II that the High Courts/Rule Making authorities may consider the rules is no reason to assume that the Supreme Court had rendered its anxious consideration to the validity or acceptability of the rules and had given its imprimatur of approval to such rules. That certainly is not the position.

56. All that I intend to note is that it may not be proper or correct to reach any conclusion regarding the power of the court to make a reference under Section 89(1) with the help of the indications available in the draft rules submitted to the Supreme Court by the Committee. The contention raised on the 5th ground cannot also, in these circumstances, succeed.

57. The 6th contention raised by the counsel is that there are no rules formulated now which can give the court an idea as to how the powers wider Section 89 is to be exercised. I have already noted that the model rules suggested by the Committee appointed by the Supreme Court do not have the attribute of enforceability. I have already noted that Rule 1-A to 1-C of Order 10 do not at all refer to reference to any of the four methods of ADR when the parties do not consent to such course. The position then is that even if there be power under Section 89(1), there are no rules to work such power. This objection need not detain me any longer as it is well settled that even if the rules are not framed that cannot act as a fetter against the exercise of substantive powers available under the Statute. In these circumstances even when Order 10 Rule 1 -A to 1-C do not specifically refer to the manner in which such powers under Section 89(1) if available is to be exercised and even when the model rules are not enforceable and are not available to court, it cannot detract against the power of the court to

invoke the jurisdiction under Section 89(1) if such a power be available. The 6th contention raised cannot also hence indicate that such a power is not available with the court under Section 89(1).

58. The seventh contention relates to SBA II. Sri. Ramesh Chander then heavily relies on the observations in paragraph 56 of SBA-II, which I have already extracted ' above. He particularly relies on the words 'of course the parties have to agree tor arbitration' and the later words 'and therefore Section 82 or 84 has no applicability when the parties agree to go for arbitration under Section 89'. The counsel contends that this must indicate to the court that the Supreme Court was of the definite opinion that sans agreement there can be no reference for arbitration.

59. It is true that these observations must persuade the court to pause and ponder deeper into the question. But the judgment has to be read as a whole. The observations in paragraph 56 have to be understood in the light of the very specific observations in the earlier paragraph 55 of SBA-I, where the Supreme Court, according to me, expressed its mind in unmistakable terms when it said 'parties shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section and if the parties do not agree, the court shall refer them to one or the other of the said modes.' The observations in paragraph 56 cannot be read in an island of its own. It is to be read in the light of what has been stated already in paragraph 55, which declares unmistakably that even if there be no agreement the court shall refer the parties to one or the other of the said four modes - arbitration included. It would be myopic, according to me, to read the said observation in paragraph 56 without being cognizant of the authentic and specific observations which are already made in paragraph 55 about the power of the court.

60. I find merit in the submission of Sri. K.L. Varghese that in paragraph 56 the Supreme Court was not dealing with the options available to a court under Section 89(1). After stating in paragraph 55 that the parties can be referred to one or the other of the four modes available under Section 89(1), the court was posed with the problem about the competence for rule making. Sections 82 and 84 of the

1996 Act confer on the rule making authorities the power to make rules for carrying out the provisions of the 1996 Act. The Supreme Court was dealing with the question as to which authority should have the power to frame rules under Section 89 C.P.C. The Supreme Court in paragraph 64 of SBA-II had directed that it is for the respective High Courts to take appropriate steps for making rules in exercise of the rule making power. The court was dealing with the question as to who can make the rules and under what authority to implement the scheme of Section 89. It is only in that context, I understand, that the observations in paragraph 56 in SBA-II will have to be considered. The problem posed was whether the Rules to be framed have to comply with the stipulations of the 1996 Act or only Section 89 C.P.C. Under Section 8 of the 1996 Act no reference could have been made without an arbitration agreement, whether such agreement was entered into prior to the suit or during the pendency of the suit. An Arbitration agreement under Section 7 was sine qua non for making a reference for arbitration under Section 8 of the 1996 Act. The court was posed with that problem. If there is no arbitration agreement satisfying the definition of such agreement under Section 7, how can the mandate of Section 89(2)(a) be followed. An Arbitrator cannot arbitrate under the 1996 Act unless there be an arbitration agreement satisfying Section 7. When Section 89(2)(a) says that a reference can be made for arbitration and thereafter the procedure under the 1996 Act is to be followed, naturally a doubt arises as to how the requirement under Section 7 can be harmonised with the power to dispose of the reference under Section 89 in accordance with the 1996 Act.

61. The observations in paragraph 56 must certainly be read and understood in the light of the specific dispute and contentions, which the Supreme Court was dealing with in paragraph 56 and am unable to agree that any observations therein can militate against or detract from the unambiguous observations in paragraph 55 that if the parties do not agree the court shall refer them to one or the other modes, including arbitration.

62. I agree with Sri. Ramesh Chander that every observation made by the Supreme Court must be given due importance and emphasis. But when there is an apparent difficulty posed by 'the statements in different portions of the same

judgment, it is certainly for the court to resort to the exercise of harmonising the different portions. I must also note that the Supreme Court was not called upon in SBA-I or SBA-II to consider the specific question whether a compulsory reference for arbitration can be made when one of the parties does not consent to such a course. Any observations made in paragraph 55 and 56 must therefore be understood in the context in which they are made. There was certainly no occasion or attempt to make any declaration of law on this specific aspect under Article 141. this Court cannot lightly assume that law on the aspect has been declared by the Supreme Court and avoid the responsibility to resolve the question. I am, in these circumstances, of the opinion that the 7th contention raised cannot also persuade the court to hold that the power under Section 89(1) to make a compulsory reference is not available to the court.

63. The 8th contention raised, it appears to me, is an argument of doom. What will happen if courts were to make indiscreet references? This is the question posed. I must assume that the Parliament has advisedly conferred the jurisdiction not on any persona designate, but on regular courts properly constituted which must be held or assumed to be manned by competent trained personnel. One must also note that any reference for arbitration made under Section 89(1) will bring the suit to a termination before that court and such decision will certainly be amenable to challenge in revision even under the amended Section 115 of the Code.

64. The Legislature was advisedly conferring jurisdiction on properly constituted regular civil courts with the authority and responsibility to identify cases which would necessitate or warrant reference to the four methods of alternative dispute resolution. To say that the court will not be able to identify the appropriate case for the appropriate track is to betray want of confidence in the wisdom and maturity of the courts. Section 89(1) in its opening passage clearly says that the court must identify whether there exists elements of a settlement. The court must further ascertain whether such elements of settlement may be acceptable to the parties. The section does not stipulate that the court must be satisfied that the elements of settlement which it identities are/or must be acceptable to the parties. That is why very carefully the permissive expression 'may be acceptable to the parties' is used. I must assume that all relevant inputs will be taken into account and the decision

shall be taken as to whether there are elements of a settlement and whether such elements may be acceptable to the parties. After such identification the court has again got to consider the peculiar nature of the dispute as also nature of the parties to the dispute. It is only thereafter that the court can take a decision - in the event of the parties not agreeing tor any one of the courses, as to which stream or track of ADR must be chosen by the court. The court with the requisite acumen, knowledge and trained intuitions must certainly be able to identify such a case as also the track which is suitable to the dispute on hand in the given situation. Certainly the rule making authority will be competent, if the same is found to be necessary, to give better and clearer criteria to be followed while choosing the different tracks. Precedential authority will also be soon available as to the circumstances under which the different tracks are to be chosen by the civil courts. In these circumstances the contention that unbridled conferment of the powers under Section 89(1) to the courts might lead to anarchy and injustice is found to be not sustainable. The said argument does not also lead me to take a view that no such power is conferred by the statute under Section 89(1) to the court to make a reference without consent of all the contestants.

65. This is not to say that I am of the opinion that any case which would be time consuming or voluminous can conveniently be referred to arbitration or for that matter any method contemplated under Section 89. The courts have to alertly consider facts and identify whether such a reference need at all be made. It is not difficult to assume that recalcitrant litigants with the sole purpose of protracting and delaying the matter may opt to request the court to follow one of the four courses available under Section 89. It calls for wisdom and sagacity on the part of the courts to decide whether there are elements of a settlement and whether such settlement may be acceptable to the parties and also as to which track of ADR would be best suited in the given circumstances. Reasons will have to be given and such reasons can be considered by superior courts discharging revisional and supervisory jurisdiction.

66. The ninth contention relates to the power of the court to refer the parties to a specified Arbitrator. Shri. M. Ramesh Chander submits that under Section 89 there can only be a reference for arbitration and no reference to any Arbitrator. Section

89(1)(a) and 89(2)(a) do refer to reference of a dispute for arbitration and does not specifically refer to any reference to the Arbitrator. The counsel expresses a doubt as to whether this means and implies that reference can be made for arbitration as indicated in Section 8 of 1996 Act. Going strictly by the language of Section 89(1)(a) and 89(2)(a) such a doubt certainly arises. But an interpretation cannot be resorted to divorced of the context and the purpose which has to be served under Section 89. If this Court were to make a reference only for arbitration without specifying any Arbitrator, it would necessarily involve a further dispute regarding the identity of the Arbitrator obliging the parties to go before the Chief Justice under Section 11 to get the Arbitrator appointed. Such procedure instead of contributing to expedition in the settlement of dispute and disposal of case would contribute to further unnecessary delay and protraction. So, such a construction which would oblige the parties to go before the Chief Justice again to get the Arbitrator appointed under Section 11, after a compulsory reference against their volition is made under Section 89, must certainly be avoided.

67. There are other indications also in support of this conclusion. If that interpretation were accepted, reference of the parties for conciliation to any conciliator in the absence of such agreement for conciliation will also be difficult as there is no provision from the plain language of Section 89 enabling the court to appoint a conciliator. This inevitably would lead to a further procedure for an appointment of a conciliator for the purpose of Section 89(1)(b) and 89(2)(a) of the Code in so far as it relates to conciliation. The power for reference for arbitration and conciliation which appears in Section 89(1)(a) and (b) and 89(2)(a) must hence certainly be interpreted to inhere in it the power and the jurisdiction of the court to refer the parties to a specified Arbitrator or Conciliator. In the instant case this may not pose any problem as there is unanimity on the identity of the Arbitrator. But, Mr. Ramesh Chander points out that going by the strict language of Section 89, such appointment of an Arbitrator may not be possible. I take the view that the power under Section 89(1)(a) and 89(2)(a) to refer the parties for arbitration would and must necessarily include, imply and inhere in it the power and jurisdiction to appoint the Arbitrator also.

68. In this context it will be apposite to note that Section 89(2)(a) clearly shows that after reference, only the procedure under the 1996 Act is to apply. When the 1996 Act was enacted, the situation which may arise under Section 89 was not certainly contemplated, Section 89 being a subsequent amendment. In this context it will be proper to refer to the decision of the Supreme Court in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya . That was a case when a request was made to make a reference for arbitration under Section 8 of the Act and if that is not possible to make a reference under Section 89. In para-18, the Supreme Court has considered the question clearly and has held that while interpreting the provision of 1996 Act, the principles or the concepts under Section 89 cannot be imported:

18. Reliance was placed on Section 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, Section 89 CPC cannot be resorted to for interpreting Section 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 Section 89 CPC and even if application under Section 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section.

The converse is also true and correct. While considering the request for reference for arbitration under Section 89, it is not necessary to follow the mandate of Section 8 where the parties can be referred by court only for arbitration and not to any specified Arbitrator. The view that if there be dispute between the parties about the Arbitrator, that question is to be resolved under Section 11, does not appear to be correct.

69. Having considered all the contentions raised for and against the proposition that courts have the power even when parties do not agree to make a reference for arbitration, I do certainly sail to the conclusion in favour of the plain and apparent tenor of Section 89 that in an appropriate case the option of referring unwilling parties to arbitration is certainly available with the court. No contention is found to be sufficient to persuade me to go against the apparent tenor of Section

89(1) as explained by the Supreme Court in SBA-1I. The traditional concept of arbitration being reference to the adjudicated decision of a private Judge, should not be imported into Section 89(1) while appreciating and understanding the width and amplitude of the power vested in the court under Section 89. I also take the view that it would not be proper to introduce the requirement of separating arbitration from the other three modes because of the traditional understanding of the concept of arbitration.

70. I have already adverted to three of the four decisions which have been cited before me. The fourth is the decision reported in Basheer and Ors. v. Kerala State Housing Board 2004 (2) KLJ 949. In that decision Mr. Justice Padmanabhan Nair was not obliged to answer any question arising under Section 89 specifically as the amended Section 89 did not have any application to the facts of that case as the suit was instituted prior to the amendment. But useful reference is made and discussion is undertaken on the principles involved though the question has not been answered finally because of the non-applicability of Section 89 to the facts of that case.

71. The 10th and last contention raised on facts by the learned Counsel is that at any rate this is not a fit case where such power for arbitration can and ought to be invoked. I take note of certain very important circumstances in this case. Firstly, at the first stage it was the petitioners who wanted the matter to be referred for arbitration, of course, on the plea that there is an arbitration agreement under Section 7 of the 1996 Act covering the situation. But later, when the plaintiff made a request for reference to arbitration the petitioners developed cold feet and went against their own earlier assertion and contended that the matter need not be referred for arbitration. The observations of the Division Bench in the F.A.O. referred above do indicate the advisability of making a reference tor arbitration. Complicated and technical questions will have to be decided and it is by now well accepted that it is in such a case where expertise of a special kind is required that the course of arbitration is most suitable. I do further take note of the fact that there is no objection raised against the persona chosen as arbitrator. I further take note of the fact that there is no dispute regarding payment of arbitrator's fee. All these are important because these various favourable circumstances may not

concur in all cases. This certainly is a fit case where the crucial and the only question to be decided is whether such a power exists in the court or not. I am certainly persuaded to agree that in the facts and circumstances of this case, this is a fit case where reference can be made for Arbitration.

72. The learned Counsel for the petitioner submits that strict mandate of Section 89 has not been followed in as much as the terms have not been formulated and given to the parties for their observation. this Court had directed the parties in the course of earlier hearing to specify whether if not arbitration, any other method of ADR is acceptable to them. There was no agreement between the parties on any mode of ADR other than arbitration. I did not find any specific formulation or reformulation of the terms of settlement and to that extent I agree with Sri. Ramesh Chander that the procedure has not been strictly followed. At any rate, there is nothing to indicate that such procedure has been strictly followed. I say so because Sri. K.L. Varghese points out that the court below had formulated the terms after considering the submissions of both counsel. I had therefore requested the learned Counsel for the petitioners to suggest reformulation of any terms, which are enumerated in the impugned order, if necessary. No specific objections are raised nor any specific improvements suggested by the learned Counsel for the respondents against the terms settled tor reference and, in these circumstances, any inadequacy in complying meticulously with the procedure prior to reference committed by the court below need not stand in the way of this Court. In fact, the memorandum of revision petition filed, no specific objection is taken against any terms of reference made already or against the omission to raise any terms of reference. I consider the terms stipulated to be adequate and complete.

73. Before parting with the case, I think it necessary for the court to reiterate that reference under Section 89(1) for any mode of ADR mechanism should not be undertaken as a matter of course by any court. Such a mindless resort to Section 89(1) may become counter productive and might contribute to further delay of the proceedings. Alert application of mind is required. All the relevant inputs must be taken into consideration. The court must note that it is given a power to take decisions even transcending the decisions of the litigants/parties to the dispute. Reference to arbitration must certainly be resorted to rarely and only in exceptional

cases. I am approving the course adopted by the court below in this case only because for the special reasons earlier referred, and as it appears to me to be an eminently fit case where the powers, if available, ought to be invoked. I must caution the courts of the risk involved of making mindless reference to any of the four methods of alternative dispute resolution under Section 89, particularly arbitration for the reason that reference to arbitration would be an irretraceable step and the party can never come back to the regular stream of adjudication by competent court of the lis.

74. I must also before parting with this case place on record my appreciation for the able assistance rendered to this Court by counsel Shri. K.L. Varghese and Shri. Ramesh Chander who appeared for the parties as also Shri. Shreelal Warier, who accepted the request of this Court for assistance. Unfortunate though it is, I must mention that it is not often that the Courts get such thorough assistance these days.

75. This Revision Petition is, in these circumstances, dismissed. No costs.