

Amicable Settlement of Disputes

Report No. 35

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Introduction

The Chief Justice of Pakistan/Chairman, Pakistan Law Commission received some material from the Secretariat of the Conference of the Chief Justices of Asia and the Pacific on pretrial hearing/conferences in civil litigation. The material contained statutory provisions and rules applied/practiced in some 40 countries of Asia, the Pacific and the United States. The Chairman forwarded the material to the Secretary of the Commission for examination, with a view to suggesting, as to whether, and if so, how, may delay in the disposal of cases be curtailed by introducing, pretrial hearing and empowering the courts to pass pretrial orders?

The issue was examined in the light of prevalent procedural law/rules in the country, as prescribed in the Code of Civil Procedure 1908. The previous studies/reports (national and foreign) on the subject were also reviewed. The relevant procedures/practices of pretrial hearing/conferences and use of alternative means of dispute-resolution were also examined.

Pretrial Hearing

It may be clarified, at the outset, that the material pertained to a bare text of the pretrial procedural laws/rules in various jurisdictions, it did not contain an account or analyses of its practical application, so as to determine its rationale/utility, and draw conclusions as to whether and what extent, a particular procedure has been effective in realising, its stated objectives of quick, just and economical disposition of cases.

The countries/regions whose procedural enactments/rules have been received include, Western Australia, South Australia, Queensland (Australia), Brunei Darussalam, Bangladesh, Fiji, Hong Kong, India, Japan, Korea, Kiribati, Marshall Islands, Micronesia, Nigeria, New Zealand, Philippines, Pakistan, Singapore, Thailand and the United States.

The perusal of material revealed that not all countries in the Asian and the Pacific region, have specific and well elaborate provisions for conducting pretrial hearing and issuing pretrial orders. For example Bangladesh, India, Japan, Korea and Pakistan have no such provisions. Most of the states, however, prescribe specific, and at times, fairly detailed procedure on the subject, e.g. Queensland (Australia), South Australia, Western Australia, Hong Kong, Nigeria, Philippines, Singapore and the United States. Again, whereas in some countries pretrial proceedings are optional, in others, they are mandatory. Pretrial conference is mandatory in Fiji, Hong Kong, Martial Islands, Micronesia, Philippines and the United States. In countries where pretrial proceedings are mandatory, the courts are bound to apply such procedures and the parties obliged to comply. For default on the part of a party, sanctions can be imposed.

The system of pretrial conferences obliges the court/judge to become fully involved and play a more activist role, at the pretrial stage of hearing. The purpose is to prevent the parties or their counsels - or for that matter, the ministerial staff of the court - to indulge in or resort to tactics, which may hamper/impede, the speedy disposition of cases.

Pretrial proceedings, if properly conducted, would result in the proper preparation of the case for trial, eliminating thereby undue delays in disposal. It helps to prevent irrelevant/unnecessary issues being framed and non-essential (factual, expert and documentary) evidence being included in the trial. An important objective of the pretrial hearing is to encourage/facilitate the parties to try and reach an out-of-court amicable settlement of the dispute. In brief, pretrial proceedings aim at achieving the following objectives:

1. Prompt service of summons to ensure the appearance of parties and/or witnesses.
2. Simplification/clarification of issues so as to avoid unnecessary/irrelevant issues/matters being included for determination.
- 3- Amendment of pleadings so as to include only the essential and exclude the non-essential material therefrom.
- 4- Seeking clarifications from parties with regard to obtaining admissions of facts and/or documents.
- 5- Restricting/limiting the number of factual and expert witnesses to the mere essential.
- 6- Constituting Commissions for recording evidence, carrying inspections and discovery/production of facts/documents.
- 7- Obtaining stipulation or admission of fact and/or documents to avoid the obtaining of unnecessary/irrelevant proof.

- 8- Encourage the parties to try and reach an out-of-court, amicable settlement of disputes, through any of the alternative means of dispute-resolution, viz. arbitration, conciliation and mediation, etc.

Let it be emphasised that the present laws/rules do not prevent judges from calling the parties to preliminary hearings to thoroughly scrutinize their pleadings. There do exist some sketchy provisions in the CPC on the subject e.g. scrutiny of the plaint and written statement for the determination of material issues, amendment of pleadings for clarity and seeking stipulations/admissions of facts/documents, etc. In actual fact, however, it may be stated, that for a variety of reasons, including the lack of obligatory statutory provisions on the issue, congestion in courts, lengthy cause list, shortage of judicial officers, none provision of training to judicial officers, etc, the courts seldom have time or stomach for making any serious effort of carrying out a thorough scrutiny of pleadings and conduct pretrial hearing for resolving the preliminary issues to ensure a just, expeditious and economical disposition of cases.

Example of advance countries e.g. the United Kingdom, United States, etc show that pretrial hearings/proceedings have proven to be extremely successful in expediting trial proceedings and reducing arrears. Due to pretrial conferences, process serving is expedited, fictitious claims dismissed and parties and/or counsels, resorting to delaying tactics subjected to sanctions. Pretrial conferences also help in resolving bulk of the claims/disputes through amicable means. The two previous reports on civil law, namely Justice S. A. Rahman's Law Reform Commission Report (1958-59) and Justice

Hamood-ur-Rahman's Law Reform Commission Report (1967-70), recommended the initiation of formal pretrial hearings for expeditious resolution of preliminary issues, thereby helping to quicken the pace of trial.

It may be clarified that in the past, some High Courts designated judges to deal exclusively with pretrial issues/matters and further to also handle the administrative work of the court. But reportedly, the experiment was not successful and the practice was soon abandoned. Currently, in the provinces of the Punjab and NWFP, a Senior Civil Judge in a District is designated for the purpose of receiving complaints in civil cases. He examines such complaints, and if found in order, are forwarded to the court of competent jurisdiction for further processing. In the Province of Sindh, civil suits are instituted in the proper court of competent jurisdiction, which is responsible for the processing/evaluation of complaints/written statements, etc.

It is a common knowledge that the present system is not working very well. The designated civil judge does not give full attention to the scrutiny/evaluation of the pleading. Such scrutiny is done in a routine manner and on a mere superficial examination of the complaint/written statement. Again, this is not the exclusive function of the judge. He performs numerous other functions. He has vast jurisdiction and is required to hear cases/suits pending before him. After the separation of judiciary, his workload is further increased, in as much as he is required to deal with criminal matters. He also exercises powers of Magistrate under Section 30 of the Criminal Procedure Code 1898. As such, he is unable to more time and pay full attention to the pretrial

hearing/processing. This aspect, the High Courts may examine with a view to relieving the judge dealing with pretrial hearing of other responsibilities, so as to exclusively deal with pretrial conferences for expediting the trial proceedings. Such judges should be given necessary orientation and training. He should handle all intervening issues, matters and processes e.g. process serving, scrutinising/amending pleadings, framing of material issues, exchange of evidence/documents and determination of number of factual and/or expert witnesses, etc. He should dispose of all miscellaneous applications arising out of pleadings. For effective and efficient performance, such a judge must possess and should exercise the necessary powers of dismissing and/or decreeing suits and imposing penalties/sanctions and costs for default and delaying tactics.

Various provisions of the CPC, in particular Order VI, X, XI, XII, XIII, XIV & XV, clearly foresee - rather warrant - the calling of parties and their counsels to a pretrial conference for settling, inter alia, the following issues:

1. The simplification/clarification of issues;
2. Impleading all the essential parties;
3. The desirability of amending the pleadings;
4. Obtaining stipulation/admissions in respect of facts/documents;
5. Preparing list of factual and expert witnesses; and
6. Seeking settlement of the dispute through alternative means of dispute resolution.

Pretrial conference will enable the court to properly and effectively manage the case and control its further processing, with a view to ensure its prompt, economical and fair disposition. The CPC contains necessary provisions (Section 35 & 35 A), which empower the judge to impose necessary costs/compensatory costs for any default on the part of parties.

The aim of pretrial conference should be to determine and settle issues such as amendment in pleadings, determination of evidence and the number of witnesses, production and examination of documents, and if the parties are willing, to get evidence collected/recorded through Commission. For the purpose of recording evidence through Commission, Section 75 of the CPC read with Order XXVI, prescribes the conditions and procedure. Under the existing laws/rules, Commission can be constituted for recording evidence and carrying out inspections. Parties who desire a quick settlement of their disputes, may at the pretrial conference, agree to the appointment of a Commission for examining the parties, their witnesses, inspection of sites and examining documentary evidence, etc.

Alternative Means of Dispute-Resolution

The alternative-dispute-resolution methods are gaining currency through out the advanced societies in the world. In some jurisdictions, such as the United States, it is reported that nearly 90 per cent of the claims/disputes are resolved through this mechanism. The method is also successful in China and Japan, which is perhaps due

to the dominant influence of Confucian philosophy and Buddhist teaching. Various alternative methods of dispute-resolution remained in vogue in our country. The system of Panchayat and Jirga were successful in resolving many civil and criminal disputes. Unfortunately though, through the promulgation of the system of Basic Democracy in the country, in the earlier 1960s, and with the introduction of the local government institutions, these indigenous institutions were discarded and replaced by the conciliation courts. The experiment, however, did not last for long as the political nature of the institutions rendered the system controversial. The conciliation courts were not perceived as impartial/ fair, hence not trusted by the people. Furthermore, the frequent suspensions of the local government institutions also resulted in the conciliation courts becoming inactive for long periods of time.

The Arbitration Act 1940 and Conciliation Court Ordinance 1961 have also not been very effective. The system of conciliation envisaged by the Family Court Act 1964 also has not delivered the desired results. This is not necessarily due so much to any structural problem in law or the institution but lack of public awareness and inadequate orientation/training of judges on the subject. Thus, there is a need for vigorous efforts to revive the system of alternative dispute resolution, both at the stage of pretrial hearing and subsequent stages of trial and appeal. For this purpose, a panel of arbitrators/mediators, comprising of the retired judges, lawyers, professionals and other prominent citizens, may be prepared and maintained in the court. The judges should be given necessary orientation and training on the subject.

The Pakistan Law Commission had also examined this issue and one of its Committee prepared draft legislation entitled the Mediation Act 1993 on the subject. The draft has been submitted to the Ministry of Law and Justice for enactment. The draft provides for a panel of mediators to be maintained at the district/sub-divisional level for the resolution of petty civil and criminal disputes. If mediation is successful, the accord is enforced through decree. The Government may consider enacting the said draft into law.

Commission's Deliberations

The Commission, in its meeting on 19 December 1998, examined the paper prepared on the issue by the Secretariat and resolved as under:

The Commission discussed the proposal of introducing the system of pretrial hearing/conference, with a view to expedite the civil trial and trying to reach an amicable out-of-court settlement of disputes. The members were of the view that in the present scenario, when there is a shortage of judges and most of the courts are confronted with the problem of arrears, it would not be realistic to designate separate administrative civil judges for dealing exclusively with pretrial hearing. It was, however, emphasised that sufficient enabling provisions exist in law, which empower the judge to carry out pretrial hearing, and it should be done earnestly. It was stated that some countries in the region are experimenting with this concept fairly successfully. There, panels of retired judges are maintained in courts whose services are utilised for conducting pretrial hearing, including an

effort to reaching an amicable settlement of disputes. The system is, again, working quite successfully in the West and some countries in the Asian region. It was emphasised that the system of alternative dispute resolution should be given due importance, as it is in line with the injunctions of Islam, which lays stress on resolution of disputes through conciliation, mediation, etc. Accordingly, the Commission recommended that the High Courts should issue appropriate instructions to the subordinate courts to pay sufficient attention to pretrial hearing so that all the pretrial formalities are timely completed and the case is ripened for early trial. Similarly, the judge should, both at the pretrial as well as subsequent stages, make an effort for amicable settlement of the dispute. This way, the Commission observed, the workload in the courts could be reduced and undue delay in disposal of cases eliminated. The Commission further emphasised that the present strength of judicial officers should be augmented, in keeping with the arrears and workload of judges.

Accordingly, the draft was revised and placed again before the Commission. In its meeting on 17 March 2001, the Commission examined the draft and after thorough scrutiny, effected appropriate changes thereto to strengthen the proposed amendments. It approved the proposed 'Code of Civil Procedure (Amendment) Ordinance 2001', as follows:

The Code of Civil Procedure (Amendment) Ordinance 2001

Commencement.- (1) This Ordinance may be called the Code of Civil Procedure (Amendment) Ordinance, 2001.

(2) It shall come into force at once.

Addition of Section 89-A.- In the Code of Civil Procedure, 1908 (Act V of 1908), a new section 89-A shall be added as under:

89-A Informal Resolution of Suits:

With the object of securing substantial, speedy and inexpensive justice, the court may in or in relation to a suit, adopt any method or procedure consistent with the norms of justice including the use of mediation, conciliation or any such other means of alternative dispute resolution to settle any dispute in issue in which all the parties to the suit may have agreed.

Additions in Order X.- In Order X, a new Rule 1A shall be added as under:

(1A) The Court may adopt any lawful procedure not inconsistent with the provisions of this Code to-

- (i) conduct preliminary proceedings and issue orders for expediting processing of the case;
- (ii) issue, with the consent of parties, commission to examine witnesses, admit documents and take other steps for the purpose of trial;

- (iii) adopt, with the consent of the parties, any alternative method of dispute resolution including mediation, conciliation or any such other means.