



OFFER OF JUDGMENT RULE

Proposing Section 35C in the Code of Civil Procedure, 1908

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Talking about contract enforcement in India, the dispute-resolution system suffers from excessive delays (Shubho Roy, 2015) and spiralling costs. Most solutions are supply-side solutions aimed at increasing judicial expenditure to achieve judicial efficiency such as putting ad-hoc numerical limits on the number of proceedings or adjournments, setting up commercial divisions in existing courts, appointment of more judges and the likes. The correlation between judicial expenditure and judicial efficiency is not vouched for by data. Assuming agents in the legal system to be rational, utility maximising individuals; an incentive based approach to solving the problem bids fair to yield palpable results. One example of the aforementioned, from the US, is Rule 68 or the “Winner beware” rule of the Federal Rules of Civil Procedure.. The rule was intended to provide an incentive for parties to settle and was adopted in 1938 to foster settlements and expedite the litigation process by taxing a plaintiff with the defendant's post-offer costs if the plaintiff refuses an offer and does not improve on it at trial.

Rule 68 is about imposing a penalty on a plaintiff who refuses a reasonable settlement offer. Before the trial starts, the defendant can make an offer to the plaintiff to settle the case. If the plaintiff accepts the offer, the dispute does not go to the court resulting in time and cost savings. If the plaintiff rejects the offer, the judge is informed about the rejection but not the terms of the offer that was rejected (this is kept in a sealed copy with the court and is used only to decide upon the penalty). If the plaintiff wins and the sum awarded in the judgment is less favourable than the pre-trial offer made by the defendant, the plaintiff has to bear the costs incurred by the defendant from the date the offer was made by him/her. Both parties therefore make their own assessment in terms of cost and time before taking the dispute to litigation. This rule thus creates incentives for reducing litigation in the system.

The rule quintessentially is a one way street i.e. only defendants can invoke it. Timings and terms of the Rule are influenced by the defendants. The plaintiff only gets a period of ten days in which to evaluate the substance and worth of the offer. Secondly, post-offer costs are often argued to be too small a disincentive to litigate in US.

I. PROPOSED RECOMMENDATIONS

The recommendations proposed in this paper have been compiled from various law journals published at different databases. The following offer a workable blueprint of the Rule as envisaged for handling civil commercial cases in India, catering specifically to breach of contract cases involving monetary damages.

1. In order to deal with the pro-defendant bias, allow both parties to make a Rule 68 offer, including counter-offers. Counter offers increase the scope for bargaining by adding

weight to the incentive for settlement; tipping the scales in favour of settlement, away from litigation. This helps parties analyse their settlement possibilities better and theoretically increases the settlement chances, giving both parties an unequivocal say in determining the terms of settlement and negotiations. Also the system of levying the penalty can be adjusted to suit this change of frame, and two ways seem logical when deciding how to levy the penalty:

- a) The highest offers by the plaintiff and the defendant are selected. Assuming plaintiff's highest offer to be greater than that of the defendant, if plaintiff prevails for defendant's highest offer or less, then plaintiff will pay the post offer costs of the defendant. If plaintiff prevails for their highest offer or greater than that, defendant will pay the post-offer costs of the plaintiff. If the final judgment is between the highest offers of the plaintiff and the defendant, no cost shifting ensues (Miller.G., 1986, 93-125).
 - b) Florida Statutes, Section 768.79: The 25% rule
Under this, the last offer for settlement is selected. This is a two-way rule providing for recovery of post-offer costs, in cases in which the verdict is at least 25% below the offer when the offer is made by the defendant, or 25% above when the offer is made by the plaintiff. The 25% margin embodied in this rule has appeal in that it may be thought to protect an offeree from severe consequences for "missing by a small margin" (Shapard, J.,1995).
2. Time for the offeree to evaluate an offer should be a minimum of 20 days and not 10 days like in US.
 3. The nature of the penalty is also a concern. The Rule currently allows for recovery of post-offer costs without the inclusion of attorney fees. This penalty may be small and needs to be reappraised. A better practice could be to increase the damage awards as compared to cost-shifting (Kaplow,L.,1993). A normative sanction can be agreed upon to decide this. Imposing an ad-valorem sanction indexed to the damage awards such as 1-2% of the awards can be one way to implement this.
 4. No discretion must be given to the courts when deciding whether to impose a penalty or to lessen the severity of the same.
 5. A supporting framework analogous to the provision for discovery (Federal Rules Of Civil Procedure, rule 26(b)(1)) existing in the States is needed order to have fruitful

negotiations for settlement so that parties can evaluate offers and arrive at realistic estimates of the settlement offer.

6. If a breach of contract involves two or more issues, then parties should have the leeway to resolve either issue under this Rule. Settlement should therefore be 'severable'. This would allow issues that do not require judicial intervention to be sorted out of court freely, thereby reducing the number of issues to be addressed by the court.

II. PROPOSED SECTION 35C

It is proposed that a new section - section 35C be included in the Code of Civil Procedure, 1908 to encourage settlement. It should be worded as follows:

- (A) Offer. After the notice is issued and service of summons , but not less than twenty days before the evidence begins, any party may serve upon the adverse party an offer to settle the claim for the money specified, and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly.
- (B) Acceptance. If within twenty days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service and the clerk shall enter judgment. Additionally, both parties must sign an agreement to keep the judgment entered confidential.
- (C) Non-acceptance. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except to determine sanctions under this rule.
- (D) Subsequent Offers. The fact that an offer is made but not accepted does not preclude subsequent counteroffers. If a counteroffer is made, the court will take the sum of an offer and a counteroffer to determine an average offer for purposes of this rule.
- (E) Sanctions. If the judgment finally obtained is within $\pm 25\%$ of the latest offer or an average offer as the case may be, then the offeree shall be liable to pay two per cent of the award as costs to the offeror.
- (F) Offer-after-Judgment. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer of settlement, which shall have the same effect as an offer made before trial or arbitration if it is served within a reasonable time prior to the commencement of hearings to determine the amount or extent of liability.
- (G) Exceptions. This rule does not apply in family law and divorce actions, or claims involving only injunctive relief.

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