CHAPTER V
CONCILIATION

5.1 CONCILIATION

Conciliation is an alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties needs, takes feelings into account and reframes representations. In conciliation the parties seldom, if ever, actually face each other across the table in the presence of the conciliator. This latter difference can be regarded as one of species to genus. Most practicing mediators refer to the practice of meeting with the parties separately as ‘caucusing’ and would regard conciliation as a specific type or form of mediation practice -- ‘shuttle diplomacy’ -- that relies on exclusively on caucusing. All the other features of conciliation are found in mediation as well. If the conciliator is successful in negotiating an understanding between the parties, said understanding is almost always committed to writing, usually with the assistance of legal counsel, and signed by the parties, at which time it becomes a legally binding contract and falls under contract law.202

A conciliator assists each of the parties to independently develop a list of all of their objectives (the outcomes which they desire to obtain from the conciliation). The conciliator then has each of the parties separately prioritize their own list from most to least important. She then goes back and forth between the parties and encourages them to ‘give’ on the objectives one at a time, starting with the least important and working toward the most important for each party in turn. The parties rarely place the same priorities on all objectives, and usually have some objectives which are not on the list compiled by parties on the other side. Thus the conciliator can quickly build a string of successes and help the parties create an atmosphere of trust which the conciliator can continue to develop.

5.2 CONCILIATION

5.2.1 Commencement of conciliation proceedings:

(1) The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.

(2) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate and if he so elects, he shall inform in writing the other party accordingly.

5.2.2 Number of conciliators:
(1) There shall be one conciliator unless the parties agree that there shall be two or three conciliators.

(2) Where there is more than one conciliator, they ought, as a general rule, to act jointly.

5.2.3 Appointment of conciliators:

(1) Subject to sub-Section (2),-

a. in conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;

b. in conciliation proceedings with two conciliators, each party may appoint one conciliator;

c. in conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

(2) Parties may enlist the assistance of a suitable institution or person in connection with the appointment of conciliators, and in particular,

a. a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

b. the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person:

Provided that in recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.
5.2.4 Submission of statements to conciliator:

(1) The conciliator, upon his appointment, may request each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of such statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

(3) At any stage of the conciliation proceedings, the conciliator may request a party to submit to him such additional information as he deems appropriate.

Explanation. —In this Section and all the following Sections of this Part, the term ‘conciliator’ applies to a sole conciliator, two or three conciliators as the case may be.

5.2.5 Conciliator not bound by certain enactments:

The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

5.2.6 Role of conciliator:

(1) The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the
circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

5.2.7 Administrative assistance:

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

5.2.8 Communication between conciliator and parties:

(1) The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

5.2.9 Disclosure of information:

When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the
other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

5.2.10 Co-operation of parties with conciliator:

The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

5.2.11 Suggestions by parties for settlement of dispute:

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

5.2.12 Settlement agreement:

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.
(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

5.2.13 Status and effect of settlement agreement:

The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms of the substance of the dispute rendered by an arbitral tribunal under Section 30.

5.2.14 Confidentiality:

Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

5.2.15 Termination of conciliation proceedings:

The conciliation proceedings shall be terminated

a. by the signing of the settlement agreement by the parties on the date of the agreement; or

b. by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

c. by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

d. by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.
5.2.16 Resort to arbitral or judicial proceedings:

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

5.2.17 Costs:

(1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) For the purpose of sub-Section (1), ‘costs’ means reasonable costs relating to -

a. the fee and expenses of the conciliator and witnesses requested by the conciliator with the consent of the parties;

b. any expert advice requested by the conciliator with the consent of the parties;

c. any assistance provided pursuant to clause (b) of sub-Section (2) of Section 64 and Section 68;

d. any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

(3) The costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.
5.2.18 Deposits:

(1) The conciliator may direct each party to deposit an equal amount as an advance for the costs referred to in sub-Section (2) of Section 78 which he expects will be incurred.

(2) During the course of the conciliation proceedings, the conciliator may direct supplementary deposits in an equal amount from each party.

(3) If the required deposits under sub-Sections (1) and (2) are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator shall render an accounting to the parties of the deposits received and shall return any unexpended balance to the parties.

5.2.19 Role of conciliator in other proceedings:

Unless otherwise agreed by the parties,

a. the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

b. the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

5.2.20 Admissibility of evidence in other proceedings:

The parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings,
a. views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
b. admissions made by the other party in the course of the conciliation proceedings;
c. proposals made by the conciliator;
d. the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

5.3 CONCILIATION UNDER INDUSTRIAL DISPUTES ACT, 1947

The machinery and modes of investigation and settlement of disputes provided under Industrial Disputes Act, 1947 include conciliation. According to Chief Justice Rajamannar\textsuperscript{203}, ‘The essential object of all recent labour legislation has been not so much to lay down categorically the mutual rights and liabilities of employers and employees as to provide recourse to a given form of procedure for the settlement of disputes in the interest of maintenance of peaceful relations between the parties, without apparent conflicts such as are likely to interrupt production and entail other dangers.’

The conciliation machinery as provided under Industrial Disputes Act, is of two types: Conciliation officers and Board of Conciliation. The Government, by notification, appoints some officers as conciliation officers, entrusting them with the duty of mediating in and promoting a settlement of industrial disputes. A conciliation officer is appointed either for a specified area or specified industry, or for a limited period. The Board of Conciliation was in existence, as an investigation machinery, to deal with the problem of industry since 1929. Section 2(c), Industrial Disputes Act, gave a satisfactory authority to this Board, which is to be constituted by a notification. Section 5 says it will have a Chairman and two or four other members, as the

\textsuperscript{203} Meenakshi Mills Ltd. v. State of Madras, (1951) II LLJ 194 (Mad.)
appropriate government thinks fit. The Chairman shall be an independent person and other members shall be persons appointed in equal numbers to represent the parties to the dispute and any person appointed to represent a party shall be appointed on the recommendation of the party. Section 10 empowers an appropriate government to make reference of disputes to the Board of Conciliation, courts or tribunals. Section 11 deals with procedures and powers of conciliation officers, boards, court and tribunals. The Act empowers every Board of Conciliation with the powers of a civil court\textsuperscript{204}. Therefore, every Board of Conciliation shall have the powers to enforce attendance of any person and examine him on oath, compel the production of documents and material objects, issuing commissions for the examination of witnesses, in respect of such other matters as may be prescribed. Section 13 prescribed certain duties for the Board. When a dispute is referred to the Board it has to try to achieve settlement and investigate the same. It has to induce the parties to reach an agreement. If settlement is arrived at, it has to send a report to the appropriate government with memorandum of settlement. If not, failure report has to be sent.

The conciliation officer has no statutory power to decide the dispute or to impose his decision on the parties. His role is one of ‘facilitator’ in the sense that he brings the parties to the negotiating table, offers his expert advice, narrows down the issues on which the parties are at variance and encourages them to arrive at a mutually acceptable settlement. Section 12 of the Industrial Disputes Act, enjoins upon the conciliation officer the duty to investigate the dispute and all matters affecting the merits and the right settlement thereof and to do all such things as he thinks fit for the purpose of inducing the parties to resolve the dispute. The conciliation officer has the power to take note of the existing as well as apprehended

\textsuperscript{204} Section 11, Industrial Disputes Act, 1947
disputes either on his own motion or on being approached by either party to the dispute. A glance at the role of conciliation machinery over the past two decades reveals that conciliation is the final stage at which ‘interest’ disputes, i.e., those relating to the determination of long-range terms of employment and conditions of labour are settled. In a majority of cases, the parties indeed come to an understanding at the bipartite level itself and make a joint request to the conciliation officer to admit the matter in conciliation, with a view to confer 12(3) status on the settlement.205

The importance of conciliation lies in that once the proceedings commence, the parties cannot resort to a strike or lockout. In case a settlement is not reached between the parties, he has to send a failure report to the government, reflecting the steps taken by him to settle the dispute and the reasons for failure. A settlement arrived at in the course of conciliation proceedings is binding not only on the parties but also on all the workmen concerned, whether or not they are parties to the dispute. Under the Industrial Disputes Act, conciliation proceedings are compulsory where the dispute refers to a public utility concern. In all other cases, conciliation proceedings have been made optional at the discretion of the conciliation officer. Goswami J. observed:

There may be several factors that may influence parties to come to a settlement as a phased endeavour in the course of collective bargaining. Once cordiality is established between the employer and labour in arriving at a settlement which operates well for the period that is in force, there is always a likelihood of further advances in the shape of improved emolument by voluntary settlement avoiding friction and unhealthy litigation. This is the quintessence of settlement which courts and Tribunals should endeavour to


206 Herbertsons Ltd. v. Workman, AIR 1977 SC 322
encourage. It is in that spirit the settlement has to be judged and not by the yardstick adopted in scrutinizing an award in adjudication.

Justice Venkataramaiah observed that the law attaches importance and sanctity to a settlement arrived at in the course of a conciliation proceeding since it carries a presumption that it is just and fair and makes it binding on all the parties as well as other workmen in the establishment or the part of it to which it relates. The attitudes of the parties have a significant bearing on the pace of dispute settlement. It is not uncommon that they resort to dilatory tactics resulting in endless chain of joint meetings and conciliation proceedings. The NCL-I observed, ‘conciliation is looked upon very often by the parties as merely a hurdle to be crossed for reaching the next stage’. However, in the post-globalisation phase, conciliation seems to be the last stage at which ‘interest’ disputes are settled in a vast majority of cases.

Negotiation is one of the prime methods to settle industrial dispute. The parties to dispute, employer and workmen are expected to negotiate to settle their problems without intervention of third party. Without this essential aptitude, it is not possible to settle any problem by way of conciliation. Formalisation of process of conciliation through different provisions of law and rules such as Industrial Disputes Act, is not enough to solve the problems. The National Labour Commission has gone into the functioning of the conciliation machinery set up by various governments. It found the proceedings to be disappointing in some States while successful in others. The reasons are mainly the indifferent attitude towards conciliation on the part of labour, management and even the conciliation officers, lack of understanding, delay due to excessive workload on officers, procedural defects, insufficient information, and adjournments. The Commission

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recommended setting up of free and independent industrial relations Commission, in place of existing government controlled industrial relations machineries.\textsuperscript{209}

5.4 CONCILIATION UNDER THE HINDU MARRIAGE ACT, 1955

Under the amended Hindu Marriage Act (HMA), the approach of the courts in matters relating to family and marriage is different from that of the other ordinary civil disputes. The amendment of HMA in 1976 provided for many significant changes in the procedure like provisions for in-camera proceedings, if desired by the parties, a prohibition on publication of family proceedings except the judgement of the High Court or the Supreme Court printed or published with the previous permission of the court, day-to-day hearing of marriage disputes, fixing of six months period for conclusion of proceedings, etc. Another very significant amendment was addition of Section 23(2) to the Act. This sub-Section states that before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case, to make every endeavour to bring about reconciliation between the parties except in case of proceedings where relief is sought on any of the grounds specified in clauses (ii), (iii), (iv), (v), (vi) and (vii) of sub-Section (1) of Section 13.

A Hindu marriage is not contractual but sacrosanct, it is not easy to create such ties but more difficult to break them. A judge is required to actively stimulate rapprochement process.\textsuperscript{210} Section 23(2) is salutary provision exhibiting the intention of the Parliament requiring the court in the first instance to make every endeavour to bring about reconciliation between the parties. The approach of court in matrimonial matters is required to be much more constructive, affirmative and productive rather than abstract,

\textsuperscript{209} Ibid, supra note 16
\textsuperscript{210} Love Kumar v. Sunita Puri, 1997 (1) HLR 179 (P & H)
theoretical or doctrinaire. Matrimonial matters must be considered by the courts with human angle and sensitivity.\textsuperscript{211}

Sub-Section (3) makes a provision empowering the court on the request of the parties or if the court thinks it just and proper for the purpose of reconciliation to adjourn the proceedings for a reasonable period, not exceeding 15 days. The court is also given power to refer the matter to any person named by the parties, or even to nominate a person if the parties fail to name any person and to give directions to report to the court. When a report is submitted, the court shall have due regard to it while disposing of the proceedings. The restriction placed on the court while adjourning the case for the purpose of reconciliation only to a period not exceeding 15 days is in consonance with the policy of speedy disposal, as contained in Section 21B which was added in 1976.

5.5 CONCILIATION UNDER THE FAMILY COURTS ACT, 1984

The Family Courts Act was passed by the Parliament to address the problem of family disputes. Section 9(1) of the Act provides that the Family Court shall endeavour in the first instance, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the proceeding, where it is possible to do so consistent with the nature and circumstances of the case. According to sub-Section (2), in addition to the general power of adjournment, the Family Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect a settlement, if it appears to the Family Court that there is a reasonable possibility of settlement. It is the statutory duty cast upon family courts to conciliate the problem and reconcile the differences and settle the family problem to protect the institution of the family. The proceedings under the

\textsuperscript{211} Jagraj Singh v. Birpal Kaur, AIR 2007 SC 2083
Act are informal and the rigid rules of procedure are not applicable. Section 6 of the Act imposes an obligation on the State government to determine the number and categories of counselors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the family court with such counselors, officers and other employees, as it may think fit. Section 9 imposes an obligation to persuade the parties in arriving at a settlement for the dispute and for that purpose the court can adjourn proceedings. Section 10 relaxes the procedures considerably as far as the matters before the Family Courts are concerned. The confidentiality of the parties and procedure is protected by making the proceedings to be heard in-camera under Section 11. Section 15 reduces the rigidity of recording oral evidence and permits adducing of evidence of formal character by way of an affidavit (Section 16).

Another important innovative provision is Section 13 of the Act, which provides that the parties to the dispute shall not have right to be represented by the legal practitioner. If the court considers necessary, in the interest of justice, the court may seek assistance of a legal expert as amicus curiae. Legal practitioners are not totally prohibited. Their necessity is reduced to facilitate face-to-face negotiations between the disputing parties.

The Law Commission of India in its 59th Report in 1974, stressed the need of adopting conciliatory approaches to make reasonable efforts at settlement before commencement of trial of family issues. However, neither the regular courts nor the family courts could make better use of conciliatory approach in resolving disputes, mostly because of lack of time, preparation, motivation on the part of courts and the parties also.\textsuperscript{212}

\textsuperscript{212} Madhubhushi Sridhar, ALTERNATIVE DISPUTE RESOLUTION – NEGOTIATION AND MEDIATION, 2006, Lexis Nexis, Butterworths, p. 282, 283