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Decoding the Role of Conciliator under the Arbitration & Conciliation Act, 1996

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Abstract

The concept of conciliation is grounded in the use of a neutral third party, the conciliator, by the disputants for carving out a mutually acceptable solution to the dispute. This definitional goal may or may not be reached, but parties do by participating in the conciliation process desire to achieve a working dialogue between themselves through the aid and assistance of the conciliator, at the minimum. Conciliation, in this sense, is particularly helpful in bridging the communication gap between the parties. This is precisely the reason that, for long, across several legal jurisdictions of the world, conciliation has been recognised as an efficacious method of alternative dispute resolution. Given its utilities in resolving the crisis, it has found its place into the justice delivery dispensation, thereby helping reduce the burden on formal institutions such as courts and tribunals. In India, the rules governing conciliation process and conciliator are codified in the Arbitration and Conciliation Act of India, 1996 (*hereinafter the Act of 1996*).

In the light of the above, the present paper offers to make an analytical account of the rules governing the conciliation process as found in the Act of 1996. To this end, it attempts to decode the multifarious, accepted roles played by the conciliator, contrasting, in particular, with the roles of a mediator.

Introduction

The idea of conciliation, in essence, has to spring from the parties, who has to take a conscious call for conciliating the dispute rather than litigating or arbitrating the same. In the contemporary dispute resolution landscape, conciliation comes into picture as a stipulated clause in the contract between parties or as a separate agreement to conciliate pre or post the emergence of dispute. Further, during any formal proceedings like litigation or arbitration, a party may genuinely desire to see conciliation of a particular part of the dispute, thereby calling the other side to conciliate the ancillary matters of the dispute.

Though the Act of 1996 has its principal focus on arbitration, yet its Part III ranging from sections 61-81 contains elaborate provisions on conciliation. Conciliation is applicable over disputes which commonly arise out of contract or torts. It is not applicable over certain disputes which the law does not permit to be submitted to conciliation.[1] The initiation of conciliation rests on the parties' willingness to seek resolution of disputes through conciliation. If either party refuses, no conciliation is possible. For commencement of the process, written

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[1] Arbitration and Conciliation Act, 1996, Section 61: Application and Scope

communication is necessary. That is, a party's written invitation must be accepted in writing by the other party. The process is deemed to commence as soon as the invitation for conciliation is accepted.[2] Thus jurisprudential foundation of conciliation like mediation rests on the parties' autonomy to select and consent for this specific method of ADR.

1. Role of Conciliator and the conciliation Process

Conciliator is not bound by the strict procedures of Civil Procedure Code, 1908, or Indian Evidence Act, 1872.[3] His or her main role[4] is to assist the parties in an independent and impartial manner in order to strike an amicable settlement of their dispute. For this purpose, the conciliator shall be guided by the principles of objectivity, fairness and justice. The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case and the expressed wishes of the parties. He may at any stage of the conciliation process, 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 behind such proposals.[5]

Section 67 makes room for the exercise of some discretions by conciliator while he conducts the proceedings. Further, he can even suggest proposals on the settlement. These two particular aspects of the role of conciliator, possibly gives determinative power in the hands of a conciliator, which is ideally not expected in the role of a mediator. These aspects bring out subtle difference between the conciliator and the mediator. Commenting on the role of conciliator, the Supreme Court in *Haresh Dayaram Thakur v. State of Maharashtra and Ors.*[6] observed: "Though the conciliator is given wide discretion, with regard to the procedure, he must conduct the conciliation in a fair, impartial and appropriate manner, failing which the validity of the settlement may be jeopardised."[7]

A conciliator, without the prior information and consent of the parties, cannot act as a witness, arbitrator, counsel or representative in any arbitral or judicial proceedings in respect of a dispute that is the subject matter of conciliation proceedings.[8] This provision is key in ensuring the conciliator's impartiality during and after the conciliation process. In this respect the positions of mediator and conciliator are same.

Phases in Conciliation

In terms of structural phases the conciliation proceeding is quite flexible like mediation. Conciliator is expected to let parties know about the nature of conciliation proceedings in his opening statement. This is followed with combined meeting between conciliator and the parties, where introductory statements are made by the parties. Depending on the nature of dispute the conciliator may conduct several rounds of joint and separate meetings with the parties. The final phase ends with termination of the conciliation process. Termination, however, may

[2] *Id.*, Section 62: Commencement of Conciliation Proceedings
[3] *Id.*, Section 66: Conciliator not Bound by Certain Enactments
[4] *Id.*, Section 67: Role of Conciliator
[5] *Id.*
[6] AIR 2000 SC 2281
[7] *Id.*
[8] Arbitration and Conciliation Act, 1996, Section 80: Role of Conciliator in Other Proceedings

happen at any moment when either party so decides, or conciliator after consultation with the parties, makes a decision to this end.[9]

Settlement Agreement

If the conciliator is of the opinion that there exists elements of settlement which may be acceptable to the parties, he shall formulate the terms of a 'possible settlement' and submit the same to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in light of such observations. If settlement is reached, the parties may drew up the settlement agreement either by themselves or with the assistance of the conciliator, and once such settlement agreement is signed by the parties, it becomes final and binding upon them.[10] The settlement agreement deemed to have the status of an arbitral award, and is enforceable as arbitral award on agreed terms as provided under Section 30 of the Act.[11] This provision is also similar to mediation, in that the settlement reached in mediation is binding and enforceable only when the same is signed by both the parties.

Confidentiality

Confidentiality is the fundamental feature of conciliation, just like it is for mediation. Parties opt for such informal processes like mediation or conciliation precisely for the reason that they are confidential by nature. Under the Act of 1996, provisions are made to ensure that conciliator and parties do not breach the confidentiality. Section 75 lays down that all information gathered during conciliation proceedings shall be kept confidential by all the parties and conciliator(s). The protection also extends to settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.[12]

The confidentiality protection also covers the post conciliation scenarios. Views expressed, admissions or proposals made during the conciliation proceedings are entitled to protection, and the same cannot be relied on by the parties in any arbitral or judicial proceedings. These provisions are necessary safeguards to ensure that parties do not use conciliation process for discovery purposes.[13]

2. Amendments to the Civil Procedure Code, 1908

A major development in the realm of contemporary practice of ADR/mediation happened in 1999, when landmark changes were brought in the civil procedure laws of the country. The Parliament passed CPC (Amendment) Act, 1999, to reintroduce Section 89 in the CPC, 1908.[14] Section 89 dealing with settlement of disputes outside the court was based on the recommendations made in the 124th[15] and 129th[16] Reports of the Law Commission. The changes were basically designed to promote the ADR mechanisms by mandating parties to the private litigations to utilise ADR methods like arbitration or mediation. The fundamental objective is to reduce the pendency and

[9] *Id.*, Section 76: Termination of Conciliation Proceedings
[10] *Id.*, Section 73: Settlement Agreements
[11] *Id.*, Section 74: Status and Effect of Settlement Agreement; *N.S. Geetha v. B. Raghuveer*, 2009 (1) KarLJ 169
[12] *Id.* Section 75: Confidentiality
[13] *Id.* Section 81: Admissibility of Evidence in Other Proceedings
[14] Previously Section 89 was repealed by Act No. 10 of 1940. It has been again added to the Code of Civil Procedure by Section 7 of Act No. 46, 1999, Section 7. The amendment became enforceable from July 1, 2002.
[15] *See*, Law Commission of India, 124th Report, "The High Court Arrears- A Fresh Look" (1988)
[16] *See*, Law Commission of India, 129th Report, "Urban Litigation- Mediation as Alternative to Litigation" (1988)

the burden of courts. To achieve this objective, Section 89 casts a duty on the courts to see that cases are settled out of court by means of appropriate ADR, before the trial is resorted to. The amendment is remarkable for development of mediation in India, as it, for the first time, incorporated various modes of ADR, allowing parties to choose a particular method under the scheme of Section 89, CPC.[17]

Scheme under Section 89

Section 89 (1) enlists a broad list of actions on the part of court to refer parties to suitable modes of ADR. These actions are outlined as follows:

Firstly, the court has to see the existence of elements of settlement in a case;

Secondly, it shall then specify the terms of settlement and give the same to the parties for their observation;

Thirdly, after receiving their observations, the court shall re-specify the terms of a possible settlement and refer the parties to any one of the 5 preferred modes of ADR, which includes, arbitration, conciliation, judicial settlement including settlement through Lok Adalat and mediation. Out of these 5 modes, only arbitration is adjudicatory and the rest consensual processes.

Section 89 (2) lays down the governing law in case of selected mode of ADR. For arbitration or conciliation, the provisions of Arbitration and Conciliation Act, 1996 will be applicable; for judicial settlement or Lok Adalat, the provisions of Legal Services Authorities Act, 1987 will be applicable. Finally, in case of dispute referred for mediation, the court shall explore compromise between the parties and shall follow procedure as may be prescribed.

Other relevant provisions which were inserted in the CPC through Amending Act of 1999, are contained in Rules 1A, 1B and IC of Order X of CPC.[18] These Rules detail the procedures adopted by the court in referring parties to ADR modes. If the suit, so referred, is not settled, the case reverts for trial.

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[17]Code of Civil Procedure, 1908, Section 89: Settlement of Disputes outside the Court.
(1) Where it appears to the court that there exists 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 observation and after receiving observation 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 through Lok Adalat; or
(d) Mediation.
(2) Where a dispute had been referred-
(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 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 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 shall a 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 procedures as may be prescribed.

[18]*Id.*, Order X. Examination of Parties by the Court.
Rule 1A. Direction of the court to opt for any one mode of Alternative Dispute Resolution- After recording the admission and denials, the court shall direct the parties to 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.
Rule 1B. Appearance before the conciliatory forum or authority- Where a suit is referred under Rule 1A, the parties shall appear before such forum or authority for conciliation of the suit.
Rule 1C. Appearance before the court consequent to the failure of efforts of conciliation- Where a suit is referred under Rule 1A and the forum or authority to whom the matter has been referred 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.

Section 89 in conjunction with Rules 1A, 1B and IC, Order X imposes a mandatory duty on courts to direct parties to settle out of court. The provisions are mandatory only in the sense that courts are to mandatorily satisfy themselves about the existence of elements of settlement. However, they cannot force parties to compulsorily opt for ADR, as that would violate the essential tenet, the principle of voluntary option by the parties. Section 89, inter alia, also mandates for voluntary option for mediation. But, it does not provide detail rules on mediation. It simply says that 'mediation' will be in accordance with rules as may be prescribed. As there is no separate legislation governing mediation, the judiciary, under the mandate of Section 89, has been left to devise procedures on mediation.

Amendments to CPC introduced by the CPC (Amendment) Act, 1999, together with CPC (Amendment) Act, 2002 were challenged in *Salem Advocate Bar Association v. Union of India*[19] (*Salem I*). It was challenged on the ground that such amendments were made without any pre-enactment consultation and debate. That these were hastily enacted, and did not address the concerns raised by the legal community. However, the Supreme Court upheld the validity of the changes in CPC, and lauded the objectives of Section 89. But, the Court also observed that some clarifications may be necessary regarding the modalities of carrying out the mandate of Section 89. The Court directed for setting up a committee[20] which could look into the issues afresh and suggest measures whereby amendments to CPC become effective and result in speedy justice. The Court observed that the committee may consider to frame draft model rules on implementing Section 89. These model rules may be adopted by the High Courts, for giving effect to ADR scheme of Section 89, especially mediation as envisaged in clause (2) (d).
In *Salem Advocate Bar Association* v. *Union of India*[21] (*Salem II*) in 2005, the Supreme Court considered the reports submitted by the Justice Jagannadha Rao Committee. The Report identified drafting errors in Section 89 which led to confusions. The problematic areas as detected are discussed as follows:

3. Conciliation and Mediation

As pointed earlier, both the processes, sound very similar. Both are non-adjudicative, based on facilitating negotiations between the parties by a neutral third person. Parties opt for such processes on voluntary basis. Proceedings are confidential and the decision-making powers rest with the parties (self-determination). These essential attributes of mediation and conciliation set them miles apart from arbitration or litigation, the latter being essentially adjudicative processes. There are many who agree on the common attributes of mediation and conciliation, yet maintain the position that both terms are not synonymous.

The difference between the two seems largely on account of historical usage. Before 1980s, the more popular term was conciliation.[22] Countries around the world do not define the term differently, and refer to such processes in a way that implies that both terms are interchangeable. However, it is also noted that both processes may be different from each other on account of degree of intervention. Ideally, in conciliation the neutral third party

[19](2003) 1 SCC 49.
[20]The Committee was headed by Justice M. Jagannadha Rao, then Chairman, Law commission of India.
[21](2005) 6 SCC 344
[22]Panchu, Sriram, *Mediation: Practice and Law*, LexisNexis, 2011, p.295

occupies a more interventionist role in contrast to mediation, where the mediator does nothing more than facilitating parties. This distinction, as noted earlier, has also been blurred on account of emergence of evaluative model of mediation.[23]

Under the Arbitration and Conciliation Act, 1996, the term mediation only appears in Section 30, which lays down that arbitral tribunal may encourage settlement of disputes using either mediation or conciliation or other procedures during arbitral proceedings. Further, even under Section 89 CPC, mediation is mentioned as a separate type of ADR, which parties may choose. Such usage of the terms may imply differences between the two. It is noted that prior to 1996 Act, the term conciliation was in vogue and mediation was hardly used. The term conciliation occurs in several statutes as for example, Industrial Disputes Act, 1947, Family Courts Act, 1984, Legal Services Authorities Act, 1987 etc.

The Committee in its Draft ADR/Mediation Rules, 2003[24], while dealing with the mediation and conciliation, has attempted to bring some clarity on this issue. Rule 4 of the Draft Mediation Rules elaborates the terms as follows:
Settlement by '*conciliation*' is a process, in which the third party, the conciliator conciliates the dispute between the parties as per the provisions of Arbitration and Conciliation Act, 1996. The conciliator makes proposals for a settlement of the dispute. This he does by formulating or reformulating the terms of a possible settlement. He thus occupies a greater role than mediator.
Settlement by '*mediation*' is a process in which third party, the mediator mediates the dispute between the parties as per the provisions of the Mediation Rules, 2003. The mediator, in particular facilitates the discussions between the parties. He assists parties in exploring areas of compromise and generating options of settlement, reminding parties' own responsibility for creating decisions that affect them.
The above distinctions between conciliation and mediation seem very subtle. The Supreme Court in *Salem II*, pointed out that Committee has drawn distinction between the two keeping in mind the facilitative model of mediation, but in USA and other jurisdictions, evaluative mediation is preferred over the facilitative mediation. In evaluative mediation, the mediator, apart from facilitation, also evaluates the issues, thus playing an interventionist role just like conciliator. Thus there remains a little difference between the two.
In *Salem II*, the Court did not decisively say that both processes are same. In absence of complete judicial or legislative clarity, many confusing questions can arise. As for example: Whether a person is conciliator or mediator; Whether mediator can make proposals, just as conciliator; Whether an agreement reached in mediation can be challenged on account of mediator playing an interventionist role like conciliator; Are laws governing conciliation and mediation same; Are credentialing process for mediator and conciliator same?

A decision by Delhi High Court illustrates the confusion over treating mediation and conciliation alike. In the given case[25], the mediation between the parties resulted in a settlement agreement. One of the parties did not fulfil

[23] *Id.*
[24] Civil Procedure ADR and Mediation Rules, 2003, *available at* http://lawcommissionofindia.nic.in/alt_dis.pdf (last visited December 20, 2022)
[25] *Shri Ravi Agrawal v. Shri Anil Jagota*, (OS) No. 19 of 2009, DHC

his obligations and the matter reached before the court. The aggrieved party sought enforcement of the settlement agreement under Sections 73 and 74 of the Arbitration and Conciliation Act. The court, however, declined to do so, giving the reason that proceedings did not amount to conciliation since there was no commencement of conciliation as per Section 62 of the Act.

Court's Role in Formulation and Reformulation of Terms of Settlement

Section 89 (1) envisages that when a court finds elements of settlement, it 'shall' formulate the terms of settlement and give the same to the parties for their observation, and after receiving observation, it 'may' reformulate the terms of a possible settlement. This clause in its literal sense would mean that a court can frame the terms of possible settlement, which defies sense. Without extensive mediation or conciliation, the possible terms of settlement cannot be achieved. If the courts at the pre-referral stage[26] formulate and reformulate the terms of a possible settlement, then very little will be left to be done by the ADR forum. Further, the said exercise requires facilitative techniques, which the presiding judges are commonly not trained at. It is not clear as to what is the intention behind this clause in Section 89. Taking note of this problem, the Supreme Court in *Salem II*, has literally re-written the clause (1) of Section 89. The said clause has now been excluded from the scheme of Section 89.[27] The SC has held that, the courts are only supposed to formulate a brief summary of disputes, and not formulate or reformulate the terms of possible settlement.[28] This initial exercise is only meant to see the suitability of disputes before referring the same for ADR. If the case is not referred to ADR, then courts have to just record the reasons for not doing so.

It is, therefore, submitted that courts' role at the pre-ADR/mediation stag should remain minimal. It will be wholly out of place, if courts assume such roles which are properly assigned to mediator or conciliator.[29]

4. Afcons Case and Aftermath

In *Afcons Infrastructure Ltd.* v. *Cherian Varkey Construction Co. P. Ltd*.[30], the SC got another opportunity to examine in detail the scope and implementation of Section 89 of CPC. The case has become a leading precedent on ADR/mediation, heralding, in particular, a new phase for mediation activities in the country.

Issue of Mandatory ADR

The *Afcons* case, *inter alia*, has dealt with a key issue of mandatory ADR. While ADR methods are opted on voluntary basis by the parties, the concept of mandatory ADR allows court to push parties to compulsorily use alternative processes. The purpose is to ensure that parties refrain from entering protracted court battles, thus

[26]The stage before the court may refer the parties to ADR methods.
[27]*Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. P. Ltd*., (2010) 8 SCC 24, para 14
[28]*Id*., para 9 (SC noting that a judge cannot formulate the terms of possible settlement unless he acts as mediator or conciliator)
[29]*See also*, Law Commission of India, 238th Report on "Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions" (2011) p. 14, (Law Commission in its 238th Report has also supported the view that court' role at the pre-ADR stage is only to refer parties to suitable ADR forum, keeping in mind the excluded categories of cases. To this end, the courts have to prepare a brief summary of disputes)
[30](2010) 8 SCC 24

relieving the pressure on court.[31] However, any element of 'compulsion' in the mandatory ADR programme may be seen as violating principle of voluntariness.[32]

The main question in *Afcons*, which triggered the re-examination of entire legislative scheme under Section 89, was: whether under Section 89 consent of all parties is required before referring them to arbitration? It is pertinent to note that arbitration is an adjudicatory process which is governed by the Arbitration and Conciliation Act, 1996. In a civil dispute, where there is no pre-existing arbitration agreement[33] between the parties, the courts have to be careful in sending parties to arbitration. Under Section 89, the courts can send parties to arbitration only on the basis of mutual consent. Once parties resort to arbitration, (under the court direction) the case goes beyond the ambit of the referral court. The arbitral tribunal then becomes the proper forum for the parties. Potentially the situation may generate issues concerning 'access to justice through courts'. Therefore, when the court directs parties to arbitration, consent of both parties are required.[34] To this end, courts should also inform parties about the consequence of choosing arbitration under Section 89.

Conciliation is a non-adjudicatory consensual process. The dispute referred for conciliation, is governed by the provisions relating to conciliation under the Act of 1996. For conciliation too, the mutual consent of both parties are required. The court cannot send the parties to conciliate without first obtaining the consent of both parties. However, unlike arbitration, the dispute referred for conciliation, does not go beyond the ambit of referral courts. This means that case reverts to court in case of failure of conciliation.

If the parties do not agree for either arbitration or conciliation, the court has to consider the other available non-adjudicatory processes, namely, mediation, Lok Adalat and judicial settlement. In *Afcons* case, the SC held that, at this stage, necessarily the court will have to refer parties to mediation or Lok Adalat or judicial settlement. For 'reference' to these processes, consent is not required.[35] If mediation facility is not available, due to lack of trained mediators, the court will refer the case to Lok Adalat. If mediation facility is available, the court may refer the complicated cases for mediation, and the simpler ones to Lok Adalat.[36] Further, if the court thinks that judicial settlement by a judge will be more appropriate, then it may refer the case to another judge. Thus the courts have been entrusted with wide discretion at the pre-ADR reference stage.

While consent is required for reference for arbitration and conciliation, the same is not a pre-requisite condition for other consensual processes. SC in its decision has reasoned that by referring parties for mediation or Lok

[31]The pressure on courts could be relieved by applying the concept of case management.

[32]Issue concerning of element of compulsion in mandatory ADR/mediation programme was prominently raised in an Italian case, namely, *Rosalba Alassini v. Telecom Italia spa and Ors.*, (Joined Cases C-317-320/08) [2010] 3 CMLR 17 ECJ. In the said case, the European Court of Justice held, that the Italian law which requires parties to the case to mandatorily engage in mediation before litigation, does not violate the right to access to court as guaranteed under Article 6 of the European Convention on Human Rights. In the given case, the court of first instance had refused to take up the case, as parties had not done mediation before coming to court. The judgment has evoked mixed responses from various quarters. It is criticized for restricting the access to court. But, the same has also been considered a necessary way to reduce mounting arrears of cases in courts. *See*, Brooker, Penny, *Mediation Law: Journey Through Institutionalism to Juridification*, Routledge, 2013, p.129; *See also*, Nolan-Haley, Jacqueline M., "Is Europe Headed Down the Primrose Path with Mandatory Mediation?", 37 *North Carolina Journal of International Law & Commercial Regulation* (2012) pp. 981-1011, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010615 (last visited December 20, 2022)

[33]Where there is an arbitration agreement between the parties, courts are bound to send parties to arbitration, *see*, Arbitration and Conciliation Act, 1996, Section 8: Power to Refer Parties to Arbitration where there is an Arbitration Agreement

[34]Also emphasized in *Jagdish Chander* v. *Ramesh Chander*, (2007) 5 SCC 719

[35]*Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. P. Ltd*. (2010) 8 SCC 24, para 26

[36]*Id.*

Adalat or Judicial settlement, the court remains in control of the case so referred. If the parties do not settle, the case reverts to the court. It may be drawn from the ratio of *Afcons* case that, at the pre-ADR stage, court reference is mandatory in respect of mediation, Lok Adalat and judicial settlement, however, the same is not mandatory in respect of arbitration and conciliation.

According to me, the two different ways of reference for mediation and conciliation at the pre-ADR reference stage has brought unnecessary distinctions between the two terms. In terms of pre-ADR reference, if parties do not agree, the court cannot send them for conciliation, but they can be referred for mediation even if they do not agree.

Further, the SC in *Afcons* has reasoned, that parties do not lose anything, and after mandatory reference, either party can take away his/her consent to non-adjudicatory processes. But this line of argument may be faulted on account of mediation and other consensual proceedings including conciliation being voluntary in nature. Even at the pre-ADR reference stage, consent of the parties matters. It is vital that parties, from the very beginning, take recourse to alternatives on a consensual basis. The mandatory reference for ADR might create legal complications in the end, if the outcome of mediation is challenged on the ground that an unwilling party was coerced into mediation by court. This situation will entirely frustrate the purpose of mediation.

5. Concluding Remarks

Some ADR theorists and practitioners have maintained distinctions between mediation and conciliation, especially with reference to the expected roles of conciliator and mediator. But, some others have refused to recognize any distinction between the two. In conciliation, the conciliator, apart from persuading the parties to negotiate, also actively formulate proposals on settlement agreement. In that sense, the conciliator sometimes occupies the role of evaluator. But, in mediation, the role of mediator is just to facilitate the parties to reach a negotiated deal. A mediator ideally does not evaluate or determine the issues in mediation process. He is expected to be an excellent facilitator of dialogue between the parties. Nonetheless, the subtle distinction between mediation and conciliation has blurred following the development of evaluative model of mediation (or evaluative mediation) in which the mediator does not only facilitate but also evaluate the issues in mediation.[37] Considering the blurring of difference between mediation and conciliation in current ADR practice, many mediators have treated both the terms as synonymous.[38] In India, questions concerning distinctions between the two have assumed critical significance in view of possible confusion due to interchangeability of these two similar sounding terms. In absence of definitive legislative clarity, legitimate doubts may arise whether the process is/was conciliation or mediation as highlighted in the case of *Shri Ravi Agrawal* v. *Shri Anil Jagota*[39] decided by the Delhi High Court. This is high time, the Parliament legislatively removed this anomaly by law and thereby creating more definitive space for the use of conciliation and/or mediation for the wider benefit of ADR community in the country.

[37] *See*, Kovach, Kimberlee K. & Love, Lela P., "Evaluative Mediation is an Oxymoron", 14 (3) *Alternative to the High Cost of Litigation* (1996) p.31

[38] *See*, Panchu, Sriram, *Mediation: Practice and Law*, LexisNexis, 2011, p. 281 (Author, who is a senior advocate in Supreme Court of India and renown mediator, notes that "there is little difference between the two expressions and that they should be treated as being synonymous").

[39] *Supra* n. 25