

Reporting Mediation: Congruous or Incongruous?

Bhavya Sharma
PhD Research Scholar (LAW)
Gautam Buddha University, Greater Noida
Uttar Pradesh, India

Mohammad Athar Talib
PhD Research Scholar (LAW)
Jamia Millia Islamia
New Delhi, India

ABSTRACT:

Mediation is a process in which a neutral third party works with and assists the disputants to negotiate a settlement by helping them communicate, identify their substantive interests, create practical and workable solution that amicably ends the dispute.

With 'Confidentiality' as its basic feature, whether reporting mediation is congruous or not? And if so, then till what extent?

In Ram Janambhoomi case, Honorable Supreme Court directed "mediation proceedings should be conducted with utmost proceedings confidentiality so as to ensure its success which can only be safeguarded by directing that proceedings of mediation and the views expressed therein by any of the parties, including the mediators, shall be kept confidential and not revealed to any other person".

Aware of the likely intense media focus on the mediation process, and conscious that wide coverage of views expressed could inflame emotions detrimental to an amicable solution, there ought not to be any reporting of the said proceedings in print or in electronic media. The Court further directed that it empowers the mediators to pass necessary orders in writing, if so required, to restrain publication of details of mediation proceedings.

The Confidentiality rule will be helpful as none would want the atmosphere to be vitiated by pre-mature disclosure when the country is in election mode. Thus, Confidentiality extends to all aspects of mediation, including the views expressed therein, the discussions, suggestions and options that emerge.

It covers the existence and contents of the mediation agreement. The only exceptions to this are where all the parties give permission for such disclosure or where it is required by law. Infact, the mediator should not even divulge to anyone that mediation is taking place between the disputing parties.

I. INTRODUCTION

Understanding Mediation and the Process

Mediation can be described as a search for a consensual solution for a dispute through negotiation with the help of third party facilitator.¹ It is a process in which mediator, an external person who is neutral to the dispute, works with parties to find a solution which is acceptable to all of them.² To be true to the spirit of the process, it would be fair to say that mediation is a forum provided to the parties in a dispute where they can allege, discuss, vent, brainstorm, and overcome the root cause of their disputes.

It is cognizant of the fact that human relationships go beyond the written letter of the law and disputes as such

¹ N.R. Madhava Menon, CLINICAL LEGAL EDUCATION, 1st ed. reprinted, 2013, p.152

² Sriram Panchu, MEDIATION PRACTICE & LAW, THE PATH TO SUCCESSFUL DISPUTE RESOLUTION, 2nd ed. 2015, p.26

must be met with a space to resolve and preserve relationships.³ In sum, *mediation is a confidential process facilitated by a neutral third party which gives the parties freedom to explore creative settlements outside the scope of written letter of law without breaking it.*⁴

The process can be summarized by saying that mediator opens up communication between the parties, encourages them to participate, identifies facts and issues, focuses them on their larger interests, invites offers and proposals, gets them to be realistic about their case and its prospects, encourages them to generate and discuss ideas and options for settlement, helps them to refine those options to reach an agreement that both parties see as fair and proper end to their dispute. The mediator moves parties from extreme ends of the disputing spectrum to the common ground of settlement.⁵

Positions v. Interests

Our needs dictate our interests. Interests are long term in nature. Positions are immediate demands being made. A joint search for solutions to the dispute is sought in this process. In essence, it involves parties to identify their real interest and develop on that and move away from the position of wanting to be proven right at all costs to considering the real interests at stake. As an illustration, A and B are involved in a custody of their 2 year old son. While A is hard-working and stay at home mother, B is drawing handsome salary. In this power struggle, they are demonstrating their positions and justifications for the same; what they neglect is their real interest and providing a healthy and safer environment for upbringing and nurturing their son. Here, the mediator steps in and ask both the parties to pivot from their positions and consider the real interests at stake. It opens up a forum for discussion beyond the limited sphere of individuals' constricted thinking.

II. THE CONFIDENTIALITY PREMISE

“Confidentiality is a virtue of the loyal, as loyalty is the virtue of faithfulness”

- *Edwin Louis Cole*

The question that begs to be raised at this point is the sanctity of the confidentiality of the process, since a third party is present in the room. Confidentiality, a basic tenet of mediation, has been expressed as “critical” and “integral” to the relationship between the mediator and the parties and to the free and frank disclosure that is necessary if obstacles to settlement are to be overcome.

The legal world of tactics and strategy vs. disputants extralegal world grounded on psychological needs,

³ Shashank Garg and Justice Ajit Prakash Shah (eds.), ALTERNATIVE DISPUTE RESOLUTION THE INDIAN PERSPECTIVE, 1st ed.2018, pp.389-390

⁴ Shashank Garg and Justice Ajit Prakash Shah (eds.), ALTERNATIVE DISPUTE RESOLUTION THE INDIAN PERSPECTIVE, 1st ed.2018, pp.389-390

⁵ Sriram Panchu, MEDIATION PRACTICE & LAW, THE PATH TO SUCCESSFUL DISPUTE RESOLUTION, 2nd ed. 2015, p.27

feelings and emotions. Mediation is not about relaying information to the opposing side in order to assist the sender tactically in highlighting the strengths of their own cases and the weaknesses and the risks of opponents' cases – similar to traditional advocacy.⁶

III. CASE LAW

The Supreme Court of India has in the case of *Moti Ram(D) Tr. LRs and Anr. v. Ashok Kumar and Anr*⁷ held that mediation proceedings are confidential in nature and the mediator should send only a copy of an executed agreement to the court. After the conclusion of sessions, the mediator's report was put before the Court. The report mentioned various settlement proposals made by the parties. As a result, the Supreme Court stressed that mediation proceedings are strictly confidential. The Court went on to clarify the requirement and purpose of the report, namely, that when successful, the mediator should send the settlement agreement signed by the parties to the Court without mentioning what occurred during the mediation proceedings. When unsuccessful, the mediator should simply state that mediation has been unsuccessful.

The Supreme Court affirmed that any disclosure of what occurred in a mediation destroys the confidentiality of the process.

Prior this judgment, parties were free to make a contractual agreement to maintain confidentiality of mediation proceedings but no statutory authority provided that mediation proceedings were confidential.⁸

In *Rama Aggarwal v. PIO, Delhi State Legal Service Authority*⁹, the Central Information Commission (CIC), held that a party cannot seek information pertaining to mediation proceedings under the Right To Information Act. The CIC observed that 'information regarding negotiation, mediation, conciliation and counseling are exempted from disclosure, being personal and given in fiduciary capacity and, no public interest could be established for disclosure'. The Court recognized that larger public interest in protecting that information from disclosure so as to help mediation flourish.

Indian laws are regarded as adequately providing for confidentiality in mediation, in line with international standards. Also, Indian Courts have supported the importance of confidentiality in mediation.¹⁰

Mediation Rules of the International Chamber of Commerce (ICC) provides that unless otherwise agreed by the parties or required by applicable rule, law, mediation is private and confidential. As a result, submissions made

⁶ Tamara Relis, PERCEPTIONS IN LITIGATION AND MEDIATION LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES, 1st ed.2009, pp. 151-153

⁷ 2010 (14) (ADDL.) SCR 809

⁸ Shashank Garg and Justice Ajit Prakash Shah (eds.), ALTERNATIVE DISPUTE RESOLUTION THE INDIAN PERSPECTIVE, 1st ed.2018, pp.395-396

⁹ CIC/SA/A/2015/000305

¹⁰ Shashank Garg and Justice Ajit Prakash Shah (eds.), ALTERNATIVE DISPUTE RESOLUTION THE INDIAN PERSPECTIVE, 1st ed.2018, p.396

by parties or the mediator may not be used in any arbitration, any court case, or similar proceeding. The same confidentiality principles applies to views expressed, concessions, offers, or any admissions made by the parties to a mediation.

IV. RATIONALE: WHAT IS THE NEED OF CONFIDENTIALITY?

Full disclosure to the mediator in confidence can be the key to a successful resolution of even the bitterest of controversies. When the parties know that everything said or done in the process of mediation, would be confidential, it opens the door to frank and honest discussions. Informality may have to be preserved without the interaction degenerating into confusion and chaos.

The purpose of introducing confidentiality into mediation practice is in its creating and preserving a sense of security for the parties during settlement discussions, but in a way that eventually **encourages** mutual disclosure of private information and opinion in order to generate the possibility of settlement. When a mediator emphasises the confidentiality of the mediation process during a mediation, this is to reassure them that no party will damage their “on-the-record” legal case by what they do or say during the mediation, nor will they seek the “oxygen of publicity”. The mediator wants parties to feel free to be creative, flexible and concessionary with minimal risk. To feel comfortable about behaving in these ways requires a solid sense of security in all participants about the private framework in which discussions occur.¹¹ Mediation often reveals deep-seated feelings on sensitive issues. Compromise negotiations often require the admission of facts which disputants would never otherwise concede. Confidentiality insures that parties will voluntarily enter the process and further enables them to participate effectively and successfully

Fairness to the disputants requires confidentiality. Privacy is an incentive for many to choose mediation. Whether it be protection of trade secrets or simply a disinclination to “air one’s dirty laundry” in the neighborhood, the option presented by the mediator to settle disputes quietly and informally is often a primary motivator for parties choosing this process.¹²

As mediation takes place outside a court of law and without the legal oaths that bind judicial proceedings, formalities around confidentiality need to exist even more rigorously to ensure mediation is taken just as seriously (and equally trusted) as an effective and binding form of alternative dispute resolution. Formalities such as setting up ground rules at the start of the mediation process are vital for its ongoing success. Ground rules may outline a strict code of conduct that both parties should adhere to during the mediation, such as the

¹¹ Heather Allen, CONFIDENTIALITY A GUIDE FOR MEDIATORS, available at <https://www.cedr.com/articles/?item=Confidentiality-a-guide-for-mediators> (visited on June 5, 2019)

¹² Lawrence R. Freedman, Michael L. Prigoff, CONFIDENTIALITY IN MEDIATION: THE NEED FOR PROTECTION, available at https://kb.osu.edu/bitstream/handle/1811/76172/OSJDR_V2N1_037.pdf?sequence=1 (visited on June 5, 2019)

tone with which they use to communicate with one another. Ground rules may also be useful for ensuring that confidentiality is upheld.¹³

V. GOING BEYOND CONFIDENTIALITY, REPORTING MEDIATION IS INCONGROUS : AN INSIGHT INTO AYODHYA CASE

The dispute over the site at Ayodhya, where a 16th century mosque stood until it was torn down by Hindutva fanatics in December 1992, has remained intractable since 1949. After the demolition of the Babri Masjid, the President referred to the Supreme Court the question whether there was a temple to Lord Ram before the mosque was built at the site. The court, in a landmark decision in 1994, declined to go into that question. More important, it revived the title suits and, thereby, restored due process and the rule of law.¹⁴

A welcome feature of the court-mandated mediation attempt is that it will not consume much time; The confidentiality rule will be helpful as none would want the atmosphere to be vitiated by premature disclosures.

In this case, the Court has directed “ Mediation proceedings should be conducted with ut-most confidentiality so as to ensure its success which can only be safeguarded by directing that proceedings of mediation and the views expressed therein by any of the parties , including the mediators, shall be kept confidential and not revealed to any other person”.

Aware of the likely intense media focus on the mediation process, and conscious that wide coverage of views expressed could inflame emotions detrimental to an amicable solution, there ought not to be any reporting of the said proceedings in print or in electronic media. However, the court refrained from passing any specific order at this stage and instead empowered the mediators to pass necessary orders in writing, if so required to restrain publication of details of mediation proceedings, the Bench further directed.

Therefore, it is made clear that confidentiality is a basic tenet of mediation and denying that and reporting the same is incongruous to the process of mediation.

VI. CONFLICT BETWEEN CONFIDENTIALITY AND DISCLOSURE

One issue of concern is where there is conflict between a mandate of confidentiality and a requirement of disclosure such as where the mediator is told confidentially that a child is being subject to physical or sexual abuse. On the one hand the laws pertaining to mediation mandate confidentiality without providing for any exceptions. On the other hand, a statue such as Protection of Children from Sexual Offences Act, 2012 imposes

¹³ Expert Evidence, CONFIDENTIALITY IN MEDIATION, available at <http://expert-evidence.com/confidentiality-in-mediation/> (visited on June 6, 2019)

¹⁴ Editorial, “ *Strange turn: on SC's order regarding Ayodhya dispute*, THE HINDU, Delhi, Saturday, March 09, 2019, available at <https://www.thehindu.com/opinion/editorial/strange-turn/article26475340.ece> (visited on June 6, 2019)

an obligation to report the commission or apprehension of commission of an offence under that Act, to the extent that failure to report is punishable by six months imprisonment and/or fine.

Turning a blind eye to child abuse can be repugnant to moral codes. This is an area where law should provide clarity. The statute can make an exception to the rule of confidentiality so as to permit disclosure of child abuse. Till this is done, agreements to mediate could contain such a clause.¹⁵

VII. CONCLUSION

Confidentiality extends to all aspects of the mediation, including the views expressed therein, and the discussions, suggestions and options that emerge. It covers the existence and contents of the mediation agreement.

The only exceptions to this are where all the parties give permission for such disclosure or where it is required by law. In fact, the mediator should not even divulge to anyone that mediation is taking place between the disputing parties. Mediator's lips are sealed to the world outside the mediation room.¹⁶

In mediation, very often offers, counter offers and proposals are made by the parties but until and unless the parties reach to an agreement signed by them, it would not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process.

Also there is an essential distinction between the two concepts, Court- Annexed Mediation and Court Referred Mediation, Court-Annexed Mediation entails mediation services provided by the court as a part and parcel of the same judicial system, while, Court- Referred Mediation pertains to disputes which are merely referred by courts to a mediator. Though both are concerned with disputes in litigation.¹⁷

In court-referred mediations, the mediator should not communicate to the court about what occurred in the mediation sessions, what stands the parties took, the merits of the case, settlement offers, what caused the mediation to fail, and such like. Infact, many mediators destroy their notes after the mediation has concluded.

Confidentiality, a basic tenet of mediation, has been expressed as "critical" and "integral" to the relationship between the mediator and the parties and to the free and frank disclosure that is necessary if obstacles to settlement are to be overcome.

The legal world of tactics and strategy vs. disputants extralegal world grounded on psychological needs,

¹⁵ Sriram Panchu, *MEDIATION PRACTICE & LAW, THE PATH TO SUCCESSFUL DISPUTE RESOLUTION*, 2nd ed. 2015, p.265

¹⁶ Sriram Panchu, *MEDIATION PRACTICE & LAW, THE PATH TO SUCCESSFUL DISPUTE RESOLUTION*, 2nd ed. 2015, p.194

¹⁷ Shashank Garg and Justice Ajit Prakash Shah (eds.), *ALTERNATIVE DISPUTE RESOLUTION THE INDIAN PERSPECTIVE*, 1st ed.2018, p.394

feelings and emotions. Mediation is not about relaying information to the opposing side in order to assist the sender tactically in highlighting the strengths of their own cases and the weaknesses and the risks of opponents' cases – similar to traditional advocacy.

As Mark Twain said , *'if your only tool is a hammer, then every problem needs a nail.'*