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CONFIDENTIALITY AND PRIVILEGE FROM DISCLOSURE IN MEDIATION PROCEEDINGS: SCOPE AND LIMITATIONS

KEY WORDS:

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ABSTRACT

Mediation is rapidly growing as a viable alternative of dispute resolution in many areas of legal field. Courts and policy makers are increasingly encouraging the voluntary use of mediation and even mandating participation in the process. Participants in mediation proceedings are assured and have an expectation that their communications and offers during the process will remain private and confidential, and will not be disclosed subsequently. Confidentiality and privilege from disclosure are foundational principles in mediation proceedings, designed to promote open communication and facilitate dispute resolution. Without that confidence and expectation, it seems unlikely that individuals would participate in mediation process in a meaningful and productive way. If reasonable expectations of confidentiality and privilege from disclosure are not realized properly, mediation may lose its efficacy as a viable alternative to litigation. This research article delves into the concepts of confidentiality and the privilege from disclosure rule, as these concepts apply to communications made during mediation, and by exploring its limitation, this study aims to elucidate the extent to which confidentiality and privilege are upheld in mediation proceedings, ultimately contributing to a deeper understanding of their pivotal role in facilitating successful dispute resolution.

INTRODUCTION

In the realm of alternative dispute resolution, mediation stands out as a prominent method due to its focus on self-determination and mutually agreeable solutions. Mediation has been described as a form of assisted 'without prejudice' negotiation. A critical aspect underpinning the effectiveness of mediation is the assurance of confidentiality and privilege from disclosure, which fosters an environment where parties can communicate openly and honestly without fear that their statements will be used against them in the future legal proceedings. In order to provide for an enabling and risk free environment that encourages parties to discuss the reasons for the dispute, their interest in resolving them, and options and proposals for resolution, parties must be assured that the discussions and if so agreed, the settlement agreement remains confidential (Chitra, 2011). Privacy and confidentiality are highly valued pre-conditions to a successful mediation practices, (Thompson, 2004) since they are the foundational principles in mediation proceedings, designed to promote open communication and facilitate dispute resolution.

Unlike court proceedings, which are public, mediation is private and confidential. Statements or evidence presented during mediation cannot be used in subsequent hearings, except under exceptional circumstances. Mediation is conducted on a 'without prejudice' basis, meaning nothing said during the mediation can be used as evidence in a later trial without consent. This 'without prejudice' nature allows for open and free discussion of concerns and proposals for settlement. No records are kept of the discussions in mediation, fostering honesty and meaningful conversation leading to resolution. Mediators do not share any information with the Court about what transpires or is said during the mediation sessions (Wolski, 2020).

The concern for confidentiality in the settlement of disputes is not unique to mediation process and has long been protected by the courts. The obligation of confidentiality extends to the parties to the dispute, their representatives and the mediator, that is secured through legislation and rules. Apart from these, parties can enter into contractual obligations for confidentiality during mediation in the absence of specific rules. Privileged communication pertains to specific confidential exchanges that are protected from being revealed in a court of law. These communications are shielded by legal privileges, preventing individuals from being forced to disclose them during legal proceedings. The principle of privileged communication aims to foster trust and

transparency in certain relationships, ensuring that sensitive information remains confidential. Similar to the professional communications between a lawyer and client, the communications during mediation process are protected because such communications are regarded as essential to the effective operation of the mediation.

This research article delves into the concepts of confidentiality and the privilege from disclosure rule, as these concepts apply to communications made during mediation, and by exploring the exceptions and limitation, this study aims to elucidate the extent to which confidentiality and privilege are upheld in mediation proceedings, ultimately contributing to a deeper understanding of their pivotal role in facilitating successful dispute resolution.

Need for Protection of Mediated Discussions

The basic assertion of adversarial method of adjudication is that all relevant and probative evidence pertaining to the issues in dispute should be made available to the court that are called upon to resolve the dispute (Gray, 1998). For this, witnesses may be compelled or bound to provide such evidence, even if it arose out of communications that the participants regarded as confidential. However, relevant and probative evidence may be excluded, if doing so serves some judicial purpose or public policy that outweighs the public interest in having all relevant and probative evidence admitted. This is the basis on which a limited range of confidential communications are treated as privileged and inadmissible.

The law requires the private interest in maintaining confidential relationships and the public interest in preserving confidences to be balanced against the administration of justice, which requires disclosure of all relevant information needed for the fair disposal of litigation (Koo, 2011). The primary justification put forwarded for this public policy is to encourage the parties to resolve their differences rather than litigate them to a finish. In *Cutts v Head*, Oliver L.J. observed, "parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedings. They should be encouraged freely and frankly to put their cards on the table".

The need for confidentiality as well arises in three contexts i.e (i) where the mediation does not result in settlement and

parties take recourse to litigation to resolve the dispute; (ii) in related proceedings between the parties or with third parties where the communications in mediation are relevant; and (iii) where the mediated settlement agreement is challenged or there is a charge of misconduct against the mediator. Thus, in mediation process the security of confidentiality arises at two different levels; one covering all that is said or happens during the mediation, and the other covering the separate private meetings between each party and the mediator. The rationale for recognizing a duty of confidentiality in this context lies in public policy. It is in the public interest to preserve limited court resources and to encourage disputing parties to resolve their differences through negotiation and amicable settlement rather than resorting to litigation.

Confidentiality is vitally important to mediation because it facilitates disclosure. People will not disclose personal needs, strategies, and information if they feel it might be used against them. In normal interpersonal relationships trust is built on past positive experiences. Conversely, in mediation, two people who know from past experience they should not trust each other are thrust together against their will and expected to give their most immediate enemy the tools needed to cause great emotional pain and financial damage. As a result, confidentiality facilitates mediation in the same way trust facilitates friendship. Confidentiality deprives the disputants of the ability to use the information they gain from the mediation to the detriment of the other party thus paving the way for meaningful interaction between the parties in a relatively non-threatening environment (Brown, 1991).

In mediation proceedings, the separate sessions, or caucuses, are typically conducted on the premise that any communication from a party to the mediator is confidential and will not be disclosed to the other party or anyone else without the originating party's consent. In these sessions, mediators may also explore settlement options with a party without that party fearing a loss of face. For mediation to succeed, open communication between the parties and the mediator is essential. All parties involved must thoroughly explore and understand the issues, background, and circumstances that led to the dispute, including why the parties could not settle their disagreement initially. Discussions during mediation may extend beyond the original legal disputes to include restructuring future relationships or proposing mutual concessions. For these discussions to be effective, the parties must be willing to address sensitive or confidential matters that wouldn't typically be considered in arbitration or litigation. If there is any risk of this information being disclosed to third parties, or made public, or used as evidence in future legal proceedings if mediation fails, the parties are likely to be hesitant and less likely to reach a successful settlement of their disputes.

Therefore, a provision on confidentiality is important, as the mediation will be more appealing if parties can have confidence, supported by a statutory duty, that mediation-related information will be kept confidential. These safeguards are central to the mediation process and highlight the importance of confidentiality in achieving successful mediation.

Confidentiality of Mediation Communications

Like any dispute resolution process, mediation occurs through written or oral communications that are made for purposes of conveying information about the dispute or parties position regarding the dispute. The word 'confidential' is defined in the Oxford English Dictionary as "anything meant to be secret and not told to or shared with other people". This definition in terms of entrustment of secret is not helpful to use in mediation process, where openness is encouraged. The Article 9 of UNCITRAL Model Law on Mediation, 2018 (Singapore Convention) expresses through disclosure of information principle that, "whatever

information a party gives to a mediator, that information may be disclosed to the other party, unless the party giving the information specifically requests otherwise". The intent is to foster open and frank communication of information between each party and the mediator and, at the same time, to preserve the parties' rights to maintain confidentiality. The Singapore Convention specifically recognized confidentiality principle under Article 10 by mandating that "all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement". The above provision is drafted broadly referring to 'all information relating to the mediation proceedings' to cover not only information disclosed during the mediation proceedings, but also the substance and the result of those proceedings, as well as matters relating to a mediation that occurred before the agreement to mediate was reached. The Convention further strengthened the confidentiality principle under Article 11 by restricting the scope of admissibility of evidence in other proceedings and thus encouraged frank and candid discussions in mediation by prohibiting the use of mediated information in any later judicial proceedings.

Pursuant to the signing of the Singapore Convention in 2019, India brings its own standalone legislation on Mediation in September, 2023 that incorporates the provisions of confidentiality in line with the Singapore Convention. Section 3 (k) of the Mediation Act, 2023 describe 'mediation communication' as "communication made, whether in electronic form or otherwise, through (i) anything said or done; (ii) any document; or (iii) any information provided, for the purposes of, or in relation to, or in the course of mediation, and includes a mediation agreement or a mediated settlement agreement". Through this provision the principle of confidentiality is made fundamental to the effective and impartial operation of mediation, to the extent that under section 23, communications made during mediation are not admissible as evidence in any court proceedings, including arbitration. Additionally, section 17 prohibits a mediator from serving as an arbitrator in the same case they mediated. This emphasis on confidentiality is especially crucial in India, where many mediated cases involve family disputes. By ensuring confidentiality, parties are more likely to speak openly, which leads to a more efficient and smoother mediation process.

Confidentiality can thus be viewed as a duty or obligation requiring a person to refrain from disclosing any communications or information shared during or in connection with mediation to anyone else other than the original source of the information. Although the basis of confidentiality is contract, but rights and obligations of confidentiality primarily arise not only from the mediation agreement itself but also from statute, as well as from judicial precedents. Sub-section 3 of Section 15 of the Mediation Act, 2023 requires the mediator to protect the confidentiality at all times during the conduct the mediation. Likewise, sub-section 2 of section 22 of the Mediation Act, 2023 further mandates that "no audio or video recording of the mediation proceedings shall be made or maintained by the parties or the participants including the mediator and mediation service provider, whether conducted in person or online to ensure confidentiality of the conduct of mediation proceedings."

The Hon'ble Supreme Court of India in *Moti Ram & Anr. v. Ashok Kumar & Anr.* (2011) 1 SCC 466, while laying down the judicial precedent regarding confidentiality of mediation proceedings opined that, "mediation proceedings are totally confidential proceeding which is unlike proceedings in Court which are conducted openly in the public gaze. If the mediation is successful, then the mediator should send the agreement signed by both parties to the court without

mentioning what transpired during the mediation proceedings. If the mediation is unsuccessful, then the mediator should only report to court that 'mediation has been unsuccessful' and nothing more. Reason being that, 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 will not amount to any concluded contract. If the happenings in the mediation proceedings are disclosed, it will destroy the confidentiality of the mediation process”.

Similarly in the matter of *Perry Kansagra v. Smriti Madan Kansagra* (AIR ONLINE 2019 SC 536), the Supreme Court was called into decide the question concerning confidentiality of the mediation process for the reason that report of child counsellor and the mediator concerning the behavior and attitude of the child was taken on record. The Hon'ble Court while considering the scope of confidentiality in mediation proceedings observed that, “it is true that the process of mediation is founded on the element of confidentiality. Qualitatively, Mediation or Conciliation stands on a completely different footing as against regular adjudicatory processes. Instead of an adversarial stand in adjudicatory proceedings, the idea of mediation is to resolve the dispute at a level which is amicable rather than adversarial. In the process, the parties may make statements which they otherwise they would not have made while the matter was pending adjudication before a court of law. Such statements which are essentially made in order to see if there could be a settlement ought not to be used against the maker of such statements in case at a later point the attempts at mediation completely fail. If the statements are allowed to be used at subsequent stages, the element of confidence which is essential for healthy mediation/conciliation would be completely lost. The element of confidentiality and the assurance that the statements would not be relied upon helps the parties bury the hatchet and move towards resolution of the disputes”.

However, the duty of confidentiality owed by mediation participants, whether regarding information shared during or after mediation proceedings is not absolute. There are situations where a party or mediator may disclose or bound to disclose otherwise confidential information to a non-participant, including a court, without the consent of the party who originally provided the information.

Limitations to Confidentiality of Mediation Communications

Mediation relies heavily on the principle of confidentiality, since the promise that discussions will remain private encourages parties to speak openly, which is crucial for reaching a resolution. However, absolute confidentiality can conflict with other legal and ethical considerations, leading to specific limitations. The confidentiality limits of mediation communications are most commonly tested when a mediated settlement agreement is contested subsequently. This can occur in a number of different ways, including (i) where there is a dispute about whether an oral settlement agreement was reached at mediation; or (ii) where there is a dispute over the interpretation of a settlement agreement; or (iii) where one party seeks to resile from a settlement agreement, on grounds such as fraud or misrepresentation. The most commonly form of the limitations crafted to confidential communications are the non-exhaustive list of recognised exceptions.

Waiver by party: A waiver is an agreement of the participating parties in a settlement agreement, which allows without prejudice communications to be disclosed and used in subsequent litigation (Koo, 2011:6). Confidentiality in mediation can be waived if all parties involved provide explicit consent. This waiver usually in writing clearly outline the extent and purpose of the disclosure. Parties may agree to disclose specific information for various reasons, such as

furthering negotiations, complying with legal requirements, or addressing mutual concerns that arise during the mediation.

Challenge to validity of Mediated Settlement Agreement:

Evidence may be admitted in a subsequent judicial proceedings to demonstrate that an agreement was actually reached during the mediation and also to establish the terms and conditions of mediated settlement agreement. If any party to the mediation proceedings claims that they entered into the agreement due to misconduct by the other party or the mediator, evidence of mediation communications may be allowed in proceedings to nullify or amend the agreement, as well as in cases based on the alleged misconduct. Examples of such misconduct include misleading and deceptive actions, misrepresentation, coercion, duress, and negligence. Similarly, if an allegation arises that an offense or fraud occurred during mediation, evidence may be admitted in related proceedings and additionally, this information might be disclosed to relevant officials, such as law enforcement agencies.

Statutory Requirement: In the context of court-annexed mediation, the Supreme Court has limited the scope of the confidentiality provisions where provisions for disclosure are set out in other statutes or rules. In *Perry Kansagra (supra)*, the Supreme Court observed that, “complete adherence to confidentiality would absolutely be correct in normal matters where the role of the court is purely of an adjudicator. But such an approach may not essentially be conducive when the court is called upon and expected to discharge its role in the capacity as *parens patriae* and is concerned with the welfare of a child.” Likewise, a mediated settlement agreement which is void under the Indian Contract Act, 1872, shall not be deemed to be lawful settlement agreement within the meaning of mediated settlement agreement, and thus open to challenge and recourse to the privilege of non-disclosure cannot be maintained.

CONCLUSION

The confidentiality and privilege protection for mediation discussions is intended to encourage the negotiated settlement of disputes without unduly compromising other interests. In formulating that protection and limitations to its application, therefore the courts have to balance many of the considerations that must be weighed in crafting appropriate protection for the confidentiality of communications in mediation. While the legal frameworks do provide robust protection, limitations exist to balance the interests of justice and public policy. Understanding these nuances is essential for mediators, parties, and legal practitioners to navigate the mediation process effectively. Future developments in legislation and judicial interpretation will continue to shape the landscape of confidentiality in mediation, reinforcing its role as a cornerstone of alternative dispute resolution.

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