

# Dispute Resolution Hotline

January 07, 2011

## MEDIATION PROCEEDINGS ARE CONFIDENTIAL SAYS SUPREME COURT YOUR EMPLOYEE AS ARBITRATOR

The Supreme Court of India (“**Supreme Court**”) has, in the case of *Moti Ram (D) Tr. LRs and Anr. Vs. Ashok Kumar and Anr*<sup>1</sup>, held that mediation proceedings are confidential in nature. The said judgment takes a forward step in relation to court-directed mediation and asserts that such mediation proceedings are confidential in nature.

### WHAT IS MEDIATION?

Mediation is a form of alternative dispute resolution and is a way of resolving disputes between two or more parties. Apart from parties referring disputes to mediation voluntarily, under Section 89 of the Civil Procedure Code, 1908<sup>2</sup> (“**CPC**”), where it appears to court that there exist elements of a settlement which may be acceptable to the parties, the court may refer parties to, *inter alia*, arbitration, conciliation or mediation.

In mediation, a third party (the mediator) assists the parties to negotiate their own settlement. In some cases, mediators may express a view on what might be a fair or reasonable settlement, generally where all the parties agree that the mediator may do so.

Where disputes are referred by a court to arbitration or conciliation under Section 89 of the CPC, the procedure set out in the Arbitration & Conciliation Act, 1996, will apply. However, where disputes are referred by the court to mediation, the courts are required to follow the procedure that may be prescribed. Unlike arbitration or conciliation, there is no specific statute that deals with mediation in India. Therefore, unlike other statutorily-recognized forms of non-binding alternative dispute resolution (being conciliation<sup>3</sup>), confidentiality in mediation proceedings is not specifically provided for in any statute in India.

### BRIEF FACTS OF THE CASE AND ORDER:

The Supreme Court of India had referred a matter for mediation to the Mediation Centre at Chandigarh. The mediator laid the report of mediation proceedings before the Supreme Court. After perusing the report, the Supreme court observed that mediation proceedings are totally confidential proceedings unlike proceedings in an open court. The Court held that:

- in the event mediation is successful, the mediator should simply send the executed agreement between the parties to the court.
- in the event mediation proceedings is unsuccessful, the mediator should simply provide a one-line report to the court stating that the mediation proceedings was unsuccessful (and not provide any details of the discussions and/or proposals made, if any).

Significantly, the Court noted that in the event the proceedings that transpired during mediation were disclosed, it would destroy the confidentiality of the mediation process.

The Court further directed that a copy of the order be sent to the Supreme Court Mediation Centre and the Mediation Centres in all the High Courts and District Courts in the country.

### ANALYSIS:

Of late, mediation has proved to be a much-favored method of alternate dispute resolution, specifically amongst various foreign entities, *inter alia*, due to its informal methods and reduced costs (compared to other forms of dispute resolution). More often than not, a trusted third party is appointed as a mediator between the disputing parties. Mediation is often used as the first step to resolve any dispute and failing any resolution under mediation, parties agree that disputes will be referred to arbitration. Thus, most commercial contracts now provide for mediation as a mechanism for dispute resolution, prior to proceeding for arbitration.

Contractually, parties may agree to maintain confidentiality of the said mediation proceedings. However, unlike in conciliation and arbitration proceedings, there is no statutory provision in India that mandates maintaining confidentiality of such proceedings in relation to mediation proceedings. A significant concern that, therefore, typically arises in such circumstances is the confidentiality that is accorded to the various discussions and proposals made in such mediation proceedings.

The instant judgment should help assuage concerns on the confidentiality surrounding the process of court-directed mediation. By the said judgment, the Court has specifically acknowledged that any discussions and proposals made during the course of mediation proceedings are confidential in nature. The said judgment should provide a fillip to mediation proceedings.

- Sahil Kanuga & Vyapak Desai

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1. By its order dated December 07, 2010 in Civil Appeal No. 1095 of 2008

2. Section 89. Settlement of disputes outside the Court -1) Where it appears to the court that there exist 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 observations and after receiving the observations 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 has been referred—

- (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 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 Authority Act, 1987 (39 of 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 Authority Act, 1987 (39 of 1987) shall 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 procedure as may be prescribed.]

Note.—For provisions as to commencement and application of the above amendments made by Act 46 of 1999, Repeal and Savings provision, see Section 32(2)(e) of the CPC (Amendment) Act, 1999 (Act 46 of 1999), given in the Appendices.

3. Section 75 of the Arbitration & Conciliation Act, 1996

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