* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 11.12.2017

\+ **C.M. APPL. 42790/2017 & 42791/2017 IN MAT. APP. (FC) 67/2016**

SMRITI MADAN KANSAGRA …. Appellant
Through: Mr. Prosenjeet Banerjee, Advocate.

Versus

PERRY KANSAGRA . .... Respondent
Through: Ms. Inderjeet Saroop and Mr. Raghav Saroop, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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C.M. APPL.42791/2017 (for exemption)

Allowed, subject to all just exceptions.

C.M. APPL. 42790/2017

1. The petitioner/wife seeks review of the judgment dated February 17, 2017 (hereafter "order under review" or "main judgment") of by this Court disposing of a matrimonial appeal - Mat. App. (F.C.) 67 of 2016. The question on which the petitioner seeks review is whether the Counselor's report furnished in the course of mediation proceedings or the Mediator's report in case of mediation, when the process fails, can be used by either of the parties during trial.

2. The parties here are disputants before the Family Court. The husband filed a petition claiming guardianship of the son born to the couple on December 02, 2009. The husband is Kenyan national who also holds a British passport. Their son too had a Kenyan as well as a British passport. The wife alleged having come to India because the husband wished the child to be brought up in an Indian environment with Indian values. In the connected litigation, the husband was given visitation rights, to meet his son at a shopping mall. He sought overnight custody of the son to enable the child to meaningfully interact with him and his parents. Before the Family Court on May 04, 2016, the counsel for the husband requested for the production of the child in Court to enable the Court to interact with the child, and ascertain his comfort level. Despite the wife's opposition, the Court directed production of the child before it on May 07, 2016. Thereafter, a second order was passed on the same date directing that in the presence of the Principal Counselor attached to the Court, the husband be allowed to meet the child for an hour in the evening. It was in these circumstances that the wife preferred an appeal (Mat App. (FC) 67/2017) impugning the first order dated May 04 2016, which directed the child to be produced in Court on May 07, 2016.

3. On May 06, 2016, the Division Bench stayed the direction requiring production of the child in Court. The Division Bench recorded the wife's fear that the husband might remove the child from India, The Court proceeded to note that as according to the wife, the son's Kenyan passport had been lost; the husband was required to apply afresh for a new passport,

which, when issued was to be given over to the Family Court, in guardianship proceedings.

4. On May 11, 2016, the Court interacted with the child and made observations about its reflections in the order. It then recorded as follows:

> *"7. During our interaction with the parties, a desire is expressed by the parties to make one more attempt for a negotiated settlement of all disputes between the parties by recourse to mediation. The parents of the respondent are also present and have joined the proceedings before us. They have also submitted that they would like to make an attempt for a negotiated settlement for all disputes between the parties.*
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> *8. The respondent before us is a Kenyan citizen who has flown to India along with his parents for monthly weekend visitation with the child of the parties. They are present in India today for this reason. It appears to us that efforts for negotiated settlement deserve to be encouraged.*
>
> *9. With the consent of parties, it is directed as follows:*
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> *(i) The parties shall appear before Ms. Sadhana Ramachandran, learned Mediator in SAMADHAN-Delhi High Court Mediation and Conciliation Centre on 9th May, 2016 at 2:30 pm.*
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> *(ii) It shall be open for the learned Mediator to join any other person or relative of the parties, as may be deemed necessary, for a holistic and effective mediation.*
>
> *(iii) In case, the respondent or any of his relative are not available in India, it shall be open for the learned Mediator to join them by any electronic mode of communication including Skype, Video Conferencing, etc. at the cost of the respondent.*

(iv) It shall also be open for the learned Mediator to meet the child at any place, as may be deemed convenient to her, and to arrange any visitation or meetings with the respondent of the child with the consent of the parties."

5. During the interactions between parties, the Mediator made an order dated 11.08.2016 which notes:-

"1. Counsellor report has been received in a sealed envelope which has been opened and shared with the parties. The report is taken on record.

2. Photocopy of the counsellor report has been handed over to learned counsel for the parties.

3. Report of the Mediator has also been received. Learned Mediator would be out of Delhi till end of September, 2016.

4. Re-notify for September 07, 2016."

6. The parties here and the child had a series of meetings with the mediator and the Counselor but they could not arrive at any settlement. The Counselor then sent a report, dated 22.07.2016 to this Court which she prepared during interaction with the child as a part of the settlement process in the mediation. Concededly, mediation failed and this Court by judgment dated February 7, 2017 held the reports of the Counselor/Mediator were not confidential and would not fall within the bar of confidentiality and placed its reliance upon Section 12 of the Family Courts Act, 1984 ("the 1984 Act") to note the following :

"17. There can be no quarrel with the proposition that mediation proceedings are confidential proceedings and anything disclosed, discussed or proposed by the parties before the mediator cannot be recorded, much less divulged. The reason being that very often during mediations, offers, counter

offers and proposals are made. The ethos of mediation would bar disclosure of specified communications and writings associated with mediation. Parties are encouraged during mediation to engage in honest discussions as regards their problems and in matrimonial disputes these honest discussions many a time give rise to a better understanding between the couple. Such an approach encourages a forget and forgive attitude to be formed by the parties. If either spouse is under an apprehension that the well-meant deliberations might subsequently be used against them it would hamper an unreserved consideration of their problems. The atmosphere of mutual trust during mediation warrants complete confidentiality.

18. But where the scope of mediation is the resolution of a child parenting issue, report by a mediator or a child counselor concerning the behaviour and attitude of the child would not fall within the bar of confidentiality for the reason no information shared by the couple is being brought on record. The mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of."

7. The review petitioner has challenged these finding of the Court on the principles of confidentiality in mediation. He relies upon the Delhi High Court Mediation and Conciliation Rules, 2004; its prescribed application format; Conciliations Rules of United Nations Commission On International Trade Law (UNCITRAL); Uniform Mediation Act (USA), 2003; Hong Kong International Arbitration Centre Rules, 1999; Code for Practice for Mediators issued by the Family Mediation Council, England and Wales; Guidelines issued by Family Justice Courts, Singapore; Members Code of Professional Conduct issued by Family Mediation, Canada; Mediation Training Manual issued by the Supreme Court of India and the case laws to bring home his point that mediation is purely a confidential process and

anything said or any view expressed by the parties in the course of conciliation process, the documents obtained or signed/drafts or information or proposal made or views expressed, admission made etc. need not be a part of the mediation report especially when the mediation has resulted in a failure.

8. Mr. Prosenjit Banerjee, learned counsel for the review petitioner urged the Court to recall or expunge the observations in the main judgment, which according to him, cause prejudice to the wife in the course of matrimonial proceedings. It was argued that the order under review, while citing Section 12 of the Family Courts Act, overlooked the fact that the power to refer to, or enlist the services of, a counselor are that of the Court and the Court alone. Thus, a mediator, who is bound by rules of confidentiality and merely interacts with disputant parties with the aim of narrowing differences, using tools such as neutral language, elimination of antagonistic perceptions, ultimately strives to facilitate a negotiated amicable solution, which the parties arrive at. She or he does not in any manner play a pro-active role in the process, or decide for the parties. All this is achieved because of the implicit trust, which the parties have in the mediator and the cloak of confidentiality, which can never be cast aside. Mr. Banerjee relied on *Moti Ram (Dead) through LR & Anr. v. Ashok Kumar & Ors.* (2011) 1 SCC 466 and argued that the main judgment wrongly distinguished its binding nature, by citing Section 12 of the Family Courts Act (the 1984 Act").

9. It was contended that in the present case, the mediator was never authorized by the Court to refer the dispute to a counselor. In fact the power to involve the counselor is exclusively that of the Court. To have held

otherwise, as the main judgment did, would be dangerous, because citing parties' consent, mediators can "outsource" their task and send reports that would contain material prejudicial to one or the other party, which would then become part of the record. Counsel contended that the mediator's report as well as the Counselor's report is now a matter of record, which the respondent husband would be relying on in the course of final arguments.

10. Mr. Banerjee stressed upon the importance of confidentiality and the bar to mediator's recording notes or even reporting to the Court as that would inevitably jeopardize, indirectly if not directly, the appreciation of merits of the case. It was submitted that in the present case, it would seem that the reports of the mediator and counselor are neutral; in reality, however they record reflections of their makers, which can be strongly suggestive of what the Court ought to do. This, he stated, completely compromises the parties and amounts to breaching the trust they reposed when they agreed to mediation. He relied upon the order referring an earlier decision (of the Supreme Court) requiring video conferencing procedures to be adopted in family proceedings for reconsideration, by a larger bench, i.e. *Santini v. Vijay Venkatesh* 2017 SCC Online 1080 (*"Santini I"* hereafter), the final judgment by the larger bench (of 3 judges) *Santini v. Vijay Venkatesh* 2017 SCC OnLine SC 1202(*"Santini II"* hereafter) as well as *Govind Prasad Sharma v. Doon Valley Officers Co-operative Housing Society Ltd* 2017 SCC Online 1001 where the Court had decisively ruled on the inviolateness of confidentiality, enacted by Sections 75 and 81 of the Arbitration and Conciliation Act, 1996. Mr. Banerjee also referred to several other decisions of Courts in UK and Canada, stressing upon the need for ensuring confidentiality in the mediation process.

11. Ms. Inderjeet Saroop, learned counsel for the respondent husband, referred to the order of August 11, 2016 by this Court order in the appeal, and argued that the placing on record of the Counselor's report was not contested or made an issue; the appellant implicitly agreed to this course of action. Characterizing the review proceeding as an impermissible attempt to reopen questions that attained finality, learned counsel argued that the counselor's report is to be referred only for the purpose of Court's appreciation with respect to the parties' position *vis-à-vis* the child. Stressing that the welfare of the child is of paramount importance in guardianship proceedings, learned counsel urged that this Court as well as the Family Court in effect exercises *parens patriae* jurisdiction. Learner counsel urged that when the Court in its orders decided to take on record the counsellor's report, it in effect validated the discretion exercised by the mediator. As the question of custody or even can interim custody was a subject matter of appeal, this Court possessed all the powers that vested with the Family Court. By extension, therefore, the Court in effect exercised the discretion under Section 12 when the Counsellor's report was brought on record. That the mediator had initially taken the services of the Counsellor and brought on record her report through that process was, therefore, an irrelevant factor.

12. It was submitted that mediation confidentiality cannot obscure the nature of the litigation which is the sensitive balancing of competing interests. The overarching public interest which the Court always keeps in mind and never loses sight of is the welfare of the child in such proceeding. Therefore, when the mediator decides to involve the services of a counsellor, to probe the sensitivities, views and attitudes of the parties in such cases, she actually enlists expertise of a particular kind uniquely relevant to custody

and guardianship issues. In these kinds of matters, an overemphasis on procedural issues, can very well obscure what is of most importance – i.e., the welfare of the child. This was the dominant consideration in the Court's mind and in fact was expressly alluded to in the opening remarks contained in the main judgment.

13. Learned counsel also relied upon the Family Court rules framed under the Act and submitted that they facilitate the procedure which was adopted in the present case. In this regard the Court's notice was brought to sincere efforts made by the mediator who held since sessions on 05 September 2016, May 10, 2016; May 11, 2016; July 11, 2016 and July 22, 2016. It was urged that the mediator's report testifies the painstaking exercise to bring about an acceptable and mutual understanding on the thorny issues. The report of July 22, 2016 was a mere reflection of what transpired and was and can never be meant as indicative of the mind of the mediator, counsellor or either party. It was submitted that the said report of July 22, 2016, in fact enclosed the copy of the counsellor's report which was then brought on the record.

14. Learned counsel argued that the scope of review does not admit a re-examination of the merits of the case. It was stressed that the mere circumstances that the underlying dispute is matrimonial does not mean that the parameters of review shrink or enlarge having regard to the nature of the case. It was submitted that the Family Courts Act in fact grants procedural and circumstantial flexibility and gives considerable leeway to the Court in devising appropriate procedures to discern the suitable order to be made. Reference was made to Section 10(3) which contains a *non-obstante* clause and states that *"Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a*

settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

15. It was in the context of such procedure that the mediator was involved and to the best judgment of the mediator and for entirely *bonafide* reasons, a counsellor was involved. The counsellor made her best efforts and reported to the Court. Neither the mediator's report nor the counselor's report in any manner casts aspersions on either party and does not suggest any conclusions. In these circumstances, it was improper for the review petitioner's counsel to contend that these reports would result in bias or prejudice.

Discussion and Conclusions

16. It would be first necessary to set out the applicable rules and provisions of law, cited by the parties. Rule 21 of the Delhi High Court Mediation and Conciliation Rules, 2004 which directs mediation/conciliation sessions to be conducted in privacy and whereas Rule 20 notes :-

> ***"Rule 20 Confidentiality, disclosure and inadmissibility of Information***
>
> *(a) xxxxxx*
>
> *(b) Receipt or perusal, or preparation of records, reports or other documents by the mediator/conciliator, while serving in that capacity shall be confidential and the mediator/conciliator shall not be compelled to divulge information regarding those documents nor as to what transpired during the mediation/conciliation before any court of tribunal or any other authority or any person or group of persons.*
>
> *(c) Parties shall maintain confidentiality in respect of events that transpired during the mediation/conciliation and shall not*

rely on or introduce the said information in other proceedings as to :

(i) views expressed by a party in the course of the mediation/conciliation proceedings;

(ii) documents obtained during the mediation/ conciliation which were expressly required to be treated as confidential or other notes, drafts or information given by the parties or the mediator/conciliator;

(iii) xxxxxx;
(iv) xxxxxx;
(v) xxxxxx;

(d) There shall be no audio or video recording of the mediation/conciliation proceedings.

(e) No statement of parties or the witnesses shall be recorded by the mediator/conciliator."

17. The format of application of SAMADHAN (the Delhi High Court Mediation and Conciliation Centre, which the parties were referred to) for referring dispute to mediation, reads as follows:-

"The entire process of Mediation will be confidential and whatever is submitted to the Mediator will not be divulged or produced or be admissible in any Court proceedings. The Mediator will not be compelled to appear as a witness in any Court of law."

18. Similarly, Article 14 and Article 20 of the Conciliation Rules of UNCITRAL read as follows:

*"**CONFIDENTIALITY***
Article 14
The conciliator and the parties must keep confidential all matters relating to the conciliation

proceedings. Confidentiality extends also the settlement agreement, except where its disclosure isnecessary for purposes of implementation and enforcement.

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ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whetheror 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 possiblesettlement 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 forsettlement made by the conciliator."

19. Keeping in view the above UNCITRAL Rules, Section 75 and 81 of the Arbitration and Conciliation Act, 1996 were incorporated and same read as under:-

*"**75. 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.*

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***81. 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."

20. The rules framed in other jurisdictions, viz. USA, Hong Kong, England, Singapore, Wales, Canada etc. were relied upon by the appellant wife, during the hearing. Rule 5 of Mediation Training Manual issued by the Mediation and Conciliation Project Committee, Supreme Court of India notes as follows:-

*"**5. Maintain Confidentiality***
Mediation being confidential in nature, a mediator shall be faithful to the relationship of trust and confidentiality imposed on him as a mediator. The mediator should not disclose any matter which a party requires to be kept confidential unless;
a) the mediator is specifically given permission to do so by the party concerned; or
b) the mediator is required by law to do so."

21. There can, be no quarrel with the proposition that the mediation proceedings are confidential and anything disclosed, discussed or proposed before the mediator need not be recorded, much less divulged and that if it is done there would always be an apprehension that the discussion may be used against the parties and it would hamper the entire process. The atmosphere of mutual trust warrants complete confidentiality and the same is in fact noted in the main judgment. The petitioner is aggrieved by its later part which notes "*but where the scope of the mediation is resolution of child parentage issue, the report concerning the behaviour and attitude of the child would not fall within the bar of confidentiality*". To our mind, this is

against the principle of mediation and charts the course of a slippery slope, as this judgment would hereafter discuss.

22. No exceptions are made in the mediation rules either in our laws or in various jurisdictions mentioned above to the absolute rule of confidentiality. This Court held *the mandate of Section 12 of the Family Courts Act, 1984 cannot be lost sight of*; yet the issue is whether the order dated May 6, 2016 was passed purely under Section 12 of the Family Courts Act, 1984 or it was simply to facilitate mediation of disputes between the parents of the child.

23. In this context, it is useful to recollect that an earlier decision of the Supreme Court had mandated proceedings before Family Courts could be held by using video-conference technology. The order referring the correctness of that decision in *Santini I* (supra) perceptively stated as follows:

> *"17. Unfortunately, it seems, none of these mandatory procedures as laid down by the Parliament have been brought to the notice of the Court while considering the case of Krishna Veni Nagam (supra). The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is mediation in conciliation but there is no conciliation in mediation. In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and*

wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. TheFamily Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of status quo ante; it can as well be a solution as acceptable to both parties. In all these matters, the approaches are different.

18. The role of a counsellor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of anybody or for that matter addicted to anything which affects the normal family life, whether they are taking free and independent decisions, whether the incompatibility can be rectified by any psychological or psychiatric assistance etc. The counsellor also assists the parties to resume free communication. In custody matters also the counsellor assists the child, if he/she is of such age, to accept the reality of incompatibility between the parents and yet make the child understand that the child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents etc. Essentially, the counsellor assists the parents to shed their ego and take a decision in the best interest of the child.

19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical

presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23, and 26 , we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in matrimonial disputes."

24. Later, in the main majority judgment (*Santini-II*) in a three judge bench, the role of the Family Court was explained as follows:

"The reconciliation requires presence of both the parties at the same place and the same time so as to be effectively conducted. The spatial distance will distant the possibility of reconciliation because the Family Court Judge would not be in a position to interact with the parties in the manner as the law commands. By virtue of the nature of the controversy, it has its inherent sensitivity. The Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility. ***Needless to emphasise, this commands a sense of trust and maintaining an atmosphere of confidence and also requirement of assurance that the confidentiality is in no way averted or done away with. There can be no denial of this fact. It is sanguinely private.***

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The Family Court Judge is only meant to deal with the controversies and disputes as provided under the 1984 Act. He is not to be given any other assignment by the High Court. The in camera proceedings stand in contradistinction to a proceeding which is tried in court. When a case is tried or heard in court, there is absolute transparency. Having regard to the nature of the controversy and the sensitivity of the matter, it is desirable to hear in court various types of issues that crop up in these types of litigations. The Act commands that there has to be an effort for settlement. The legislative intendment is for speedy settlement. The counsellors can be assigned the responsibility by the court to counsel the parties. That is the

schematic purpose of the law. The confidentiality of the proceedings is imperative for these proceedings."

25. Section 12 of the 1984 Act, empowers the Family Court with the discretion to refer the parties to a counselor. Undoubtedly, that power also extends to the *appellate court.* However, this case has three rather unusual features: one that the Court never authorized the mediator to exercise *power that is vested statutorily with it.* The discretion to involve or not to involve a counselor is the Court's *and is non delegable.* The respondent husband's argument that the referral order permitted the mediator to involve "others" cannot be meant to authorize the exercise of discretion that is solely vested with the Court. Second, the issue of confidentiality is to be examined because the mediator furnished two reports- to the Court, in this case. A mediator's position is unique; undoubtedly she (or he) has professional training and competence to handle issues that involve intense and bitter struggle over matrimonial issues, properties, shared household, custody, (temporary or permanent) and in commercial matters, issues that have monetary and financial impacts. In all cases, parties express their fears, their expectations and their dearly held positions *on the strength of the confidence that they repose in the mediator and the mediation process- both of which are reinforced by the absolute cloak of confidentiality*. Given these imperatives, mediator's reports, *where the process has led to failure, should not record anything at all.* Having regard to this position the fact that a mediator in a given case, proposes- for all the best and *bona fide* reasons, the involvement of a counselor, does not in any manner undermine or take away the Court's sole power to exercise it. In the eventuality of the parties' agreeing, to such a course, they have to be asked to approach the Court, for

appropriate orders; the Court would then refer them to the counselor. The question of the kind of report to be submitted to the Court and whether it would be a part of the record would be known during the course of the proceeding. In the present case, the parties merely consented. *There is nothing to show that the parties were aware that the mediator's report, with regard to not merely what transpired, but with respect to her reflections, would be given to the court; nor was there anything to show that they were aware – when they consented to the involvement of a counselor that her report would be given to the court.* The third unusual feature is that in at least two sittings with the counselor, the mediator was present. This "joint" proceeding is, in the opinion of the Court, unacceptable. It can lead to undesirable consequences, especially if the mediator and counselor proceed to furnish their reports (as they did in this case). A reading of both reports in the present case, paints a definite picture to the reader strongly suggestive of a plausible course of action or conclusion. It is this, the *power of suggestion*, which parties are guaranteed protection from, when they agree to mediation. Imagine if there were to be a possibility of divergence of opinion. Where would that lead? Aside from adding to contentiousness, the Court too would be left confounded.

26. It is necessary to state here that a mediator is not *amicus curiae*, or as is mistaken, an officer of the court. A mediation process is one where a neutral third party (the mediator) acts as a non-judgmental facilitator to help the disputants reach an agreement which is satisfactory to all involved. Mediation requires cooperation among the parties to "re-orient" them toward each other for the sake of maintaining their ongoing relationships. (Brown *Divorce and Family Mediation: History, Review, Future Directions*, CoNC.

CTs. REV., Dec. 1982).The mediator facilitates the parties, whose willingness to involve themselves in an attempt at settlement, leads them to her or him. One of the fundamental drivers to this is confidentiality. The process contains and encapsulates privacy and secrecy, in all its content and hues. Often settlements are difficult to come by; the reason of failure can be manifold: mistrust or unwarranted suspicion of one party; obstinacy, unwillingness to budge from previously held entrenched positions; plain uncouth or unpleasant behavior of a party, to spite the other. The mediator's role is to eliminate all these obstructions and lead the parties to the real possibility of ending the strife or contest. Her reward is the success, when achieved and the satisfaction of having brought together parties who possibly could not share a common table hitherto, to shake hands. However, success is not always guaranteed; the cause for failure would be all the factors mentioned earlier or more. In such eventuality, if a mediator were to report to the Court, about the course of the mediation proceeding, the danger is the *real possibility of indirectly (if not directly) hinting at the obstructing party's behavior*. Even a neutral observation about one party's unwillingness to accept a possibly reasonable proposal (which may not be fully spelt out) lets the cat out of the bag; more importantly, it amounts to an *ex parte* briefing to the Court, through the report, by the mediator. Honesty, trust, and cooperation are difficult to achieve if the parties fear that disclosures made during mediation may later form the basis for a recommendation to the Court. In this context, the effect of such reports or divulging of confidences was explained in *Govind Prasad Sharma & Others* (supra). A demarcation report made by the government agency in the course of conciliation proceedings between the parties was sought to be relied upon. The Court

alluded to the *"four pigeon holes"* which enact absolute bar to adducing evidence or material regarding matters discussed in the course of conciliation and held that if *"there are insidious encroachments on confidentiality, a free and fair settlement may never be arrived at, thus stultifying the object sought to be achieved by Part III of the 1996 Act."* The context of those observations, undoubtedly was a conciliation proceeding; however, the imperative of confidentiality is no less in mediation, because if parties do not agree to settle, the outcome is the same: failure. In other words, the bar of confidentiality, mandated by Section 75 of the Arbitration and Conciliation Act, is no different for an unsuccessful mediation; it applies with equal, if not greater rigor.

27. With respect, this Court is of the opinion that the reference to *insidious encroachments* is most apt, in the circumstances. Unlike a local commissioner, *who is appointed to report facts and existence of circumstances to the court,* the mediator does not play a part in the adjudicatory process. Howsoever it may be termed, a failed mediation results in an adjudicatory process, where the parties have full liberty to fall back on all contentions available to them in law. Their confidence in the adversarial system rests on their belief that the positions held by them in court *is justified in law, irrespective of the concessions they might have made in private to the mediator, entirely on the strength of the confidentiality the process guarantees.* Allowing reports: ***any reports,*** to be on the record, other than *merely reporting the outcome: i.e. in the event of failure, stating that as a fact, with no preface and no conclusions or observations,* is what they expect; that is what the Court also requires. Exceptions made, even to allow the most innocuous observations, recounting the dates or what the mediator

thought of the *process of mediation, or the parties, even in neutral language,* can result in prejudice, because the Court seized of the dispute, or a party's counsel, has the other side of the picture and it might not be difficult to hazard a guess as to which was the party behaving unreasonably or creating an obstruction. This undoubtedly would compromise the ability of the party to establish her or his case on the merits in the dispute, before the Court, which is otherwise bound to appreciate the evidence and apply the law. In matters that involve exercise of discretion, such disclosures can be extremely damaging. This is precisely what the Court said, in *Moti Ram* (supra) when it indicated that when the mediation is *"unsuccessful the mediator only write a sentence in his report and sent to the Court stating that 'mediation has been unsuccessful'"* and nothing more.

28. In *Potter vs. Potter* 1983 (40) OR (Second) 417, the report of the psychologist concerning the information passing between the parties before marriage was also not permitted to be proved, on the principle of confidentiality being essence of mediation. In *Re Teligent Inc.* 640 F.3d 53 (Second Circuit, 2011) the value of confidentiality was stressed when it was said that *"Confidentiality is an important feature"* of mediation, because it *"promotes the free flow of information that may result in the settlement of a dispute."* The Court added, *"We vigorously enforce the confidentiality provisions" of our own mediation system "because we believe that confidentiality is essential"* to "*its vitality and effectiveness."* Even in regard to child custody mediation, confidentiality is respected and exceptions, wherever needed, are clearly spelt out in governing rules or statute.[1] The

[1] For instance, the *California Rules of Court, 2017* contains one such: Rule 5.210. Court-connected child custody mediation, rules elaborately deal with responsibility of mediators, especially in child custody

Chartered Institute of Arbitrator's Rules[2] also maintain absolute confidentiality rules, in mediation:

> *"12. Confidentiality Save as required or permitted by law:*
> *12.1the Institute, the parties, their representatives, their advisors and the mediator(s) shall keep confidential all information (whether given orally, in writing or otherwise) produced for, or arising out of or in connection with, the mediation passing between any of the participants and between any of them and the mediator made for the purposes of the mediation, including the fact that the mediation is taking place or has taken place. Each party shall be responsible for ensuring that all of its representatives and advisors are bound by appropriate undertakings of confidentiality and shall take appropriate measures to limit the dissemination of any information relating to the mediation only to those persons as may be required for the purposes of the mediation;*
>
> *12.2 unless the parties otherwise agree in writing, confidentiality under this Rule 12 also extends to the existence and content of any settlement agreement except to the extent that disclosure is necessary for its implementation or enforcement; and*
>
> *12.3 no document or other communication that would be admissible in evidence in any court, arbitral or adjudication proceeding shall be rendered inadmissible by reason only of its disclosure in the course of and for the purposes of the mediation."*

29. The observations made in the main judgment dated February 17, 2017 in effect would permit the mediators to exercise *de facto*, or in default, the

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disputes, the mediation process, including the mediator's role; the circumstances that may lead the mediator to make a particular recommendation to the court; limitations on the confidentiality of the process; and access to information communicated by the parties or included in the mediation file etc. Most jurisdictions stipulate mandatory eligibility and qualification criteria for enlistment as mediators in matrimonial and custody disputes.

[2] http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/mediation/1-guidelines-on-confidentiality-in-mediation.pdf?sfvrsn=4 accessed on 10 December, 2017 at 16:38 hours.

exclusive powers of the Court under Section 12 of the 1984 Act, which are non delegable. There is no question of validation of such action, by a later order of the Court. The danger of this would be that Courts can well draw upon such irregularly produced material, to arrive at conclusions. The requirement of Section 12 also has to be understood as the mandate of law that only the Court and no other body can refer the parties to counseling. The proposition that something which the law mandates to be performed in one manner, and no other manner *"where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all"*[3] applies with full force. The order dated May 06, 2016 in this case merely referred the parties to the mediator and carved out the course and ambit of mediation. The report of the counselor was never sought by the Court, and yet was treated to be one under Section 12 of the Act of 1984. Had the Court invoked Section 12 of the Family Courts Act, 1984 it would have clearly spelt out and recorded that while doing so; and in that sense there ought to have been a clear invocation of Section 12. The absence of such reference necessarily meant that the reference to "others" meant only those connected with the dispute, such as family members of either the husband or the wife, whose participation was to *facilitate amicable dispute resolution, not independent evaluation by a counselor in an unguided manner to be incorporated or annexed to a mediation report.*

30. If such a position is allowed as in this case, mediation may then well be used as a forum for gathering expert opinion which would then enter the main file of the case. The mandate of Section 89 of the Civil Procedure

[3] *Nazir Ahmed v King Emperor* AIR 1936 PC 243 followed by *State of UP v Singhara Singh* AIR 1964 SC 358

Code, 1908, read with Rule 20 and Rule 21 of the Delhi High Court Mediation and Conciliation Rules, 2004 provides for confidentiality and non-disclosure of information shared with the mediator and during the proceedings of mediation. In the present case, the help of the counselor sought by the mediator to get holistic settlement between the parties was not ordered in the manner visualized by Section 12 of the Family Courts Act, 1984. Consequently neither the report of the mediator nor of the counselor could have been allowed to be exhibited. They are contrary to the mandate of principles governing the mediation - they undermine party autonomy and choice; besides, they clearly violate Section 75 of the Arbitration and Conciliation Act. The observations in the judgment dated February 17, 2017 to the extent it notes that *"the reports of the mediator as also of the counselor concerning the behavior and attitude of the child, especially when the mediation process has failed would not fall within the bar of confidentiality and hence cannot be used in any proceedings…..Such reports are a neutral evaluation of expert opinion to a Court to guide the Court as to what orders need to be passed in the best interest of the child. These reports are not confidential communications of the parties"* and carving a general exception to mediation confidentiality in child custody matters and disputes for which the Family court can seek the assistance of the counselor, under Section 12 of the 1984 Act, are hereby recalled. We hasten to add that this judgment is not a reflection on the mediator whose unstinted track record is known to all, or the endeavor of the counselor, who too is very experienced in her field. Their

commitment and sincerity to secure a settlement satisfactory to all, and the mediation process in general, is not doubted; this judgment should in no way dampen that zeal and determination that they have displayed.

31. To summarize and conclude:

(1) Mediation proceedings depend upon maintenance of confidentiality *at all times, during and at the end of the proceedings.* This constitutes a permanent "dark area" off limits, till such time appropriate and nuanced clear rules are enacted by legislation or binding norms by way of limited exception. Mediators therefore cannot file reports *especially in the event of failure (of parties to reach a settlement)* discussing generally or even in neutral narrative, the position of parties or even without blaming the parties, indicating the reason for failure. It is held that a mediator can report only one outcome: a settlement, if it is agreed to by the parties and the terms of which are written. In all other circumstances, it is hereby declared that no mediation report should contain anything except the report of failure, preferably only one sentence that *"the parties could not agree to settle their disputes"* or some such language. Nothing more.

(2) Mediators cannot involve experts in the process; if there is any need, they have to require the parties to approach the Court explaining the reason why there is need. In case the mediator feels that involvement of a counselor in family or custodial matters is essential, she or he again has to require the parties to approach the Court. Upon the parties applying in this regard, the Court may, after hearing them, exercise its discretion under Section 12.

(3) In the proceeding or interaction between the parties either singly or together, with the counselor, the mediator should not be present. The

communication between the counselor so appointed and the Court should be confidential (as also the report) and it may be shared with the parties under such circumstances as the Court may deem appropriate. It should not be treated as part of the record, in the sense that it becomes the subject of debate or argument during the proceedings, on merits. Here, the Court is at liberty to devise the appropriate procedure, depending upon the exigencies of the case, under Section 10 (3) of the Family Courts Act.

32. In view of the discussion and conclusions, it is hereby directed that the mediator's report as well as the counselor's report shall be disregarded by the Family Court, when it proceeds to decide the merits of the case. This also means that the said reports cannot be a subject of debate or argument. The Court's option to take appropriate course of action otherwise, under provisions of the Family Courts Act, 1984 is, however, preserved and kept open. The review petition is accordingly allowed. There shall be no order on costs. A copy of this judgment shall be provided *dasti* to the parties.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

DECEMBER 11, 2017