INTERVIEW: IN CONVERSATION WITH MR. GOURAB BANERJI

Senior Advocate, Supreme Court of India

Overseas Associate, Essex Court Chambers

Additional Solicitor General for the Union of India at the Supreme Court (2009-2014)

Editor's Note: Mr. Gourab Banerji, one of the leading arbitration experts of the country, is a distinguished Senior Advocate in the Supreme Court of India. He appears as counsel in a large number of domestic and international commercial arbitrations and investment arbitrations in India and overseas. He is an alumnus of Cambridge University, from where he graduated with First Class Honours. He was the Additional Solicitor General for the Union of India at the Supreme Court from 2009-2014 and represented the Government of India in *Republic of Italy v Union of India* among other landmark cases. He developed his practice mainly before the Supreme Court of India with an emphasis on commercial matters, and particularly commercial arbitration.

Editorial Board (EB): ***How would you describe your law school experience?***

Mr. Gourab Banerji (GB): I went into law school in rather unusual circumstances. I went to Cambridge immediately after high school, when I was 18, which is the standard in England. So, I did three years of law, and it was unadulterated law. My experience at Cambridge was quite a revelation for somebody who had studied in Calcutta and Delhi, and obviously there are so many memories from those three years. What I found really special about that system of supervision, which we call tutorials here. So, the learning was much more during the supervisions. We had supervisions with one teacher and maybe three to four students. Sometimes the teacher was from our college, sometimes they were from some other college, and we had to put in an essay or an answer, and then we had a one-hour discussion. What I learnt in those one-hour sessions, with three or four of my contemporaries was much more than I learnt in lectures. One essentially learnt how to think about interesting problems. What was particularly unusual about Cambridge was that the top professors would conduct supervision for undergraduate courses. They had a lot of focus on undergraduate courses. So, we had a lot of eminent people including Chris Greenwood, Mickey Dias, Conor Gearty amongst the many well-known names who supervised me. Of course, one remembers all the friendships, and all the other activities as well. I was captain of the college badminton team. It was a wonderful experience.

EB: What is your most cherished memory from your time at Cambridge?

GB: There are obviously a lot of memories, not all to do with academics. Mainly, what one remembers are the friendships that you make across the board, and of course a very happy moment was when I got my final year results. I could not actually find the result on the board, because in Cambridge, the system which was there, which I am not sure if it is still there now, is that they put up a typed list on the Senate hall steps. So, you have to go there and fight through a crowd of people to see where your name is in the list. I looked at the 2.1 list, I could not find my name. I then looked at the 2.2 list, I could not find my name. I looked at the third list, I could not find my name. I was extremely disappointed, I thought that I had not got through, I remember lying down on the grass and trying to figure out how I will tell my parents. Somebody came by and told me that I had got a first class. So that was a much cherished moment of my life. I went there and looked at it four or five times to satisfy myself that it was actually there. I had missed a 1st class in my previous two years, so I was not very hopeful.

EB: What were the factors which motivated you to have a special focus on arbitration?

GB: You know that is a really interesting question because I get bombarded by people wanting to join or wanting to intern because I am a so-called specialist in arbitration. The fact is that, I came in into this by chance and because of opportunities that came my way, so there was no predetermined place for me to become a so-called arbitration practitioner. In fact, the first major arbitration that I did internationally was very interesting, one where the then Solicitor General of India, Mr. Tehmtan Andhyarujina was the lead counsel. He brought in Rohinton Nariman (who is now retired Justice Nariman), as the second counsel, and Rohinton then recommended me as the junior lawyer. The three of us went to Amsterdam in the year 2000 to appear for National Fertiliser Limited. That was my first major international arbitration, and I have very happy memories of that. It was an unusual case because the public sector undertaking which we were representing actually won the arbitration, which was quite an achievement. I also did a few arbitrations in London around that time.

I was fortunate, I would say and once you get into arbitration, and develop a liking for that, more cases of that nature come on your way. Apart from arbitration, there are many matters which have I done, and many other aspects which I am also interested in.

EB: Could you brief us on your other areas of interests which aren't recognized as you just mentioned, due to arbitration taking the limelight?

GB: So, I have obviously represented the government when I was the Additional Solicitor General, I remember doing the Italian Marines Case. I have done a lot of writ and constitutional matters in the Supreme Court, and also as an *amicus*. Particularly as a law officer, I've represented various organs of the state, including the Intelligence Bureau. A lot of court, including constitutional law as well, which for some reason is downplayed nowadays, because everybody thinks it's all about arbitration.

EB: In your experience, how is the arbitration practice in India different from other developed jurisdictions? Do tell us about your role as an Overseas Associate at Essex Court Chambers?

GB: So far as my experience regarding arbitration practice in India being different from practice abroad, I think it's relatively well-known that India has much more of an ad-hoc system, and abroad it is mainly institutional. The reality is that if you do international commercial arbitration, then the timelines are tight, the hearings are focused, the stakes are often very high, and you have to realise that the people who do this- whether they are QCs in England or Senior Counsel from Singapore or Hong Kong- they devote a lot of time to doing these matters, also doing them single-mindedly. So, of course the quality is, in a sense, superior. But I would say that that is not limited to arbitration abroad. I have appeared as counsel and arbitrator in matters in Delhi and Bombay in international matters, where it is been as per international standards.

We have top-class senior advocates, younger lawyers, and some arbitrators who can compete with the best in the world, but the difference is that, in reality we don't have much of a developed a system, so the arbitrations here have their own dynamics and difficulties. There are practical difficulties which are required to be worked out in domestic arbitration, but not in international arbitrations.

Moving on to the second part of the question, what is interesting about Essex Court Chambers is this. in England there are two categories of lawyers: Barristers and Solicitors, unlike India which has a unified system. Barristers are traditionally those who would be in Court, and solicitors would

be traditionally those who would interact with the clients. This barrier is breaking down, but it is still there in England. Barrister's chambers in London are common. There are generally accepted to be four to five Magic Circle law firms; similarly, there are four to five magic circle sets of barrister's chambers, one of which is Essex Court Chambers which I have joined, the others include the Brick Court, Fountain Court, Blackstone, and One Essex Court. So, there are these four to five top commercial chambers. Essex Court Chambers is particularly well-known for commercial arbitration and international law. We have a lot of barristers there, who are very well-known internationally in arbitration, and also public international law. So, what my experience there has been is, once you actually interact with some of the leading QCs in England, in commercial work, in arbitration, and in international law. You can see how they function, and you can see how each of them approaches work. Of course, everybody has their own style, but it's been a learning experience to see how the best and brightest in England deal with these problems, and how they operate in Singapore, how they handle arbitrations.

I have now had the opportunity to be on the same side, on opposing sides, seeing them cross-examine witnesses. Also, I have argued before high quality arbitrators. Essex Court Chambers also has its panel of top arbitrators who are internationally very known. So, it's been a learning experience. It's been an interesting journey, I joined them in 2014, soon after I ceased to be the ASG. In seven years, obviously there have been many opportunities internationally. In the last couple of years, I have been an expert witness in a London arbitration, and I have been a sole arbitrator for an LCIA matter seated in London between a Canadian and a Kenyan party with English law as the law of the arbitration, so absolutely no connection with India. So, it has been quite an interesting experience.

I was in one of the arbitrators in a ICC arbitration. In fact, the Supreme Court revealed the names of the arbitrators in the order, so I can mention that it was the case of *Balasore v Medima* where I believe that Justice Bobde gave judgement; I was noted as one of the arbitrators. So, it has been an interesting experience, lots of opportunities, lots of learning, and good fun. I am an individual lawyer though I have some juniors, I was never a part of a law firm or a collegiate setup. Now, there is some sort of a collegiate setup where you have other lawyers, senior lawyers who are friends, older than you, younger than you and it's a different experience.

EB: In the past, you have represented the Government of India in arbitration proceedings. How has that experience been, and how is it different from representing individuals or body corporates?

GB: I have represented India in many Court proceedings, which was an experience in itself which we will leave aside for a moment. So far as arbitration proceeding is concerned, there are two categories of cases where I represented government or government instrumentalities. I have in the recent past represented the Government of India in the Antrix-Devas dispute, and what I could find is when it comes to commercial matters, the briefing is excellent, like in this Antrix-Devas dispute, where was a commercial arbitration- I, of course, came in only after the arbitration was over and we challenged the award. I want to make it clear that Antrix is a government instrumentality, but it is not the government, it is a separate corporate entity. Of course, now it is subject to winding up, but that is a different matter.

The government responds extremely well in commercial cases when the stakes are high. One cannot simply criticise the government. When they are at the top of their game, they respond very well and certainly, it was a very good experience.

I was involved for some time in this Cairn-Vedanta investment arbitrations, with which I am no longer involved, so I can talk about it. I think the problem with investment treaty arbitration, is that the government somehow, is not attuned to being at the receiving end in an investment treaty arbitration. It finds it very difficult to admit that it is liable to be questioned, that too by a foreign tribunal on sovereign actions; for instance, in Cairn and Vedanta, it was the legislation by the government that is contentious. In any other action in investment treaty arbitration, it is always a governmental action, so the government is very un-used to being questioned about government action before foreign tribunal. I have found that in such cases, the response, perhaps is not appropriate, because they have not been able to get their head around the fact that they are liable under investment treaties. Not that the government has a bad case or anything, it is just that they are not used to it. So that is a little bit of a difficult experience, and as it happened, I stepped out of both Cairn and Vedanta for certain reasons, a couple of years ago.

EB: Recently, the Government of India has suggested retracting the retrospective tax amendments. This has come in the light of the Cairn and Vodafone arbitrations. What are your thoughts on that?

GB: I was not involved in Vodafone, but I was certainly involved in Cairn and Vedanta at some point of time, so my thoughts are coloured by the fact that I do understand the government's position. The fact of the matter is, that the judgement of the Supreme Court in 2012 is in fact quite debatable. Justice Chandrachud in the Bombay High Court had decided in favour of the government and then it was reversed by Justice Kapadia and I think Justice Radhakrishnan, in the Supreme Court. It's debatable whether the Supreme Court came to the right decision on the point, In fact, Rohinton Nariman argued it as the Solicitor General in that matter against Vodafone, but be that as it may, the decision to then retrospectively or at least take away the basis of that judgement by the amendment, was a controversial one, and there were different voices there.

I am glad that this decision to reverse the judgments has been taken now, it would have been much more helpful had it been taken earlier, a lot of the pain of going through all these arbitration proceedings and costs might have been saved. Optically, it might have been better for the Government as now it may even appear that the Government is doing this because it has lost the case. There is much to be said about the government's position on the awards, there are good grounds to challenge the awards. When I was ASG, I used to regularly appear before Justice Kapadia during the time when he was CJI, in a large number of tax matters listed before him, and one of his comments on the bench was that the real issue was not the retrospective amendment but the fact that the retrospective amendment was made many years after the issue arose. He gave an example that in England, similar amendments were brought out relatively quickly. So, had the government acted quickly and plugged the loopholes quickly, this dispute would not have really arisen.

Instead of bringing in the retrospective amendment which they did in 2012, had they brought it at an earlier stage, then really there would not have been much debate because other countries had done it, and Justice Kapadia specifically mentioned to me that England had done it, he mentioned it in court, so I'm sure he was right. So, the answer here is that the government is required to be a little more proactive and close all these disputes one way or the other, much more quickly. By government, I don't mean this government, or the previous government. Whatever the dispensation is, they should react more quickly and deal with these specific problems which arise out of investment treaty disputes.

EB: In the recent past, there were coordinated efforts to institutionalize arbitration in India through amendments. How do you evaluate the progress made in this direction?

GB: So, I was also involved to some extent in some of these discussions, in 2015, 2019 etc. The problem here is that this is really, in some sense, not for the government to do, this is a very top-down approach. You cannot, by amendment, force people to go to institutional mechanisms. You can cajole them, question them, you can guide them but until you have credible domestic institutions, whether in the public or the private sector, who have credibility, to whom people will go to, or you will inevitably have ad hoc arbitration. You have to change the mindset; you have to put in the clauses in the agreement before the dispute arises.

Now, people are, of course, putting in institutional agreement clauses when people negotiate agreements. But it is a matter of changing the mindset and it is unfair to put the burden on the government to introduce amendments to solve this problem. Unless and until there are credible institutions of domestic origin who will be deemed acceptable to industry, there will be no option of institutional arbitration, though the government may want to try by introducing amendments. So, amendments may be necessary, but they may not be decisive.

EB: Has there been any peculiar or comical instances in the courtroom, or during arbitral proceedings which left an impression on you?

GB: So, let me limit to arbitration, because in court I will be subject to contempt laws. I had a peculiar experience in the NFL Karsan matter. Actually, the witness for the other side was in handcuffs because he had been arrested by the CBI. He was led in, in handcuffs and he spoke in Turkish, so we had this surreal situation of the witness speaking in Turkish and the translation taking place; and because we did not want the other side, the Swiss lawyers, to understand what we were saying, we were speaking to each other not in English, but in Hindi. Neither Mr. Andhyarujina, nor Mr. Nariman's Hindi at that point was very good, but it was the only common language we could speak. Of course, they spoke to each other in Gujarati.

The second incident I remember is, in a sense, a little sad but quite interesting. There was an arbitration which I did very early in my career against DMRC relating to the first Metro line set up in Delhi and there was an arbitration on that. It was an interesting case where we were for this venture, ASHI versus DMRC. Obviously, this was quite a long time ago and I aggressively cross-

examined one of the witnesses, I don't think I would have done it now. At a certain point of time, the witness broke down and there were copious tears. After I demonstrated about five or six times that he was essentially not telling the truth, at five or six occasions, he broke down, and he had to be led out, he had a glass of water and joined back in. Anyway, that arbitration ended in our favour.

Fast forward to 2012. The law officer of the DMRC came to me and asked me if I would like to be briefed for DMRC. So, I was a law officer and it was a government body, so I could do it. After about two months, he came to us and told me that they were not in a position to brief me. On asking why, he said that I may remember so and so, who I didn't. He then told me that the person had I cross examined earlier had now become a senior officer at DMRC and he had instructed him to meet anybody except Mr. Banerji, and was instructed not to brief me under any circumstance. So, that is what happened, it came back to bite me. I would have thought that the very fact I conducted a good cross-examination would enable me to be on his side and he would have wanted that, but evidently not. He harboured that grudge, perhaps justifiably, but I still remember that as the only time in my career where a witness was actually reduced to tears.

EB: The Amazon Case highlighted some of the major discrepancies in the Indian arbitration regime. Where do you feel we are lacking in making progressive arbitration laws?

GB: I don't think we are lacking in making laws, in the sense that we were lacking maybe five to seven years ago. We have brought in one amendment in 2015, post the 2015 law commission report, and post the 2019 Law commission report. Yes, there are gaps which are yet to be filled, but I think that so far as legislation is concerned, the last few years have been reasonably proactive. That doesn't mean that we should not be more proactive. Other countries, particularly Singapore and Hong Kong are very good at this, as they are marketing themselves as well. So, we should move faster, we should get the government to make further amendments. Frankly, this is something that the industry and businesses should drive, and the government should be taking a secondary role and responding to industry and business. It is not fair to expect the government to step in at every stage, unless it is persuaded by corporates that this is a good idea, and I am sure that if you can persuade the government, they will take the necessary steps.

My only concern is that, on the previous occasions, I have found that the way the government approaches these matters is a little top-heavy, in the sense that they primarily involve judges and

bureaucrats, who may not perhaps be the best persons to be on committees and suggest amendments. Of course, nobody can doubt their legal knowledge and acumen, but on the practical aspect they should have more input from business corporates and practitioners, so that they can push through the amendments.

Justice AP Shah, who an exceptionally good chairman of the Law Commission, suggested amendments, as also Justice Srikrishna, who is also an expert in arbitration. So, obviously there were many well-known big names in the Committee. Justice Nariman was involved, Justice Indu Malhotra was involved, Justice Narasimha was involved, etc.. I mean it was quite a high-powered set-up on both occasions, and it would be interesting to see what the government would do now. But a little more involvement of industry and practitioners might produce a more internationally attuned set of amendments.

EB: What are some of the tips you can share with graduates who are entering the profession and starting their career as a litigator or an arbitrator, and taking up matters and briefs? What are the skills that one should develop? And how should one arm themselves to sustain in the profession?

GB: In my view, this is the most difficult question you have asked me in this entire interview, and I am not sure that there is a simple and easy answer to this. I receive virtually on a daily/weekly basis, CVs from students for an internship or to join me, and every time I look at them, I get a feeling that I could not have been able to join my chambers because everybody seems to have had so many achievements in their short careers in terms of moots, in terms of articles, and God knows what else. My understanding here is that the broadest approach is required, I don't think it is possible to say that I will become a specialist arbitration lawyer, or a specialist competition lawyer, there has to be a more open mind and less focus on the black letter of law. I think the best comment I would note here is of Justice Nariman, as he puts it: "You have to read and look beyond the law in order to be a good lawyer." So that's the first tip.

The second thing I would say is that this is not a sprint, this is a marathon; everyone has their own journey, you will always find people who are doing better than you, who have better connections than you, who are getting better cases than you. Everybody has their own journey. If you persevere, if you put in the hours, you will ultimately get to the end of the marathon, and you will be a winner.

So, the most dangerous thing you can do is to compare yourself to a contemporary, because that will bring nothing else but unhappiness.

And just an anecdote on the fact that you must read or be interested in matters beyond the law. In the Karsan arbitration, we were coming back from Amsterdam and somebody had a heart attack, and the plane had to land in Istanbul. We were in the plane for half an hour to 40 minutes with Justice Nariman sitting next to me. And for 40 minutes, without reference to any anything else, he told me the entire history of the Ottoman British Empire, with all the names, dates, the Sultans, etc., I mean obviously you have to have a phenomenal interest and memory to do that. But this is not unusual; one of the top English lawyers who was directly appointed to the Supreme Court, was Jonathan Sumption, who I have seen in action and was an absolutely brilliant lawyer. He is a world-renowned expert in one particular area of history. So, a lot of very successful lawyers have a definite interest in areas other than law - Soli Sorabjee's interest in jazz. There are any number of examples. I don't think that this is the age where you immediately specialize, unless you want to achieve everything by the age of 35! You will have your own path, you will be successful in your own way and everyone has their own journey. Each one of us has a unique story to tell.