INTERVIEW: IN CONVERSATION WITH MR. RANJIT SHETTY

Editor's Note: Mr. Ranjit Shetty is a Senior Partner at Argus Partners. With almost 20 years of experience in litigation and dispute resolution, he has advised on a wide range of contentious matters relating to commercial matters, government tenders, banking & finance, real estate and challenges to legislations.

Editorial Board (EB): ***How has your journey been as a lawyer since your initial years, up until now? Could you take us through some of the most memorable experiences that you wish to share with our readers?***

Ranjit Shetty (RS): In the nascent phase of my profession, I started as an Articled Clerk (internship before appearing for a Solicitors exam) at M/s. Kanga and Co., under Ashir Amin. He was my mentor. I am what I am because of him. It was his approach towards work and his interactions with clients, associates, interns etc. which moulded my personality. After the internship, he guided me to join M/s. Bachubhai Munim & Co. After that, I'd been a rolling stone till I joined Argus Partners –a firm of likeminded partners having the same drive/passion not only towards work, but also towards life!

I have had many memorable moments. There is this one particular case however, which stands out. Once in a potential arbitration dispute, the client had given only one simple instruction: to delay the matter. What started as a simple letter (then faxed to us), went to being a law point and further to being heard by a Constitutional Bench of the Supreme Court. This happened before the arbitral tribunal had even been constituted. I must mention that the law point, that was ultimately decided in my client's favor, was handled responsibly and was one which laid down the correct law.

EB: We understand that you graduated from GLC Mumbai, would you like to share your law school experience?

RS: I was in the morning batch which commenced at 7 a.m. Though I would reach the college on time, my main challenge was to attend classes which I was not very regular at. I was more regular in attending the canteen – so I had a normal law college life.

EB: Considering the COVID-19 pandemic, there have been a lot of disruptions in the supply chain, and parties are often finding themselves to be incapable of performing their contractual obligations. Consequently, a flurry of activity has been initiated revolving around force majeure clauses. Can you share your comments on this and share your thoughts on possible remedies for parties whose contracts do not adequately address the COVID-19 situation?

RS: Contractual clauses need to be drafted and considered carefully. In my view, except in maritime contracts, very few contracts in India would have actually considered pandemics as one of the *force majeure* events, or included it as an exemption for non-performance of contracts. That said, if a contract exposes a party and the pandemic (Covid-19) is not factored in, then the only possible recourse would be to rely on Section 56 of the Contract Act i.e. frustration of contract or impossibility to perform. However, this defence would depend on a lot of factors, especially the contract scope and the facts which lead to the contract frustration, or impossibility to perform. There would be a heavy onus on the party to show that it was not in a position to perform the contract.

EB: What are some of the key concerns that must be kept in mind while drafting a dispute resolution clause?

RS: I am a litigator, and if I may say so, I have the benefit of seeing how a dispute resolution clause is interpreted in court. In my view, two things are extremely important during the drafting or the negotiating of the dispute resolution clause. One, is to understand from the client, their preference in the event of a dispute scenario; what is it that the client wants. The preference could be which courts to have jurisdiction, whether they want arbitration, mode of appointing an arbitrator, mode of appointing arbitrator(s), number of arbitrators, governing law etc. Once that is done, the draftsman is expected to get familiar with the law of the subject.

Just to give a simple example, under the Civil Procedure Code, no party can give jurisdiction to a court which otherwise would not have jurisdiction. However, should the parties decide to opt for arbitration, they can mutually decide on a court/jurisdiction dehors the law decided on this under the civil procedure code. Similarly, being oblivious of how the Courts have explained the terms "*venue*" and "*seat*" in the context of arbitration, can have serious implications.

EB: Parties often tend to disregard the good faith negotiations required by the dispute resolution clauses and proceed directly to arbitration. The various High Courts are also divided on the issue of the enforceability of such clauses. What is your take on the issue?

RS: I believe that if parties have a chance to try and settle the matter, that is something they should certainly explore. Even under the Commercial Courts Act, mediation is mandatory before you file a suit; the only exception is if you have to seek some kind of interim relief. But otherwise, I feel that if there is a scope for someone to try and explore settlement avenues, then that is something they must do.

As a matter of practice, the first thing I enquire with my client, is whether there is being a scope for settlement. And if there is a scope for settlement, then ofcourse you handle/strategize the matter accordingly. Yes, the law is not yet settled on this point of structured negotiation before parties eventually landing up in a legal forum.

EB: Which newer technologies may be adopted to aid arbitration lawyers, especially now that during the pandemic, arbitration hearings have moved online?

RS: Technology is quite relevant today, especially in light of the ongoing pandemic. I'm sure you must have heard of Mr. Virag Tulzapurkar, Senior Counsel at Bombay High Court. He used to tell me that he is digitally challenged. Forget a smart phone, he wasn't even using a cell phone till recently. In the last year of the pandemic, it was a pleasure to see him argue in online hearings through e-briefs. If someone like him can adapt to technology, then I'm sure that any reasonable tech savvy lawyer can easily adapt and should adapt themselves to online hearings. What is really required is a mindset to settle with online hearings.

In the arbitration scenario, a lot of hearings have taken place online. The only possible challenge to arbitration is the conduction of cross-examination of the witness. As the witness is not in the same room, there may be a situation where someone is prompting him with leads and answers. Generally, one could have a representative of the opposing team go and sit in the same room with the witness to ensure that he is not prompted; but in the pandemic scenario, no one from the opposing team would want to volunteer to sit in the same room as the witness. So that is one challenge we face at the moment.

I also think that this could be disadvantageous from the witness' perspective. Some witnesses may not be familiar with online hearings; they may not be able to maintain direct eye contact with the camera. The arbitrator, at such times, might think that the witness is engaging in unfair means, including being tutored by his lawyer or prompted on the arbitrator's question.

EB: If there is any one element that you would like to change in the Indian arbitration regime, what would it be as part of improving the process?

RS: Recently, an arbitrator, a Retired Chief Justice of a High Court during the course of an arbitration where even I was involved, mentioned to all parties that this entire process of admission/denial of documents is archaic and should no longer be followed. I tend to agree with him. Also, because arbitrators are doing so many arbitrations at a point of time, there are no short dates given or available. I personally believe that this is one of the biggest reasons why the arbitration process in India has failed.

Under the Bankruptcy and Insolvency Law, there have been some discussions about restricting the number of assignments that a professional can take up. The same should apply to arbitrators too. To a large extent, there has been an attempt to deal with this aspect in recent amendments which required the arbitrators to disclose the number of matters handled by them, but I'm not sure if it has worked effectively.

EB: As part of advising your clients on incorporating dispute resolution clauses, specifically in international commercial arbitration with one Indian party and another foreign entity, how often do you encounter uncertainty in application of Indian curial law? What factors weigh in when advising your clients regarding the appropriate choice of law?

RS: A foreign entity always has majorly two concerns while negotiating a dispute resolution clause with an arbitration agreement. One is the delay in concluding an arbitration proceeding. Second is the issue involving enforcement of an award. After the 2015 and 2019 amendments, arbitration proceedings are expected to be concluded in a time bound manner, so there was an effort to allay that concern. However, the 2019 amendment has again carved out an exception of this time bound process for international arbitrations.

On the enforceability part, though the grounds of challenge to an award have been narrowed down substantially post the 2015 amendment and some recent landmark judgements of the Supreme Court, there still seems to be uncertainty from an international perspective. For them it's still a

grey area. One of the reasons could be the multi-layered appeal remedies within India, which eventually delays the award holders from enjoying the award and its benefits.

EB: There is a myth in law schools that if you join the Dispute Resolution team in a law firms, your work will be solely limited to Alternative Dispute Resolution, which is not true. Can you please provide a brief outline of the work profile of persons working in a Dispute Resolution team?

RS: I disagree. Unless you are in a firm that has an exclusive ADR/Arbitration vertical and an associate is a part of that team, an associate of a dispute resolution team is exposed to all kinds of matters including/involving real estate, mismanagement & oppression, shareholders disputes, take overs, probate issuance/revocation, summary suits, partition suits, specific performance and ofcourse the Insolvency & Bankruptcy Code. I feel that whilst a lawyer may take up a niche practice area within the litigation arena, he should have a flavor of other litigation practices too.

EB: So according to you, what are the subjects a law student should know before joining disputes, or any litigation team?

RS: This reminds me of what a friend's senior once told her: *"A good lawyer is someone who knows something about everything, and everything about something".*

So, for litigation you need to be familiar, not necessarily well versed, with all the laws. But I would say that the Civil Procedure Code is your bible and you can't run away from that. Similarly, the Arbitration Act. The Insolvency & Bankruptcy Code is also something that is coming up in parallel with the two. Other Acts depend on the issues involved in the matters. For example, if you have a mismanagement & oppression issue, you need to look into Companies Act; and for probate, you will need to dive into the Succession laws, etc.

EB: In your career, which arbitration dispute did you find the most challenging? Could you please share with us key takeaways from that experience?

RS: I was recently leading the team in an international commercial arbitration which involved complex questions relating to enforcement of contractual rights arising from an investment agreement. The dispute involved interplay between cross-border investments, securities law,

foreign exchange laws, along with the aspect of proving laws in a claim of damages arising out of a breach of a contract. While conducting the arbitration, the law on the subject matter was not settled and we had undertaken extensive research on complicated questions of law. We had taken out precedents on each of the points of law to argue the case while making some innovative arguments on the issue of damages. The issue of damages was our primary concern, and we were pretty confident about the award. While the award was ultimately passed in our client's favour, a challenge to the award has gone to the Bombay High Court involving the interpretation of fundamental policy of Indian law under the Arbitration Act, in the context of claim for damages.

This will be an interesting challenge, since the Court will now have to strike a balance between the limited scope of Courts to interfere in the arbitration award vis-à-vis the well enshrined principles of proving loss in a claim for damages. The judgement of the Bombay High Court in the matter would be a landmark judgement on the interpretation of 'Fundamental Policy of Indian Law' in the context of a claim for damages. Fingers crossed!

EB: What are the most important skills that a young lawyer in the field of Dispute Resolution should definitely have? What is your advice for law students in their penultimate and final years who are seeking employment in the post COVID-19 scenario?

RS: Lawyers in the field of dispute resolution are very fortunate. They have the advantage of learning not only from their own team, but also from their opponents. Knowledge of law is certainly important, but according to me, the knack of handling a particular situation in which a client is placed (legally, contractually, or factually), understanding a client and being able to handhold them is of equal significance. A client is as important as the matter itself! This is something which a young lawyer should always keep in mind.

As regards advice to the students, in Argus we have a bookmark, which I would say is my advice to all students:

"Read,
Read,
Read,
Read,
Read,
…….
Lead!"