

IN CONVERSATION WITH MR. SITESH MUKHERJEE

Editor's Note: Mr. Sitesh Mukherjee is an independent legal practitioner and appears before the High Court, Supreme Court, and other tribunals. Previously he was a partner and head of Dispute Resolution of Trilegal which he built and led for over 11 years. Mr. Mukherjee has twenty-five years of experience in handling a variety of corporate commercial disputes, including high stakes arbitrations in diverse stakes arbitrations in diverse industries such as power, infrastructure, and banking.

Editorial Board (EB): *You have practiced firm litigation for the most part of your career and now decided to start independent counsel practice. Could you please take us through the thought process? What would your advice be to young lawyers who want to pursue litigation but are confused between firms and chambers?*

Sitesh Mukherjee (SM): Before I started at Trilegal, I worked as an independent lawyer for the initial part of my career. That's a background many law firm partners may not have, Therefore, the thought I always had was to get back to individual counsel practice at some point in time. It's not that the firms are not the right place to do litigation or develop a litigation practice. In fact, I believe that the future of litigation practice in India is in the firms, be it full-service firms or specialized dispute only firms. Eventually, there will be more dispute lawyers in firms who will be front-ending litigation. As things stand today, it is still a process of transition. The litigation practice in India is still getting organized and corporatized. We still have a situation where the face value is more important in courts, and that comes from volume-driven practice. While courts and clients are increasingly demanding more attention to detail, it is a process of transition that will take some time.

As I said, volume-based practice gets you in front of the courts, in terms of your aspiration of becoming a counsel. Large firms are still not in a position where they can have their partners regularly appearing in court. As we practice in specialized tribunals and specialized practices, I see partners in large firms, increasingly appearing before the court. It's a process that will take time.

EB: *You have had an experience of practicing both in Mumbai as well as Delhi. It's widely known that the litigation in both these cities differs widely. Could you please tell us about that?*

SM: I spent 23 years practicing in Delhi and have been stationed in Mumbai more prominently in the last four years so I am more familiar with the court set up in Delhi. In Delhi, due to many tribunals and smaller courts, the opportunities to build up the practice are more. Bombay on the other hand has a more solicitor-driven culture, The settlement of the draft and trial strategy are decisions of counsel, whether it be junior or senior counsels.

However, I have noticed that things are changing in Bombay. For example, in the NCLT, I found increasing participation of firm lawyers. For a long time, SEBI was the only major all India tribunal in Bombay, and we did have firms specializing in SEBI work, and some of them were as good as any counsel in Bombay. I believe that if there are more specialized tribunals in Bombay over a period of time, individual lawyers will take up more work themselves.

The second thing is with the emergence of arbitration as a specialized practice area, I find lawyers and law firms, both in Delhi and Mumbai, have the opportunity to work on the matters in their entirety, including arguing, as they are better equipped than lawyers who are briefed for a short period of time. I feel that in India, as in other countries, the solicitor-based work will be reduced and lawyers, and even litigation lawyers, in law firms, will have to start fronting their own cases before various tribunals.

EB: It is observed that Mediation is emerging as a preferred method of alternate dispute resolution. How are the law firms responding to this change? Are firms trying to recruit people who are experienced in mediation?

SM: A lot of good things, are being said about the importance of mediation. Unfortunately, mediation is still not a significant practice area, because courts in India do not penalize people for adventurous litigation or arbitration. There isn't enough disincentive for embarking on litigation. As a result, not enough importance is given to mediation, especially because of the consequence of losing in payment of interest, at most, which is also negligible. Costs need to be awarded more regularly at a higher level by courts in order to disincentivize people from embarking on luxury litigation or adventurous litigation. Until that happens, mediation will not emerge as a serious practice area.

EB: How do you think we can improve mediation in India as a method of resolving disputes?

SM: We need to develop the practice area for practitioners to excel in it. You can keep training people and having seminars, but until it emerges as a practice area that clients want to rely upon and find useful, there is no way for people to get practical hands on experience.

Right now, we are looking for statutory changes, policy changes, and things to legislate overall, including court prescriptions. This reminds me of the time when the new Arbitration Act was introduced, it was based on the UNCITRAL model. But it didn't take off till the BALCO judgment. We have to change the ground rules. One of the biggest ground rules is to disincentive litigation. The only way to disincentivize litigation is to impose costs.

Similarly, if you look at it from the perspective of plea-bargaining, if the court process was fast, one would have the incentive, because one could get convicted faster if the offence was proved. If the trial is going to stretch on for years, there is no incentive to have a plea-bargaining system. As long as courts are slow and award minimal costs, mediation will not become popular. Personally, I see it holding a lot of potential for future lawyers.

EB: Since the last few years, climate change is being extensively discussed across the world. How do you think this development will affect the process of arbitration specifically regarding the energy industry?

SM: The energy industry, as you know, is already familiar with the arbitration process internationally and nationally. In India the difficulty is that we have tribunals for most of the downstream and mid-stream activities, we have arbitration only for the upstream activity and for the trading activity in oil and gas, which limits its scope in India. Nonetheless, the energy industry, on the whole, is used to arbitration.

When environmental arbitration is introduced, the energy industry, in general, will be able to cope with it pretty well. There are two or three things that are in favour of having environmental arbitration in the energy industry for large infrastructure projects. One is that Arbitration brings a lot of expertise.

Large projects, particularly in the energy sector, have long, tremendous costs to the environment, as well as long-term social costs. In order to have accountability for these costs, arbitration is a very good means to ensure that energy companies pay costs for the damage to the environment.

Along with the expertise, the quality of evidence is an important concern, which is much better in arbitration because of the experts and the disclosure requirements. This also supports arbitration in environment related disputes, especially in the energy sector. There are already precedents. Like DRVs which are already working, and ad hoc tribunals like the deep-water tribunal for oil spills. The International Oil Pollution Tribunal discusses the oil pollution caused by oil tankers and parties can make their claims there. The Energy Industry has an idea of how the arbitration process works.

In energy arbitration, there is an element of public interest and multiplicity of parties, hence you will find that they resemble claims tribunals rather than arbitration in the way we recognize it. Arbitration jurisprudence needs to move to accommodate multiple party interests and public interests in order to cater to this area.

EB: In the coming future, to what extent we can address the scope of Human rights concerns, e.g., er have seen the issue of Sterlite protests concerning the copper industry in Tamil Nadu and instances of police brutality.

SM: I do not believe that Human Rights can be decided through arbitration. The basis of many of those rights are in public law, and there is also a larger socio-political element to these aspects, which reflects on the whole nation-state and the government. So Human Rights would need to be addressed through the statutory tribunal. Arbitration is not the solution to that. However, environmental claims are different as (a) they require a significant amount of expertise, (b) the authority of evidence in an arbitration process is higher by virtue of the disclosure requirements, and (c) there is also the time factor which courts in India and arbitration tribunals don't have, therefore for such specialized matters, so Dispute Resolution Boards should be able to function better in that respect as well.

EB: In terms of human resources, what are the needs and requirements of clients engaged in the energy sector when they seek legal assistance?

SM: I would say there is a challenge to the development of the human resource. When I talk of human resources, I refer to young lawyers and their opportunities in sector arbitrations and international arbitrations in India. A lot of the positions are developing in Europe, and we don't have that level of expertise in India. For India to turn into a seat to reckon with, we need to open up the market to international firms. There will be specialized expertise that foreign firms and lawyers will bring in, which will provide confidence to the International Investors to actually arbitrate in India.

On the transactional side, ply in and ply out, a lot of the documentation and meeting can happen internationally. Therefore, the participation of international lawyers will be easier, even if they cannot be accommodated in India. In International arbitration, if India is to be a prominent arbitration seat, foreign firms should have a more prominence here, with a more permanent setup. There are only a handful of firms in India, the top tier or even the next level, only a dozen of such firms, overall, with the experience in international arbitration. Whereas the people who are interested in working in the area are much more.

The culture of arbitration is really permeating in India. We have a lot of law firm partners who are focused on the subject of arbitration, international arbitration especially is turning into a niche, specialized practice in India. People don't have to go to court to develop a name in arbitration. There is a lot of expertise that is being developed. The process would however greatly be assisted if international practitioners were involved.

EB: *What are the challenges ahead for developing the arena of institutional arbitration in the Indian Energy sector?*

SM: I think much of the energy sector is governed through statutory tribunals. From my practice in this area, I notice that the detail with regard to evidence is key to solving disputes. The tribunals operate under a *prima facie* case on documentary evidence. Even if you talk about the PNGRB or the CERC, a lot of them are faced with the question of damages, change in law, and force majeure. The evidence is almost never taken there. So, personally, if there is a need to regulate some parts of the value chain in the energy sector, there should be a mechanism to ensure that cases that require a significant amount of expertise and evidence should be referenced to arbitration so that we don't do a cut and dried process of assessment in areas where detailed evidence and expertise is required.

I think on the development of international arbitration in the energy sector, we have to ensure that even if we are going to have regulators there should be room for arbitration as well. The *Gujarat Urja v Essar Power* judgement of the Supreme Court, early in the day after the electricity Act came in, spelled out that if a particular subject matter is covered by the jurisdiction of the electricity tribunals, then there is no question of those contracts being arbitrated by tribunals. That has been followed in other areas of regulatory problems as well. There should be space for arbitration to take place in appropriate cases.

EB: *Any final advice for students who are entering the post COVID employment market. How do you see law firms adapting to the change in conditions? What would be expected of young associates initiating their careers?*

SM: Of course, it's a difficult time for people who are graduating from law schools, the opportunities are likely to be few because of two reasons. One, the work from home creates a certain amount of efficiency, where associates required by firms will reduce. Secondly, Mentorship is difficult in an online mode, therefore learning is difficult in a mentorship-based method. The employment opportunities have been reduced and the learning opportunities are reduced. So far

as the law firms are concerned, they are still trying to find a way to bring on board the new hires for this year. They will find a way to do it, but it is still a challenge.

I think that people should look for roles in in-house situations because companies are more active, and the legal departments are going to have more face-to-face interaction. Secondly, you must use your time to continue with your education and learning if you are not getting a job. Read the most recent judgements, and participate in seminars and webinars. A lot of senior lawyers are coming and sharing their experiences and thoughts that provide you with a great alternative to personal mentorship.

If you feel that you are satisfied, continue with your education, do an LL.M. come back when things are better. Overall, there is a lot of self-help that will be required for lawyers who will be graduating now and are facing the challenge of getting to their first jobs. You will have to learn to motivate yourself. You can also do an LL.M., part-time maybe if you already have a job. That would be my advice-Use the time gainfully to develop expertise by developing your knowledge.

P.S.: We express our sincere gratitude to Mr. Sitesh Mukherjee for his valuable time and for providing us with insights into his practice area. We hope the interview is as enriching and fruitful for our readers as it has been for us.