



ASKED & ANSWERED

Ashish Joshi on Indian Politics and Law

By JO MATHIS
Legal News

A pro-business government is now in power in India following a landslide victory last month of the Bhartiya Janta Party (BJP) led by its Prime Ministerial candidate Narendra Modi.

Ashish Joshi is an Ann Arbor attorney who was admitted to practice law in India and whose practice includes cross-border litigation/dispute resolution between U.S. and Indian businesses and individuals.



Ashish Joshi

Mathis: What is the significance of the recent election in India?

Joshi: Government has always been at the heart of India's underachievement. The few strong governments India has enjoyed were dominated by the Nehru-Gandhi dynasty and the Congress party. Their economic agendas left much to be desired. And, if the economic agendas were admirable, the government or the party lacked the clout to implement the policies. It is after a very long time that the people of India chose a single party giving it enough stability to last for the next five years and more importantly, giving it ability to take decisive actions and financial reforms.

Mathis: How does this election result in India affect Americans?

Joshi: A reboot of Indian economy would be a great thing not just for Indians, but also for the world. It is expected that the incoming government will take up significant measures in the coming months. Indian stock markets soared on the BJP/Modi victory and resilient public markets are likely to encourage a flurry of public offerings, deals, and provide opportunities for private equity investors for making optimum exits, which in turn are likely to attract further invest-

ments in India.

American businesses and investors are likely to find tremendous opportunities in India especially in the areas of manufacturing, healthcare, energy, infrastructure and technology.

Michigan has a special connection to India – from the huge influx of human capital to the University of Michigan's schools to Indian businesses opening their research and development centers in Michigan. Recently, one of India's automotive giants, Mahindra & Mahindra, announced that it's setting up a factory in Ann Arbor to build its GenZe scooter.

On the other side of the coin, Michigan businesses are more than ever making deals in India and/or expanding their business interests in India. Ann Arbor's Arbor Brewing Company launched an outpost in Bangalore, India after partnering with a University of Michigan student of Indian origin. Of course, the pub's best selling and flagship Sacred Cow IPA was renamed as Raging Elephant IPA for the Indian market to respect the local culture and sentiments.

Mathis: You were admitted to practice law in India. Did you actually practice law in India?

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India's legal system closely resembles English model

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Joshi: Yes, I did. I was a litigator and my practice focused on business and commercial litigation. My knowledge of the Indian marketplace and my experience as a lawyer in India has been extremely valuable in advising my U.S. clients to navigate the Indian courts, bureaucracy and in resolving disputes.

Mathis: What's India's legal system like?

Joshi: India follows the common law system and essentially adopts the English – and up to a point, the American – legal system. However, unlike England, India has a written constitution and unlike America, India does not have jury trials. The constitution of India is quasi-federal, federal in character but unitary in spirit. The legislative powers are divided between the federal and state legislature. The constitution identifies and allocates the areas of legislation between the federal and state legislatures through separate lists: the Union list, the State list, and the Concurrent list.

Mathis: What kind of cases do you handle as a part of your cross-border India practice?

Joshi: My practice focuses on dispute resolution, by litigation or through alternative methods. I have handled a broad ranging cases ranging from litigating a case involving theft of trade secrets by an agent of a US company in India to litigating business disputes between US and Indian businesses to negotiating a resolution of a dispute surrounding a World Bank project in India without resorting to litigation. At the end of the day, business litigation is not about winning at all costs, but at calculated costs.

Mathis: Can you describe the court system in India?

Joshi: The Supreme Court of India is the highest appellate court in the nation and adjudicates appeals from the state High Courts. The state High Courts are the principal civil courts of original jurisdiction in the state with some exceptions. Below the High Courts are the district courts consisting of District and Sessions judges that adjudicate civil and criminal matters and have the power to impose any sentence including capital punishment. Certain specialized areas of law have dedicated tribunals to ensure speedy adjudication of the matters. These include the Com-



Photo by Jo Mathis

Joshi, pictured in his Ann Arbor office, is fluent in Hindi, which is the national language of India, as well as Gujarati, which is his mother tongue and the language spoken in the state of Gujarat, the most industrial, business friendly state in India.

pany Law Board, the Income Tax Appellate Tribunal, the Labor Appellate Tribunal, the Copyright Board, Securities Appellate Tribunal, Competition (what we call in the U.S., Antitrust matters) Appellate Tribunal, Debt Recovery Tribunal and others.

Mathis: What should U.S. lawyers know about enforcement of U.S. judgments in India?

Joshi: I often get consulted to help enforce a U.S. judgment in India. U.S. lawyers should note that a foreign judgment can be enforced in India pursuant to India's Code of Civil Procedure ("CPC") in two ways. One, by either filing a suit upon judgment or two, if the judgment is rendered by a court in a "reciprocating territory," it can be enforced directly by execution proceedings as if the foreign judgment was a decree of an Indian court. A "reciprocating territory" is one that has been notified as such by the government of India. While the UK has been notified by the government of India as a "reciprocating territory," the U.S. has not. As of now, a U.S. judgment can be enforced in India only by fil-

ing a suit based on the judgment.

Mathis: Do American lawyers have any common misconceptions about enforcing U.S. judgments in India?

Joshi: Yes, usually on the issues of jurisdiction and ex-parte adjudication. It is important to note that even if a foreign court did not have jurisdiction over a defendant, its judgment can still be enforced in India if the defendant appeared before the foreign court and failed to dispute its jurisdiction. In addition, while a decision of a foreign court must be based on the merits of a case, the mere fact that it was ex-parte does not preclude enforcement in India. The test is whether it was passed as a mere formality or penalty or whether it was based on evaluation and adjudication of the parties' claim and defense. Also, because a particular judgment does not conform to Indian law does not preclude enforcement.

Mathis: Do Indians have any common misconceptions about the American court system?

Joshi: Indian businesses – and other foreign companies for

that matter as well – are extremely leery of the U.S. litigation process, especially about the process and the cost of discovery. They are not used to our litigation process in general, balk at the hourly billing practice and believe that even if they were to win the litigation in the end, it would probably be a pyrrhic victory given how much American lawyers charge by the hour. And, I think this is a misconception because while the hourly billable practice may be a norm for the large law firms, many small to midsize law firms are very flexible and creative in their fee arrangements. For example, we routinely offer to charge flat fees, flat monthly fees, partial contingency fees, success based fees and similar alternatives not just to our Indian clientele but, in appropriate cases, also to our American business clientele. We believe that a law firm should not get paid more the longer it takes it to do the same task.

Mathis: Are there any concerns for or about the new Indian government?

Joshi: The Economist magazine recently summed it up very aptly. There are three major concerns for Mr. Modi and his government. First is that Mr. Modi may turn out to be more of a Hindu nationalist than an economic reformer. Second is that he may be overwhelmed by India's complex combination of politics, bureaucracy and corruption. And, the third is that Mr. Modi's strength may make him into an autocrat instead of a democrat – as Indira Gandhi was for a while. So, yes, there are risks. But overall this is a time for optimism.

Mathis: We have heard that legal proceedings in Indian courts can take inordinate amounts of time before final resolution. Is it true?

Joshi: Unfortunately, that is true in a general sense due to a

heavy case load and other budgetary factors. However, in analyzing dispute resolution mechanisms in India, it is crucial to understand the practice of interim relief such as injunctions. Given the time constraints, it is common for a litigant in India to apply for urgent interim reliefs such as an injunction requiring the opposite party to maintain status quo or restraining certain action or freezing orders or deposit of security into an escrow etc. Interim orders are those orders that are passed by the court during the pendency of a suit or proceeding and while they do not finally determine the merits or substantive rights of a party, they have the potential to be a "game changer" in litigation. Battles over interim proceedings and their timing play a crucial role in the conduct of litigation between the parties.

Mathis: What about alternative dispute resolution mechanisms? Does India have these?

Joshi: Absolutely! Indian businesses are big on arbitration. India's first arbitration legislation was enacted prior to its independence in 1940, the Arbitration Act, 1940.

However, arbitration under this act and ancillary legislations was not effective and often led to litigation (that it was designed to avoid in the first place). The Indian legislature thereafter enacted the Arbitration & Conciliation Act of 1996 to make arbitration – both domestic and international – more effective in India.

The current legislation is based on the UNCITRAL Model Law and facilitates International Commercial Arbitration as well as domestic arbitration and conciliation.

Under the new law, an arbitral award can be challenged only on limited grounds and that too in the manner prescribed under the law.