FOREIGN LAW FIRMS IN INDIA

Pallavi Supehia*

INTRODUCTION

Roscoe Pound, an eminent jurist states that "historically, there are three ideas involved in a profession: organization, learning, and a spirit of public service."[1]

As globalisation spurred and the mode of transportation became cheaper, it is believed probably then, people started to settle in different jurisdictions and also started practising in foreign lands. It is also assumable that due to this transgression of advocates Bar Councils were made. Bar associations/councils/committees are bodies that regulate and set standards as to practice in a particular court. These Associations lay down guidelines and upon fulfilment of those, one can get an enrolment and start practising.

The Advocates Act of 1961 is a testament for guidelines and rules governing the standards and qualifications of practising law in India. It also lays down all the rules the practitioners must abide by for practising in any Court in the territory of India. Discrepancy had loomed large on the status of foreign entities including Lawyers, Firms, and Business Process Outsourcing (herein after referred to as BPOs) like Legal Process Outsourcings (*herein after referred* to as LPOs) which were conducting business in India both in a litigious manner and non-litigious manner.

The then prevailing ambiguous interpretations of law gave way to mushrooming of several such legal Offices and Firms which posed a contentious question of taxation. The most basic tenet of taxation i.e. income to be taxed where it is earned[2] is hit as the work of a non-liaison office forms a Permanent Establishment. The creation of a Permanent Establishment makes all of these Legal Shops subject to profits made in India. This presence being taxable while the practise not falling under the purview of the Advocates Act was also a point of dispute. The quest for settling the position of foreign law firms in both a litigious and non- litigious manner was done by the Supreme Court in the case of *Bar Council of India v. A K Balaji and Ors*[3] which is the focus of this research paper.

* Assistant Manager (Legal) – IFFCO TOKIO General Insurance Co. Ltd.

[1] Roscoe Pound, "What is a Profession - The Rise of the Legal Profession in Antiquity", 19 Notre Dame L. Rev. 203 (1944), at p. 204.

[2] The Income Tax Act, 1995, § 9 (1)(i).

[3] Civil Apeals Nos .7875-7879 of 2015.

THE ADVOCATES ACT, 1961

The Charter Act of 1861[4] first authorised establishment of the High Courts under the Letters Patent of 1865. These Letters Patent also empowered the High Courts to enrol legal practitioners and subsequently make rules for enrolment of Advocates and Attorneys who were then also known as Solicitors. The perambulatory clause to this Act stated that it aims to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils and an All-India Bar. After being shaped by several important legislations such as The Legal Practitioners Act, 1879 and Indian Bar Council Act of 1926 the Advocates Act of 1961 was passed.

The Act as it stands today much like the Income Tax Act, 1961 sets to define who can practise in front of a court[5] as the Income Tax Act provides that a Chartered Accountants may represent taxpayers in front of tax department and Appellate Tribunal much like Advocates themselves.[6]

The Section 21 of the Act sets out various qualifications to be able to register in the roll of the Bar Council.[7] *Inter alia* meticulous educational qualifications the section lays down that all those enrolled must be a citizen of India.[8]

This section served as the biggest bone of contention as it essentially bars anyone from practising in an Indian court if they are not Indian as per the Citizenship Act of 1955. The only exception to this rule is that contained under the *rule of reciprocity*.[9] The rule of reciprocity states that lawyers of the foreign states which allow the lawyers enrolled in India to practice in their Courts shall be allowed to appear before the Indian Courts.[10] This has been negatively laid down in the Act which states that if any country places Indian citizens on an unfair discrimination or restricts them from practising in their state then the citizens of that state shall be restricted equal and reciprocal manner by the Act.

Legal dilemmas springing from this position

The legal ambiguity divided the parties into two fractions. One majorly recommending that foreign lawyers and firms should be made operational and which shall consequently open the economy adopting the principles of liberalisation. While the other disputing party argued that allowing any foreign parties would be inimical to the Indian counterparts. Ironically, of all post-colonial countries India remains one

[4] Indian High Courts Act, 1861, (24 & 25 Vict. c. 104).
[5] The Advocates Act, 1961 (Act No. 25 of 1961), s 29.
[6] The Income Tax Act, 1961, s 288.
[7] The Advocates Act, 1961 (Act No. 25 of 1961), s 24.
[8] The Citizenship Act, 1955 (Act no 57 of 1955).
[9] The Advocates Act, 1961 (Act No. 25 of 1961), s 47.
[10] Bar Council of India Resolution No. 6/1997, Rule 5.

of the only few countries untouched by any London/New York firms.

The arguments in favour of liberalization are put below:

1. An increasing number of foreign clients are now involved in Indian transactions, which is why International firms want to establish a stronghold in India, to better serve their clients. It is on the lines of the principles of a global village. India being a country where common law is practiced opening the borders for foreign law firms and lawyers would be quite easy and would make legal assistance for global citizens accessible.

2. Barring the entry of foreign law firms in India is delimiting the scope of the market of Arbitrations and ensuring to crescent a full growing moon. Due to this the International Arbitrations shift to Singapore, Paris and London, which are acclaimed seats of arbitration, contrary to the declared policy of the Government[11] and against the national interest. The aim towards making India the International Centre for Alternative Dispute Resolution (ICDAR) suffers when the superfluity of the lawyers participating from both ends is highly constrained.

3. The presence of foreign lawyers in India may also give rise to potential Indian tax exposure which is important to be considered in the overall scheme. A foreign legal service provider shall come up in India when they have a business connection or a permanent establishment ("**PE**") in India when its employees or associates frequently visit India or spend considerable time (individually or collectively) in India. [12] A Permanent Establishment as a fixed place of business in a Contracting State is said to come up through which the business of an enterprise located in the other Contracting State is wholly or partly carried on.[13]

For instance, under the India-US tax treaty, a service PE may arise if services are rendered by such employees who stay in India for an aggregate period of 90 days in a year. If the services are provided to related parties (for instance, to a foreign affiliate of the service provider such as a captive LPO), even a day"s presence may give rise to a service PE. Under the Treaty, any income attributable to the PE would be taxable in India. Presently the doctrine of *territorial nexus* applies, i.e. the calculation of taxable income includes only those services

[11] Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, Department of Legal Affairs, *available at:* http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (visited on September 9, 2020)

[12] Vyapak Desai, Vivek Kathpalia *et al.* "Practice of foreign law in India Foreign lawyers can "Fly- in and Fly- out"5 *ILI* 2012, *available at:* http://www.indialawjournal.org/archives/volume5/issue_1/special_story.html (visited on September 9, 2020).

[13] Ishikawajima-Harima Heavy Industries Ltd. v. Director of Income Tax, (2007) 288 ITR 408, 426 (SC), at ¶ 23.

which were both rendered in India and utilized in country[14] excluding that which was rendered outside but utilized in India.

Foreign law firms would also be subject to Indian taxes if they establish an Indian presence in the form of a fixed base or a branch office. Further complications may arise if the foreign law firm is organized as a foreign limited partnership, limited liability partnership or a tax transparent entity since it may face difficulties in claiming tax treaty benefits. In such cases, the tax implications would be governed by the Indian domestic law provisions where the potential tax exposure is wider. Since the Bar Council can in principle only regulate those who appear before the Court, and can‟t regulate the back office operations it leads to a violation of immigration laws. This is despite the Bombay High Court in *Lawyers Collective v. Union of India* and clearly observed that the expression „right to practice the profession of law‟ is not restricted only to advocates practicing in litigious matters but also includes within its ambit persons practicing in non-litigious matters.[15] Under the guise of LPOs (Legal Process Outsourcing), conducting seminars and arbitrations, foreign lawyers visit India on a Visitor Visa and practice illegally.

4. In India, the legal profession is considered as a noble profession to serve the society and not treated as a business but the foreign law firms treat the profession as trade and business venture to earn money. Indian lawyers are prohibited from advertising, canvassing and solicit work but foreign law firms are advertising through websites and canvass and solicit work by assuring results. The Law Commission in its report recommended that the ban on non-advertising should be lifted.[16]

5. Under the BCI Rules, an Indian advocate is prohibited from entering into any fee-sharing or profit-sharing agreement with any person other than an advocate (including a foreign lawyer).[17] Unlike current trends in foreign law firms (eg alternative business structures), Indian law firms cannot, therefore, provide multi-disciplinary services to clients like accounting, taxation management, etc.[18] The international practices are at a stark difference from the Indian practices and rules.

6. An Indian advocate is not allowed to work as „a full-time salaried employee of any

[14] Clifford Chance v. DIT [2009] 176 Taxman 485 (Bom)
[15] Lawyers Collective v. Union of India (2010) (2) BCR 753 (Bom HC).

[16] Law Commission of India, 266th The Advocates Act, 1961 (Regulation of Legal Profession), (March, 2017) p. 92 *available at:*http://lawcommissionofindia.nic.in/reports/Report266.pdf (last visited on September 10 2018)
[17] Rule 2, Chap III, Part VI, Bar Council of India Rules, 1975.
[18] Amanpreet Chinna, "Liberalisation of Indian Legal Services: Politics and Challenges" 10. 5235/ OUCLJ. 122 295 (2013) *available at*: https://www.researchgate.net/publication/259275714_Liberalisation_of_Indian_Legal_Services_Politics_and_Challenges (last visited on September 9, 2020).

person, government, firm, corporation or concern‟ under the BCI Rules.[19] It means that if an Indian advocate joins a foreign law firm as a paralegal, assistant, associate solicitor/lawyer or as a partner, he has to surrender his practicing certificate to the State Bar Council.[20]

Even the international legal practice, as put forth in the principles of International Bar Association, include fairness, uniform and non-discriminatory treatment, professional responsibility, reality and flexibility.[21]

IMPORTANT CASES

1. *Lawyers Collective v. Bar Council of India and ors*[22]

Facts: The history of this case stems from the applications of foreign law firms from US and UK, namely, White & Case, Chadbourne & Parke and Ashurt Morris Crisp, to set up liaison offices in India. The first application put forth the Foreign Investment Promotion Board was denied and a subsequent application to the Reserve Bank of India during the period 1993 - 1995 was granted under Section 29(1) (a) of the Foreign Exchange Regulation Act, 1973, hereinafter referred to as FERA. *Lawyers Collective*[23] was filed against this approval granted by the Reserve Bank of India, herein after referred to as RBI, which was also made a party of this Writ Petition.

Contentions from the petitioner's end: The petitioners contented that the enrollment under the Advocates Act, 1961 was mandatory to carry on the profession in law even in non-litigious matters. The main submission remained that RBI did not have the right to grant permission under FERA[24] since „practice of law‟ cannot be classified under „activity of a trading, commercial or industrial nature‟ to fall within the ambit of the provision. It was also contended that the grant of such a permission would result in an unfair advantage to Foreign Legal Shops over Indian Advocates as they would not be subject to the Advocates Act, 1961 or the rules framed by the Bar Council of India.

RBI's contentions: The RBI stated that it was not concerned with the Advocates Act and had the power to grant such permission under Section 26 of FERA. The nature of this permission was also explained by submitting that the only effect of the said permission would result into establishment of liaison offices which shall act as a communication office between overseas principals and parties in India. It was unambiguously submitted that the permission

[19] Rules 47-51, Section VII, Bar Council of India Rules, 1975.
[20] CS Lal, *Commentaries on Advocates Act, 1961 and Bar Council of India Rules* 2nd edn, Law Publishers (2006) 384.
[21] International Bar Association, International Principles on Conduct for the Legal Profession *available at:* https://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C (last visited on September 9, 2020).
[22] Writ Petition. No. 1526 of 1995.
[23] *Ibid*
[24] Foreign Exchange Regulation Act, 1973, (Act no 46 of 1973) s 29.

did not allow involvement in any litigious practice to any foreign bodies.

Foreign Law firm's contentions: On the other hand, the foreign law firms tried to bring in a novel argument and put forth that there is no violation of the Advocates Act if such permission is granted as the Advocates Act 1961 was enacted by the Parliament under Entries 77[25] and 78[26] of List I of the Seventh Schedule to the Constitution and the ambit of these entries are limited to denoting and regulating persons entitled to appear before the Supreme Court and the High Courts respectively i.e. in a practicing in a litigious matters; hence, the ambit of the Act could not outgrow the ambit of the authority under which the Act was passed. It was submitted as a simple arithmetic of the doctrine of devolution of powers. The said Act would not apply to the persons practicing in non-litigious matters, unless a legislation was enacted to regulate persons practicing in non-litigious manners by invoking Entry 26 in List III to the Seventh Schedule[27] which does not cap the dimensions of how the entry should be legislated upon. The present Act lacks the same and hence has no mandate over non-litigious practices.

Held: The Bombay High Court decided the following two issues in the case:

1. Whether the permission granted by the Reserve Bank of India was valid in law?
2. Assuming the grant of permission was valid whether the 1961 Act would apply to non-litigious matters also?

The Court concluded by holding that the Advocates Act, 1961 is a complete code by itself since Section 29 covers both litigious as well as non-litigious practice and invalidated the permission granted by the RBI.

2. *A.K. Balaji v. The Government of India & ors.*[28]

Facts: The petitioner in the instant case approached the Court seeking the writ of Mandamus to take action against foreign law firms/lawyers illegally practicing in India and to forbear them from having any litigation/ non litigation based practice and commercial transaction in that regard in India.

Petitioner's contentions: The grounds raised by the petitioners were with respect to enrolment of foreign practitioners, the disciplinary authority of the Bar Council over them, the nobility of the legal profession the rules related to the same, the rule of reciprocity and loss to the exchequer caused by the prevalent disguised practise by

[25] The Constitution of India, 1950 Seventh Schedule, List I, Entry 77: *Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.*

[26] The Constitution of India, 1950 Seventh Schedule, List I, Entry 78, *Constitution and organisation 1 [(including vacations)] of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.*

[27] The Constitution of India, 1950 Seventh Schedule, List III, Entry 26: *Legal, medical and other professions.*

[28] AIR 2012 Mad 124.

foreign players in India. The question being, if offering legal assistance to clients in India on foreign law, with or without establishing liaison offices, is violative of any provisions of the 1961 Act or not?

Foreign Law firm's contentions: India being a signatory to WTO is obliged to conform to the fundamental principles of National Treatment,[29] Market Access,[30] Domestic Regulation[31] and Transparency under The General Agreement on Trade in Services (GATS). The statute en block without isolating anything, suggests that foreigners can practice law in India provided that the prescribed conditions are satisfied. Countries such as US and UK are very much receptive of Indian lawyers, India is refusing to grant the same reciprocity.

Observations: The Court in the instant case gave due regard to the view that the enactment of the Arbitration Act was to fulfill its obligations under International Treaties and Conventions and also the policy of the government to make India a hub of International Arbitration. India being a signatory to the WTO and The General Agreement on Trade in Services (GATS), the Court opined that liberalization policy which opened up the economy for foreign investment has led to a growth in the number of disputes involving a foreign entity, which naturally leads to the need for advice on foreign law in the course of International Commercial transaction. Also, keeping in mind the economic implications and national interest involved the Court held that it would be a dangerous proposition to hold that foreign law firms cannot come into India to advice clients on foreign law which would catapult the Indian effort backwards in becoming a preferred seat for arbitration.

Held: The Court ultimately held that

1. There is no bar for the foreign law firms/ lawyers to visit India for a temporary period on a 'fly in and fly out' basis to give legal advice to their clients in India on foreign law or any international legal issues or any matter relating to International Commercial Arbitration.
2. Legal Process Outsourcings (LPOs) providing a wide range of customized and integrated services will not fall under the ambit of the Advocates Act or the Bar Council of India Rules, but the Bar Council of India can take appropriate action if such companies attract the violation of any provisions under the Act.

3. Bar Council of India v. A K Balaji and Ors.[32]

The *Lawyers Collective v. Bar Council of India ors*[33] and *A.K. Balaji v. The Government of India*

[29] General Agreement on Trade and Services, 1995, Art VII.
[30] General Agreement on Trade and Services, 1995, Art XVI.
[31] General Agreement on Trade and Services, 1995,Art VI (4).

[32] CIVIL APPEAL NOS.7875-7879 OF 2015.
[33] W.P. No. 1526 of 1995.

& ors[34] were both brought before the Supreme Court by way of a final appeal. The Supreme Court settled the discrepancy in 2018 via the *Bar Council of India vs AK Balaji and Ors.*

The Supreme Court in a very progressive step, for the first time observed that the ambit of The Advocates Act also includes companies and firms in addition to individuals. Prior to this judgement, non-human entities involved in the legal profession were earlier not recognised by the Bar Council of India.

The Supreme Court held that:

i) The phrase "practice of profession" includes both litigation practice and non-litigation practice. The understanding of "practice of profession" has thus been given a wider meaning to include provision of advisory services, legal opinions etc.

ii) On the issue whether practice by foreign lawyers and law firms is permissible without fulfilling the requirements of the Act and Bar Council of India Rules, the Hon‟ble Supreme Court held that the regulatory framework for conduct of advocates applies to non-litigation practice as well. It was further held that the prohibitions as applicable under the Advocates Act are applicable to foreign lawyers and law firms also.

iii) On the issue whether there is a bar on foreign lawyers and law firms to visit India on a "fly in and fly out" basis for giving legal advice regarding foreign law, the Hon‟ble Supreme Court held a casual or temporary visit for giving advice of the foreign law will not be covered under "practice" and the same is permissible. A particular visit being a „casual‟ or „regular‟ shall be decided on a case to case basis.

iv) On the issue of foreign law firms/lawyers conducting arbitration in international commercial arbitration, the Hon‟ble Supreme Court also held there is no absolute bar and the same would be subject to the rules and regulations of the concerned arbitration institution or the provisions of Section 32 and 33 of the Act. It further held such foreign law firms/ lawyers will however be subject to Code of Conduct as applicable to legal profession in India.

v) Modifying the Order of the Madras High Court in Para 63(iv) that process outsourcing companies B.P.O. Companies providing wide range of customized and integrated services and functions to its customers like word processing, secretarial support, transcription services proof reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. The Supreme Court held that mere label of such

[34] AIR 2012 Mad 124.

services cannot be treated as conclusive. If in pith and substance the services amount to practice of law, the provisions of the Advocates Act will apply and foreign law firms or foreign lawyers will not be allowed to do so and will be decided on a case-to-case basis.

vi) Finally the Supreme Court directed the Reserve Bank of India (RBI) to not permit opening of any foreign law firms in the country, nor to renew the permissions already granted to foreign law firms until any further orders by the Supreme Court on the matter.

Hence, the Supreme Court capped the limit of permissible professional activities in a small circumference for foreign players in India.

RECENT DEVELOPMENTS

In 2017, the Government of India amended the Special Economic Zone Rules[35]allowing foreign entities to give Legal and Accountancy services in Special Economic Zones taking baby steps towards opening India‟s legal and accounting sectors to foreign parties. The notification amended the definition of „service‟ as per the SEZ Rules to omit legal and accountancy services under Rule 47 meaning henceforth excluding these two services from the list of services that could not earlier be outsourced from overseas entities in the Special Economic Zones.

Further, after the Supreme Court‟s order in 2018 and despite a settled position, RBI in its FED Master Direction No. 102015-16 has included professional or consultancy services rendered by persons resident outside India under Annexure C of Para 7 (ii). There have been amendments to the Foreign Exchange Management Regulation (FEMR) 2016 to include legal profession within the definition of "stand-alone basis."

These amendments were met with sharp opposition by the legal fraternity as the same allowed Foreign Law Firms to open operations in Special Economic Zones.[36] It was also pointed out that in passage of such amendment the concurrence of the Bar Council should be mandatory.

OBSERVATIONS

The Supreme Court has let the gates of practicing in non- litigious matters slightly ajar for International Firms or lawyers for mainly the reasons of proliferation of Trade and facilitation of the same via Arbitration. The Supreme Court also gave due interest in putting light on the money made by third parties on the basis of immorally funding litigation against other parties and basing their profits on the result of the litigation. In the judgment the Hon‟ble

[35] Special Economic Zones (Amendment) Rules, 2017, Notification No. G.S.R. 200(E) dated 7 March 2019.

[36] Bar Council of Delhi letter dated 29.07.2019, Sub: Representation against permitting Foreign Law Firms to open offices in SEZ Area in India, Ref. No. 1991/SF/2019.

Supreme Court discouraged this practice on for both Indian and Foreign Lawyers also for Third parties.

The "fly in fly out" principle has not been clearly defined in the judgment, as to what could be the restrictions or parameters to identify whether a visit would be „regular" or „casual" visit and the same has been left open to Bar Council of India or Union of India to make rules and regulations in this regard. The settled law still leaves damp ground for confusion as to tax liabilities and the appropriate visa compliances required for such „casual" or „regular" travels to India. Countries such as US and UK are very much receptive of Indian lawyers; India is being very strict as to the connotation of the rule of reciprocity as enshrined in the Act.

The Bar council is the proprietor of the lawyers who appear before the Courts of the Country but despite this they have not shown any aggressive interest in settling the position despite the case going on for more than a span of 10 years. The Bar Council should not only pass interim resolutions to settle any discrepancies but should also make specific rules to regulate BPOs, LPOs and other Firms or lawyers who come to India for arbitration or counseling their clients about International Law.

The tussle between the legal fraternities including the Bar & the Bench insistent on not allowing any foreign entities and the RBI pitted at regulating all kinds of economic activities needs a mediation, so that all interests can be well balanced. In order to make India a hub for foreign arbitrations it is imperative that the foreign entities are allowed and it is better to strictly regulate than to keep an exponential market sphere untouched and impregnable.