

# Dispute Resolution Hotline

March 21, 2018

## FOREIGN LAWYERS ALLOWED TO PRACTICE FOREIGN LAWS ON CASUAL VISITS TO INDIA

- Supreme Court allows foreign lawyers to give legal advice on foreign law involving diverse international legal issues on "casual" visits to India;
- Court holds that 'fly in fly out' may amount to practice if it is on a frequent basis. Further, casual visits may not be 'practice of law' and whether a visit is casual or frequent would depend on facts of each case. Bar Council or Union of India at liberty to frame appropriate rules.
- Supreme Court holds that "practice of law" includes not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion;
- Foreign lawyers may not be debarred from conducting arbitration proceedings in India. Specifically, in relation to international commercial arbitration, they may be governed by the code of conduct applicable to the legal profession in India.

### INTRODUCTION:

Recently, the Supreme Court of India ("**Supreme Court**") in *Bar Council of India v. A K Balaji & Ors* settled the law on the interpretation of words '*practice the profession of law*', the scope of foreign lawyers to practice foreign law in India, scope of foreign lawyers to participate in arbitration proceedings in India. Previously, the Madras High Court ("**Madras HC**") and Bombay High Court ("**Bombay HC**") had ruled on this subject. The Bar Council of India ("**Bar Council**") filed appeal against the Madras HC decision, while Global Indian lawyers challenged the Bombay HC decision before the Supreme Court.

### DECISION OF THE MADRAS HIGH COURT<sup>1</sup>

A writ petition was filed before the Madras HC where forty parties were arrayed as Respondents (including 32 foreign law firms). The Petitioner sought directions against the foreign law firms or foreign lawyers allegedly practising the profession of law in India.

Madras HC held that:

- foreign law firms, foreign lawyers cannot practice the profession of law in India (either litigation or non-litigation), unless they fulfil the requirement of the Advocates Act, 1961 ("**Act**") and the Bar Council of India Rules ("**Rules**").
- foreign law firms or foreign lawyers can visit India for a temporary period on a 'fly in and fly out' basis, for the purpose of giving legal advice to their clients regarding foreign law or their own system of law and on diverse international legal issues.
- foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.
- the B.P.O. Companies providing wide range of customized and integrated services and functions to its customers<sup>2</sup> do not come within the purview of the Act or the Rules. However, in the event of any complaint made against these B.P.O. Companies violating the provisions of the Act, the Bar Council may take appropriate action against such erring companies.

### DECISION OF THE BOMBAY HIGH COURT:

The substance of challenge before the Bombay HC was slightly different in so far as the Reserve Bank of India ("**RBI**") had already granted permission to few law firms to open a liaison office in Mumbai. This was challenged, and Bombay HC essentially opined on whether the practice in non-litigious matters amounts to 'practising the profession of law' under Section 29 of the Act. Issues also arose under the earlier foreign exchange regulatory regime (FERA, 1973) which do not have a bearing on the interpretation of the Act and Rules.

Importantly, Bombay HC held that the expression '*to practise the profession of law*' in Section 29 of the Act is wide enough to cover the persons practising in litigious matters as well as persons practising in non-litigious matters. Notably, the Bombay High Court did not address whether foreign lawyers can practice foreign law in India.

### JUDGMENT AND ANALYSIS:

- Supreme Court has held that 'practice the profession of law' includes both litigation as well as non-litigation practice. In this regard, the Supreme Court held that right to practice is genus of which right to appear and conduct cases is specie.<sup>3</sup> It was additionally observed that the ethics of legal profession apply not only when an

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advocate appears before the Court but the same also applies to regulate practice outside the Court.

Supreme Court also held that regulations applicable to individual advocates would apply to firms and other bodies and therefore, firms could not do what individual lawyers were prohibited from doing.

*Analysis:* The Supreme Court has upheld the view taken by the Madras HC and Bombay HC, and did not materially diverged from earlier principles.

- b. Based on a review of the scheme in Chapter IV of the Act, Supreme Court concluded that advocates enrolled with the Bar Council alone are entitled to practice law. Therefore, in accordance with the Act a foreign lawyer could appear only with prior permission of the court or tribunal.<sup>4</sup>

*Analysis:* The above determination is consistent with the view taken by the Madras HC and Bombay HC.

- c. Supreme Court has allowed casual visit of foreign lawyers for giving legal advice regarding foreign law on diverse international legal issues. Madras HC had allowed the foreign lawyers to ‘*fly in and fly out*’ for giving legal advice regarding foreign law on diverse international legal issues. Supreme Court observed that ‘*fly in and fly out*’ may amount to practice of law if done on a regular basis, and concluded that whether a particular visit qualifies to be a frequent visit, or a casual visit has to be determined on a case to case basis, and Bar Council or Union of India are at liberty to make appropriate rules in this regard.

*Analysis:* It seems that Supreme Court has narrowed the scope of foreign lawyers to practice foreign law from ‘fly in fly out’ to a “casual” visit. It remains to be seen whether Bar Council or Union of India enacts rules and sets out what constitutes casual visit and regular visit. The expression “casual” visit has however not been clarified by the court.

- d. Supreme Court has opined that foreign lawyers are not completely debarred to conduct arbitration proceedings. The court specifically pointed out that in respect of disputes arising out of a contract relating to international commercial arbitration, proceedings may fall under Sections 32 and 33 of the Act read with the provisions of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”). While foreign lawyers may not be debarred from conducting arbitration proceedings, however, they will be governed by code of conduct applicable to the legal profession in India, and Bar Council or Union of India are at liberty to frame rules.

*Analysis:* The Supreme Court has allowed foreign lawyers to participate in the arbitral proceedings, subject to them being governed by code of conduct applicable to legal profession. It remains to be seen whether Bar Council or Union of India enacts appropriate rules in this regard.

- e. In relation to BPOs and LPOs, Supreme Court held that mere label of word processing, secretarial support, transcription services, proof reading services, travel desk support services, etc. is not conclusive to suggest that such services do not come within the purview of the Act or the Rules.

*Analysis:* Supreme Court upheld the view of the Madras HC that the BPO companies providing range of customized and integrated services and functions to its customers may not violate the provisions of the Act, only of the activities in pith and substance do not amount to practice of law. However, mere label of word processing, secretarial support, transcription services, proof reading services, travel desk support services, etc. is not conclusive to suggest that such services do not come within the purview of the Act or the Rules. If the “pith and substance” of the services amount to practice of law, then the provisions of Act will apply and foreign law firms or foreign lawyers will not be allowed to provide such services.

While the Supreme Court has more or less reiterated rulings of the Madras HC, the observations in relation to “casual” visits are most important. The Supreme Court did not expand on this expression, however, courts have interpreted this expression in the context of taxation to mean event of a non-recurring nature. Court acknowledged that whether a visit was casual or frequent would depend on facts of the case, however, absent facts to the contrary, Bar Council may regard frequent visits as amounting to practice of law.

The ruling that foreign lawyers would be amenable to the jurisdiction of Bar Council even in respect of international commercial arbitrations appears to be contrary to the internationally accepted practice of foreign lawyers freely practising before international commercial arbitral tribunals. While Supreme Court has not placed any express restrictions and has only acknowledged Bar Council’s right to regulate, it is hoped that any regulation is consistent with the spirit of Government of India’s intention to promote India as an international arbitration hub.

Supreme Court’s observations in relation to LPOs must also be seen in the context of an internationally accepted practice of outsourcing labour intensive work to non-lawyers. It is hoped that Bar Council recognizes these benefits of a globalized service economy which provides employment and foreign exchange to India as a result of services allied, incidental or ancillary to ‘practice of law’. Given Government of India’s multi-pronged approach to promote India as an investment destination and increase ease of doing business in India, it is hoped that any measure Bar Council is consistent with the spirit of the Supreme Court’s ruling and Government of India’s macro-economic policy.

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You can direct your queries or comments to the authors

<sup>1</sup> Please [click](#) to read our hotline on the Madras HC decision.

<sup>2</sup> Such as ‘...*word processing, secretarial support, transcription services, proof reading services, travel desk support services, etc.*’

<sup>3</sup> Supreme Court referred to Pravin C Shah v. K A Mohd. Ali (2001) 8 SCC 650 and Ex Capt Harish Uppal v. Union of India (2003) 2 SCC 45

<sup>4</sup> See Section 32 of the Act

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