

**BRIEF CASE** • M J ANTONY

A weekly selection of key court orders

**Contract hits impossible hurdle**

The law says that a contract to do an act, which turns out to be impossible of performance after the agreement, becomes void and the person who suffers must be compensated. If environment restrictions not contemplated in the contract frustrate a project and it becomes impossible or impracticable to implement it, the contractor deserves compensation, according to the Supreme Court. The contractor who could not undertake a housing project because of environment curbs not contemplated by the government at the time of signing the agreement was compensated in the judgment, Delhi Development Authority vs Kenneth Builders. The development authority (DDA) gave to a contractor a housing project in the ridge area of the capital, which is an ecologically sensitive area. At the time of the contract, this fact was not taken into consideration by either party. Later, it was found that the project could not be undertaken because of various regulations to protect the area. Any development activity at the site required sanction from the Ridge Management Board and the Supreme Court itself, because of environment litigation. Though DDA granted the contract on the "as is where is" basis, the construction could not be undertaken which is prohibited by law and without permission. Invoking Section 56 of the Contract Act, the court asked DDA to refund the deposit made by the contractor with interest.

**Revived unit must pay tax dues**

An industrial unit which was protected by the Sick Industries Act during revival plans could be asked to pay its tax dues when it is revived, the Supreme Court ruled in the case, Director General of Income Tax vs GTC Industries. The firm was declared sick in 1997 and referred to BIFR. After a draft rehabilitation scheme was circulated, the revenue authorities demanded ₹366 crore in taxes. However, it was barred from recovering it due to the SICA provisions. In 2007, the net worth of the company became positive and it asked the board to de-register it and it was done. Income tax authorities now demanded ₹761 crore outstanding. The company, which allegedly alienated some of its properties, moved the board for stay of any coercive steps. It was granted. After more appeals, the high court asked the company to approach the board. The authorities appealed to the Supreme Court. It allowed the appeal and stated that the high court had gone wrong as the company has been revived and the scheme had also expired in 2011. So, the tax authorities can go ahead and recover the arrears.

**Mining after expiry of licence**

The Supreme Court last week indicted the Ministry of Environment and Forests for allowing a mining firm to continue mining though the local residents complained that its licence had expired long ago. In this case, Talaulicar & Sons vs Union of India, the licence was granted for two years. The regulations permitted five years, which ended in 2010. When the mining continued, some residents moved the Bombay High Court and the National Green Tribunal against the operations. The high court found that operations in the Sanieem Sacorda iron ore mine was without sanction. The firm appealed to the Supreme Court. It agreed with the high court and stated that regulations, including a public hearing, have not been followed. It asked the ministry to take a fresh look at the issue and take a decision after scrupulously following the regulations and all factors leading to the environment impact assessment including effective public hearing preceded by due publication in the media.

**Auction of property cancelled**

In a dispute over the sale of property of a liquidated company, the order of the company court is binding on the recovery officer under the Debt Recovery Act, the Supreme Court has held in its judgment, Anita International vs Tungabadra Sugar Works Mazdoor Sangh. The winding up proceedings of Deve Sugars Ltd of Karnataka gave rise to complex litigation in the Madras and Karnataka High Courts. The Madras High Court appointed an official liquidator. State Bank of Mysore, which had extended loan to the firm, moved the debt recovery tribunal in Karnataka and got a recovery certificate. This was challenged in the Karnataka High Court by the workers. Ultimately, the recovery officer sold the property to Anita International for ₹10.25 crore, which was alleged to be far below the actual price. Ending the multifarious litigation, the Supreme Court cancelled the sale made by the recovery officer, holding that his sale was in utter violation of the company court order.

**Garware loses claim over 'suncontrol'**

The Bombay High Court last week rejected the petition of Garware Polyester Ltd to stop 3M Company of US and its Indian subsidiary 3M India Ltd from using the words sun control/suncontrol for their products. Garware alleged that they were its registered trade marks for window films for sun protection and the rival firms had infringed the right and was also guilty of 'passing off'. The high court ruled that the expression 'sun control' is purely descriptive and ordinary words found in any common dictionary. It only indicates the kind, quality and intended purpose of these films. It describes their main characteristic, which is to block certain effects of sunlight.

**Bank must protect cash in transit**

If proper security is not provided by a bank for transiting huge cash and it is robbed on the way, the insurer would not be liable, the National Consumer Commission ruled last week, setting aside the order the Gujarat state commission ordering New India Assurance to recoup the loss to a cooperative bank in Ankheswar. According to the indemnity policy, the bank was required to employ two guards with firearms when the amount is more than ₹10 lakh. However, the Navsarjan Industrial Bank sent two clerks and a guard with a wooden stick to State Bank of India to encash a cheque of ₹20 lakh. While returning with the cash, two men on bike fired the guard injuring him. They carried away the trunk with cash. The coop bank sued the insurance company. The state commission allowed the claim. New India appealed to the national commission. It set aside the state commission judgment and ruled that the coop bank had infringed the conditions in the policy regarding the number of guards with firearms. The commission rejected the contention of the coop bank that it was not told about those conditions. It also did not believe the coop bank which pleaded that Ankheswar being a small city, it was difficult to find armed guards.

# A divided house queers the pitch

The Bar Council of India's proposal to open up legal services has brought to the fore divisions within the profession

SUDIPTO DEY

An India market survey by a consultancy firm for an international client in 2014 threw up some interesting numbers. Of the top 100 foreign law firms that have undertaken India-related work, 69 have a dedicated India desk, mostly out of Singapore or London. Thirty of these were America-based, and 19 from Britain.

Since then, action in the India market has intensified. The government has over the past two years set the ball rolling to liberalise legal services and allow foreign lawyers and law firms to practise international law in India. In anticipation of the changes, large and mid-sized law firms, under the aegis of the Society of Indian Law Firms, that had so far been resisting the move, changed tack. They pitched for a phased and sequential approach for entry of foreign firms, spread over five to seven years.

However, the recently released draft rules for entry of foreign lawyers and law firms by the sector regulator, Bar Council of India, were akin to setting the cat among the pigeons. There is no mention in the draft rules of removing the restriction on Indian law firms and lawyers when it comes to publicising or advertising their services. It is silent over the issue of a phased entry for foreign law firms or removal of ambiguities around ownership structures.

Instead, it seeks to allow foreign lawyers and law firms to register with the Bar Council for a prescribed fee, open offices in the country, hire Indian lawyers or enter into partnerships with Indian law firms, among others.

"The Bar Council has directly jumped to stage-3 of our proposal. Internal liberalisation was a pre-con-



**CAUGHT IN PROCEDURAL HURDLES**

**KEY DRAFT BAR COUNCIL RULES FOR FOREIGN LAWYERS/ LAW FIRMS**

- Allowed to practise international arbitration and dispense international law in India on the principle of reciprocity (but cannot appear in the courts)
- The foreign law firm could be a limited liability partnership, company or a corporation
- Register with the Bar Council with a fee of \$25,000 for individual lawyers, \$50,000 for firms, private limited partnerships, company, limited liability partnership
- Allowed to open offices in India, engage or hire Indian lawyers, enter into partnership with Indian law firms
- Come under the ambit of the rules and regulation of Bar Council of India

**WHAT THE BIG BOYS WANT**

- Internal liberalisation of the legal profession as a pre-condition to opening up of the legal services

- A phased entry for foreign law firms/ lawyers spread over five to seven years

- Remove restriction on Indian law firm/lawyers to publicise/advertise
- Remove ambiguities around ownership structure. Indian law firms are not allowed to incorporate under the company law, or operate as limited liability partnership

**GREY AREAS THAT NEED CLARITY**

- Do the draft rules envisage creating two different playing fields — one for domestic law firms, and the other for foreign players?
- How does the Bar Council monitor whether foreign firms are dispensing Indian law to their clients?
- Can Indian lawyers hired by foreign law firms practise Indian law?
- How does partnerships between foreign and Indian law firms work under different ownership structures?

dition before opening of the sector," said Lalit Bhasin, president, Society of Indian Law Firms. The association is currently preparing its response to the Bar Council's proposals, expected to be discussed among various stakeholders in August.

With the timelines for entry of foreign players getting blurred, what is irking many large domestic entities is the impact on their revenue, largely coming from cross-border commercial deals. Till now, foreign law firms and large domestic players enjoyed a cosy and symbiotic relationship, charging a premium for their services, with each referring businesses to each

other. With foreign firms now getting a foot in the India door, the economics could go for a toss. Even as getting business becomes more competitive, the costs — namely remuneration for top talent — are likely to go northwards. "The war for talent is here to stay, along with the churn in the market," said Bithika Anand, chief executive at Legal League Consulting.

Many are questioning the need for creating a dual playing field, one for domestic players and another for foreign ones. "We are in favour of creating a level playing field for domestic players with the entry of foreign law firms," noted Ashok Sharma, president,

Indian Corporate Counsel Association. Many foreign lawyers feel the high fee structure for registration of foreign lawyers and law companies, and the cumbersome process for registration, raise the bar for entry. According to Erik Wulff, partner, DLA Piper LLP, a US-based legal entity, the fees appear disproportionate to the cost of the administrative process of evaluating applications. Some like advocate Anand Prasad feel the high fee structures might also work against Indian law firm's efforts to go international. "In fact, the cleverly drafted rules provide foreign firms limited room for their operations," he adds.

One of the issues relates to recognition of reciprocity arrangements by the Bar Council of India. As Wulff points out there is little clarity on how BCI will look at the terms of reciprocity when a multi-jurisdictional law firm opens office in India. "BCI will need to look at these situations realistically and practically," he adds. Also, there is no clarity on whether Indian lawyers hired by foreign law firms can advise on Indian law.

As the turf battle between big Indian law firms and their international brethren intensifies, the landscape for corporate legal services is headed for a churn for some time to come.

**DEBATE**

Experts share insights on why experiments in the use of artificial intelligence and automation in legal services are raising questions over the impact on jobs, remuneration and company structures

## 'Artificial intelligence will reshape the business model'



VIKRAM SHROFF

It's the era of man versus machine. And, we lawyers are equally at risk. Technology was always disruptive — however, the pace at which artificial intelligence (AI) is developing has caught most unaware. To illustrate:

IBM's ROSS, which gets smarter with time as it "learns" from user history, can research 200 million pages of simple text in a second. Symantec's Clearwell system can scan and summarise 500,000 documents in two days. LegalZoom and RocketLawyer allow people to create wills, incorporate businesses and register intellectual property rights.

Over the past decade,

automation has driven considerable change in the legal sector. Leading law firms and legal outsourcing are already using or testing AI for contract creation and management, discovery, knowledge management and compliance functions.

AI will reshape the underlying business model of our profession. Several law firms have formed joint ventures or bought firms to use their technology. AI will eventually help create virtual law practice that combines the strength of humans and machines — in fact, the "law firm" Robot, Robot & Hwang's senior partners are two super-computers, each with their own areas of specialisation!

Given that our documents, legal research and diligence will be done better by intelligent machines, lawyers will need to develop skills and migrate to areas where they enjoy comparative advantage — negotiation, business development, client handling and

intuitive analysis.

Richard Susskind, in "The End of Lawyers?" claims that the jobs of many traditional lawyers will be eliminated by smart systems and processes. But, will clients accept legal advice from robots? Will IBM's Watson be able to replace the judgment of a senior partner? Will we need to draw professional distinction between AI-generated documents and actual advice? Will legal regulators allow AI to practice law? And, will technology be a disruptor or a facilitator for our profession?

Technology should be treated not as a replacement for lawyers but a component of legal work. It will take away from us repetitive and less meaningful work. It's no longer a question of "if" but "when". If progress in AI continues unabated, AI systems may exceed human in general reasoning ability.

The writer is the head of HR Law at Nishith Desai Associates

## 'Expect changes in how large firms organise, work'



SUDIPTA BHATTACHARJEE

The rise of machines is now a reality in the knowledge-based service sectors, especially those dealing with a "rule-based" ecosystem like legal services. Recent news of an artificial intelligence (AI) lawyer Chatbot overturning 160,000 parking tickets and an AI system achieving 70 per cent accuracy in predicting outcome of court cases created ripples.

Certainly, the rise in AI technologies is going to be disruptive apropos the legal profession; legal research and repetitive manual functions like filing, generating standard templates and basic review of documents are amenable to full automation. However, the exact extent of such disruption

remains unclear at this stage.

When it comes to qualitative analysis/strategic inputs as required in high-end legal advice, humans should still rule the roost. While AI can analyse 'rules' and precedents, choosing the right strategy from often conflicting conclusions emerging from such analysis is often intuitive; for AI to beat human intuition in the legal sphere will require significant advancements in 'Big Data' analysis. Specifically in the Indian context, given that our overall legal ecosystem is still quite rudimentary and is extensively fueled through human discretion rather than 'rules', in the near term, I don't foresee a massive impact. However, in the medium term, we can expect fundamental changes in the manner in which larger law firms organise and work as the focus will gravitate towards high-end legal advisory.

Essentially, consumers of legal services receive two

things — a work product that meets her requirement (which may be "substitutable" by AI); second, assurance of quality/consequence by the lawyer. This latter can only be provided by a competent lawyer, backed by insurances and regulated quality control/responsibility requirements — this aspect is probably "un-substitutable". Till the second aspect is not substituted through AI, no new legal implications vis a vis AI-based legal service delivery is foreseen. However, the traditional concepts of 'deficiency in service' will need to be calibrated to an AI scenario — it is likely that a certification-based model evolves wherein law firms using AI of certified standards are subject to a lower rigour as opposed to other firms who may be subject to a 'strict liability' regime apropos "deficiency".

The writer is principal-tax controversy management, Advaita Legal

## 'Our primary focus is profitability'

It has been more than a year that the country's largest law firm was replaced with two new firms — Shardul Amarchand Mangaldas & Co. and Cyril Amarchand Mangaldas. Sudipto Dey caught up with CYRIL SHROFF, managing partner, Cyril Amarchand Mangaldas (CAM), on the firm's journey since the re-launch, the impact of entry of foreign law firms and changes in the corporate litigation landscape. Edited excerpts:



**CYRIL SHROFF**

Managing partner, Cyril Amarchand Mangaldas

**Last year you had indicated plans to be a 1,000-strong lawyer firm. Where are you in those plans?**

In the last one year our headcount has grown, we are now about 630 lawyers. It is not a race for numbers for its own sake. We aspire to be the top legal services firm in Asia by 2025, delivering world-class service to our clients through size, practice coverage and quality. We are currently focusing on profitability and the number of lawyers is only relevant if it delivers profit, by leverage (i.e. partner to associate ratio). Emerging markets, like India, are fee-sensitive. The challenge is to arrive at an optimal leverage ratio

that ranges between 1:4.5 and 1:6. The gap between us and the next firm is over 200 lawyers.

**So, you are not looking at increasing the number of lawyers?**

At this juncture our primary focus is on profitability. We may look at increasing the number of lawyers at a later stage.

**Given the recent partner churn in the industry, how challenging has it been to manage the firm over the past few months?**

Several third-party reports have validated that we continue to be at the top in every practice area by a big margin. Maintaining our top position has not been easy. But, it has been exciting. Despite the turbulence, we managed to keep the real core of the firm together. Every major firm in the fraternity has been affected by the churn. But, on a net basis, we have gained significantly.

**Looking back, is there anything you would have done differently?**

I always look ahead. Our main goal was to maintain the No. 1 market position and our strategy over the past year has obviously worked.

**How do you look at the issues around the entry of foreign law firms into India?**

Our institutional response to the draft rules proposed by the Bar Council of India is being prepared by the Society of Indian Law Firms. Personally, I would welcome it if it is done in a structured and phased manner, with proper safeguards.

**What is your assessment of the impact that the opening up of the legal services will have on domestic legal fraternity?**

India is a bright spot among the emerging economies. Given the opportunities in the country, I expect many dual qualified international lawyers to come back to India over the next 12 to 18 months. The United Kingdom has been a big destination for Indian legal talent. With Brexit, I expect legal talent to head back to India over the next two-three years. Indian law firms will

have to heavily invest in technology, spruce up their business support services — something we have done over the years — to bridge the gap between them and foreign law firms. Firms that are under-invested on technology will get overwhelmed by foreign firms, very quickly.

**Do you see any changes in the corporate litigation landscape, now that we have the Bankruptcy Code, the NCLT in place, while efforts are on to have GST by next year?**

An easier and speedier mechanism for settling insolvency is what the market needed. The real change will only be seen once the various systems and infrastructures proposed under the Code are in place and work cohesively. The Bankruptcy Code will transform the way corporate, and investors plan, implement and assess their business. The litigation landscape will change a lot. It is a priority practice focus for us.

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