Dispute Resolution Hotline

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FOREIGN LAW FIRMS DEBARRED FROM PRACTICING IN INDIA

A long-pending and contentious litigation[1], petitioning against allowing foreign law-firms to set up liaison office in India has been finally concluded at the Bombay High Court ("**High Court**"). The High Court has ruled that permissions granted by the Reserve Bank of India ("**RBI**") to some foreign law firms in early nineties to set up liaison office in India, is not valid in law. High Court has also held that practice of law in India, both non-litigious and litigious, requires prior enrolment under the Indian Advocates Act, 1961 ("**Advocates Act**").

In this context, the High Court has observed that a person can be said to be practising in non-litigious manner *"when he represents to be an expert in the field of law and renders legal assistance to another person by drafting documents, advising clients, giving opinions, etc."*

This judgment of the High Court could have far reaching implications not only in respect of foreign lawyers practising law in India but also in respect of other professionals such as Company Secretaries or Chartered Accounts who are not enrolled to 'practise' law as Advocates and may render advise on various aspects of corporate and taxation law.

FACTS OF THE CASE

In the early nineties, it appears that some US and UK based law firms ("**Foreign Law Firms**") applied to the Foreign Investment Promotion Board for permission to operate in India, which permission was denied.

Foreign Law Firms (namely White & Case, Chadbourne & Parke and Ashurst Morris Crisp) then sought permission from RBI under S. 29 of Foreign Exchanges Regulation Act, 1971[2] ("**FERA**"), since repealed, to set up a liaison office in India to conduct the activities of, amongst other, "coordination, communication between its head office, clients, various governments; establish business contacts, explore foreign investment opportunities in India and other administrative functions". The RBI granted permission under FERA, with certain restrictions, such as, the liaison office shall not enter into contracts on its own name, its expenses shall be met by its head office etc.

In 1995, Lawyers' Collective ("**Petitioners**"), a public trust, filed a writ petition in the High Court against the Foreign Law Firms and RBI. Some other interested parties joined in the proceedings, either in support or against. The issues petitioned before the High Court were:

a. The RBI could not grant Foreign Law Firms permission to set up liaison office in India under FERA; and

b. Foreign Law Firms could carry out liaising activities in India only upon due enrolment as 'Advocate' under provisions of Advocates Act.

Petitioners argued that RBI has no power under S. 29 of FERA to allow any foreign law firm to practice law in India, since practice of law is not in the nature of trade, commerce or industrial activity (for which, RBI is empowered to allow setting up of liaison office). By citing a plethora of judgments, from Indian Supreme Court as well as American and Australian courts[3], Petitioners contended that the practice of law includes practice in both litigious as well as non-litigious manner. Supreme Court of India has held that "*The right to practice, no doubt, is the genus of which the right to appear and conduct cases in court may be a specie*"[4].

RBI argued in defense that it acted within the scope of its authority under S. 29 of FERA and it was not concerned with the provisions of the Advocates Act. Foreign Law Firms argued that the constitutional powers of the Parliament vested under relevant entries of VII Schedule[5], which only allows Parliament to legislate to regulate practice of law in Supreme Courts and High Courts. Therefore, as such, the scope of the Advocates Act does not transmute into practice of law in non-litigious manner which is otherwise covered under provisions of another entry of the Constitution.

Government of India (a defendant in this matter) stated that practice of foreign or international law involving drafting legal documents or giving opinions does not require enrolment with the Bar Council.

JUDGMENT

THE HIGH COURT HELD THAT:

· Since Foreign Law Firms' parent provide legal advice to clients all over the world, their liaison office in India, even though functioning as coordination and communication channels, would also be conducting activities in relation to providing legal advice. In other words, the activity of liaison office are "inextricably linked" to the head office of Foreign Law Firms.

· RBI's authority under S. 29 of FERA is limited to granting permission to foreign entities to set up a branch or liaison office in India for carrying any activity of trading, commercial or industrial nature. Based on judicial precedents[6], the

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High Court held that since the practice of law is a profession and not a business, trade or commerce, as covered under the scope of S. 29 of FERA. Therefore, the RBI has no authority to grant permission to foreign law firms to establish liaison office in India.

· The objects[7] of the Advocates Act is inclusive and is meant to regulate persons practicing law in any part of India as well as persons practicing the profession of law in any court, including Supreme Court. If it were to be held that practice of law did not include non-litigious practice, the purpose of Advocates Act would fail since any professional misconduct of an advocate while conducting non-litigious practice would not be punishable.

High Court also directed the Government of India to act expeditiously in relation to the issue of foreign law firms practicing the profession of law in India, as this issue has been pending for over 15 years.

OUR ANALYSIS

This judgment establishes with sufficient substance that under the Advocates Act, practice of law in India, includes litigious as well as non-litigious practice. The Advocates Act does not differentiate practice of foreign law or Indian law, when mandating that no person shall practice law in India without enrolment under the Advocates Act. Jurisprudence in India and abroad is clear in this respect and activities in relation to providing non-litigious advice cannot be left unregulated on the grounds that the Advocates Act has limited application only to litigious practice.

The constitutional provisions of Entries 77 and 78, though specifically limited to legislation for practice in High Court and Supreme Court, can very well be said to include the practice of law generally in India. The extension of Parliament's constitutional powers to regulate practice of law in non-litigious manner can squarely fall within the concept of 'pith and substance'[8] widely recognized under constitutional jurisprudence of India.

The Advocates Act provides for enrolment criteria[9] for persons to register as Advocates with Bar Councils. Non-Indian nationals could enroll as 'Advocate' under Advocates Act if their country of nationality allows duly qualified Indian Advocates to practice law on a reciprocal basis and if they fulfill certain other eligibility criteria such as educational qualification, minimum age etc. This eligibility criteria for enrollment as advocate or attorney or solicitor, is applicable in other jurisdictions as well.

Sharing our firm's own experience, we have opened offices to practice Indian law in two foreign locations — Palo Alto (Silicon Valley) and Singapore. California state allows setting up of foreign law firms to practice foreign law in California, only after due enrolment with the State Bar of California. Similar provisions exist in Singapore where a foreign lawyer is required to enroll with the Attorney General of Singapore before starting the practice of foreign law in Singapore. Instead of just complying with those countries foreign exchange laws, we specifically requested and obtained enrolment with the State Bar of California and Attorney General of Singapore respectively. The High Court ruling seems to imply that such practice must also be carried out in India.

While the judgment brings in some clarity on the subject, a number of questions are still left unanswered. Take for example, the situation of a foreign lawyer giving advice on foreign law, while in India for a temporary period. In that event, could a foreign lawyer be said to be 'practicing' law in India? So the question that remains unanswered is that where does one draw a distinct and unambiguous line to establish a professional practice to be 'practice' of law?

Prima facie, 'practice' would involve an element of continuity of certain activity. Some of the benchmarks to establish 'practice of law' in India, may therefore include:

1. Length, continuity and frequency of stay of a foreign lawyer in India;

2. Whether any fixed workspace is available at the disposal of a foreign lawyer or a law firm in India;

3. The kind of activity and nature of work performed in India.

Therefore, in our view, sporadic or a short visit of a foreign lawyer should not tantamount to practice of law in India.

It would now be for the Central Government/ Bar Council to legislate and frame appropriate rules in consultation with all the stake holders, in respect to entry of foreign law firms in India. Until such time, India would be closed to practice of any law, without due enrolment under qualifications prescribed under the Advocates Act.

- Kabeer Shrivastava & Rajesh Simhan

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1 Copy of judgment available on: http://bombayhighcourt.nic.in/data/judgements/2009/OSWP8152695.pdf (last accessed on December 24, 2009 at 2100 IST)

2 "Restrictions on establishment of place of business in India:

29. (1) Without prejudice to the provisions of section 28 and section 47 and notwithstanding anything contained in any other provision of this Act or the provisions of the Companies Act, 1956 (1 of 1956), a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a company (other than a banking company) which is not incorporated under any law in force in India 2[***] or any branch of such company, shall not, except with the general or special permission of the Reserve Bank,—

(a) carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the Reserve Bank has been obtained under section 28; or

3 New York Country Lawyers Association (Roel) reported in 3 N.Y. 2D 224; ".....Whether a person gives advice as to New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice. Likewise, when legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law whether the documents be prepared in conformity with law of New York or any other law. To hold otherwise would be to state that a member of the New York Bar only practices law when he deals with local law, a manifestly anomalous statement.

Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business
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Supreme Court of South Carolina in its opinion No. 25757 reported in 2003 S.C. Lexis 293: “Based on the foregoing analysis, we hold that when nonlawyer title abstractors examine public records and then render an opinion as to the content of those records, they are engaged in the unauthorized practice of law. But if a licensed attorney reviews the title abstractor’s report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law.”

Legal Practice Board case (2002) Supreme Court of Western Australia, etc.

4 Harish Uppal case reported in (2003) 2 Supreme Court Cases 45

5 Schedule VII, List I, Entry 77: Constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such court), and the fees taken therein; persons entitled to practice before the Supreme Court

Schedule VII, List I, Entry 78: Constitution and Organization (including vacations) of the High Court except provisions as to officers and servants of High Court; persons entitled to practice before the High Court.

6 MP Electricity Board v/s Shiv Narayan reported in (2005) 7 Supreme Court Cases 283

7… (1) The establishment of an All India Bar Council and a common roll of advocates, and advocate on the common roll having a right to practice in any part of the country and in any Court, including the Supreme Court;…

8 D D Basu, Constitutional Law of India: The doctrine means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the Legislature which enacted it cannot be held to be invalid, merely because it incidentally encroaches on matters assigned to another Legislature. (Referencing various Supreme Court of India judgments)

9 Section 24 of Advocates Act