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ANALYSIS OF NEW RULE OF BAR COUNCIL OF INDIA - FOREIGN LAWYERS AND LAW FIRMS TO PRACTICE IN INDIA.

AUTHORED BY - RADHA SHARMA

ABSTRACT

The legal profession is one of the ancient professions, not only in the country but in the world also. Since very long standing time, it has been observed as a noblest profession. Government and administration can't run properly without adequate laws and without the contribution of the legal profession. In 1961 existing Advocates Act enacted for the purpose of amending and consolidating the law relating to legal practitioners. This act also makes provision for establishment of State Bar Council and Bar Council of India. "One of the important function of Bar Council of India is to frame rules to practice the profession of law by advocates. In exercise of it's power the Bar Council of India has also framed rules called Bar Council of India Rules in exercise of its powers under [Section 49](#) of the Act. In Chapter III of Part VI of the Rules dealing with the 'Conditions for right to practice', are found rules frame under [Section 49\(1\)\(ah\)](#) of the Act which deals with the conditions subject to which an advocate shall have the- right to practice, and the circumstances under which a person shall be deemed to practice as an advocate in a court¹." In the present research paper I will analyze the new rule of Bar Council of India **vide notification dared 10th March, 2023 namely the Bar Council of India Rules for registration and regulation of foreign lawyers or foreign law firms to practice the profession of law in India.**

Introduction

In other words, the legal profession is considered as noble as virtue and as important as justice. The lawyer helps the court to reach at a right decision because lawyer collects all evidences pertaining to the case, then presents all evidences to the court and helps to court to reach at right decision. *In the*

¹ Haniraj L. Chulani v. Bar Council of Maharashtra and Goa, AIR 1996 SC 1708

*matter of Madhav Singh*² the Court has observed that advocates and pleaders are enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice but also for giving professional advice for which they are entitled to be paid by those members of the public who require their services. It has rightly been observed that a sound system of administration of justice must have three basic ingredients, namely a well-planned body of laws based on wise concepts of social justice, a judicial hierarchy comprised of the Bench and the Bar, learned in the law and inspired by high principles of professional conduct and existence of suitable generation to ensure fair trial³.

Chapter IV of the Rules lays down nature and extent of law practice by a foreign lawyer and foreign law firm. Rule 8 of Bar Council of India Rules provides the nature and extent to which a foreign lawyer is authorized to practice law in India⁴.

The Bar Council of India recently made the Rules for the Regulation of Foreign Lawyers and Foreign Law Firms in India, which allows them to practice the profession of law in India.

However, it does not allow them to appear before courts, tribunals or other statutory or regulatory bodies. The BCI has been opposed to allowing foreign law firms and foreign lawyers to practice in India for more than a decade. But now, the BCI has reasoned that this move will address concerns over FDI flow in the country and will make India a hub for international commercial arbitration. This rule will bring legal clarity for practicing legal profession with regard to foreign law firms and foreign lawyers.

The BCI said "it is determined to implement these rules to enable foreign lawyers and foreign law firms to practice foreign law and various international law and international arbitration matters in India on a reciprocity basis in a well-defined, regulated and controlled manner."

As per section 29 of Advocates Act, 1961⁵ "there shall be only one class of persons entitled to practice the profession of law, namely, advocates". Under the Advocates Act, 1961, only advocates registered with the Bar Council are permitted to practice law in India. All others may appear only with the permission of the court, authority or person before whom the proceedings are pending.

² *In the matter of Madhav Singh*, AIR 1923 Pat 185

³ C.L. Anand, *General Principles of Legal Ethics*, p. 39

⁴ Bar Council of India Rules, Rule 8 Chapter IV

⁵ Section 29 of Advocates Act, 1961

New rule framed by Bar Council of India permits foreign advocates and law firms to register with the Bar Council of India only if they are permitted to practice law in their home countries. However, they cannot practice with regard to litigious matter in the field of Indian law. They will be permitted to work Non - Litigious matters such as joint ventures, mergers and acquisitions, intellectual property matters, contract drafting and other related matters on a reciprocal basis. They shall not be permitted to do any work related to property transfer, title investigation or any other kind of similar work. Same restriction shall also applicable to Indian lawyers working with foreign engaged only in "non-contentious practices".

Points to be considered for practice in India:

Foreign advocates must follow the rules and regulations set by the Bar Council of India to practice the profession of law in India. The rules for foreign advocates to practice in India are primarily governed by the Advocates Act, 1961 and the rules of the Bar Council of India framed in exercise of power given under Section 49 (1) of Advocates Act, 1961⁶. Here are some points to be considered to practice the profession of law in India:-

Qualifications:

A foreign lawyer must be qualified to be admitted as an advocate on a state roll as per section 24 of Advocates Act, 1961. As per Section 24 “a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:—

(a) he is a citizen of India

Provided that subject to the other provisions contained in this Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practice law in that other country;

(b) he has completed the age of twenty-one years;

(c) he has obtained a degree in law⁷”

⁶ Section 49 (1) of Advocates Act, 1961

⁷ Section 24 of Advocates Act, 1961

Registration:

It is also required to register with the Bar Council of India by foreign lawyers to practice law in India. The registration process includes submit an application, paying a fee and completing a security check.

Limitation on practice:

It is not allowed for foreign lawyers to engage in litigation matters or appear in courts in India. They can only provide legal advice and consulting services to their clients i.e. they are allowed to practice in India in non litigious matters.

Overall, while foreign lawyers can practice law in India, there are several restrictions and requirements that must be met. It is important to carefully check and follow the regulations set by the Bar Council of India to avoid any legal problems.

Advantages of this new rule-

The question of whether foreign lawyers should be allowed to practice law in India is a contentious issue having strong arguments on both sides. Here are some critical analyzes of the pros and cons of allowing foreign lawyers in India.

Being allowed to practice law in India to foreign advocates can bring a number of benefits such as:

Increased Competition: Allowing foreign lawyers to practice law in India will lead to increase competition among advocates, which will further lead to better quality of legal services and it will also lower costs for clients. Definitely foreign lawyers would bring some new perspectives, best practices of international law and experience that would benefit Indian clients.

Expertise in International Law: Often foreign lawyers also have expertise in international law, which will be beneficial to those Indian clients who are involved in cross-border transactions or disputes.

Access to Global Networks: Foreign lawyers can bring with them access to global networks of lawyers and law firms, which can benefit Indian clients seeking legal representation or advice in foreign jurisdictions. . In addition, it would provide an opportunity for Indian lawyers to learn from foreign lawyers and possibly work on international cases.

Promotion of India as a legal hub: Allowing foreign lawyers to practice law in India can help to promote India as a legal hub for all countries and it will attract more foreign investment and business to the country.

Opportunities for Indian lawyers: Allowing foreign lawyers to practice law in India can also provide opportunities for Indian lawyers to collaborate and learn from foreign lawyers, which can help improve the quality of legal education and training in India.

Expanding Legal Services: This would also increase the range of legal services that can be provided in India, which would be beneficial to businesses and individuals who want to engage in international trade and commerce.

Economic benefits: Allowing foreign lawyers in India could also have economic benefits as it would encourage foreign law firms to set up offices in India, create jobs and contribute to the growth of the legal sector in India.

Disadvantages of this new rule-

Impact on employment opportunities : One of the major disadvantages of allowing foreign lawyers to practice law in India is that it could have a negative impact on employment opportunities for Indian lawyers. If foreign lawyers are allowed to practice in India, they may be able to offer their services at lower rates, which could make it difficult for Indian lawyers to compete. This could lead to a reduction in the number of jobs available for Indian lawyers.

Understanding of Indian laws: Another disadvantage is that foreign lawyers may not have a thorough understanding of Indian laws and legal procedures. This could lead to them making mistakes or giving inaccurate advice to clients. This could have serious consequences for clients who rely on their legal representation.

Outflow of legal talent from India : Allowing foreign lawyers to practice in India could also lead to an outflow of legal talent from the country, as Indian lawyers may be attracted by higher salaries and better working conditions offered by foreign law firms. This could have a negative impact on the development of the Indian legal system.

Unethical practices and behavior: There are concerns about the ethical implications of allowing foreign lawyers to practice in India. Foreign lawyers may not be subject to the same ethical standards and regulations as Indian lawyers, which could lead to unethical practices and behavior. This could damage the reputation of the legal profession in India and undermine public confidence in the judicial system.

Violation of sovereignty: Allowing foreign lawyers to practice in India could be seen as a violation of Indian sovereignty as foreign lawyers may not be familiar with Indian law and culture, leading to potential misunderstandings and conflicts.

Lack of reciprocity: There is no guarantee that foreign countries would reciprocate and allow Indian lawyers to practice law in their countries, leading to an uneven playing field.

Risk of Exploitation: There is a risk that foreign law firms could take advantage of the Indian legal market, leading to exploitation of Indian lawyers and clients. Foreign law firms may also have an unfair advantage due to their greater resources and international relationships.

In conclusion, while there are valid arguments on both sides, the decision to allow foreign lawyers to practice law in India ultimately depends on weighing the potential benefits against the risks and potential disadvantages. It is important to ensure that any policy changes are made with care and that appropriate safeguards are put in place to protect the interests of Indian lawyers and clients.

Previous cases regarding this BCI decision

There have been cases where foreign lawyers have been allowed to appear in Indian courts under certain circumstances.

The legal profession in India has traditionally been restricted to Indian citizens only, with foreign lawyers not permitted to practice law in India. However, this began to change in the late 20th century when India began to liberalize its economy and open up to foreign investment.

In 1995, the Bar Council of India, which regulates the legal profession in India, amended its rules to allow foreign lawyers to visit India to advise on foreign law or matters arising from international

transactions. This was seen as a significant step forward as it opened up new opportunities for foreign law firms to advise clients on cross-border transactions and other matters.

However, this was only a partial opening of the legal profession in India to foreign lawyers. Foreign lawyers were still not allowed to appear in Indian courts or engage in the regular practice of law in India.

In 2009, the Indian government introduced a bill in parliament that would allow foreign lawyers to practice law in India, but the bill faced opposition from the Indian Bar Association and other groups and was eventually withdrawn.

In 2012, the Bar Council of India amended its rules again to allow foreign lawyers to come to India to advise clients on foreign law or work in collaboration with Indian lawyers on specific projects. This was seen as another step forward but again failed to allow foreign lawyers to engage in regular legal practice in India.

As of today, foreign lawyers are still not allowed to sit in Indian courts or practice law in litigious matters in India, but they can advise clients on foreign law or work with Indian lawyers on specific projects.

The Lawyers Collective vs. Bar Council of India (2010)⁸ – The Lawyers Collective, an NGO, challenged the Bar Council of India's rule barring foreign lawyers from practicing law in India. The case went all the way to the Supreme Court, which upheld the bar rule but clarified that foreign lawyers can visit India temporarily to advise clients on foreign law or participate in arbitration proceedings.

AK Balaji Vs. Government of India (2012)⁹ – In this case, the Madras High Court held that foreign lawyers cannot practice law in India even if they are merely providing legal advice on foreign law. The case was appealed to the Supreme Court, which forwarded it to a larger panel for further consideration.

⁸ *Lawyers Collective vs. Bar Council of India*, 2010 (2) Mah LJ 726.

⁹ *AK Balaji Vs. Government of India* AIR 2012 Mad 124

These cases highlight the ongoing debate and legal issues surrounding the issue of allowing foreign lawyers to practice law in India. Although there has been some relaxation of the rules in recent years, the issue remains contentious and unresolved.

Vodafone tax dispute case¹⁰

One such case is the Vodafone tax dispute case. In this case, Vodafone, a British multinational telecommunications company, was involved in a tax dispute with the Indian government. The Indian government claimed that Vodafone was liable to pay taxes in India for the acquisition of shares in the Indian company. Vodafone, on the other hand, argued that the transaction took place outside India and therefore was not subject to any tax in India.

During the hearing of the case, Vodafone was represented by a team of Indian lawyers as well as a foreign lawyer, Mr. Harish Salve. Mr. Salve was a senior advocate in the Supreme Court of India and is also qualified to practice law in England and Wales. Mr. Salve was allowed to appear as a "friend of the court" or as amicus curiae in the case.

The role of amicus curiae is to assist the court in a case where there is no party representing a particular view or where the court requires specialized expertise. In the Vodafone case, Mr. Salve was appointed amicus curiae by the Supreme Court to assist the court in interpreting certain provisions of the Income Tax Act and the relevant Double Taxation Treaty between India and the United Kingdom.

Mr. Salve's arguments and opinions had a great influence on the final judgment of the case. In its judgment, the Supreme Court held that Vodafone is not liable to pay taxes in India for the transaction in question. The judgment was widely discussed and debated in the legal community and Mr. Salve's contribution to the case was highly appreciated.

In conclusion, while foreign lawyers are generally not permitted to practice law in India, they may be permitted to appear in Indian courts under certain circumstances, such as in the role of amicus curiae. The Vodafone case is an example of how a **foreign lawyer can make a significant contribution to a case in India** even though he is not allowed to practice law in the country.

¹⁰ *International Holding BV vs Union of India*, [2012] 1 S.C.R.. 574

In India, foreign lawyers were not allowed to practice law or appear in courts, with a few exceptions such as international arbitration. However, there have been discussions and debates about the possibility of allowing foreign lawyers to provide legal services in non-contentious matters on a fly-in-fly-out basis.

The Bar Council of India (BCI), which is the regulatory body for legal education and profession in India, has earlier barred foreign lawyers from practicing in India in any form, including in non-judicial matters. However, in 2017, the BCI issued a draft set of rules that would allow foreign lawyers to provide legal services in India on a fly-in-fly-out basis, subject to certain conditions. Under the proposed rules, foreign lawyers would be allowed to provide legal advice, consultation and representation to clients in matters that do not involve appearing before a court or tribunal in India. This would include advising clients on legal issues related to business transactions, mergers and acquisitions and other business matters. But there has been some resistance from the legal community in India. Some lawyers argue that allowing foreign lawyers to provide legal services in India would lead to an influx of foreign law firms, which could threaten the livelihood of Indian lawyers. Others argue that foreign lawyers could bring valuable expertise and knowledge to the Indian legal profession and could help improve the quality of legal services available in the country. In conclusion, while foreign lawyers are currently not allowed to practice law or appear in courts in India, there have been discussions about allowing foreign lawyers to provide legal services in non-contentious matters on a fly-in-fly-out basis.

Bar Council of India Vs. A.K. The Balaji¹¹

The Bar Council of India Vs. A.K. The Balaji case was a landmark decision by the Supreme Court of India in 2018. The case dealt with whether foreign law firms and foreign lawyers could practice in India.

The Bar Council of India passed a resolution in 2012 barring foreign lawyers and law firms from practicing in India on the grounds that their presence would harm the interests of Indian lawyers. However, a group of foreign lawyers challenged the order in the Madras High Court. The Madras

¹¹ Bar Council of India Vs. A.K. The Balaji, (2018) 5 SCC379

High Court held that the Bar Council of India had no power to restrict the practice of foreign lawyers and law firms in India and that the order violated the right to practice any profession or practice any occupation guaranteed under the Indian Ordinance Constitution.

The Bar Council of India appealed this decision to the Supreme Court. The Supreme Court upheld the decision of the Madras High Court and held that foreign lawyers and law firms could visit India on a "fly in and fly out" basis to give legal advice on foreign law, but could not set up permanent offices or practice. The court also ruled that foreign lawyers can participate in international commercial arbitrations held in India, but only if they are domiciled outside India.

Taken together, Bar Council of India Vs. A.K. The Balaji case shed light on the scope of practice of foreign lawyers and law firms in India and highlighted the importance of maintaining the independence and integrity of the Indian legal profession.

There have been several landmark cases in India related to the issue of allowing foreign lawyers to practice law in the country.

Conclusion

This significant new step by bar council of India is likely to pave the way for potential consolidation, particularly for firms engaged in cross-border mergers and acquisitions (M&A) matters. The entry of foreign law firms will go a long way in boosting India's ambitions to be more visible and valuable in the global context, especially in the field of international trade and commerce. This new rule will be a game changer for mid-sized firms and will also help law firms in India achieve greater efficiency in talent management, technology, domain knowledge in a global context and management.