REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7875-7879 OF 2015

BAR COUNCIL OF INDIA ...APPELLANT

VERSUS

A.K. BALAJI AND ORS. ...RESPONDENTS

WITH

CIVIL APPEAL NO.7170 OF 2015
(Association of Indian Lawyers *versus* M/s. London Court of International Arbitration (LCIA) and ors.)

AND

CIVIL APPEAL NO. 8028 OF 2015
(Global Indian Lawyers *versus* Bar Council of India & Ors.)

J U D G M E N T

ADARSH KUMAR GOEL, J

1. The issue involved in this batch of matters is whether foreign law firms/lawyers are permitted to practice in India. Reference needs to be made to two leading matters. Civil Appeal Nos.7875-79 of 2015 have been filed by the Bar Council of India against the Judgment of Madras High Court dated 21st February, 2012 in ***A.K. Balaji versus The Government of India***[1]. Civil Appeal No.8028 of 2015 has

[1] AIR 2012 Mad 124

been filed by Global Indian Lawyers against the judgment of Bombay High Court dated 16th December, 2009 in ***Lawyers Collective versus Bar Council of India[2].***

2. The Madras High Court held as follows:

> ***"63.*** *After giving our anxious consideration to the matter, both on facts and on law, we come to the following conclusion :-*
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> *(i) Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfil the requirement of the Advocates Act, 1961 and the Bar Council of India Rules.*
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> *(ii) However, there is no bar either in the Act or the Rules for the foreign law firms or foreign lawyers to visit India for a temporary period on a "fly in and fly out" basis, for the purpose of giving legal advise to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.*
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> *(iii) Moreover, having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, 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.*
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> *(iv) The B.P.O. Companies providing wide range of customised 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. However, in the event of any complaint made against these B.P.O. Companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies."*

[2] 2010 (2) Mah LJ 726

3. The Bombay High Court, on the other hand, concluded as follows:

> ***"60.*** *For all the aforesaid reasons, we hold that in the facts of the present case, the RBI was not justified in granting permission to the foreign law firms to open liaison offices in India under Section 29 of the 1973 Act. We further hold that the expressions ' to practise the profession of law' in Section 29 of the 1961 Act is wide enough to cover the persons practising in litigious matters as well as persons practising in non litigious matters and, therefore, to practise in non litigious matters in India, the respondent Nos. 12 to 14 were bound to follow the provisions contained in the 1961 Act. The petition is disposed of accordingly with no order as to costs."*

4. When the matter against the judgment of the Madras High Court came up for hearing before this Court on 4th July, 2012, following interim order was passed :

> *"In the meanwhile, it is clarified that Reserve Bank of India shall not grant any permission to the foreign law firms to open liaison offices in India under Section 29 of the Foreign Exchange Regulation Act, 1973. It is also clarified that the expression "to practice the profession of law" under Section 29 of the Advocates Act, 1961 covers the persons practicing litigious matters as well as non-litigious matters other than contemplated in para 63(ii) of the impugned order and, therefore, to practice in non-litigious matters in India the foreign law firms, by whatever name called or described, shall be bound to follow the provisions contained in the Advocates Act, 1961."*

The said order has thereafter continued and is still in force.

5. In Civil Appeal Nos.7875-7879 of 2015, writ petition was filed before the Madras High Court by one A.K. Balaji, Advocate. Apart from official respondents, 32 law firms of U.K., U.S.A., France and Australia have been impleaded as respondents 9 to 40. Prayer in the writ petition is to take action against the original respondents 9 to 40 or any other foreign law firms or foreign lawyers illegally practicing the profession of law in India and direct them to refrain from having any illegal practice on the litigation side and in the field of commercial transactions in any manner whatsoever.

PLEADINGS

6. Averments in the petition are that the writ petitioner was an advocate enrolled with the Bar Council of Tamil Nadu. To practice law in India, a person has to be Indian citizen and should possess degree in law from a recognized University in India. Nationals of other countries could be admitted as advocates in India only if citizens of India are permitted to practice in such other countries. Foreign degree of law from a University outside India requires recognition by the Bar Council of India. The Indian advocates are not allowed to practice in U.K., U.S.A., Australia and other foreign nations except on fulfilling onerous restrictions like qualifying tests,

experience, work permit. Foreign lawyers cannot be allowed to practice in India without reciprocity.

7. Under the Advocates Act (the Act), a foreigner is not entitled to practice in India in view of bar contained in Section 29. However, under the guise of LPOs (Legal Process Outsourcing), conducting seminars and arbitrations, foreign lawyers are visiting India on Visitor Visa and practicing illegally. They also violate tax and immigration laws. They have also opened their offices in India for practice in the fields of mergers, take-overs, acquisitions, amalgamations, etc. Disciplinary jurisdiction of the Bar Council extends only to advocates enrolled under the Act. 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. Many accountancy and management firms are also employing graduates and thus rendering legal services.

8. The stand of the Union of India initially was that if foreign law firms are not allowed to take part in negotiations,

settling of documents and arbitrations in India, it will obstruct the aim of making India a hub of international arbitration. Many arbitrations with Indian Judges as arbitrators and Indian lawyers are held outside India where foreign and Indian law firms advise their clients. Barring the entry of foreign law firms for arbitrations in India will result in many arbitrations shifting to Singapore, Paris and London, contrary to the declared policy of the Government and against national interest. However, its final stand in affidavits dated 19th April, 2011 and 17th November, 2011 was different as recorded in Para 3 of the High Court Judgment as follows :

> ***"3 .*** *The first respondent Union of India filed four counter affidavits on 19.08.2010, 24.11.2010, 19.04.2011 and 17.11.2011. In one of the counter affidavits, it is stated that the Bar Council of India, which has been established under the Advocates Act, 1961, regulates the advocates who are on the "Rolls", but law firms as such are not required to register themselves before any statutory authority, nor do they require any permission to engage in non-litigation practice. Exploiting this loophole, many accountancy and management firms are employing law graduates who are rendering legal services, which is contrary to the provisions of the Advocates Act. It is stated that the Government of India along with the Bar Council of India is considering this issue and is trying to formulate a regulatory framework in this regard. The 1st respondent in his counter warns that if the foreign law firms are not allowed to take part in negotiations, settling up documents and arbitrations in India, it will have a counter productive effect on the aim of the government to make India a hub of International Arbitration. In this connection, it is stated that many arbitrations with Indian Judges and Lawyers as Arbitrators are held outside India, where both foreign and Indian Law Firms advise their clients. If foreign law firms are denied entry to deal*

*with arbitrations in India, then India will lose many of the arbitrations to Singapore, Paris and London. It will be contrary to the declared policy of the government and against the national interest**. In the counter affidavit filed on 19.04.2011, it is stated that a proposal to consider an amendment to Section 29 of the Advocates Act, 1961 permitting foreign law firms to practice law in India in non litigious matters on a reciprocity basis with foreign countries is under consultation with the Bar Council of India. Finally, in the counter filed on 17.11.2011, it is stated that the Government of India has decided to support the stand of the Bar Council of India that the provisions of the Advocates Act, 1961 would apply with equal force to both litigious and non-litigious practice of law, and it is only persons enrolled under Section 24 of the Act, who can practice before the Indian Courts."***

(emphasis added)

9. In this Court, stand of the Union of India is that presently it is waiting for the Bar Council of India to frame rules on the subject. However, it can frame rules under Section 49A at any stage.

10. Stand of the Bar Council of India before the High Court is that even non litigious practice is included in the practice of law which can be done only by advocates enrolled under the Act. Reliance was placed on the judgment of the Bombay High Court in ***Lawyers Collective*** (supra). Further reference was made to Sections 24 and 29 of the Act. Section 47(2) read with Section 49(1)(e) provides for

recognition of qualifications of foreigners being recognized for practice. It was submitted that practice of foreign lawyers in India should be subject to regulatory powers of the Bar Council.

11. Stand of the foreign law firms, *inter alia,* is that there is no bar to a company carrying on consultancy/support services in the field of protection and management of intellectual, business and industrial proprietary rights, carrying out market service and market research, publication of reports, journals etc. A person not appearing before Courts or Tribunals and not giving legal advice cannot be said to be practice of law. The ninth respondent stated that it was a part of group of companies and not a law firm and was duly registered under the Indian Companies Act, 1956. The tenth respondent, another foreign law firm, submitted that there is no violation of law in giving advice on foreign law. Even Indian lawyers are permitted to practice outside India and issue of reciprocity is a policy matter to be decided by the Government of India. It does not have a law office in India and does not give advice on Indian laws. In England, foreign lawyers are free to advice on their own system of law without nationality requirement or qualification of England. The

eleventh respondent is an American law firm and submitted that it advises clients on international legal issues from different countries. Indian clients are given advice through Indian lawyers and law firms which are enrolled with the Bar Council. There is no discrimination in U.S. against Indian citizens practicing law. Indian lawyers travel to US on temporary basis for consultation on Indian law issues.

12. The Act and the Bar Council Rules govern practice of Indian law and not foreign law. Participation in seminars and conferences does not constitute practice in law. The fourteenth respondent denied the existence of its office in India and that it was practicing Indian law. It also took the same stand as Respondent No.11 that regulatory framework for advocates did not govern practice of foreign law. It denied that it is operating a Legal Process Outsourcing office (LPOs) in India. Its lawyers fly in and fly out of India on need basis to advice clients on international transactions. To the extent Indian law is involved, such matters are addressed by Indian lawyers. If the foreign law firms are prevented from advice on foreign law, the transaction cost of Indian clients for consultation on foreign law will increase. Other foreign law firms have also taken more or less similar stand.

Fifteenth respondent stated that it is a Business Process Outsourcing (BPO) company providing wide range of customized and integrated services and functions. The sixteenth respondent also stated that it has no office in India and is only rendering services other than practice of Indian law. The eighteenth respondent stated that it does not have any office in India and does not practice law in India. It only advises on non Indian law. Respondent Nos.19, 26, 39 and 40 stated that they are limited law partnerships under Laws of England. They do not have any law office in India. Respondents Nos.20, 21, 24, 25, 27, 28, 30, 31, 32, 33, 34 and 38 also stated that they do not have any office in India and do not practice Indian law. Indian lawyers cannot advice on foreign laws and the requirement of Indian litigants in regard is met by foreign lawyers. Its lawyers fly in and fly out of India on need basis to advise the clients on international transactions. To the extent Indian law is involved such matters are addressed by Indian lawyers.

13. The respondent No.22 stated that it is an international law firm but does not have any office in India. It advises clients on laws other than Indian laws. Its India Practice Group advises clients on commercial matters involving an

"Indian Element" relating to mergers, acquisitions, capital markets, projects, energy and infrastructure, etc. from an international legal perspective and it does not amount to practice in Indian law. Respondent No.23 stated that it is only advising on matters of English, European Union and Hong Kong laws. It has working relationships with leading law firms in major jurisdictions and instructs appropriate local law firms to provide local law advice. Respondent No.29 stated that it is a limited law partnership registered in England and Wales and does not have office in India. It does not represent parties in Indian courts nor advises on Indian law. Respondent No.35 stated that it does not maintain any office in India and its expertise in international law. 36th Respondent stated that it does not practice Indian law and has no office in India nor it operates any LPO. Its lawyers fly in and fly out on need basis to advise clients on international transactions or matters involving Australian laws or international Benches to which there is an Indian component. Working of Indian laws is entrusted to Indian lawyers. The 37th Respondent denied that it has any office in India or is running LPO in India. It only advises with respect to regulatory laws other than Indian law.

FINDINGS

14. The High Court upheld the plea of the foreign law firms to the effect that there was no bar to such firms taking part in negotiations, settling of documents and conducting arbitrations in India. There was no bar to carrying on consultancy/support services in the field of protection and management of intellectual, business and industrial proprietary rights, carrying out market survey and research, publication of reports, journals etc. without rendering any legal advice. This could not be treated as practice of law in India. Referring to Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 (the Arbitration Act), it was observed that if in international commercial arbitration, India is chosen as the seat of arbitration, the foreign contracting party is bound to seek assistance from lawyers of their own country on the contract. There could be no prohibition for such foreign lawyers to advise their clients on the foreign law.

15. Judgment of the Bombay High Court in ***Lawyers Collective*** (supra) was distinguished on the ground that setting up of law offices for litigious and non litigious matters was different but if a foreign law firm without establishing

any liaison office in India offers advice to their clients on foreign law, there was no legal bar to do so.

16. The Bombay High Court in its judgment observed:

> ***"44.*** *It appears that before approaching RBI, these foreign law firms had approached the Foreign Investment Promotion Board (FIPB for short) a High Powered body established under the New Industrial Policy seeking their approval in the matter. The FIPB had rejected the proposal submitted by the foreign law firms. Thereafter, these law firms sought approval from RBI and RBI granted the approval in spite of the rejection of FIPB. Though specific grievance to that effect is made in the petition, the RBI has chosen not to deal with those grievances in its affidavit in reply. Thus, in the present case, apparently, the stand taken by RBI & FIPB are mutually contradictory.*
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> ***45.*** *In any event, the fundamental question to be considered herein is, whether the foreign law firms namely respondent Nos. 12 to 14 by opening liaison offices in India could carry on the practise in non litigious matters without being enrolled as Advocates under the 1961 Act ?*
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> ***46.*** *Before dealing with the rival contentions on the above question, we may quote Sections 29, 30, 33 and 35 of the 1961 Act, which read thus:*
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> > ***29.*** *Advocates to be the only recognised class of persons entitled to practice law. - Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates. (not brought into force so far)*
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> > ***30.*** *Right of advocates to practise. -Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,*

(i) in all Courts including the Supreme Court;

(ii) before any tribunal or person legally authorized to take evidence;

(iii) before any other authority or person before whom such advocate by or under any law for the time being in force entitled to practise.

33 . *Advocates alone entitled to practise. -Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any Court or before any authority or person unless he is enrolled as an advocate under this Act.*

35 . *Punishment of advocates for misconduct - (1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.*

(1-A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.

(2) The disciplinary committee of a State Bar Council [***] shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State.

(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely:

(a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

(b) reprimand the advocate;

(c) suspend the advocate from practice or such period as it may deem fit;

(d) remove the name of the advocate from the State roll of advocates.

(4) Where an advocate is suspended from practice under Clause (c) of Sub-section (3), he shall, during the period of suspension, be debarred from practising in any Court or before any authority or person in India.

(5) Where any notice is issued to the Advocate-General under Subsection (2), the Advocate-General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf. Explanation-In this section, (Section 37 and Section 38), the expressions "Advocate-General" and "Advocate-General of the State" shall, in relation to the Union territory of Delhi, mean the Additional Solicitor General of India.

47 . *The argument of the foreign law firms is that Section 29 of the 1961 Act is declaratory in nature and the said section merely specifies the persons who are entitled to practise the profession of law. According to the respondent Nos. 12 to 14, the expression 'entitled to practise the profession of law' in Section 29 of the 1961 Act does not specify the field in which the profession of law could be practised. It is Section 33 of the 1961 Act which provides that advocates alone are entitled to practise in any Court or before any authority or person. Therefore, according to respondent Nos. 12 to 14 the 1961 Act applies to persons practising as advocates before any Court / authority and not to persons practising in non litigious matters. The question, therefore, to be considered is, whether the 1961 Act*

applies only to persons practising in litigious matters, that is, practising before Court and other authorities ?

48. In the statements of Objects & Reasons for enacting the 1961 Act, it is stated that the main object of the Act is to establish All India Bar Council and a common roll of advocates and Advocate on the common roll having a right to practise in any part of the country and in any Court, including the Supreme Court. Thus, from the Statement of Objects and Reasons, it is seen that the 1961 Act is intended to apply to (one) persons practising the profession of law in any part of the country and (two) persons practising the profession of law in any Court including the Supreme Court. Thus, from the statement of objects and reasons it is evident that the 1961 Act is intended to apply not only to the persons practising before the Courts but it is also intended to apply to persons who are practising in non litigious matters outside the Court.

49. Apart from the above, Section 29 of the 1961 Act specifically provides is that from the appointed day, there shall be only one class of persons entitled to practice the profession of law, namely Advocates. It is apparent that prior to the 1961 Act there were different classes of persons entitled to practise the profession of law and from the appointed day all these class of persons practising the profession of law, would form one class, namely, advocates. Thus, Section 29 of the 1961 Act clearly provides that from the appointed day only advocates are entitled to practise the profession of law whether before any Court / authority or outside the Court by way of practise in non litigious matters.

50. Section 33 of the 1961 Act is a prohibitory section in the sense that it debars any person from appearing before any Court or authority unless he is enrolled as an advocate under the 1961 Act. The bar contained in Section 33 of the 1961 Act has nothing to do with the persons entitled to be enrolled as advocates

under Section 29 of the 1961 Act. A person enrolled as an advocate under Section 29 of the 1961 Act, may or may not be desirous of appearing before the Courts. He may be interested in practising only in non litigious matters. Therefore, the bar under Section 33 from appearing in any Court (except when permitted by Court under Section 32 of the 1961 Act or any other Act) unless enrolled as an advocate does not bar a person from being enrolled as an advocate under Section 29 of the 1961 Act for practising the profession of law in non litigious matters. The Apex Court in the case of Ex-Capt. Harish Uppal (supra) has held that the right to practise is the genus of which the right to appear and conduct cases in the Court may be a specie. Therefore, the fact that Section 33 of the 1961 Act provides that advocates alone are entitled to practice before any Court / authority it cannot be inferred that the 1961 Act applies only to persons practising in litigious matters and would not apply to person practising in non litigious matters.

51. It was contended that the 1961 Act does not contain any penal provisions for breaches committed by a person practicing in non-litigious matter and, therefore, the 1961 Act cannot apply to persons practising in non-litigious matters. There is no merit in this contention, because, Section 35 of the 1961 Act provides punishment to an advocate who is found to be guilty of professional or other misconduct. The fact that Section 45 of the 1961 Act provides imprisonment for persons illegally practicing in Courts and before other authorities, it cannot be said that the 1961 Act does not contain provisions to deal with the persons found guilty of misconduct while practising in non litigious matters. Once it is held that the persons entitled to practice the profession of law under the 1961 Act covers the persons practising the profession of law in litigious matters as well as non-litigious matters, then, the penal provisions contained in Section 35 of the 1961 Act would apply not only to persons practising in litigious matter, but would also apply to persons practising the profession of law in non-litigious matters. The

very object of the 1961 Act and the Rules framed by the Bar Council of India are to ensure that the persons practising the profession of law whether in litigious matters or in non litigious matters, maintain high standards in professional conduct and etiquette and, therefore, it cannot be said that the persons practising in non litigious matters are not governed by the 1961 Act.

52 . Strong reliance was placed by the counsel for the respondent No. 12 on the decision of the Apex Court in the case of O.N. Mohindroo (supra) in support of his contention that the 1961 Act applies only to persons practising the profession of law before Courts / Tribunals / other authorities. It is true that the Apex Court in the above case has held that the 1961 Act is enacted by the Parliament in exercise of its powers under entry 77 and 78 in List I of the Seventh Schedule to the Constitution. However, the fact that entry 77 and 78 in List I refers to the persons practising before the Supreme Court and the High Courts, it cannot be said that the 1961 Act is restricted to the persons practising only before the Supreme Court and High Courts. Practising the profession of law involves a larger concept whereas, practising before the Courts is only a part of that concept. If the literal construction put forth by the respondents is accepted then, the Parliament under entry 77 & 78 in List I of the Seventh Schedule to make legislation only in respect of the advocates practicing before the Supreme Court / High Courts and the Parliament cannot legislate under that entry in respect of advocates practising before the District Courts/ Magistrate's Courts / other Courts / Tribunals / authorities and consequently, the 1961 Act to the extent it applies to advocates practising in Courts other than the High Courts and Supreme Court would be ultra vires the Constitution. Such a narrow construction is unwarranted because, once the Parliament invokes its power to legislate on advocates practising the profession of law, then the entire field relating to advocates would be open to the Parliament to legislate and accordingly the 1961 Act has been enacted

to cover the entire field. In any event, the question as to whether the persons practicing the profession of law exclusively in non-litigious matters are covered under the 1961 Act, or not was not an issue directly or indirectly considered by the Apex Court in the case of O.N. Mohindroo (supra). Therefore, the decision of the Apex Court in the above case does not support the case of the contesting respondents.

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55. It was contended by the counsel for Union of India that if it is held that the 1961 Act applies to persons practising in non-litigious matters, then no bureaucrat would be able to draft or give any opinion in non-litigious matters without being enrolled as an advocate. There is no merit in the above argument, because, there is a distinction between a bureaucrat drafting or giving opinion, during the course of his employment and a law firm or an advocate drafting or giving opinion to the clients on professional basis. Moreover, a bureaucrat drafting documents or giving opinion is answerable to his superiors, whereas, a law firm or an individual engaged in non litigious matters, that is, drafting documents / giving opinion or rendering any other legal assistance are answerable to none. To avoid such anomaly, the 1961 Act has been enacted so as to cover all persons practising the profession of law be it in litigious matters or in non-litigious matters within the purview of the 1961 Act.

56. *The argument that the 1961 Act and the Bar Councils constituted there under have limited role to play has been time and again negatived by the Apex Court. Recently, the Apex Court in the case of Bar Council of India v. Board of Management, Dayanand College of Law reported in MANU/SC/5219/2006 : (2007) 2 SCC 202 held thus:*

> *It may not be correct to say that the Bar Council of India is totally unconcerned with the legal education, though primarily legal education may also be within the province*

of the universities. But, as the apex professional body, the Bar Council of India is concerned with the standards of the legal profession and the equipment of those who seek entry into that profession. The Bar Council of India is also thus concerned with the legal education in the country. Therefore, instead of taking a pendantic view of the situation, the State Government and the recommending authority are expected to ensure that the requirement set down by the Bar Council of India is also complied with.

Thus, when efforts are being made to see that the legal profession stand tall in this fast changing world, it would be improper to hold that the 1961 Act and the Bar Council constituted there under have limited role to play in the field relating to practising the profession of law.

57. It is not in dispute that once a person is enrolled as an advocate, he is entitled to practise the profession of law in litigious matters as well as non-litigious matters. If the argument of the respondents that the 1961 Act is restricted to the persons practising the profession of law in litigious matters is accepted, then an advocate found guilty of misconduct in performing his duties while practising in non-litigious matters cannot be punished under the 1961 Act. Similarly, where an advocate who is debarred for professional misconduct can merrily carry on the practise in nonlitigious matters on the ground that the 1961 Act is not applicable to the persons practising the profession of law in non litigious matters. Such an argument which defeats the object of the 1961 Act cannot be accepted.

58. It may be noted that Rule 6(1) in Chapter III Part VI of the Bar Council of India Rules framed under Section 49(1) (ah) of the 1961 Act provides that an advocate whose name has been removed by an order of the Supreme Court or a High Court or the Bar Council as the case may be, shall not be entitled to practise the profession of law either before the Court

and authorities mentioned under Section 30 of the 1961 Act, or in chambers, or otherwise. The above rule clearly shows that the chamber practise, namely, practise in non litigious matters is also within the purview of the 1961 Act.

59 . *Counsel for the Union of India had argued that the Central Government is actively considering the issue relating to the foreign law firms practising the profession of law in India. Since the said issue is pending before the Central Government for more than 15 years, we direct the Central Government to take appropriate decision in the matter as expeditiously as possible. Till then, the 1961 Act as enacted would prevail, that is, the persons practising the profession of law whether in litigious matters or non litigious matters would be governed by the 1961 Act and the Bar Councils framed there under, apart from the powers of the Court to take appropriate action against advocates who are found guilty of professional misconduct.*

60. *For all the aforesaid reasons, we hold that in the facts of the present case, the RBI was not justified in granting permission to the foreign law firms to open liaison offices in India under Section 29 of the 1973 Act. We further hold that the expressions ' to practise the profession of law' in Section 29 of the 1961 Act is wide enough to cover the persons practising in litigious matters as well as persons practising in non litigious matters and, therefore, to practise in non litigious matters in India, the respondent Nos. 12 to 14 were bound to follow the provisions contained in the 1961 Act. The petition is disposed of accordingly with no order as to costs."*

17. The Madras High Court agreed with the above view as follows :

"44. *As noticed above, the facts of the case before the Bombay High Court were that the respondents which were foreign law firms practising the profession of law in US/UK sought permission to open their liaison office in India and render legal assistance to another person in all litigious and non-litigious matters. The Bombay High Court, therefore, rightly held that establishing liaison office in India by the foreign law firm and rendering liaisoning*

activities in all forms cannot be permitted since such activities are opposed to the provisions of the Advocates Act and the Bar Council of India Rules. ***We do not differ from the view taken by the Bombay High Court on this aspect."***

18. The Madras High Court after above observation proceeded to consider the matter as follows:

> **"45 .** However, the issue which falls for consideration before this Court is as to whether a foreign law firm, without establishing any liaison office in India visiting India for the purpose of offering legal advice to their clients in India on foreign law, is prohibited under the provisions of the Advocates Act. In other words, the question here is, whether a foreign lawyer visiting India for a temporary period to advise his client on foreign law can be barred under the provisions of the Advocates Act. This issue was neither raised nor answered by the Bombay High Court in the aforesaid judgment."

19. It was held :

> ***"51.*** *We find force in the submission made by the learned counsel appearing for the foreign law firms that if foreign law firms are not allowed to take part in negotiations, for settling up documents and conduct arbitrations in India, it will have a counter productive effect on the aim of the Government to make India a hub of International Arbitration. According to the learned counsel, many arbitrations with Indian Judges and Lawyers as Arbitrators are held outside India, where both foreign and Indian law firms advise their clients. If foreign law firms are denied entry to deal with arbitrations in India, then India will lose many of the arbitrations to foreign countries. It will be contrary to the declared policy of the Government and against the national interest. Some of the companies have been carrying on consultancy/support services in the field of protection and management of intellectual, business and industrial proprietary rights, carrying out market surveys and market research and publication of*

reports, journals, etc. without rendering any legal service, including advice in the form of opinion, but they do not appear before any courts or tribunals anywhere in India. Such activities cannot at all be considered as practising law in India. It has not been controverted that in England, foreign lawyers are free to advice on their own system of law or on English Law or any other system of law without any nationality requirement or need to be qualified in England.

52. *Before enacting the Arbitration and Conciliation Act, 1996 the Law Commission of India, several representative bodies of trade and industry and experts in the field of arbitration have proposed amendments to the Act to make it more responsive to contemporary requirements. It was also recognised that the economic reforms in India may not fully become effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms. The United Nations Commission on International Trade Law (UNCITRAL) adopted in 1985 the Model Law on International Commercial Arbitration. The Arbitration and Conciliation Act is, therefore, consolidated and amended to the law relating to domestic and international commercial arbitration as well as for the enforcement of foreign arbitral award. The Act was enacted as a measure of fulfilling India's obligations under the International Treaties and Conventions. On account of the growth in the international trade and commerce and also on account of long delays occurring in the disposal of suits and appeals in courts, there has been tremendous movement towards the resolution of disputes through alternative forum of arbitrators.*

53. *Section 2(1)(f) of the Act defines the term "International Commercial Arbitration" as under:-*

> *(f) International Commercial Arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is*
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> *(i) an individual who is a national of, or habitually resident in, any country other than India; or*

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

54 . *From the above definition, it is manifestly clear that any arbitration matter between the parties to the arbitration agreement shall be called an "international commercial arbitration" if the matter relates to the disputes, which may or may not be contractual, but where at least one of the parties habitually resides abroad whether a national of that country or not. The New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce, even though such an agreement does not lead to a foreign award.*

55 . *International arbitration is growing big time in India and in almost all the countries across the globe. India is a signatory to the World Trade Agreement, which has opened up the gates for many international business establishments based in different parts of the world to come and set up their respective businesses in India.*

56 . *Large number of Indian Companies have been reaching out to foreign destinations by mergers, acquisition or direct investments. As per the data released by the Reserve Bank of India during 2009, the total out ward investment from India excluding that which was made by Banks, had increased 29.6% to U.S. Dollar 17.4 billion in 2007-08 and India is ranked third in global foreign direct investment. Overseas investments in joint ventures and wholly owned subsidiaries have been recognized as important avenues by Indian Entrepreneurs in terms of foreign exchange earning like dividend, loyalty, etc. India is the 7th largest, the second most populated country and the fourth largest economy in the world. Various economic reforms brought about have made India grow rapidly in the Asia-Pacific Region, and the Indian Private Sector has offered considerable scope for foreign direct investment, joint-venture and collaborations. Undoubtedly, these cross-border transactions and investments would*

give bigger opportunities for members of the legal fraternity, in order to better equip themselves to face the challenges. It is common knowledge that in the recent past, parties conducting International Commercial Arbitrations have chosen India as their destination. The arbitration law in India is modelled on the lines of the UNCITRAL Model Law of Arbitration and makes a few departures from the principles enshrined therein. The Arbitration and Conciliation Act 1996, provides for international commercial arbitration where at least one of the parties is not an Indian National or Body corporate incorporated in India or a foreign Government.

57. *Institutional Arbitration has been defined to be an arbitration conducted by an arbitral institution in accordance with the rules of the institution. The Indian Council of Arbitration is one such body. It is reported that in several cases of International Commercial Arbitration, foreign contracting party prefers to arbitrate in India and several reasons have been stated to choose India as the seat of arbitration. Therefore, when there is liberalization of economic policies, throwing the doors open to foreign investments, it cannot be denied that disputes and differences are bound to arise in such International contracts. When one of the contracting party is a foreign entity and there is a binding arbitration agreement between the parties and India is chosen as the seat of arbitration, it is but natural that the foreign contracting party would seek the assistance of their own solicitors or lawyers to advice them on the impact of the laws of their country on the said contract, and they may accompany their clients to visit India for the purpose of the Arbitration. Therefore, if a party to an International Commercial Arbitration engages a foreign lawyer and if such lawyers come to India to advice their clients on the foreign law, we see there could be no prohibition for such foreign lawyers to advise their clients on foreign law in India in the course of a International Commercial transaction or an International Commercial Arbitration or matters akin thereto. Therefore, to advocate a proposition that foreign lawyers or foreign law firms cannot come into India to advice their clients on foreign law would be a far fetched and dangerous proposition and in our opinion, would be to take a step backward, when India is becoming a preferred seat for arbitration in*

International Commercial Arbitrations. It cannot be denied that we have a comprehensive and progressive legal frame work to support International Arbitration and the 1996 Act, provides for maximum judicial support of arbitration and minimal intervention. That apart, it is not in all cases, a foreign company conducting an International Commercial Arbitration in India would solicit the assistance of their foreign lawyers. The legal expertise available in India is of International standard and such foreign companies would not hesitate to avail the services of Indian lawyers. Therefore, the need to make India as a preferred seat for International Commercial Arbitration would benefit the economy of the country.

58. *The Supreme Court in a recent decision in Vodafone International Holdings B.V. vs. Union of India and another, SLP(C) No.26529 of 2010, dated 20.01.2012, observed that every strategic foreign direct investment coming to India, as an investment destination should be seen in a holistic manner. The Supreme Court observed that the question involved in the said case was of considerable public importance, especially on Foreign Direct Investment, which is indispensable for a growing economy like India. Therefore, we should not lose site of the fact that in the overall economic growth of the country, International Commercial Arbitration would play a vital part. The learned counsel appearing for the foreign law firms have taken a definite stand that the clients whom they represent do not have offices in India, they do not advise their foreign clients on matters concerning Indian Law, but they fly in and fly out of India, only to advise and hand-hold their clients on foreign laws. The foreign law firms, who are the private respondents in this writ petition, have accepted the legal position that the term "practice" would include both litigation as well as non-litigation work, which is better known as chamber practice. Therefore, rendering advice to a client would also be encompassed in the term "practice".*

59. *As noticed above, Section 2(a) of the Advocates Act defines 'Advocate' to mean an advocate entered in any roll under the provisions of the Act. In terms of Section 17(1) of the Act, every State Bar Council shall prepare and maintain a roll of Advocates, in which shall be entered the names and addresses of*

(a) all persons who were entered as an Advocate on the roll of any High Court under the Indian Bar Council Act, 1926, immediately before the appointed date and (b) all other persons admitted to be Advocates on the roll of the State Bar Council under the Act on or after the appointed date. In terms of Section 24(1) of the Act, subject to the provisions of the Act and the Rules made thereunder, a person shall be qualified to be admitted as an advocate on a state roll if he fulfils the conditions (a) a citizen of India, (b) has completed 21 years of age and (c) obtained a degree in Law. The proviso to Section 24(1)(a) states that subject to the other provisions of the Act, a National of any other country may be admitted as an Advocate on a State roll, if a citizen of India, duly qualified is permitted to practice law in that other country. In terms of Section 47(1) of the Act, where any country specified by the Central Government by notification prevents citizens of India practicing the profession of Law or subjects them to unfair discrimination in that country, no subject of any such country shall be entitled to practice the profession of Law in India. In terms of Sub-Section (2) of Section 47, subject to the provision of Sub-Section (1), the Bar Council of India may prescribe conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognized for the purpose of admission as an Advocate under the Act. Thus, Section 47 deals with reciprocity. As per the statement of objects and reasons of the Advocates Act, it was a law enacted to provide one class of legal practitioners, specifying the academic and professional qualifications necessary for enrolling as a practitioner of Indian Law, and only Indian citizens with a Law Degree from a recognized Indian University could enrol as Advocates under the Act. The exceptions are provided under the proviso to Section 24(1)(a), Section 24(1)(c)(iv) and Section 47(2). In the light of the scheme of the Act, if a lawyer from a foreign law firm visits India to advice his client on matters relating to the law which is applicable to their country, for which purpose he "flies in and flies out" of India, there could not be a bar for such services rendered by such foreign law firm/foreign lawyer.

60 . *We are persuaded to observe so, since there may be several transactions in which an Indian*

company or a person of Indian origin may enter into transaction with a foreign company, and the laws applicable to such transaction are the laws of the said foreign country. There may be a necessity to seek legal advice on the manner in which the foreign law would be applied to the said transaction, for which purpose if a lawyer from a foreign law firm is permitted to fly into India and fly out advising their client on the foreign law, it cannot be stated to be prohibited. The corollary would be that such foreign law firm shall not be entitled to do any form of practice of Indian Law either directly or indirectly. The private respondents herein, namely the foreign law firms, have accepted that there is express prohibition for a foreign lawyer or a foreign law firm to practice Indian Law. It is pointed out that if an interpretation is given to prohibit practice of foreign law by a foreign law firms within India, it would result in a manifestly absurd situation wherein only Indian citizens with Indian Law degree who are enrolled as an advocate under the Advocates Act could practice foreign law, when the fact remains that foreign laws are not taught at graduate level in Indian Law schools, except Comparative Law Degree Courses at the Master's level.

61 . *As noticed above, the Government of India, in their counter affidavit dated 19.08.2010, have stated that the contention raised by the petitioner that foreign law firms should not be allowed to take part in negotiating settlements, settling up documents and arbitrations will be counter productive, as International Arbitration will be confined to a single country. It is further pointed out that many arbitrations are held outside India with Indian Judges and Lawyers as Arbitrators where both foreign and Indian Law firms advise their clients. It has been further stated if foreign law firms are denied permission to deal with arbitration in India, then we would lose many arbitrations to other countries and this is contrary to the declared policy of the Government and will be against the National interest, especially when the Government wants India to be a hub of International Arbitration*

62 . *At this juncture, it is necessary to note yet another submission made by the Government of India in their counter. It has been stated that law firms as such or not required to register themselves*

or require permission to engage in non-litigation practice and that Indian law firms elsewhere are operating in a free environment without any curbs or regulations. It is further submitted that the oversight of the Bar Council on non-litigation activities of such law firms was virtually nil till now, and exploiting this loop hole, many accountancy and management firms are employing law graduates, who are rendering legal services, which is contrary to the Advocates Act. Therefore, the concern of the Government of India as expressed in the counter affidavit requires to be addressed by the Bar Council of India. Further, it is seen that the Government in consultation with the Bar Council of India proposes to commission a study as to the nature of activities of LPOs, and an appropriate decision would be taken in consultation with the Bar Council of India."

RIVAL CONTENTIONS

20. Shri C.U. Singh, learned senior counsel for the Bar Council of India submitted that Advocates enrolled with the Bar Council of India are the only recognized class of persons entitled to practice law in India. Unless any other law so permits, no person can practice before any 'Court, authority or person' other than an Advocate enrolled under the Act. In particular cases, the 'Court, authority or person' may permit a person other than an advocate enrolled under the Act to appear before him. It was submitted that the expression "practice profession of law" covered not only appearance before the Court but also opinion work which is also known as chamber practice. The Ethics prescribed by the Bar Council of India covered not only conduct in appearing before Court or authority but also in dealing with the clients including giving legal opinion, drafting or

participation in law conference. If a person practices before any 'Court, authority or person' illegally, is liable to punishment for imprisonment which may extend to six months. Thus, the view taken by the Madras High Court that visit by a foreign lawyer on fly in and fly out basis to give advice on foreign law or to conduct arbitration in international commercial arbitrations was erroneous. Reference has also been made to definition of the term 'advocate' under Section 2(a) of the Act. Section 6 lays down functions of the Bar Council including admission of persons as advocates, safeguarding rights, privileges and interests of advocates. Section 17 lays down that every State Bar Council shall prepare a roll of advocates and no person can be enrolled in more than one State Bar Council. Section 24 lays down qualifications for admission on the roll of a State Bar council. The qualifications include the citizenship of India, unless a person is national of a country where citizens of India are permitted to practice. One is required to have the prescribed qualification from India or out of India if such degree is recognized by the Bar Council of India, being a Barrister called to the Bar before 31st December, 1976, passing of articled clerks examination or any other examination specified by the Bombay or Calcutta High Court or obtaining foreign qualification recognized by the Bar Council of India are also the prescribed qualifications. It was submitted that even in other jurisdictions, persons other than those

enrolled with the concerned Bar Council are not allowed to practice. Even short term running of legal service is subject to regulatory regime.

21. Learned counsel for the foreign law firms S/Shri Arvind Datar, Sajjan Poovayya, Dushyant Dave, learned senior counsel and Mr. Nakul Dewan, learned counsel supported the direction of the Madras High Court permitting foreign lawyers to render legal services on fly in and fly out basis and also with reference to international commercial arbitrations. It was submitted that Bar Council could come into picture only in respect of advocates enrolled with it. It is only with reference to appearance before the Courts or other authorities or persons that the regulatory regime of the Bar Council may apply but with regard to non litigation/advisory work even those not enrolled as advocates under the Advocates Act are not debarred. It was also submitted by Shri Dewan that Advocates Act applies only to individuals and not to law firms. Provision for reciprocity applies only for enrolment under the Advocates Act and not for casual legal services on fly in and fly out basis or in connection with international commercial arbitration. Foreign lawyers are regulated by the disciplinary regime applicable to them and only their Bar Councils could take action with regard to their working in India also. Practice of law in India did not cover advising on foreign law. Thus, if by a pre-determined invitation, a foreign

lawyer visited India to advise on a foreign law, there is no bar against doing so.

22. Certain decisions have been cited at the Bar to which reference may be made. In ***Roel versus New York County Lawyers Association***[3]***,*** the Court of Appeals of the State of New York dealt with a case where a Mexican citizen and lawyer, who was not a citizen of the United States nor a member of the New York Bar, maintained his office in New York and advised members of the public on Mexican law. He did not give any advice as to New York law. The majority held that this was not permissible. It was observed:

> "*To allow a Mexican lawyer to arrange the institution of divorce proceedings for a New York resident in a Mexican court, without allowing him to tell the client that the divorce might be invalid (Querze v. Querze, 290 N.Y. 13) or that it might adversely affect estate or other property rights or status in this State (Matter of Rathscheck, 300 N.Y. 346), is to give utterly inadequate protection to him (See 70 Harv.L.Rev. 1112-1113). Nor are we in anywise persuaded by the argument in the brief of the Association of the Bar that there is any difference between the right of a Mexican lawyer to act and advise the public in divorce matters and the right (3 N.Y.2d 232) of foreign lawyers generally to act an advise with respect to foreign law. ... ...*
>
> ***The complex problem posed by the activities of foreign attorneys here is a long-standing one. It may well be that***

[3] 3 N.Y.2d 224 (1957)

foreign attorneys should be licensed to deal with clients in matters exclusively concerning foreign law, but that is solely within the province of the Legislature. Our courts are given much control over the lawyers admitted to the Bar of our State; we have no control, however, over those professing to be foreign law experts.

We see no substance in appellant's claim that section 270 of the Penal Law when applied to him deprives him of liberty and property without due process of law, in that the statute as so construed is unreasonable and serves no public purpose."

23. The minority view, on the other hand, held that:

"In this century when the United States has become the creditor nation of the world and when the ramifications of our industrial, commercial, financial and recreational lives extend to every corner of the global, it is especially improbable that the Legislature intended to preclude the giving of legal advice in this State to our citizens concerning these far-flung enterprises by trained lawyers from abroad who are equipped to give accurate information and opinions regarding them. The customary residential requirements for admission to the Bar would in themselves often preclude their becoming admitted to our Bar. ... ...

The omission of the Legislature to enact statutes licensing or regulating the conduct of foreign lawyers in practicing purely foreign law in this State, does not indicate that such conduct is prohibited by sections 270 and 271 of the Penal Law, but merely that the Legislature has not seen fit to subject them to regulation. Whatever the merits of such

proposed legislation, it is not for us to enact it. If foreign lawyers came under section 270 and 271 of the Penal Law, it would stifle their activities to the detriment of the large and increasing number of our nationals who engage in transactions in foreign countries, inasmuch as it would be impossible for most of them to be admitted to practice in this State."

24. In ***Appell versus Reiner***[4]**,** the Supreme Court of New Jersey dealt with a case of New York lawyer, who was not admitted to the New Jersey Bar, giving legal services to New Jersey residents in a matter involving the extension of credit and the compromise of claims held by New York and New Jersey creditors. The Chancery Division held that the New York lawyer could not advice in respect of New Jersey creditors. The Supreme Court of New Jersey held:-

"The Chancery Division correctly delineated the generally controlling principle that legal services to be furnished to New Jersey residents relating to New Jersey matters may be furnished only by New Jersey counsel. We nevertheless recognize that there are unusual situations in which a strict adherence to such a thesis is not in the public interest. In this connection recognition must be given to the numerous multi-state transactions arising in modern times. This is particularly true of our State, situated as it is in the midst of the financial and manufacturing center of the nation. An inflexible observance of the generally controlling doctrine may well occasion a result detrimental to the public interest, and it follows that there may be instances justifying such exceptional treatment warranting the ignoring of state lines. This is such a situation. Under the peculiar facts here

[4] 43 N.J. 313 (1964); 204 A.2d 146

present, having in mind the nature of the services to be rendered, the inseparability of the New York and New Jersey transactions, and the substantial nature of the New York claim, we conclude that plaintiff's agreement to furnish services in New Jersey was not illegal and contrary to public policy.

It must be remembered that we are not here concerned with any participated by plaintiff in a court proceeding. What is involved is the rendering of advice and assistance in obtaining extensions of credit and compromises of indebtedness. ... ..."

25. Again, there was a dissenting view as follows:

"... ...Regulation of the interests of the public and the bar requires a rule of general application. In cases such as we have here, the only fair and workable rule is one which recognizes that the client's matter is primarily a New Jersey one and calls for the engagement of a member of our bar for the legal services to be rendered here. And, in that connection, in the interest of interstate amity, if an out-of-state attorney renders legal services in New Jersey which are a minor or incidental part of a total problem which has its principal and primary aspects in his state, he should be allowed to recover in our courts for the work done in this jurisdiction."

26. Mr. Poovayya referred to Rules of the Indian Council of Arbitration which could apply only if there was an agreement between the parties that the arbitration was to be in accordance with the Rules of the Indian Council of Arbitration. Rule 45 laid down that parties have no right to be represented by lawyers unless the arbitral tribunal considers it necessary and allows.

27. Referring to the Arbitration Act, it was submitted that international commercial arbitration is defined under Section 2(f) which covers arbitration relating to disputes where one of the parties is a national or habitual resident of a country other than India or a body corporate incorporated outside India or an association of body of individuals whose management and control is exercised in a country other than India or a Government of a foreign country. In such cases, parties may agree to have an arbitrator of any nationality, to any language to be used in arbitration proceedings, to any place of arbitration. Section 28(b) permits Arbitral Tribunal to decide disputes in accordance with rules of law applicable to the substance of the dispute as agreed by the parties. The arbitrator has to give equal opportunity to the parties to present their case (Section 18). Parties can agree on the procedure to be followed (Section 19). Section 34(2)(a)(iii) provides that an award may be set aside, inter-alia, on the ground that the party was unable to present its case in the arbitration proceedings. Procedure for presenting case of a party before the arbitrator may be governed by agreement or by the procedural rules.

28. Shri Dushyant Dave referred to rules of certain Arbitration Institutions to the effect that the parties are free to be represented by an outside lawyer. It was submitted that by way of Convention

in international commercial arbitrations, there cannot be any compulsion to engage only a local lawyer. Section 48(1)(b) of the Arbitration Act provides that enforcement of a foreign award can be refused if the parties were unable to present their case. The New York Convention Awards are governed by the First Schedule to the Act. Article-II provides for recognition of an arbitration agreement between the parties. Article-V(1)(b) provides that if the party against whom the award is invoked was not given proper notice or could not present his case, the award cannot be enforced. Section 53 of the Arbitration Act refers to Geneva Convention Awards which is regulated by the Second Schedule to the Act containing similar provisions.

29. Mr. Dave submitted that the Special Leave Petition arising out of the Delhi High Court order is on the question whether London Court of International Arbitration could use the expression "COURT" had become infructuous as the respondent had closed its working in India. He, however, referred the following:

I) <u>Handbook of ICC Arbitration – Commentary, Precedents, Materials – Second Edition (Michael W. Buhler and Thomas H. Webster)</u>

Article 21(4): "The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers."

The authors' comment is as follows:

"*In an ICC arbitration, parties have the right to be represented by the persons of their choice. A distinction should however be made between "authorized representatives" and "advisors". Usually, the parties have attorneys represent them in the arbitration. Thus, an attorney may have both capacities, but this may not always be the case. As an adviser, he or she would not need a power of attorney. On the other hand, as a representative of a party, he or she might need a power of attorney. In arbitration. The major centres of arbitration do not appear to have restrictions on the right of lawyers from other countries to argue cases in those countries, with the possible exception of California."*

The footnote 31 is as follows:

"See Birbower, Montabano, Condon & Frank, P.C. v. The Superior Court of Santa Clara, 949 P.2d 1 (Cal. 1998); see also Holtzmann and Donovan, "United States Country Report" in ICCA Handbook, Supp. 28 (Paulsson edn, 1999). The California Rules of Court were modified in 2004 in order to permit any US qualified lawyer to represent a party in an arbitration (r.966). However, it remains unclear whether lawyers admitted to foreign bars can represent parties in national or international arbitration."

II) Arbitration of Commercial Disputes – International and English Law and Practice (Andrew Tweeddale and Keren Tweeddale).

Representation of the parties

10.15. The right to legal representation at trial has existed both in the common law and in international treaties for centuries[5]. However,

[5] See, for example, art 42 of the Statute of the International Court of Justice which states: '1. The parties shall be represented by agents. 2. They may have the assistance of counsel or advocates before the Court. 3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.' See also art 37 of the Hague Convention 1899 which states: 'The parties have the right to appoint delegates or special agents to attend the Tribunal, for the purpose of serving as intermediaries between them

the right to legal representation is not absolute. The parties may agree to dispense with legal representation[6]. Furthermore, some rules of arbitration prohibit the use of legal representation[7]. In international commercial arbitrations it is generally accepted that the parties may choose their own advocate without necessarily choosing one qualified at the seat of the arbitration[8]. However, in a few recent cases that principle has been challenged[9].”

III) Redfern and Hunter on International Arbitration

“In general, the parties may also be represented by engineers, or commercial men, for the purpose of putting forward the oral submissions, and even for the examination of witnesses. It is not uncommon, where a case involves technical issues, for an engineer or other professional man to be part of the team of advocates representing a party at a hearing, although it is more usual for such technical experts to be called as witnesses

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and the Tribunal. They are further authorized to retain, for the defense of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.’

[6] Henry Bath & Son Ltd. v. Birgby Products [1962] Lloyd’s Rep 389; and see also the English Arbitration Act 1996, s 36.

[7] The arbitration rules of the Australian Football league, for example, limit legal representation.

[8] See, for example, In the matter of an Arbitration between Lawler, Matusky and Skelly, Engineers and the Attorney General of Barbados (No.320 of 1981) 22 August 1983 where the High Court of Barbados held that there was a ‘common law right of everyone who is *sui juris* to appoint an agent for any purpose’. The court held that this included the right to appoint a representative to appear as advocate on a party’s behalf in a commercial arbitration.

[9] In the matter of an Arbitration between Builders Federal (Hong Kong) Ltd. and Joseph Gartner & Co., and Turner (East Asia) Pte Ltd (No. 90 of 1987) (1988) 2 MLJ 280 the Malaysian Judicial Commissioner Chan Sek Keong ruled that the respondents, who were a foreign company, could not select a counsel from their own country because Singapore’s Legal Profession Act operated as a bar to foreign lawyers from representing their clients in international arbitrations in Singapore. However, in June 2004 Singapore finally amended its Legal Profession Act to eliminate this restriction on representation by foreign lawyers in arbitrations in Singapore. See also *Birbrower, Montabano, Condon & Frank v. Superior Court of Santa Clara County, 1998 Cal LEXIS 2, 1998 WL 1346 (Cal 1/5/98)* where the court held that a New York lawyer representing a client in a Californian arbitration was not qualified to act for his client because he was not called to the Californian bar and therefore not entitled to recover his fees. The court, however, stated that this principle would not apply to an international commercial arbitration.

in order that their opinions and submissions may be tested by cross-examination. However, it may sometimes be convenient and save time if technical experts address the arbitral tribunal directly as party representatives[10].

The Supreme Court of California held in 1998 that representing a party in an arbitration without its seat in California was 'engaging in the practice of law' in that state. It followed that a New York lawyer, not a member of the Californian Bar, was not qualified to represent his client in a Californian arbitration; and was thus unable to recover his fee when he sued for it[11]. Fortunately the court stated that the rule did not apply in international arbitration. IN England there is not, and never has been, any danger of a similar situation arising[12]. A party to an arbitration may, in theory, be represented by his plumber, his dentist, or anyone else of his choosing, although the choice usually falls on a lawyer or specialist claims consultant in the relevant industry[13]."

IV) LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA) RULES (2014)

Article 18 – Legal Representatives

"18.1Any party may be represented in the arbitration by one or more authorized legal representatives appearing by name before the Arbitral Tribunal.

18.2 Until the Arbitral Tribunal's formation, the Registrar may request from any party: (i) written proof of the authority granted by that party to any legal representative designated in its Request or Response; and (ii) written

[10] Both the UNCITRAL RULES (Art4) and the LCIA Rules (Art18) make it clear that parties are entitled to be represented by non-lawyers.

[11] *Birbrower, Montabane, Condon Frank v. The Superior Court of Santa Clara County, 1998 Cal Lexis2; 1998 WL 1346 (Cal 1/5/98)*

[12] i.e. that only a member of the local bar should be entitled to represent a party in a judicial or quasi-judicial proceeding.

[13] English Arbitration Act, 1996, s 36. This reaffirms the previous common law position.

confirmation of the names and addresses of all such party's legal representatives in the arbitration. After its formation, at any time, the arbitral Tribunal may order any party to provide similar proof or confirmation in any form considers appropriate."

V) CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSIN (CIETAC) ARBITRATION RULES.

Article 22 - Representation

"A party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration. In such a case, a Power of Attorney shall be forwarded to the Arbitration Court by the party or its authorized representative(s)."

VI) ARBITRATION RULES, MEDIATION RULES OF INTERNATIONAL CHAMBER OF COMMERCE.

ARTICLE 26 – Hearings

"4. The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers."

VII) COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES OF AMERICAN ARBITRATION ASSOCIATION

R-26. Representation

"Any party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email

address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given."

VIII) ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (SIAC)

Party Representatives

"23.1Any party may be represented by legal practitioners or any other authorized representatives. The Registrar and/or the Tribunal may require proof of authority of any party representatives.

23.2 After the constitution of the Tribunal, any change or addition by a party to its representatives shall be promptly communicated in writing to the parties, the Tribunal and the Registrar."

IX) RULES OF INTERNATIONAL COMMERCIAL ARBITRATION BY INDIAN COUNCIL OF ARBITRATION

20. Party Representation and assistance

"At the hearing, a party shall be entitled to appear through Attorney, Advocate or a duly authorized Advisor or Representative or in person, subject to such proof of authority to the satisfaction of the Registrar or the Tribunal."

30. Shri C.U. Singh, learned senior counsel, by way of rejoinder, opposed the submissions of learned counsel appearing for the foreign law firms. He submitted that the stand of the Central Government finally was to support the stand of the Bar Council of

India. The argument that participation of foreign lawyers will be in the interest of the country was raised by the foreign law firms only as shown from para 51 of the Madras High Court judgment. He submitted that the arbitrator was also an 'authority' before whom only advocates enrolled in India alone could appear. The arbitrator could record evidence and summon witnesses through Court(Section 27). Rules of Arbitration Institutions have to be in conformity with the law of the land. He also submitted that the rules framed by the Bar Council of India under Section 49 define the practice of law so as to cover even giving of opinion.

31. Shri Singh further pointed out that Ethics for the profession as applicable in India are different from the Ethics applicable in other countries. In this regard, it was submitted that Rule 36 in Part VI, Chapter II of the BCI Rules prohibits direct or indirect advertising by advocates, or solicitation by any means whatsoever. Rule 18 bars an advocate from fomenting litigation. In ***Bar Council of Maharashtra versus M.V. Dabholkar***[14]***,*** this Court held that advertising was a serious professional misconduct for an advocate. As against this, in USA Rule 7.3 of the American Bar Association Rules bars only in-person or live telephonic solicitation of clients, but expressly permits lawyer-to-lawyer solicitation, as well as client solicitation by written, recorded or electronic communication, unless

[14] (1976) 2 SCC 291

the target of solicitation has made known to the lawyer his desire not to be solicited, or the solicitation involved coercion, duress or harassment. The US Supreme Court, inter alia, in ***Zauderer versus Office of Disciplinary Counsel***[15] and in ***Shapero versus Kentucky Bar Association***[16] struck down disciplinary actions against lawyers for soliciting clients through print advertisements or hoardings. In UK, Solicitors Regulation Authority(SRA) is a regulatory body established under the Legal Services Act, 2007. Chapter 8 of the SRA Handbook permits publicity of the law firm but prohibits solicitations.

32. In India, with regard to Contingency fees, Rule 20 in Part VI, Chapter II of the BCI Rules bars an advocate from stipulating a fee contingent on the results of the litigation or from agreeing to share the proceeds thereof. Rule 21 prohibits practices akin to champerty or maintenance, and prohibits an advocate from buying or trafficking in or stipulating or agreeing to receive any share or interest in an actionable claim. In USA Rule 1.5 (c) of the ABA Rules permits lawyers to charge contingency fees, except in certain specified cases like criminal defence, etc. Fee-splitting arrangements between lawyers from different firms are also permitted with some restrictions. In U.K., Section 58 of the Courts and Legal Services Act, 1990 permits “conditional fee agreements”

[15] 471 US 626 (1985)
[16] 486 US 466

except in criminal proceedings and family law matters and Section 58AA permits “damages-based fee agreements”, all of which entitle legal practitioners to a share of the “winnings”.

33. In India, there are no rules framed by the Bar Council on the subject ‘sale of law practice’. In U.S.A., Rule 1.17 permits law firms or lawyers having private practice to sell their practice including the goodwill. In U.K., SRA Guidelines permit sale of practice as a going concern or acquisition of a practice which is closing down.

34. In India, senior advocates are barred from interacting directly with clients, and are not permitted to draft pleadings or affidavits, correspond on behalf of clients, or to appear in court unassisted by an advocate (Part VI, Chapter I of the Bar Council of India Rules). In U.S.A., no such distinction or designations are made. In U.K., there appear to be no restrictions on Queen’s Counsel (QCs) similar to the ones imposed by the Bar Council in India. QCs are permitted to join law firms as partners.

35. In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no

restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. In U.S.A., lawyers are permitted to fund the entire litigation and take their fee as a percentage of the proceeds if they win the case. Third Party Litigation Funding/Legal Financing agreements are not prohibited. In U.K., Section 58B of the Courts and Legal Services Act, 1990 permits litigation funding agreements between legal service providers and litigants or clients, and also permits third party Litigation Funding or Legal Financing agreements, whereby the third party can get a share of the damages or "winnings".

36. In India, partnerships with non-lawyers for conducting legal practice is not permitted. In U.K., Section 66 of the Courts and Legal Services Act, 1990 expressly permits solicitors and barristers to enter into partnerships with non-solicitors and non-barristers.

CONSIDERATION OF THE ISSUES

37. We have considered the rival submissions. Questions for consideration mainly arise out of directions in para 63 of the Madras High Court judgment which have already been quoted in the beginning of this judgment. viz. :

(i) Whether the expression 'practise the profession of law' includes only litigation practice or non-litigation practice also;

(ii) Whether such practice by foreign law firms or foreign lawyers is permissible without fulfilling the requirements of Advocates Act and the Bar Council of India Rules;

(iii) If not, whether there is a bar for the said law firms or lawyers to visit India on 'fly in and fly out' basis for giving legal advice regarding foreign law on diverse international legal issues;

(iv) Whether there is no bar to foreign law firms and lawyers from conducting arbitration proceedings and disputes arising out of contracts relating to international commercial arbitration;

(v) Whether BPO companies providing integrated services are not covered by the Advocates Act or the Bar Council of India rules.

RE : (i)

38. In ***Pravin C. Shah versus K.A. Mohd. Ali***[17], it was observed that right to practice is genus of which right to appear and conduct cases is specie. It was observed:

> *".....The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart form appearing in the courts he can be consulted by*

[17] (2001) 8 SCC 650

his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions etc. ……"

In ***Ex. Capt. Harish Uppal versus Union of India***[18], same view was reiterated.

39. Ethics of the legal profession apply not only when an advocate appears before the Court. The same also apply to regulate practice outside the Court. Adhering to such Ethics is integral to the administration of justice. The professional standards laid down from time to time are required to be followed. Thus, we uphold the view that practice of law includes litigation as well as non litigation.

RE : (ii)

40. We have already held that practicing of law includes not only appearance in courts but also giving of opinion, drafting of instruments, participation in conferences involving legal discussion. These are parts of non-litigation practice which is part of practice of law. Scheme in Chapter-IV of the Advocates Act makes it clear that advocates enrolled with the Bar Council alone are entitled to practice law, except as otherwise provided in any other law. All others can appear only with the permission of the court, authority or person before whom the proceedings are pending. Regulatory mechanism for conduct of advocates applies to non-litigation work

[18] (2003) 2 SCC 45

also. The prohibition applicable to any person in India, other than advocate enrolled under the Advocates Act, certainly applies to any foreigner also.

RE : (iii)

41. Visit of any foreign lawyer on *fly in and fly out* basis may amount to practice of law if it is on regular basis. A casual visit for giving advice may not be covered by the expression '*practice'.* Whether a particular visit is casual or frequent so as to amount to practice is a question of fact to be determined from situation to situation. Bar Council of India or Union of India are at liberty to make appropriate rules in this regard. We may, however, make it clear that the contention that the Advocates Act applies only if a person is practicing Indian law cannot be accepted. Conversely, plea that a foreign lawyer is entitled to practice foreign law in India without subjecting himself to the regulatory mechanism of the Bar Council of India Rules can also be not accepted. We do not find any merit in the contention that the Advocates Act does not deal with companies or firms and only individuals. If prohibition applies to an individual, it equally applies to group of individuals or juridical persons.

RE: (iv)

42. It is not possible to hold that there is absolutely no bar to a foreign lawyer for conducting arbitrations in India. If the matter is

governed by particular rules of an institution or if the matter otherwise falls under Section 32 or 33, there is no bar to conduct such proceedings in prescribed manner. If the matter is governed by an international commercial arbitration agreement, conduct of proceedings may fall under Section 32 or 33 read with the provisions of the Arbitration Act. Even in such cases, Code of Conduct, if any, applicable to the legal profession in India has to be followed. It is for the Bar Council of India or Central Government to make a specific provision in this regard, if considered appropriate.

RE: (v)

43. The BPO companies providing range of customized and integrated services and functions to its customers may not violate the provisions of the Advocates Act, only if the activities in pith and substance do not amount to practice of law. The manner in which they are styled may not be conclusive. As already explained, if their services do not directly or indirectly amount to practice of law, the Advocates Act may not apply. This is a matter which may have to be dealt with on case to case basis having regard to a fact situation.

44. In view of above, we uphold the view of the Bombay High Court and Madras High Court in para 63 (i) of the judgment to the effect that foreign law firms/companies or foreign lawyers cannot practice profession of law in India either in the litigation or in non-litigation side. We, however, modify the direction of the Madras

High Court in Para 63(ii) that there was no bar for the foreign law firms or foreign lawyers to visit India for a temporary period on a *"fly in and fly out"* basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues. We hold that the expression *"fly in and fly out"* will only cover a casual visit not amounting to "practice". In case of a dispute whether a foreign lawyer was limiting himself to "fly in and fly out" on casual basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues or whether in substance he was doing practice which is prohibited can be determined by the Bar Council of India. However, the Bar Council of India or Union of India will be at liberty to make appropriate Rules in this regard including extending Code of Ethics being applicable even to such cases.

45. We also modify the direction in Para 63 (iii) that foreign lawyers cannot be debarred from coming to India to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. We hold that there is no absolute right of the foreign lawyer to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration. If the Rules of Institutional Arbitration apply or the matter is covered by

the provisions of the Arbitration Act, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of international commercial arbitration in view of Sections 32 and 33 of the Advocates Act. However, they will be governed by code of conduct applicable to the legal profession in India. Bar Council of India or the Union of India are at liberty to frame rules in this regard.

46. We also modify the direction of the Madras High Court in Para 63(iv) that the 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. We hold that mere label of such 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.

The Civil Appeals are disposed of accordingly.

.....J.
[ADARSH KUMAR GOEL]

.....J.
[UDAY UMESH LALIT]

NEW DELHI;
MARCH 13, 2018.