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The Bar Council of India (BCI) rules over foreign lawyers

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Why is in news?

In a move that could potentially change the landscape of legal practice in the country, the Bar Council of India (BCI) has allowed foreign lawyers and law firms to practise in India. Although they cannot appear in court, they can advise clients on foreign law and work on corporate transactions.

A brief about BCI decision

The BCI is a statutory body established under the Advocates Act, 1961, and it regulates legal practice and legal education in India. For over a decade, BCI was opposed to allowing foreign law firms in India

BCI recently notified in the official gazette the Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022.

In a Statement of Objects and Reasons, the BCI said it “resolves to implement these Rules enabling the foreign lawyers and Foreign Law Firms to practise foreign law and diverse international law and international arbitration matters in India on the principle of reciprocity in a well-defined, regulated and controlled manner.”

Operation of Foreign firms so far

The issue of foreign law firms entering the Indian market came to courts with a challenge before the Bombay High Court in 2009.

In ‘Lawyers Collective v Union of India’, the Bombay High Court essentially held that only Indians holding Indian law degrees can practise law in India.

The HC interpreted Section 29 of the Advocates Act, which states that only advocates enrolled with BCI can practise law.

The HC also held that ‘practice’ would include both litigious and non-litigious practice, so foreign firms can neither advise their clients in India nor appear in court.

In 2012, the issue came up before the Madras High Court in ‘AK Balaji v Union of India’.

In 2015, the Supreme Court in a decision recognised the practice of foreign law firms in a very narrow sense. In ‘AK Balaji v Government of India’, the Madras High Court also held that foreign firms cannot practise either on the litigation or non-litigation side unless they meet the requirements and rules laid down by the Advocates Act and the BCI rules.

Over 32 foreign law firms from the UK, the US, France and Australia had been impleaded as respondents in the case. However, the Madras High Court created an exception. It said that there would be no ban on temporary visits or advising clients on a “fly in and fly out” basis.

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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 advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

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

By 2012, Business Process Outsourcing (BPOs) had arrived in India on a big scale and did backend work for US-based companies. In the legal profession, these firms, Legal Process Outsourcing (LPOs), carried support operations for lawyers. They operated in uncertain legal frameworks and the Supreme Court had to intervene to settle the law on the issue.

SC Decision over the issue

Both the Madras and Bombay High Court judgments were challenged by the BCI and Lawyer’s Collective respectively before the Apex Court.

In 2018, the Supreme Court upheld both the High Court judgments disallowing foreign law firms and lawyers, with some modifications such as holding the expression “fly in and fly out” to cover only “casual visit not amounting to practice.”

This meant that the “fly in and fly out” route could not mean regular visits. On the issue of LPOs, the SC did not decide on their fate.

They argued that they were essentially BPOs that managed secretarial support, transcription services, proofreading services, travel desk support services, etc. which technically do not come within the purview of the Advocates Act or the BCI Rules.

Provisions under new rules

According to the Advocates Act, advocates enrolled with the Bar Council alone are entitled to practise law in India.

All others, such as a litigant, can appear only with the permission of the court, authority or person before whom the proceedings are pending.

The notification essentially allows foreign lawyers and law firms to register with BCI to practise in India if they are entitled to practise law in their home countries. However, they cannot practise Indian law.

Further, the foreign lawyers or foreign Law Firms shall not be permitted to appear before any courts, tribunals or other statutory or regulatory authorities.

They shall be allowed to practise transactional work /corporate work such as joint ventures, mergers and acquisitions, intellectual property matters, drafting of contracts and other related matters on a reciprocal basis.

They shall not be involved or permitted to do any work pertaining to the conveyancing of property, Title investigation or other similar works, the notification states.

Indian lawyers working with foreign law firms will also be subject to the same restriction of engaging only in “non-litigious practice.”

Conclusion

The BCI move will address concerns about the flow of Foreign Direct Investment in the country and make India a hub of International Commercial Arbitration. The rules also bring legal clarity to foreign law firms that currently

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operate in a very limited way in India.