

Attorney-Client Privilege in India

A "privileged professional communication" is a protection awarded to a communication between the legal adviser and the client. Professional communications and confidential communications with the legal advisors have been accorded protection under The Indian Evidence Act, 1872 ("**the Act**"). If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilled person, or would only dare to tell his counsel half his case. We will discuss this topic from the perspective of India and few other countries in the world. In this article we will discuss the Indian law the way it perceives attorney-client privilege.

PRIVILEGED COMMUNICATIONS

In India, Sections 126 to 129 of the Act deal with privileged communication that is attached to professional communication between a legal adviser and the client.

Section 126 of the Act provides the scope of privilege attached to professional communications in an attorney-client setting. It restricts attorneys from disclosing any communications exchanged with the client and stating the contents or conditions of documents in possession of the legal advisor in course of and for the latter's employment with the client.

The section also provides certain exceptional grounds on which such privilege shall stand denied, being in furtherance of any illegal purpose or facts coming to the awareness of the attorney showing that either crime or fraud has been committed since the commencement of the attorney's employment on the concerned matter. It is immaterial whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Section 127 extends the privilege provided under section 126 to the interpreters, clerks and servants of the legal adviser.

Section 128 continues to bind the legal adviser from disclosing any information covered under sec 126 unless the client calls the legal adviser as a witness and questions him on the same.

Section 129 lays down that no one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional advisor, unless he offers himself as a witness.

To claim privilege under section 126 of the Act, a communication by a party to his pleader must be of a confidential nature. (**Memon Hajee Haroon Mohamed v. Abdul Karim [1878] 3 Bom. 91**). Also, there is no privilege to communications made before the creation of a relationship of a pleader and client. (**Kalikumar Pal v. RajkumarPal 1931 (58) Cal 1379, Para 5**)

In India any person who seeks an advice from a practicing advocate, registered under the Advocates Act, would have the benefit of the attorney-client privilege and his communication would be protected under section 126 of the Act. This section would also extend to the employees of the advocate/law firm which could include accountants, paralegals, and such other employees.

BAR COUNCIL OF INDIA RULES

The Bar Council of India Rules (“**BCIR**”) stipulates for all advocates (legal advisers) certain standards of professional conduct and etiquette. Part VI, Chapter II, Section II, Rule 17 of BCIR stipulates that *“An advocate shall not, directly or indirectly, commit a breach of the obligations imposed by Section 126 of the Indian Evidence Act”* thus reiterating the spirit of attorney-client privilege, breach of which will also lead to violation of the Bar Council Rules.

POSITION OF AN IN-HOUSE COUNSEL

The Supreme Court in **Satish Kumar Sharma v. Bar Council of Himachal Pradesh (AIR 2001 SC 509)** held *“If a full-time employee is not pleading on behalf of his employer, or if terms of employment are such that he does not have to act or plead but is required to do other kinds of functions, then he ceases to be an advocate. The latter is then a mere employee of the government or the body corporate”*.

The judgment also quotes Part VI, Chapter II, Section VII, Rule 49 of the Bar Council of India Rules, stating that *‘an advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice and shall, on taking up any such employment intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment. An advocate cannot be a full-time salaried employee. The only exception is if the person is a Law Officer of the Central Government of a State or of any public corporation entitled to be enrolled in the Bar.’*

In **Municipal Corporation of Greater Bombay v. Vijay Metal Works (AIR 1982 Bom 6)** the court held that *“a salaried employee who advises his employer on all legal questions and also other legal matters would get the same protection as others, viz., barrister, attorney, pleader or vakil, under Ss.126 and 129, and,*

therefore, any communication made in confidence to him by his employer seeking his legal advice or by him to his employer giving legal advice should get the protections of Ss.126 and 129.”

Thus, in India, communications between clients and in-house lawyers would generally have to be tested whether the in-house counsel is a full time salaried employee as contemplated under Part VI, Chapter II, Section VII, Rule 49 of BCIR.

Further, distinction may have to be made whether the advice sought is in legal or executive capacity.

Foreign investment in Single–Brand Product Retail Trading/ Multi-Brand Retail Trading / Civil Aviation Sector / Broadcasting Sector / Power Exchanges - Amendment to the Foreign Direct Investment Scheme

The Government has attempted to stem the trend of economic policy paralysis by announcing a slew of measures yesterday with a view to enhancing foreign direct investment (FDI), including in some sensitive sectors which had witnessed political deadlock over the last year or so. The new measures relate to multi-brand retail, single-brand retail, civil aviation, power trading exchanges and broadcasting. Please [follow the link for the RBI notification for the same.](#)

News 10 @ a glance

DIPP releases new rules for NBFC subsidiaries

The Department of Industrial Policy and Promotion (DIPP), vide Press Note No. 9 of 2012 series, issued on October 3, 2012 (“Press Note”), has amended paragraph 6.2.24.2 (1) (iv) of the 'Consolidated FDI Policy'. In view of the Press Note, Non Banking Financial Companies (NBFCs) having foreign investment above 75% but below 100 % and with a minimum capitalization of US\$ 50 million are now permitted to set up step down subsidiaries for specific NBFC activities. Prior to the said amendment, 100% foreign

owned NBFCs with a minimum capitalization of US\$ 50 million were permitted to set up step down subsidiaries for specific NBFC activities, without any restriction on the number of operating subsidiaries and without bringing in additional capital.

RBI cuts CRR

Reserve Bank of India slashed cash reserve ratio by 25 basis point to 4.50% in its mid quarter review of the monetary policy. CRR is the minimum proportion of deposits that banks must hold with the central bank. The CRR reduction is expected to inject Rs. 17,000 crore liquidity into the banking system.

RBI allows NRIs to pick-up shares, debentures at face value

The Reserve Bank has Allowed a person living outside India or an entity incorporated outside India to purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to compliance with the issue price. Also, where non-residents (including NRIs) make investment in an Indian company in compliance with the provisions of the Companies Act, 1956, by way of subscription to Memorandum of Association, such investments may be made at face value subject to their eligibility to invest under the FDI scheme.

Excise and customs duty on

domestic LPG cylinders reduced to zero

The government abolished import and excise duties on LPG cylinders they buy beyond the 6 per annum quota of subsidized cooking gas, and asked state governments to subsidize the requirements of households at their level. Non-subsidized commercial LPG cylinders, however, would continue to attract customs duty of 5 per cent and excise duty at 8 per cent.

Tax on overseas borrowings slashed, Rajiv Gandhi Equity Savings Scheme approved

Finance Minister P Chidambaram cut withholding tax on overseas borrowings to 5 per cent from 20 per cent and approved the Rajiv Gandhi Equity Savings Scheme (RGESS). While the RGESS is aimed at encouraging first time retail investors to invest in stock markets through tax concessions, the cut in withholding tax to 5 per cent seeks to lower the cost of foreign borrowings by the Indian companies. Besides the equities of blue chip private and public sector companies, he said, the investors under the scheme would also be permitted to invest through Mutual Funds and listed Exchange Traded Funds (ETFs).

SC issues notice to Centre on plea for probe of Air India aircraft purchase

The Supreme Court issued a notice to the Centre and Air India on a plea seeking a CBI/SIT probe into alleged irregularities, including purchase of aircraft for the national carrier and giving up of profit making routes to private airlines, when Praful Patel was Civil Aviation Minister. A bench of justices H L Dattu and C K Prasad sought response from the government, the national carrier and CBI on a petition filed by an NGO, Centre for Public Interest Litigation, alleging that various decisions taken during the tenure of Patel were meant to benefit private airlines and caused huge loss to Air India.

Vodafone willing to pay Rs 8,000 crore tax if interest waived

Declaring that it was ready to "take a step forward" if the government took one, Vodafone has brightened hopes of a settlement in its long-running tax dispute with India's tax authorities "If government takes one step forward, Vodafone will also take a step forward," the chairman of its Indian business Anajit Singh told reporters in comments that have been interpreted to mean that it may not be averse to paying the tax liability so long as the government waived the interest and penalty amounting to more than Rs 12,000 crore.

HC asks CBI to give back seized documents to CWG OC

The Delhi High Court asked the CBI

to provide the Commonwealth Games Organising Committee the copies of various documents seized by it during its probe into various games-related scams to enable the committee pursue its ongoing arbitral proceedings against various firms. The court also asked the organizing committee to appoint a person within two days to identify various documents which it wanted to use in various arbitral proceedings. The court was hearing the CWG OC's plea for a direction to the CBI to provide it the copies of various documents seized by the investigating agency during its probe into various cases against some of the CWG OC office bearers, including Suresh Kalmadi.

Establishment of Liaison Office (LO) / Branch Office (BO) / Project Office (PO) in India by Foreign Entities – Clarification

RBI vide a notification clarified that permission to establish offices, in India by foreign Non-Government Organizations/Non-Profit Organizations/Foreign Government Bodies/Departments, by whatever name called, are under the Government Route as specified in A. P. (DIR Series) Circular No. 23 dated December 30, 2009. Accordingly, such entities are required to apply to the Reserve Bank for prior permission to establish an office in India, whether Project Office or otherwise.

Bauxite mining in Visakhapatnam

agency area: not to be allowed

Union Rural Development Minister Jairam Ramesh said bauxite mining would not be allowed at any cost in the Visakhapatnam agency area to protect the interests of tribals. He also said that some private companies had shown interest in mining bauxite there. However, local villagers and tribals are opposing the proposed move.