

6th September, 2022

FOREIGN COMPANIES & FUNDAMENTAL RIGHTS - PART III OF THE CONSTITUTION OF INDIA

1. Introduction

- Section 9 of the Companies Act, 2013 states that any company incorporated under the Companies Act would be a body corporate having a separate juristic legal entity.
- The Supreme Court in the case of *'Tata Engineering Locomotive Co. Ltd. v. State of Bihar¹ and Ors.'* has held that the company is a natural person and has its own life.
- A well-settled proposition in law² is that these incorporated 'persons' are entitled to the protection of the fundamental rights as granted under the Constitution which are as wide as to cover all 'persons'.
- However, the scheme of protection under Fundamental Rights available to a Company not incorporated under the Companies Act, i.e., Foreign Companies does not stand in equal footing.
- Pertinently, by foreign company and foreign national are not to be confused and used interchangeable for the purposes of availability of Fundamental Rights. In the case of *'Louis De Raedt vs. Union of India³*, the Hon'ble Supreme Court upheld the right of foreign national to take recourse to Writ Jurisdiction for enforcement of the Fundamental Rights. However, it shall not be wrong to state that law is far from being settled in cases involving the rights of a foreign artificial person.

2. Foreign Companies Non-Citizens & Writ Jurisdictions

- The Constitution does not provide for any categorical bar on invoking of the Writ Jurisdiction by a foreign entity.
- The basic requirement for invoking the jurisdiction of the Writ Courts is the breach of the legal right by any person or authority, who fits the description of "State" under Article 12 of the Constitution of India. In exceptional cases, a "person" or "authority" who is not

"State" within the meaning of Article 12 of the Constitution can also be subjected to the jurisdiction of the Writ Court.

- The very initial judicial pronouncement done by the High Court of Judicature at Calcutta in the matter of *'Hongkong & Shanghai Banking Corporation Ltd. V/s Union of India⁴*, wherein the Hon'ble Court while examining the very maintainability of the Writ Petition filed by a foreign company under Article 226 of the Constitution upheld the right of foreign entity to invoke the Writ Jurisdiction. Observing further the Hon'ble Court held that *".....This position would not change in respect of a company incorporated outside this country. A foreign company in any event has a right to sue and there is no bar under the Civil Procedure Code also in that regard....."*. Evidently, the Hon'ble High Court also held that Article 19 is not available to foreign entity.
- The question as to the availability of which fundamental rights are available to foreign entity and which are not available to foreign entity had remained a concern for the Courts, which is far from settled as on date.
- In the year 2011, the Hon'ble High Court of Judicature at Calcutta in *'Erbis Engineering Company Ltd. V/s State of West Bengal⁵* held that Article 15, 16 and 19 are not available to foreign entity.
- In interpreting so, the Court relied primarily on two sources, firstly, Article 367 and secondly, the intent of the framers of the Constitution. While relying on the former, the Court noted that the definition of the word 'person' under the General Clauses Act, 1897 can be resorted to and taken shelter under Article

¹ (1964) 6 SCR 885.

² The State Trading Corporation of India Ltd And Ors Vs The Commercial Tax Officer, Vishakhapatnam 1963 AIR 1811, 1964 SCR (4) 89.

³ 1991 AIR 1886.

⁴ WP No.388 of 2003.

⁵ (2012) 2 CLT LT 674.



Abinash Agarwal

Senior Associate, MCO Legals
LLB., Faculty of Law, University
of Delhi, B.Com(Hons.)
University of Delhi

Expertise:

Civil Litigation, Commercial
Arbitration, Legal Due Diligence,
Legal Compliances

✉ abinash.a@mcolegals.co.in



Animesh

Research Partner

4th Year of B.A.LLB (Hons.),
Damodaram Sanjivayya National
Law University

367, for the purposes of interpretation and secondly, the intentional using of words ‘citizens’ and ‘persons’ by framer of our Constitution.

- In words of Hon’ble Justice Mr. Soumitra Pal “.....*It is pertinent to note while Articles 15, 16 and 19 confer fundamental rights on the “citizens”, Article 14 confers fundamental rights on “any person.” This distinction between a “citizen” and a “person” was engrafted in our Constitution by its framers with a specific intent - to grant certain fundamental rights to its “citizens” and to grant certain rights or legal rights to a “person”. There is no ambiguity in the language of the Articles and the intent is expressed with sufficient linguistic precision.....Hence, if it is established by a party aggrieved that he has a legal right and such right has been infringed, order or writ may be issued under Article 226.*”
- The Hon’ble High Court of Delhi in the case of ‘*Thomson- Csf v/s National Airport Authority of India*’⁶ while dealing with a challenge by a foreign entity to the tendering process under Writ jurisdiction upheld the right of foreign entity to mount such challenge averring infringement of Article 14 of the Constitution on the ground of duty of the State to measure its action in the threshold of meeting of Article 14. The Court further held that the fundamental rights conferred by Articles 15, 16, 19 and 29 can be invoked by citizens alone, rights created by Article 14, is guaranteed to the individual or person, irrespective of the fact that whether the individual is foreigner or a citizen or an alien or it is an artificial person.
- Similar judicial interpretation was pronounced by the Hon’ble High Court of Delhi in the case of ‘*Israel Military Industries v. UOI*’⁷ wherein the Court upheld the rights of the company incorporated under the laws of the State of Israel under Article 14 of the Constitution.

3. Conclusion

- Even though foreign companies have been afforded protection under Article 14 of the Constitution, the law on the applicability of other fundamental rights is now well settled. Though most of the Writ jurisdiction filed by the foreign companies’ alleging violation of the Article 14 are in essence to get rights under Article 19, which is a prominent abuse of the process of Law.
- In cases like ‘*Cosmo Tours and Travels & Others vs. Union of India and others*’⁸ and ‘*The Power Measurement Ltd. vs. U.P. Power Corporation Ltd*’⁹ the incorporated foreign entities attempted to abuse the process of Law through alleging violation of Article 14 but in actual enforcing rights under Article 19, which are not available to foreign entities.
- Courts have been consistent in criticizing such abuse of Writ jurisdiction by foreign entities. However, lot more clarity and certainty is to be laid down by the Hon’ble Courts in future in this regard.

⁶ AIR 1993 Del 252.

⁷ (2013) 201 DLT 1.

⁸ 2010 SCC OnLine Del 1465.

⁹ 2003 (2) AWC 1642 b.