

CHAMBERS GLOBAL PRACTICE GUIDES

Art & Cultural Property Law 2025

Definitive global law guides offering
comparative analysis from top-ranked
lawyers

India: Law & Practice

Roshnek Dhalla, Bijal Ajinkya,
Moin Ladha and Shailendra Bhandare
Khaitan & Co



INDIA

Law and Practice

Contributed by:

Roshnek Dhalla, Bijal Ajinkya, Moin Ladha and Shailendra Bhandare
Khaitan & Co



Contents

1. Art Law Framework p.6

1.1 Relevant Authorities and Legislation p.6

2. Rights to Artworks p.7

2.1 Artists' Rights Over Their Art p.7

2.2 Copyright in Collaborative Artworks p.7

3. Protection Against Plagiarism p.8

3.1 Legal Consequences of Copyright Infringement p.8

3.2 Registering Artwork p.8

3.3 Resale Right p.9

3.4 Using Copyrighted Images p.9

4. Authentication of Artworks p.9

4.1 Posthumous Rights to Authenticate Artwork p.9

4.2 Art Authentication p.9

4.3 Legal Remedies Following a Declaration of Inauthenticity p.9

5. Cultural Heritage p.9

5.1 Defining Cultural Heritage p.9

5.2 Cultural Heritage and Adverse Possession p.10

5.3 State Rights to Cultural Heritage p.10

6. Sale of Art Objects Domestically and Abroad p.10

6.1 Key Clauses in Art Sale Contracts p.10

6.2 Issues in Cross-Border Art Sales p.11

6.3 Gallery and Auction House Liability for Fake Art p.12

6.4 Pre-Sale Checks for Auction Houses and Galleries p.12

6.5 Role and Responsibilities of an Art Adviser p.12

6.6 Anti-Money Laundering Regulations and the Art Market p.12

7. Collections p.13

7.1 Legal Status of Collections p.13

8. Photography p.13

8.1 When Are Photographs Protected as Art? p.13

8.2 Legal Protection for Different Types of Photographs p.13

9. Artworks and New Technologies p.13

9.1 NFTs p.13

9.2 Counterfeit NFTs p.14

10. Gifts, Donations, Trusts and Inheritance p.14

10.1 Planning for Generational Transfer of Artworks p.14

10.2 Legal and Fiscal Issues in Artwork Succession p.16

10.3 Tax Implications of Artwork Gifts and Donations p.16

10.4 Artworks Exempt from Inheritance/Donation Taxes p.17

10.5 Trusts p.17

Khaitan & Co is a top-tier full-service law firm with over 1,200 legal professionals (including over 270 leaders) and with presence in India and Singapore. With more than a century of experience in practising law, it offers end-to-end legal solutions in diverse practice areas to clients across the world. The firm has a team of about 20 highly motivated and dynamic professionals delivering outstanding client service and expert legal advice on art law, and specialising in a combination of areas, including intellectual

property, cultural heritage, art transactions and more. It has represented buyers, sellers, galleries and auction houses in the buying and selling of artwork, and has handled cases related to the authenticity of artwork, including misrepresentation or theft. The firm has also addressed copyright, trade mark and licensing issues related to artwork (including digital art), and has helped with disputes or legal challenges regarding the ownership and repatriation of cultural artifacts or art.

Authors



Roshnek Dhalla is a partner in the corporate and commercial practice at the Mumbai office of Khaitan & Co. She specialises in cross-border M&A, restructuring, regulatory and corporate

compliance. Roshnek leads the firm's fine arts practice, and regularly advises collectors, auction houses, dealers, museums, corporates and institutions. Her work goes beyond disputes, and includes the sale and purchase of arts and antiquities under the standard terms of business of major market players for exports/imports, stolen art and related issues. Roshnek is a member of the All-India Initiative on Creative Economy. Her extensive experience allows her to provide comprehensive advice to her clients, ensuring that potential legal challenges are addressed promptly and efficiently.



Bijal Ajinkya is a partner in the tax and private client practice at the Mumbai office of Khaitan & Co. She is the presiding officer of the firm's Prevention of Sexual Harassment Committee,

and is a leader in the firm's DEI initiatives. She currently serves as an advisory board member of the ARRA scholarship foundation. Bijal is the first Indian qualified lawyer to be admitted as an international fellow to the American College of Trust and Estate Counsel (ACTEC). She currently serves as a Steering Committee member in the Asia-Pacific Wealth Advisors Forum, hosted by Cambridge Forums. She is actively engaged in making representations and participating in consultations with the Indian government on new tax policies and key legal issues.

Contributed by: Roshnek Dhalla, Bijal Ajinkya, Moin Ladha and Shailendra Bhandare, **Khaitan & Co**



Moin Ladha is a partner in the Mumbai office of Khaitan & Co. He has over 17 years' experience in public M&A and securities, and leads the firm's regulatory practice. In addition

to advising on financial and strategic investments in public listed space, Moin provides strategic advice in relation to regulatory issues concerning exchange control, structuring regarding cross-border transactions and investments. Moin is a member of drafting committees, works closely with the SEBI and the RBI, and also has significant expertise in advising individuals and family offices on overseas investments.



Shailendra Bhandare is a partner in the intellectual property (IP) practice group at Khaitan & Co. Shailendra's expertise covers the entire life cycle of IP (prosecutions,

enforcements, contentious matters, management and transactional work). He advises several multinational and domestic conglomerates, including Fortune 500 companies. He focuses on trade marks, copyrights, designs and technology-related matters. He has also advised on IP diligences, patent transactional matters, IP licensing matters, commercialisation contracts, technology transfers, and media and entertainment contracts. He is also part of the firm's TechReg group. He is actively involved in the International Trademark Association's (INTA) policy/advocacy initiatives in India, and is the past chair of INTA's India Global Advisory Council and INTA's Trademark Office Practices India Subcommittee.

Khaitan & Co

One World Center,
0th, 13th and 14th Floors
Tower 1C,
841 Senapati Bapat Marg
Mumbai 400 013
India

Tel: +91 22 6636 5000
Fax: +91 22 6636 5050
Email: bdo@khaitanco.com
Web: www.khaitanco.com



KHAITAN
& CO ADVOCATES
SINCE 1911

1. Art Law Framework

1.1 Relevant Authorities and Legislation

The Antiquities and Art Treasures Act, 1972 (the “*Antiquities and Art Treasures Act*”) aims to provide for the protection and preservation of antiquities and art treasures. The definition of an “*antiquity*” is wide and inclusive. It includes coins, sculptures, paintings, and works of art and craftsmanship that are not less than 100 years old.

An art treasure has been defined in the same Antiquities and Art Treasures Act as any human work of art, which is not an antiquity and has been declared by the Central Government to be an art treasure. Significantly, no work of art can be declared as an art treasure during the lifetime of the creator.

Pursuant to the Antiquities and Art Treasures Act, the Ministry of Education and Social Welfare promulgated the Antiquities and Art Treasure Rules, 1973 (the “*Rules*”). The law does not prohibit dealing in antiquities or art treasures; it seeks to regulate the trade in such objects rather than impose a total prohibition on such activity.

By Notification GSR No 904(E) dated 1 December 1976, the Central Government declared the paintings (including drawings, sketches, diagrams and the like) and objects of art by Rabindranath Tagore, Amrita Sher Gill, Jamini Roy and Nandalal Bose to be art treasures under the Antiquities and Art Treasures Act.

On 10 August 1979, by Notification GSR 477(E) the Central Government declared the paintings (including drawings, sketches, diagrams and the like) and objects of art by Ravi Verma, Gaganendra Nath Tagore, Abanindra Nath Tagore, Sailoz

Mookerjee and N Roerich to be art treasures under the Antiquities and Art Treasures Act.

The works of these nine artists have been declared as art treasures by the Central Government and their exportation is regulated under the Antiquities and Art Treasures Act. A specific permit from the Director General, Archaeological Survey of India is necessary before any exportation of paintings of these nine artists, who are described as “*Navratnas*” (which means the “*nine jewels*”).

The effect of these two notifications with respect to the works of the named artists is that their works cannot be taken outside India without the express permission of the Central Government; further, if the Central Government believes that their works need to be preserved in a public place, the Central Government can compulsorily acquire their works.

The Copyright Act, 1957 (the “*Copyright Act*”) is also applicable in the case of the art treasures by these artists. These art treasures would qualify as artistic works under the Copyright Act. Section 2(c)(i) of the Copyright Act defines an “*artistic work*” as a painting, a sculpture, a drawing, an engraving or a photograph, whether or not any such work possesses artistic quality. The Copyright Act accords protection to these art treasures, as the copyright in these works vests in the authors of such works. Copyright, in the case of an artistic work, means the exclusive right of the author – that is, the artist’s right to:

- reproduce the work in any form;
- communicate the work to the public;
- issue copies of the work to the public;
- include the work in any cinematograph film; and
- make any adaptation of the work.

The term of copyright in an artistic work is the lifetime of the author and 60 years from the date of their death, provided that the artistic work was published during the lifetime of the author.

2. Rights to Artworks

2.1 Artists' Rights Over Their Art

Under Indian copyright laws, an artist's rights over a piece of artwork can be broadly categorised into two categories.

Economic Rights

This encompasses a set of exclusive rights that may be exercised/exploited by the copyright holder for monetary gains by themselves or through a third party under a licence, such as:

- the right to reproduce the artwork in any material form;
- distribution rights and the right to communicate/make available the artist's artwork to the public;
- the right of adaptation or to create derivative works from the artist's artwork; and
- the right to enforce such rights against infringers.

Moral Rights

These are also known as "*author's special rights*", which are personal to the creator of the artwork and may be retained by the creator/author despite the assignment of copyright in the artwork or sale of such artwork to any third party by the creator or author. Such rights include:

- the right to attribution or paternity, which refers to the author's/artist's right to claim authorship over their work and to be attributed for it; and

- the right of integrity, which enables the author/artist to prevent or object to any act amounting to wrongful distortion, improper modification or mutilation of their artwork resulting in the author's/artist's honour or reputation being adversely affected.

In addition to moral and economic rights, artists also have "*resale right*", which is a statutory personal right that enables original authors/artists to benefit from a percentage (not exceeding 10% of the resale price) of the price of sale of the artist's original work (not copies); see 3.3 **Resale Right** for more details.

2.2 Copyright in Collaborative Artworks

If an artwork is created by two or more artists/authors, each of whose contribution is independent but fundamental to the artwork, such artwork is categorised as a work of joint authorship under Indian copyright laws. The following applies as per the Indian jurisprudence on copyright over artworks having joint authorship/collaborative artwork:

- mutual agreement is required between all authors concerned with a collaborative artwork for transfer of rights, titles and interests in such artwork;
- irrespective of the degree of contribution by each author in a collaborative artwork, the authors' rights of ownership, monetary exploitation and otherwise of the collaborative artwork will be equal, unless an agreement to the contrary has been executed between the authors; and
- individual authors of a collaborative artwork cannot claim exclusive rights in said artwork at the cost of the co-authors or without the approval of such co-authors.

3. Protection Against Plagiarism

3.1 Legal Consequences of Copyright Infringement

The consequences of copyright infringement under Indian copyright laws can be broadly categorised as criminal and non-criminal/civil.

Criminal Consequences

Imprisonment for a period of six months to three years, and a fine of between INR50,000 and INR2,00,000, is applicable. If the copyright infringement was not undertaken for business or trade gains, the courts may impose a sentence of less than six months and a fine of less than INR50,000. However, in cases involving copyright infringement that result in mass infringement or counterfeit copies being distributed on a large scale, Indian courts may impose higher penalties. The penalties and imprisonment could also be greater in the case of habitual infringers. Further, criminal remedies also include search and seizure of infringing products. It is pertinent to note that copyright infringement is a cognisable offence – ie, the police can investigate allegations of copyright infringement after receiving a complaint.

Non-Criminal/Civil Consequences

The most common consequence of copyright infringement is issuance of an injunction by the courts to stop the infringing activity immediately; injunctions are commonly issued at the interim stage of a copyright infringement suit if the court is satisfied with the prima facie infringement claim presented by the aggrieved party. Additionally, entitlements of a copyright owner whose work has been infringed include monetary compensation owing to losses arising from damages (actual as well as statutory) caused due to copyright infringement as well as receiving an account of profits earned by the infringing

party from the unauthorised exploitation of a copyrighted work (which aids in quantifying damages). Further, search and seizure orders are also common under civil remedies.

3.2 Registering Artwork

Although Indian copyright laws have set out a process for copyright registration, such registration is not mandatory and does not confer any additional rights with respect to the registered copyright work per se. The only advantage of securing copyright registration in India is the evidentiary value that such registration provides during an infringement action.

With reference to the registration process, once an application is filed, the Indian Copyright Office (CO) allots a diary number to the application. The application is thereafter examined by the CO, and an examination report is issued in relation to the application. Objections (if any) raised by the CO are to be replied to within the prescribed time. Upon clearing the objections, the application proceeds to registration. If the applicant has acquired rights from other parties or if the work involves other authors, the copyright application is also required to be accompanied by deed(s) of assignment of copyright or consent letters from such other authors.

In the case of artistic works (such as logos, etc), before the above process, an application has to be filed with the Trade Marks Registry to seek a no-objection certificate to the effect that there are no trade marks that are identical/similar to the proposed artistic work.

This process takes around 24 months; the timeline is indicative, and efforts can be made to expedite the process.

3.3 Resale Right

A resale right is a statutory personal right that enables original authors/artists to benefit from a percentage of the price of sale (exceeding INR10,000) earned from the resale (sale following the first sale of the work) of the artist's original work (not copies). This right subsists for the entire term of copyright protection (ie, the author's lifetime plus 60 years) and despite the original artist's/author's assignment of the copyright.

Resale rights are crucial for artists, since in most cases the value of original artwork increases over time in the resale market and helps the artist benefit from such appreciation of their artwork's value, which may have been sold at a significantly lower price initially. Under Indian copyright laws, in the case of resale of an original artwork, the author of such work – being the first owner of the artwork or their legal heirs – shall have a right to share (not exceeding 10% of the resale price) in the resale price, which is fixed by the relevant authorities.

3.4 Using Copyrighted Images

Permission to use a copyrighted work may be obtained from the copyright holder or authorised licensees of the copyright holder directly under a licence, in writing.

4. Authentication of Artworks

4.1 Posthumous Rights to Authenticate Artwork

An artist's estate is normally the most suitable option for authentication.

4.2 Art Authentication

Nobody (including a foundation) can be compelled under the pretext of moral rights or oth-

erwise to include a specific artwork in the artist's *catalogue raisonné* or to issue a favourable opinion regarding a certificate of authenticity.

4.3 Legal Remedies Following a Declaration of Inauthenticity

In India, a buyer will have several civil remedies in cases where purchased artworks are declared inauthentic after the purchase. Apart from any specific remedy or damages provided for within the contract for sale of the artwork, the buyer may seek to rescind the contract on the grounds that the buyer's consent to the agreement was caused by fraud or misrepresentation.

A buyer who has purchased an artwork that is later declared inauthentic may also claim that the contract has been breached, and seek damages. Such damages can include the purchase price and other costs that are shown to have been reasonably and proximately caused to the buyer as a result of the breach of contract.

Moreover, in cases where the artwork is sold by an art dealer, auction house or art gallery, the buyer may additionally have a remedy under the Consumer Protection Act, 2019 to claim compensation for having been sold a defective product. It is relevant to note that when an inauthentic artwork is sold, the true owner of the copyright in such artwork would have recourse to separate remedies under copyright law.

5. Cultural Heritage

5.1 Defining Cultural Heritage

While the term “*cultural heritage*” is not a defined term, in common parlance, cultural heritage is interchangeably used to denote ancient monument, antiquity, heritage buildings and heritage sites in India. Section 2(a) of the Ancient Monu-

ments and Archaeological Sites and Remains Act, 1958 provides an inclusive definition of an ancient monument to mean any structure, erection or monument, any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than 100 years.

In the absence of a legislative definition of “*cultural heritage*”, it is still understood holistically under three distinctive pieces of legislation specifically enacted for preservation of ancient monuments, archaeological sites and remains, and treasure troves. For instance, the government has separately reserved its right under Section 20E of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 to prepare “*heritage by-laws*” for each protected monument declared to be of national importance under said Act.

5.2 Cultural Heritage and Adverse Possession

It is unusual for a cultural heritage item to be subject solely to adverse possession; rather, it is more often claimed to have been devolved as part of inheritance and ancestral ownership. To address any apparently legitimate claim, Indian law broadly provides for an agreement between the private entity and the government to capture the restrictions on use, maintenance and disposal of the cultural heritage item by the possessor.

In cases where individuals have claimed and litigated ownership and managerial rights on heritage properties (for instance, temples), the Indian Supreme Court has conducted judicial diligence rejecting individuals’ unverified claims of continuous and uninterrupted possession. Thus, Indian Courts have, time and again, rigorously scrutinised claims of adverse possession

when made against heritage property of public interest.

5.3 State Rights to Cultural Heritage

While most cultural heritage items are immovable, art treasures and antiquities are movable items that may be discovered by an individual. Indian law accordingly provides for such items to be returned to the government treasury, and reserves the right of the government to compulsorily acquire antiquities and art treasures under the Antiquities and Art Treasures Act.

Under Section 14 of the Antiquities and Art Treasures Act, antiquities held by private entities have to be specifically registered with a government-appointed registering officer for “*better appreciation of cultural heritage*”. Further, the Indian government also exercises its right to designate archaeological sites for excavation of antiquities – for instance, Sinauli in northern India, whereby remains of war chariots and copper artefacts (to name a few) have been unearthed by the State in the past two decades.

6. Sale of Art Objects Domestically and Abroad

6.1 Key Clauses in Art Sale Contracts

An art sale contract should include:

- the description of the work;
- a photograph of the artwork;
- details of payment;
- representations and warranties; and
- details of storage, insurance, title, inspection and governing law.

A key clause that one should not miss (especially if representing the buyer) is the rescission clause, which, once triggered, requires the sale

to be undone, the artwork returned to the seller and the purchase price refunded.

On the other hand, if representing the seller, to avoid this problem the seller should attempt to negotiate their art sale contract to require the dealer, gallery or auction house to obtain an independent analysis that justifies the buyer's rescission request before executing the rescission, or at least articulate a reasonable determination of liability and provide such determination to the seller. When the authenticity of the artwork is in question, the rescission clause can be a valuable inclusion in the art sale contract.

6.2 Issues in Cross-Border Art Sales

Section 7 of the (Indian) Foreign Exchange Management Act 1999, as amended from time to time (FEMA) allows an exporter to export goods subject to the requirements set forth by the Reserve Bank of India (RBI). In terms of Section 7 of FEMA read with the Foreign Exchange Management (Current Account Transactions) Rules 2000, the RBI has formulated the Master Direction on “*Export of Goods and Services*” dated 1 January 2016 (the “*Export Direction*”). Any exportation of goods (which in the authors’ view includes objects of arts, sculptures, etc) are covered under the requirements of the Export Direction.

While any exportation will have to comply with all applicable requirements under the Export Direction, a significant requirement to note here is that the full value of the goods exported from India is required to be realised and repatriated to India within nine months from the date of the exportation, for all exporters. For goods exported to a warehouse established outside India, the proceeds shall be realised within 15 months from the date of shipment of goods. The amount representing the full export value of the exported

goods shall be received through an authorised dealer bank (that is, the bank designated by the exporter in India) (the “*AD Bank*”).

All shipments and receipts will have to be reported by the exporter in the Export Data Processing and Monitoring System (EDPMS) of the RBI. The EDPMS captures all the details of advance remittances received for exports. Further, AD Banks are required to report all inward remittances, including advances and old outstanding inward remittances received for exportation of goods, to the EDPMS.

The Export Direction also allows for an exporter to receive an advance payment against the exports (with or without interest) from a buyer outside India. In such cases, the exporter is required to ensure that shipment of goods is made within one year from the date of receipt of the advance payment – the rate of interest (if any) payable on the advance payment should not exceed the London Inter-Bank Offered Rate (LIBOR) or any other widely accepted or alternative reference rate plus 100 basis points, and the documents covering the shipment are routed through the AD Bank through which the advance payment is received.

Another key aspect to note here is that in the case of any contravention of the prescribed timelines/requirements mentioned in the Export Direction, such instances can be referred by the RBI to the Indian enforcement agencies that may attract a penalty of up to three times the value of the contravening export transaction. Therefore, it is imperative that all reporting obligations of the exporter are duly adhered to and that, in the case of any contravention, the exporter necessarily approaches the RBI for its post facto approval to deal with such delays.

6.3 Gallery and Auction House Liability for Fake Art

Usually, if there is a claim for fake art and the buyer is able to prove that the work is fake, the auction houses/galleries are bound to take back the work and return the price (with interest) to the buyer. Going by jurisprudence, the courts have rejected the statute-barred defence of limitation of time, stating that the limitation period begins when fraud is discovered, and not when the sale occurred.

6.4 Pre-Sale Checks for Auction Houses and Galleries

Before offering artistic works for sale, it is imperative that the auction houses/galleries do some due diligence regarding the authenticity of the work, its condition and (most importantly) identifying title gaps. One way of carrying out this check is to obtain as much information as possible about the ownership history of the artistic work from the seller of the artistic work.

If this is a secondary sale of the artistic work and the seller has limited information, they can get the artistic work verified from an art expert or a historian – ie, to check whether the artistic work is recorded or will be included in a *catalogue raisonné* that is authored by an artist or a recognised expert, and to review publication and the history of the artistic work to see whether other people have also deemed the artwork to be authentic.

The rigorous authentication process helps preserve the integrity of the art market, ensuring that buyers can trust the legitimacy of their purchases. Auction houses/galleries must navigate these concerns, ensuring that the sale of artwork complies with legal and moral standards.

6.5 Role and Responsibilities of an Art Adviser

The role of art advisers depends largely on the kind of clients they work with. For example, with private collectors intending to build a collection, art advisers will often be the curators and will help the client by offering them pieces that fit their personal tastes or interests, advising on the framing, lighting, and conditions in which to store the artwork for the perfect storage and display solutions. On the other hand, when it comes to art investment, art advisers can advise on what art to purchase and when to purchase it for the maximum profits to be made.

Separately, art advisers can also be onboarded by the government for the purpose of:

- preparing heritage by-laws under Section 20E of the Ancient Monuments and Archaeological Sites and Remains Act, 1958; and
- constituting the members of the National Monuments Authority under Section 20F of the Ancient Monuments and Archaeological Sites and Remains Act, 1958, which is an advisory body to the government on matters requiring expertise in the fields of archaeology, architecture, heritage, conservation architecture or law, etc.

6.6 Anti-Money Laundering Regulations and the Art Market

In India, the Prevention of Money Laundering Act, 2002 (PMLA) read with the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 (the “PMLA Rules”) prescribes guidelines against money laundering. The PMLA imposes an obligation on the “reporting entity” that is, the banking company, financial institution, intermediary or a person carrying on a designated business or profession – to maintain records of prescribed transactions, furnish reporting to the

authorities and appoint a designated director. That said, participants (that is, importers/exporters) of the art market are not included within the ambit of the term “*reporting entity*”, so no compliance/due diligence requirements are imposed on them.

In any event, Section 3 of the PMLA states that if anyone directly or indirectly attempts to indulge, knowingly assists, or is a party to or involved with any process or activity connected with the “*proceeds of crime*”, and projects these as untainted property, they shall be guilty of money laundering. For context, the term “*proceeds of crime*” is defined as meaning any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property, or, where such property is taken or held outside the country, the property equivalent in value held within the country or abroad.

Further, if the authorities have a reason to believe that a person is in possession of any proceeds of crime, they may attach such property under Section 5(1)(a) of the PMLA. Therefore, if any artistic work sought to be exported/imported is connected with the proceeds of crime, it could attract the censure of the law under Section 3 read with Section 5 of the PMLA.

7. Collections

7.1 Legal Status of Collections

Usually, collections that are reminiscent of rich Indian history are protected as cultural heritage. To illustrate, the Asiatic Society in Mumbai is culturally earmarked not only for housing rare collections of books and manuscripts but also for its exterior and interior architectural marvels.

Indian law envisions composite protection for collections under the legislation applicable to:

- ancient monuments for the collections’ tangible structure; and
- antiquities and art treasures for the items hosted in such collections.

8. Photography

8.1 When Are Photographs Protected as Art?

For a photograph to be considered a copyrightable artistic work, it needs to be an original work involving some degree of skill and effort by the author (in this case, the photographer, unless there is an agreement to the contrary or the photographer is taking the photograph on behalf of someone) of such photograph, irrespective of the quality of the photograph.

8.2 Legal Protection for Different Types of Photographs

Indian copyright laws do not distinguish between different types of photographs as such. If a photograph is not an original work, and accordingly is not subject to copyright protection and is beyond the ambit of Indian copyright laws, it can be used by the general public without any restraints or prior approval.

9. Artworks and New Technologies

9.1 NFTs

Non-fungible tokens (NFTs) and cryptocurrencies have recently gained immense popularity. NFTs are unique digital assets that are stored on blockchain technology, and cryptocurrencies are decentralised digital currencies that operate independently of central banks.

NFTs are unique digital assets that are typically bought and sold on marketplaces such as Open-Sea and Nifty Gateway.

An NFT is considered to be a virtual digital asset and is defined by Section 2(47) of the Income Tax Act, 1961. Further, any capital gain from the sale of such virtual digital assets will be taxable at 30%. Thus, any capital gain on the sale of NFTs will be taxable at 30% as per Section 115BBH, and no deductions will be allowed.

Some popular examples of NFTs in an Indian context include the five couture pieces by Indian fashion designer Manish Malhotra, which were sold as NFTs and put in the form of a sketch/GIF. Furthermore, poem recitals by Bollywood actor Amitabh Bachchan were captured as an audio NFT before being auctioned for USD500,000. Another example involves Varun Desai, who creates digital installations using code-generated video art and hand-drawn animation. Additionally, Indian multimedia artist Raghav KK's work was recently sold for USD94,500 at Sotheby's Burning Man art auction, as an NFT.

9.2 Counterfeit NFTs

Like any other authenticity certificate, even an NFT can be counterfeited, whereby the originator of the NFT may not necessarily be the creator of the underlying artwork. Being an inherent limitation of an unregulated space, artists need to be vigilant if their artwork has been minted as an NFT and immediately report to the blockchain platform for its delisting. At best, the originator who minted the NFT can be traced using the unique wallet address that paid for such minting and that has been collecting royalties on each resale of the artwork.

Indian law comprehends NFT counterfeiting as a cyberfraud and violation of the intellectual prop-

erty rights of the artist. In light of related judgments, the authors understand that counterfeit NFTs can be ordered to be taken down globally when they originate from a wallet address located in India.

10. Gifts, Donations, Trusts and Inheritance

10.1 Planning for Generational Transfer of Artworks

India has always been a land rich in art, from the time of its great rulers to the present day, with art playing an integral role in its cultural identity. Today, as wealth continues to surge across the country, Indians are rediscovering their aristocratic tastes, embracing both Indian and global art with renewed enthusiasm. The growing number of high net worth individuals (HNIs) are increasingly investing in valuable artworks, sculptures and antiques, blending status with a deep appreciation for culture. Art has not only become a symbol of refinement but also a growing asset class within the portfolios of India's wealthiest families. With India's profound cultural and historical legacy, many of these works are treasured heirlooms, rich in emotional and historical significance. As these pieces continue to be passed down through generations, planning for their careful transfer has become essential, ensuring that the legacy of art and culture is preserved for the future.

In this light, putting in place a formal mode of generational transfer of such assets becomes extremely pertinent. Depending on the commercial objectives of the testator, several modes of succession may be put in place for generational transfer of artworks, as follows.

Under a Gift

While not a typical and generally adopted mode of succession, gifting the artwork to the intended recipient is a possibility. It is simple and convenient as the gift can be made by mere physical delivery and be recorded by way of a letter (or similar instrument), which requires no registration or other formalities. However, the key consideration is that one parts with the assets during one's lifetime itself. Further, once the asset is gifted, the ownership passes, and hence one is unable to subsequently reverse the gift or transfer it to someone else. Gifting of artworks may also entail certain tax implications, as discussed in **10.3 Tax Implications of Artwork Gifts and Donations**.

Under a Will

This is the practice most commonly adopted by individuals, wherein the will lays down the intended beneficiary of each of the individual's assets. Unlike a gift, the will enables the testator to enjoy ownership of the asset during their lifetime. Further, wills are a private document and can be changed numerous times, thereby providing flexibility to the testator in naming the intended heirs. However, even this mode of succession might not be full proof, as a will is susceptible to challenges; furthermore, it may also bring administrative challenges such as unclear instructions, carrying out valuations, obtaining probate, etc. Lastly, a will does not achieve any asset protection objectives and also leaves the artwork susceptible to a potential estate duty, if re-introduced in India.

Private Trusts

A more sophisticated manner of succession, a trust is an extremely flexible arrangement that can be structured to meet the tailored objectives of different individuals. It separates legal and beneficial ownership, thereby allowing one

to retain control during one's lifetime (potentially in the capacity of a trustee of the trust), while also ensuring that the beneficiaries are identified as per their wishes. Further, given that transfers into a trust occur during one's lifetime, they are not susceptible to the challenges and administrative inconveniences of a will. If structured optimally, trusts not only provide tax neutrality but also provide sufficient asset protection and protection from any potential estate duty, if re-introduced in India.

In the context of artworks, especially family heirlooms or any generational art pieces, it would often be the wish of the family that the future generations preserve such artworks and carry on the family's legacy for generations. Such objectives can only be achieved through a trust structure wherein the wishes of the settlor (made as part of the trust document) can place restrictions or prescribe guidelines on the preservation and maintenance of the artworks within the family. Such structure can also prescribe rules and by-laws regarding any commercial activities that may be undertaken in respect of such artwork, including public displays, donation to any museums and so on.

Family Arrangements

While not a usual mode of succession, the importance of family arrangements cannot be overstated, especially in cases of artworks that may have remained with families for generations. With such ancestral properties, there is often lack of clarity regarding the title and ownership of assets, which results in inevitable disputes among the later generations.

It is in such scenarios that a family arrangement may be entered into between all the relevant family members, where, through mutual agreement, everyone agrees to a clear and fair divi-

sion of the title in various family assets, thereby making well-defined demarcations and providing clear titles in respect of each asset to avoid disputes.

10.2 Legal and Fiscal Issues in Artwork Succession

The testamentary succession of artworks presents a multifaceted set of legal challenges. Indian succession law mandatorily requires for a probate to be obtained in certain Indian jurisdictions (such as Madras, Kolkata and Bombay) which can delay the transfer of title, creating administrative complications for heirs. Another pertinent issue is determining the testator's final wishes, especially where multiple wills are produced by potential heirs. Furthermore, artworks may also be subject to certain regulatory restrictions – for instance, the Antiquities and Art Treasures Act stipulates special permits as necessary for the transfer of artwork. This regulatory overlay creates an additional layer of compliance requirements beyond standard succession procedures, impeding the transmission of artefacts to the legatees.

On the other hand, intestate succession of artworks in India leads to a different set of issues. In India, intestate succession is dealt with under the personal law that may be applicable to the individual (based on religious faith). More often than not, these personal laws identify multiple legal heirs having an equal right over the deceased's estate. This may result in a fragmented ownership of the artwork, eventually resulting in disputes or disposal thereof to monetise such fragmented ownership, which might not necessarily be aligned with the wishes of the deceased.

After the demise of the intestate, the executors or administrators of the estate assume the custodial responsibility for artefacts – a role that

demands specialised knowledge of preservation techniques and appreciation of artistic and emotional significance. Executors or administrators lacking such expertise risk causing irreversible damage to valuable pieces.

10.3 Tax Implications of Artwork Gifts and Donations

The Indian Income Tax Act, 1961 (the “*Indian IT Act*”) governs taxation in respect of gifts or donations of properties. The Indian IT Act provides that the receipt of “*property*” by any person, without consideration or for inadequate consideration, shall be chargeable to tax at the fair value of such “*property*”. Accordingly, in the case of a gift/donation, the entire fair value of the “*property*” is deemed to be the recipient's income, which is chargeable to tax at the ordinary income tax rates.

The term “*property*” has been defined under the Indian IT Act as including, inter alia, “*drawings, paintings, sculptures, or any work of art*”. Further, property also includes in its meaning “*jewellery*”, which has been defined in a broad manner to even include articles (such as furniture, utensils, etc) that may be made of precious or semi-precious stones/metals.

The broad definition of the term “*property*” with respect to artworks is likely to cover all forms of artistic works and thereby subject the gift thereof to tax. However, as an exception to this rule, certain gifts have been exempted from tax:

- gift of artwork between “*relatives*” (as defined under the Indian IT Act);
- transfer of artwork into a trust that is created solely for the benefit of “*relatives*”;
- receipt of any artwork from any person (even if non-relative) under a will or inheritance; and

- donation of artwork to any charitable organisation holding a valid registration under the Indian IT Act.

10.4 Artworks Exempt from Inheritance/ Donation Taxes

While India does not have any inheritance taxes at present, it did have an estate duty in force until 1985. Under the erstwhile estate duty law of India, certain artworks were exempted from the levy of estate duty:

- such works of art that are of national, scientific or historical interest, which are retained in the family and dealt with only in accordance with prescribed conditions or are donated to the government or any public institution; and
- such works of art (which may not satisfy the conditions in the preceding point) that are not intended for sale and are dealt with by the family only in accordance with prescribed conditions.

Even though India does not currently impose any inheritance tax or estate duty, its re-introduction is a topic of constant discussion and debate. As recently as 2024, in the run-up to the general elections, the discussions surrounding any potential re-introduction of estate duty in India had become relevant. While the current government denied any intention to introduce such a law, there are often discussions regarding its re-introduction as a measure to facilitate more equitable distribution of wealth.

10.5 Trusts

Indian trust law does not impose any restriction on placing artworks in a trust; however, certain legal, tax and stamp duty implications may need to be borne in mind depending on the nature of the trust, and certain principal points such as whether the ultimate beneficiaries are merely the relatives of the settlor or the public at large, etc.

No fiscal penalties are associated with such an arrangement where artwork is housed in a trust.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Rob.Thomson@chambers.com