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Lecture-30



Rights and Privileges of Advocates

LECTURE 30: Rights and Privileges of Advocates

Advocates Are the Only Recognized Class of Persons Entitled To Practice in the Profession of Law

Under the Advocates Act 1961, only advocates enrolled in India are entitled to practice the profession of law - which includes not only appearing before Courts and giving legal advice as an attorney, but also drafting legal documents, advising clients on international standards and carrying out customary practices and transactions.

The Advocates Act, 1961 distinguishes between two types of advocates -- Senior Advocates and Advocates. A Senior Advocate is designated by the Supreme Court or any High Court based on his ability or special knowledge. However, in order to file an appearance before the Supreme Court of India, one must be an advocate-on-record or be instructed by an advocate-on-record. To be eligible to qualify as an advocate-on-record, one year training contract with an advocate-on-record needs to be completed, besides passing prescribed tests.

In order to discuss, Advocates are the only recognized class of persons entitled to Practice the profession of Law, it will be imperative to go through the Advocates Act, 1961; The Indian Power of Attorney Act, 1882 and The Constitution of India. The relevant provisions of The Advocates Act, 1961 are as follows;

Section 29 - Advocates to be the only recognized class of persons entitled to practice law-

Subject to the provisions of this Act and rules made there under, there shall, as from the appointed day, be only one class of persona entitled to practice the professions of law, namely, advocates.

Section 30, Right of Advocates to Practice -

Subject to the provisions of this Act, every advocate whose name is entered in the (State Roll) shall be entitled as of right to practice throughout the territories to which this Act extends-

In all Courts including the Supreme Court;

Before any Tribunal or person legally authorized to take evidence: and

Before any other Authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

Section 33 - Advocates alone entitled to practice-

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.

Section 45 - Penalty for persons illegally practicing in Courts and before the authorities.

Any person who practices in any Court or before any authority or person, in or before whom he is not entitled to practice under the provisions of this Act, shall be punishable with imprisonment for a term which may extend to six months.

Famous Latin maxim of natural justice is-absolute sententia expositore non indigent: plain language does not need and interpreter.

It is evident from the bare reading of above provisions of the Advocates Act, 1961 that only and only Advocates enjoy the privilege to practice the law.

The relevant provision of The Indian Power of Attorney Act, 1882 is as follows -

Section 2 - Execution under power- of- attorney.- The donee of a power- of- attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force.

Another famous Legal maxim of natural justice is expression unius est exclusion alterius; when there is express mention of certain things, then anything not mentioned is excluded.

Another famous Legal maxim of natural justice is Dura lex sed led; the law is hard but it is the law.

The Full Bench of Honble Madras High Court in **M. Krishnammal v/s T. Balasubramania**, reported in AIR 1937 Madras, Page No. 937 held as under:

In connection, we would add the following general observations with regard to what the claim put forward by the respondent really amount to. It is that he should be accorded all the rights and privileges which are enjoyed by members of the legal profession whose qualifications for admission to its rank are laid down in the rules made by the Bar Council with the sanction of the High Court, and whose professional conduct thereafter is regulated by rules of practice and professional etiquette and who are subject to the disciplinary control of the High Court, whereas the respondent need possess no qualifications, whatsoever, as regards education and character and is not bound by any rules of professional conduct or etiquette and is not subject to the disciplinary control of the High Court or of any one; and there can be no better example than this case itself affords of the highly objectionable result such a claim may lead to, and actually has led to here, because the respondent claims to be remunerated by his principal for his services in question and before us stated that the condition regulating his payment is that he is to receive it only if the result of the proceedings is successful but not otherwise. On his own

admission, this is a transaction which, if entered upon by a legal practitioner, would at once render him liable to strong disciplinary action, for to engage in speculative litigation is a grave breach of professional conduct. Yet his claim is that he is free to undertake such business and this is only to undertake such business and this is only one example of probable resultant evils.

The aforesaid Judgment of the Madras High Court has been considered in the case of **T. C. Mathai v/s Distt. & Session Judge**; 1999 (3) S.C.C 614 by the Honorable Supreme Court and approved as under; Section 2 of the power of attorney Act cannot override the specific provision of a statute which requires that a particular act should be done by a party in person. When the code requires the appearance of an accused in a Court it is no compliance with if a power of attorney holder appears for him. It is a different thing that a party can be permitted to appear through counsel. Chapter XVI of the Code empowers the Magistrate to issue summons or warrant for the appearance of the accused. Section 205 of the Code empowers the magistrate to dispense with the personal attendance of the accused, and permit him to appear by his pleader if he sees reasons to do so. Section 273 of the Code speaks of the powers of the Court to record evidence in the presence of the pleader of the accused, in cases when personal attendance of the accused is dispensed with. But in no case can the appearance of the accused be made through a power of attorney holder. So the contention of the appellant based on the instrument of power of attorney is of no avail in this case.

The Gujarat High Court has also considered the judgment of Madras High Court as above during the course of hearing in the matter of Jaymal Thakore Vs Gujrat State Charity Commissioner, Ahmedabad & Ors.; reported in AIR 2001 Guj. 279.

D.M. Dharmadhikari, C. J.: The Petitioner is a Chartered Accountant and in his professional capacity claims a right to represent his clients both as recognised agent and a Pleader under a duly executed power of attorney in his favour in proceedings before the Charity Commissioner under Section 50A of the Bombay Public Trust Act, 1950 (hereinafter referred to as the Act) which admittedly is applicable to the State of Gujarat.

14. The provisions of Order III Rule 1 and 2 repeatedly came for construction and application before law Courts in civil proceedings. For the purpose of this case reference to one of the earlier decisions of Chhagla C. J in *Aswin Shambhuprasad Patel V. National Rayon Corporation Ltd.*, AIR 1955 Bombay 262 would be profitable. Construing the provisions of Order III Rule 1, it was held that the expression appearance, application or act in or to any Court in Order III Rule of C.P.C. does not include pleadings. The recognised agent under power of attorney from the party in his favour may appear, file an application or act on behalf of the party in the proceedings as recognised agent of the party. Such power or Authority to appear, file application and act is also available to a pleader, but to plead in the case, that is to do something for the party in the case other than what the recognised agent can do, that is to practice law or plead for the client, is the monopoly right only of a pleader or a registered advocate, A recognised agent appointed by a party may be holding a duly executed power of attorney cannot be said to be a pleader and can have no right to plead, The provisions of Advocates Act, 1961 confers a monopoly right of pleading and practicing law only on enrolled or registered advocates. Section 30 of the Advocates Act confers such a right to practice on a pleader and/or advocate after he gets himself enrolled as such.

Section 30 reads:

Section 30. Right of advocates to practice-

Subject to the provisions of the Act, every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the Territories to which this Act extends,Â

(i) in all Courts including the Supreme Court;

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

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

15. Section 33 of the Advocates Act confers an exclusive and monopoly right on the enrolled advocate or pleader to plead and practice in Court of law.

The said provision contained in Section 33 reads:

Section 33. Advocates alone entitled to practice-

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.

16. The provisions of Section 32 of the Advocates Act are also required to be noticed in this context which reserves a discretion and power to the Court only to permit appearances to any non-advocate for a party. It may be noted that Section 32 also does not confer any power and discretion on the Court to permit any non-advocate to plead or practice law in a Court. Section 32 restricts the powers of the Court to permit any non-advocate only to appear on behalf of a party. See the language of Section 32 restricts the powers of the Court to permit any non-advocate only to appear on behalf of a party.

See the language of Section 32 quoted here above:

17. When the Petitioner as a Chartered Accountant and a holder of power of attorney conferring on him all rights to act, appear and plead on behalf of his client sought such permission, the Charity Commissioner allowed him to act as a recognized agent, but refused to allow him to plead and practise as a pleader or an advocate.

The relevant part of his order which is under challenge at the instance of Petitioner in this case needs reproduction (as rendered in English):

For the reasons recorded as above. It is consequently ordered in the matter of enquiry application No. 1/92 filed in this Office under Section 50 A of the Bombay Public Trusts Act, wherein, the Chartered Accountant Shri Jaimal Thakore has appeared with the Authority letter and authority executed on stamp paper on behalf of six trustees of Nawawas Rajpur Hirpur Timba Education Trust which has been registered as a public trust under registration No. E/244/ Mehsana, that the authority to act as an advocate, besides appearing, which has been given under the document, there is no provision for any party to give authority to any individual other than an advocate to act as an advocate and since there is a provision

under Rule 7 of the Rules framed under the Public Trusts Act for an authorized agent and pleader to appear, he can appear on behalf of the six trustees for whom he has appeared, in this matter of enquiry but it is held that he does not thereby acquire a right to plead therein and therefore, Shri Jaimal Thakore himself can only appear on behalf of the said trustees and he, as the authorized agent acquires an authority to sign on behalf of the original parties; to submit reply and documents and to do the act of adducing evidence and he cannot do the act of taking examination in chief or cross-examination. Also he cannot address the authority i.e. the Charity Commissioner, before whom this proceeding is pending. It is held that he does not acquire the right of examining witnesses in Court and of addressing the Court as is being done by a pleader in a Court. This application is accordingly granted.

Further, for the reasons stated above, since this case does not become a special case wherein an individual can be granted permission to plead and address the Court in the manner in which a pleader can do by appearing, even though Shri Thakore has been authorized to act as a pleader in the authority letter executed in his favour, he is not permitted to appear for the purpose of conducting the matter. Considering the facts, no orders as to costs. It is directed that this Application shall now proceed further.

Apart from the above, the word to practice the profession of law has been considered by The Honble Mumbai High Court in **Lawyers Collective V/s Bar Council of India & Others** Writ Petition No. 1526 of 1995, Order dated 16th December, 2009, reported in 2010 (112) Bom. L. R. 32. the relevant abstracts of the judgment are reproduced here under:

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.

This matter has been also considered by the Madras High court also in **A. K. Balaji v/s Government of India & Ors.**, W.P. No. 5614 of 2010, Vide Order dated February 21, 2012, the relevant abstracts of the judgment are reproduced here under:

44. As noticed above, the fact 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 liaisons 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.

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.

63. After giving our anxious consideration to the matter, both on facts and on law, we come to the following conclusion:

(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.

(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.

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.

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.

The Judgment of the Honble Bombay High Court has got its finality as no appeal has been moved before the Honble Supreme Court of India against this order. The Madras High Court has also taken the same view as of Bombay High Court on the to practise profession of law in litigious as well a non litigious matters, and has been held that without having enrolled with any State Bar Council under the provisions of the Advocates Act 1961, as mentioned finally at 63 (1) of its judgment.

The Honble Supreme Court of India has also clarified in its interim order dated 04/07/2012 against the judgment of the Honble Madras High Court, where, the Point Number 63 (ii) is only in dispute, which permits the foreign lawyers for advise to their clients on certain conditions, but not for practice, which is reproduced here under: (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 advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

Thus, it is clear that that when an advocate of other country, who has not been got enrolled with State Bar Council of any State in India under the Advocates Act,1961, has not been permitted for practice the profession of law in India, then, why those persons who have not been enrolled as an advocate with Bar Council of any State in India are being permitted to practise the profession of law

The relevant provision The Constitution of India is as follows-

Article 141 - Law declared by Supreme Court to be binding on all Courts - The law declared by Supreme court to be binding on all courts within the territory of India.

It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is mandate of the Constitution as provided in article 141 that the law declared by the Supreme Court shall be binding on all Courts within the territory of India, **Suganthi Suresh Kumar V. Jagdeeshan**; (2002) 2 SCC 420 ; AIR 2002 Cri. LJ 1003; 2002 SCC (Cri.) 344.

The judicial discipline to abide by Supreme Court decision cannot be forsaken under any pretext by any authority or Court, be it even High Court, **State of Himachal Pradesh V. Paras Ram**, AIR 2008 SC 930. Supreme Court of India in **Harish Uppal v/s Union of India**, (2003) 2 SCC 45 observed that The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the Courts he can be consulted by 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, he can work in any Office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc. The right to practice, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie. A similar view has been expressed in **Pravin Shah v/s K. A. Md. Ali**, (2001) 8 SCC 650. Accordingly, it was contended that the right to practice must include non-litigious practice too.

In view of the above legal position, it is crystal clear that no body, except an advocate who is enrolled

with the State Bar Council, can argue a case before the Honble Supreme Court, High Court, Tribunal, Appellate Authority, Assessing Authority, or person, and cannot practice the profession of law either in litigious as well as non litigious matters.

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)
1.	Under the Advocates Act 1961, only advocates enrolled in India are entitled to practice the profession of law	True	False
2.	The Advocates Act, 1961 distinguishes between two types of advocates -- Senior Advocates and Advocates.	True	False
3.	A Senior Advocate is designated by the Supreme Court or any High Court based on his ability or special knowledge	True	False
4.	Advocates are the only recognized class of persons entitled to Practice the profession of Law	True	False
5.	In all Courts including the Supreme Court	True	False

Answers: 1-(a),2-(a), 3-(a),4-(a),5-(a)