

## UNIT -3

### BENCH BAR RELATION

#### ***Bench Bar Relation:***

Bar-Bench Relation in law refers to the cordial relationship between the Advocates and the Judges. The Bar (Advocates) and Bench (Judges) play an important role in the administration of justice. The judges administer the law with the assistance of the lawyers. The lawyers are the officers of the court. They are expected to assist the court in the administration of justice. As the officers of the court the lawyers are required to maintain respectful attitude toward the court bearing in mind that the dignity of the judicial office is essential for the survival of the society. Mutual respect is necessary for the maintenance of the cordial relations between the Bench and Bar.

The opinion of our Supreme Court in the context of Bench- Bar Relation has been clearly laid down in ***P.D. Gupta v. Ram Murti and Others***<sup>1</sup> as follows: *"A lawyer owes a duty to be fair not only to his client but also to the court as well as to the opposite party in the conduct of the case. Administration of justice is a stream which has to be kept pure and clean. It has to be kept unpolluted. Administration of justice is not something which concerns the Bench only. It concerns the Bar as well. The Bar is the principal ground for recruiting judges. Nobody should be able to raise a finger about the conduct of a lawyer. Actually judges and lawyers are complementary to each other. The primary duty of the lawyer is to inform the court as to the law and facts of the case and to aid the court to do justice by arriving at the correct conclusions. Good and strong advocacy by the counsel is necessary for the good administration of justice. Consequently, the counsel must have freedom to present his case fully*

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<sup>1</sup> AIR 1998 SC 283.

*and properly and should not be interrupted by the judges unless the interruption is necessary."*

In ***Mahant Hakumat Rai v. Emperor***<sup>2</sup> the Lahore High Court had held that "Without failing in respect to Bench, it is the duty of the members of the Bar to assert their just rights to be heard by the tribunal before which they are practising. They should be fearless and independent in the discharge of their duties, and would be perfectly right in protesting against irregular procedure on the part of any judge; and if the advocate is improperly checked or found fault with, he should vindicate the independence of the Bar. He would be perfectly justified in insisting on getting a proper hearing and he would be perfectly right to object to any interruption with the course of his argument such as to disturb him in doing his duty to his client. Plenary powers vested in the Presiding Officer of the Court, apart from the fact that they have rarely been used against members of the legal profession so far, should only be used to vindicate the honour of the court or to satisfy the necessities of public justice and not as a matter of course." It may, however, be noted that the presence of professional etiquette coupled with recognition by judiciary of the importance of an independent Bar, will work together to minimise the possibility of confrontation between the Bench and the Bar.

To conclude this part we can say that, a free and fearless Bar is not to be preferred to an independent judiciary, nor an independent judiciary to a free bar. Neither has a primacy over the other. Both are indispensable to a free society. The freedom of the Bar presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. One of the potent means for assuring judges of their independence is responsible, well- behaved, cultured and, learned Bar. Finally, reciprocal adjustment of conduct by the Bench and the Bar is the keystone to the smooth functioning of courts in general interest of the society.

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<sup>2</sup> AIR 1943 Lahore 14.

## ***Bar Council of India***

### **Introduction**

The Bar Council of India is a statutory body established under Section 4 of Advocates Act 1961 that regulates the legal practice and legal education in India. Its members are elected from amongst the lawyers in India and as such represents the Indian bar. It was created by Parliament under the Advocates Act, 1961. In March 1953, the 'All India Bar Committee', headed by S. R. Das, submitted a report which proposed the creation of a bar council for each state and an all-India bar council as an apex body. It was suggested that the all India bar council should regulate the legal profession and set the standard of legal education. The Law Commission of India was assigned the job of assembling a report on judicial administration reforms. In 1961, the Advocates Act was introduced to implement the recommendations made by the 'All India Bar Committee' and 'Law Commission'. In 1963, C. K. Daphtary became the Chairman and S. K. Ghose became the Vice Chairman. It prescribes standards of professional conduct, etiquettes and exercises disciplinary jurisdiction over the bar. It also sets standards for legal education and grants recognition to Universities whose degree in law will serve as a qualification for students to enroll themselves as advocates upon graduation.

### ***FUNCTIONS AND POWERS OF BAR COUNCIL OF INDIA:***

Section 7 of the Advocates Act provides for the following statutory functions of the Bar Council of India:

1. To lay down standards of professional conduct and etiquette for advocates;
2. To lay down the procedure to be followed by its disciplinary committee and the disciplinary committees of each State Bar Council;

3. To safeguard the rights, privileges and interests of advocates;
4. To promote and support law reform;
5. To deal with and dispose of any matter which may be referred to it by a State Bar Council;
6. To exercise general supervision and control over the state bar council;
7. To promote legal education and to lay down standards of legal education in consultation with the Universities in India imparting legal education and the State Bar Councils, With respect to this point, the Supreme Court has made it clear that the question of importing legal education is entrusted to the Universities in India and not to the Bar Council of India. All that the Bar Council can do is to suggest ways and means to promote such legal education to be imparted by the Universities and for that purpose it may lay down the standards of education. Sections 7 do not entitle the Bar Council itself to frame rules laying down pre-enrolment as Advocate;
8. To recognize Universities whose degree in law shall be a qualification for enrolment for an advocate for that purpose to visit and inspect Universities, or direct the State Bar Councils to visit and inspect Universities for this purpose;
9. To conduct seminars and organise talks on legal topics by eminent jurists and publish journals and papers of legal interest;
10. To organize legal aid to the poor;
11. To recognize on a reciprocal basis foreign qualifications in law obtained outside India for the purpose of admission as an advocate in India;
12. To manage and invest the funds of the Bar Council;

13. To provide for the election of its members who shall run the Bar Councils.
14. To perform all other functions conferred on it or under this Act;
15. To do all other things necessary for discharging the aforesaid functions;
16. The Bar Council of India may constitute one or more funds in the prescribed manner –
  - (a) giving financial assistance to organise welfare schemes for indigents, disabled or other advocates;
  - (b) giving legal aid or advise in accordance with the rule made in this behalf;
  - (c) establishing law libraries.
17. The Bar Council of India can also receive grants, donations, and gifts for any of these purposes mentioned under point no 16.

In ***Ex-Captain Harish Uppal v. Union of India***, the court held that section 7 provides in respect of the functions of the Bar Council of India, but none of its functions mentioned in section 7 authorizes it to paralyze the working of the Courts. On the contrary it is enjoined with a duty to lay down standards of professional conduct and etiquette for advocates. No Bar Council can ever consider giving a call of strike or a call of boycott. In case any association calls for a strike or boycott the concerned State Bar Council of India must immediately take disciplinary action against the advocates who gives a call for a strike. It is the duty of every advocate to ignore a call of strike or boycott.

In ***Raveendranath Naik v. Bar Council of India, AIR 2007 Kar. 75*** the court held that the resolution passed by the Bar Council India directing advocates not to participate in any programme organised by the

Legal Services Authorities in any Lok Adalat or any legal aid programme has been held illegal and void.

Section 7-A of the Advocates Act makes it clear that the Bar Council of India may become a member of international legal bodies, such as, the International Bar Association or the International Legal Aid Association, contribute such sums as it thinks fit to such bodies by way of subscription or otherwise and authorise expenditure on the participation of its representatives in any international legal conference or seminar.

Section 7(2) of the Advocates Act provides that the Bar Council of India may constitute one or more funds in the prescribed manner for the purpose of:

- (a)** giving financial assistance to organise welfare schemes for indigent, disabled or other advocates;
- (b)** giving legal aid or advice in accordance with the rules made in this behalf;
- (c)** establishing law libraries.

It may receive any grants, donations, gifts or benefactions for all or any of the purposes specified above such grants, donations, etc., shall be credited to the appropriate fund or funds constituted under this subsection.

### **Powers of Bar Council of India:**

#### **1. Admission as advocates:**

Section 20 of the Advocates Act provides that every advocate who was entitled as of right to practise in the Supreme Court immediately before the appointed day and whose name is not entered in any State roll may, within the prescribed time, express his intention in the prescribed form to the Bar Council of India for the entry of his name in the roll of a State Bar Council and on receipt thereof the Bar Council of India shall direct that the name of such advocate shall, without payment of any fee, be entered in the role of that State Bar Council and the State Bar Council concerned shall comply with such direction. The entry in the State Roll made in the

compliance with such direction shall be made in the order of seniority determined in accordance with the provisions of Section 17(3). Where an advocate omits or fails to express his intention within the prescribed time, his name shall be entered in the roll of the State Bar Council of Delhi.

Section 19 of the Advocates Act makes it clear that every State Bar Council shall send to the Bar Council of India an authenticated copy of the roll of advocates prepared by it for the first time under this Act and shall, thereafter, communicate to the Bar Council of India all alternations in and addition to, any such roll, as soon as the same have been made.

Section 18 of the Advocates Act makes provision in respect of the transfer of name from one State roll to another. It provides that any person whose name is entered as an advocate on the roll of any State Bar Council may make an application in the prescribed form to the Bar Council of India for the transfer of his name from the roll of that State Bar Council to the roll of any other State Bar Council and on receipt of any such application, the Bar Council of India shall direct that the name such person shall, without the payment of any fee, be removed from the roll of the first-mentioned State Bar Council and entered in the roll of the other State Bar Council and the State Bar Councils concerned shall comply with such direction:

*Provided that where any such application for transfer is made by a person against whom any disciplinary proceeding is pending or where for any other reason it appears to the Bar Council of India that the application for transfer has not been made bona fide and that the transfer should not be made, the Bar Council of India may, after giving the person making the application an opportunity of making a representation in this behalf, reject the application. It has been made clear that where on an application made by an advocate under this section, his name is transferred from the roll of one State Bar Council to that of another, he shall retain the same seniority in the latter roll to which he was entitled in the former roll.*

## **2. Appointment of Committee and Staff-members:**

Section 9 of *the Advocates Act* empowers a Bar Council to appoint disciplinary *committees*, It shall constitute one or more disciplinary committees each which shall consist of three persons of whom two shall be persons elected by the Council from amongst its member and the other shall be person co-opted by the Council from amongst advocates who possess the qualifications specified in the proviso to sub-section (2) of Section 3 of the and who are not members of the Council and the senior most advocates amongst the members of a disciplinary committee shall be the Chairman *thereof*.

Section 9-A of the *Advocates Act* empowers a Bar Council to appoint or more legal aid committees. Each committee shall consist of such number of members not exceeding nine but not less than five as may be prescribed. The qualifications, the method of selection and the term of office the members of such committee shall be such as may be prescribed.

Section 10(1) makes provisions in respect of constitution of Standing Committees by a State Bar Council. Besides, Section 10(2) of the *Advocates Act* requires the Bar Council of India to constitute the following committees:-

- (1) an executive committee consisting of nine members elected by the Council from amongst its members;
- (2) a legal education committee consisting of ten members, of whom five shall be persons elected by the Council from amongst its members and five shall be persons co-opted by the Council who are not members thereof.

Section 11 of the *Advocates Act*, requires every Bar Council to appoint a secretary. It also empowers the Bar Council to appoint an accountant and such member of other persons on its staff as it may deem necessary. The secretary and the accountant shall possess such qualifications as may be prescribed.

### **3. Maintenance of account, etc:**

According to Section 12 of the Advocates Act every Bar Council shall cause to be maintained such books of account and other books in such form and in such manner as may be prescribed. The account shall be audited by auditors duly qualified to act as auditors of companies under the Companies Act, 1956 at such times and in such manner as may be prescribed. Sub-section (3) of Section 12 makes it clear that as soon as may be practicable at the end of each financial year but not later than the 31st day of December of the year next following, a State Bar Council shall send a copy of its account together with a copy of the report of the auditors there on to the Bar Council of India and shall cause the same to be published in the official Gazette. Sub-section (4) of Section 12 provides, as soon as may be practicable at the end of each financial year but not later than the 31<sup>st</sup> day of December of the year next following, the Bar Council of India shall send a copy of its accounts together with a copy of the report of the auditors thereon to the Central Government and shall cause the same to be published in the Gazette of India.

#### **4. Rule-making power:**

A Bar Council may make rules under the provisions of Section 15 of the Advocates Act. Sub-section (2) of Section 15 of the Act provides that in particular and without prejudice to the generality of the foregoing power, such rules may provide for:

- (a)** the election of members of the Bar Council by secret ballot including the conditions subject to which persons can exercise the right to vote by postal ballot, the preparation and revision of electoral rolls and the manner in which the results of election shall be published;
- (b)** the manner of election of the Chairman and the Vice-Chairman of the Bar Council;
- (c)** the manner in which and the authority by which, doubts and disputes as to the validity of an election to the Bar Council or to the office of the Chairman or Vice-Chairman shall be finally decided;
- (d)** the filling of casual vacancies in the Bar Council;

- (e)** the powers and duties of the Chairman and the Vice-Chairman of the Bar Council;
- (f)** the constitution of 'one or more funds by a Bar Council for the purpose of giving financial assistance or giving legal aid or advice referred to in Section 6(2) and Section 7(1) of the Advocates Act;
- (g)** organisation of legal aid and advice to the poor, constitution and function of committees and sub-committees for that purpose and description of proceedings in connection with which legal aid or advice may be given;
- (h)** the summoning and holding of meetings of the Bar Council, the conduct of business there at and the number of members necessary to constitute a quorum;
- (i)** the constitution and functions of any committee of the Bar Council and the terms of office of members of any such Committees;
- (j)** the summoning and holding of meetings, the conduct of business of any such committee and the number of members necessary to constitute a quorum;
- (k)** the qualifications and the conditions, of service of the secretary, the accountant and other employees of the Bar Council;
- (l)** the maintenance of books of accounts and other books by the Bar Council;
- (m)** the appointment of auditors and the audit of the accounts of the Bar Council;
- (n)** the management and investment of the funds of the Bar Council.

Sub-section (3) of Section 15 makes it clear that no rules made under this section by a State Bar Council shall have effect, unless they have approved by the Bar Council of India.

Section 49 of the Advocates Act confers on the Bar Council of India general power to make rules. It provides that the Bar Council of India make rules for discharging its functions under this Act and in particular, such rules may prescribe:

- (a)** the conditions subject to which an advocate may be entitled to vote at an election to the State Bar Council including the qualifications or disqualifications of voters and the manner in which an electoral roll of voters may be prepared and revised by a State Bar Council;
- (b)** qualifications for membership of a Bar Council and the disqualification for such membership;
- (c)** the time within which and the manner in which effect may be given to the proviso to section 3(2).
- (d)** the manner in which the name of any advocate may be prevented from being entered in more than one State roll;
- (e)** the manner in which the seniority among advocates may be determined;
- (f)** the minimum qualifications required for admission to a course of degree in law in any recognised University;
- (g)** the class or category of persons entitled to be enrolled as advocates;
- (h)** the conditions subject to which an advocate shall have the right to practise and the circumstances under which a person shall be deemed to practise as an advocate in a Court;
- (i)** the form in which an application shall be made for the transfer of the name of an advocate from one State roll to another;
- (j)** the standard of professional conduct and etiquette to be observed by advocates;
- (k)** the standards of legal education to be observed by Universities in India and the inspection of Universities for the purpose;
- (l)** the foreign qualifications in law obtained by persons other than citizens of India which shall be recognised for the purpose of admission as an advocate under this Act;
- (m)** the procedure to be followed by the disciplinary committee of a State Bar Council and by its own disciplinary committee;
- (n)** the restrictions in the matter of practice to which senior advocates shall be subject;

- (o) the form of dresses or robes to be worn by advocates having regard to the climatic conditions appearing before any Court or tribunal;
- (p) the fees which may be levied in respect of any matter under this Act;
- (q) general principles for guidance of State Bar Councils and the manner in which directions issued or orders made by the Bar Council of India may be enforced;
- (r) any other matter which may be prescribed.

In the case of **Indian Council of Legal Aid and Advice v. Bar Council of India**, AIR 1995 SC 691, the Supreme Court has held that the rule debarring a person who has completed the age of forty-five to be enrolled as an advocate is arbitrary, unreasonable and beyond the power of the Bar Council of India and consequently, void.

The Supreme Court in **V. Sudeer v. Bar Council of India, AIR 1999 SC 1167**, has held that the Bar Council can exercise power and frame rules for effectively discharging its statutory functions as laid down by the Act. Neither of statutory functions entitled Bar Council to provide for disqualification, disability or an additional condition for enrolment. The rule made by Bar Council of India which lays down pre-enrolment training as pre-condition is ultra vires.

Section 49-A empowers the Central Government to make rules. It provides that the Central Government may, by notification in the official Gazette make rules for carrying out the purposes of this Act including rules with respect to any matter for which the Bar Council of India or a State Bar Council has power to make rules. It has been made clear that if any provision of a rule made by a Bar Council is repugnant to any provision of a rule made by the Central Government under this section, then, the rule under this section shall prevail and the rule made by the Bar Council shall, to the extent of the repugnancy, be void. Every rule made under this section shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of 30 days which may be comprised in one session or in two or more

successive sessions and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall, thereafter, have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

#### **5. Power to punish for professional or other misconduct:**

Section 36 of the Advocates Act empowers the Bar Council of India to punish an advocate for professional or other misconduct. It provides that where on receipt of a complaint or otherwise the Bar Council of India has reason to believe that any advocate whose name is entered on any State roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. The disciplinary committee of the Bar Council of India may, either on its own motion or on a report by any State Bar Council or an application made to it by any person interested, withdraw for inquiry before itself any proceedings for disciplinary action against any advocate pending before the disciplinary committee of any State Bar Council and dispose of the same.

The disciplinary committee of the Bar Council of India, in disposing of any case of professional or other misconduct of advocate shall observe, so far as may be, the procedure laid down in Section 35 of the Act. In other words in disposing of such case, it shall fix a date for its hearing, cause a notice thereof to be given to the advocate concerned and Attorney-General of India, Thus after giving the advocate concerned and the Attorney General of India an opportunity of being heard, it will dispose of the case and may make any order which the disciplinary committee of a State Bar Council can make under Section 35(3) of the Advocates Act. Thus, in disposing of such case it may dismiss the plaint, reprimand the advocate, suspend the advocate from practice for such period as it may deem fit and remove the name of the advocate the State roll of advocates. Sub-section (4) of Section 36 makes it that if any proceedings

are withdrawn for inquiry before the disciplinary committee of the Bar Council of India, the State Bar Council concerned shall give effect to any such order.

#### **6. Appellate power:**

Section 37 of the Advocates Act empowers the Bar Council of India to hear appeal against the order of the disciplinary committee of a State Bar Council made under Section 35 of the Act. It provides that any person aggrieved by an order of the disciplinary committee of a State Bar Council under Section 35 for punishing an advocate for professional or other misconduct or the Advocate-General of the State may, within 60 days of the date of the communication of the order to him, prefer an appeal to the Bar Council of India. Every such appeal shall be heard by the disciplinary committee of the Bar Council of India which may pass such order including an order varying the punishment awarded by the disciplinary committee of the State Bar Council thereon as it deems fit. However, no order of the disciplinary committee of the State Bar Council shall be varied by the disciplinary committee of the Bar Council of India so as to prejudicially affect the person aggrieved without giving' him reasonable opportunity of being heard.

Section 38 provides remedy to the person aggrieved by the order passed by the disciplinary committee of the Bar Council of India. It provides that any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under Section 36 or Section 37 of the Advocates Act or the Attorney-General of India or Advocate-General of the State concerned, as the case may be, may within 60 days of the date on which the order is communicated to him, prefer an appeal to the Supreme Court and the Supreme Court may pass such order including an order varying the punishment awarded by the disciplinary committee of the Bar Council of India thereon as it deems fit. However, no order of the disciplinary committee of the Bar Council of India shall be varied by the Supreme Court as so as to prejudicially affect the person aggrieved without giving him a reasonable opportunity of being heard. Disciplinary jurisdiction over

advocates though rests in Bar Councils, yet by virtue of section 38, final authority is with the Supreme Court – **Harish Uppal v. Union of India, 2003 AIR, SCW 43.**

Section 39 makes it clear that Sections 5 and 12 of the Limitation Act shall, so far as may be, apply to the appeal to the Bar Council of India under Section 37 or to the Supreme Court under Section 38.

#### **7. Other powers und functions:**

**(i)** The Bar Council of India may if it is satisfied that any State Bar Council is in need of funds for the purpose of performing its functions under the Advocates Act, give such financial assistance as it deems fit to that Bar Council by way of grant or otherwise;

**(ii)** Where any country specified by the Central Government in this behalf by notification in the official Gazette, prevents citizens of India from practising the profession of law or subjects them to unfair discrimination in that country no subject of any such country shall be entitled to practise the profession of law in India. Subject to these provisions, the Bar Council of India may prescribe the conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognised for the purpose of admission as an advocate under this Act (i.e. the Advocates Act, 1961).

**(iii)** The Bar Council of India may, at any time, call for the record of any proceeding under this Act which has been disposed of by a State Bar Council or a committee thereof and from which no appeal lies for purposes of satisfying itself as to the legality or propriety of such disposal and may pass such orders in relation thereto as it may think fit. It has been made clear that no order which prejudicially affects any person shall be passed under this section without giving him a reasonable opportunity of being heard;

**(iv)** The Bar Council of India or any of its committees other than disciplinary committee, may of its own motion or otherwise review any order within 60 days of the date of that order was passed by it under the Advocates Act.

In **D. Saibaba v. Bar Council of India, AIR 2003 SC 2502**, the Supreme Court has held that so far as the commencement of period of limitation for filing the review petition is concerned the expression "the date of that order" as occurring in section 48AA has to be construed as meaning the date of communication or knowledge (actual or constructive) of the order to the petitioner.

**(v)** Section 48-B of the Advocates Act empowers the Bar Council of India to give direction to a State Bar Council or any Committee thereof the proper and efficient discharge of the functions assigned to it. It provides that for the proper and efficient discharge of the functions of a State Bar Council or any committee thereof, the Bar Council of India may, in the exercise of its powers of general supervision and control, give such directions to the States Bar Council or any committee thereof as may appear to it to be necessary and the State Bar Council or the committee shall comply with such directions. Where a State Bar Council is unable to perform its functions for any reason whatsoever, the Bar council of India may, without prejudice to the generality of the foregoing power, give such directions to the ex officio member thereof as it may appear to it to be necessary and such directions shall have effect notwithstanding anything contained in the rules made by the State Bar council.

**(vi)** Section 48 makes provision in respect of indemnity against the legal proceedings. It provides that, no suit or other legal proceeding shall against any Bar Council or any committee thereof or a member of a Council or any committee thereof for any act done in good faith done or intended to be done in pursuance of the provisions of the Advocates any rules made there under.

## **FUNCTIONS AND POWERS OF STATE BAR COUNCIL:**

Every Bar Council is a body corporate having perpetual succession and a common seal with power to acquire and hold property, both movable and

immovable and to contract and may by the name by which it is known sue and be sued.

**Functions of State Bar Council:** Section 6(1) of the Advocates Act provides that the functions of State Bar Council shall be –

- (a)** to admit persons as advocates on its roll;
- (b)** to prepare and maintain such roll;
- (c)** to entertain and determine cases of misconduct against advocates on its roll;
- (d)** to safeguard the rights, privileges and interest of advocates on its roll;
- (dd)** to promote the growth of Bar Associations for the purpose of effective implementations of the welfare schemes referred to in clause (a) of sub section (2) of this section and clause (a) of sub section (2) of section;
- (e)** to promote and support law reform;
- (ee)** to conduct seminars and organize talks on legal topics by eminent jurists and publish journals and papers of legal interest;
- (eee)** to organize legal aid to the poor in the prescribed manner;
- (f)** to manage and invest the funds of the Bar Council;
- (g)** to provide for the election of its members.
- (gg)** to visit and inspect Universities in accordance with the directions given under clause (I) of sub-section (1) of section7;
- (h)** to perform all other functions conferred on it by or under this Act;

(i) to do all other things necessary for discharging the aforesaid functions.

(2) A State Bar Council may constitute one or more funds in the prescribed manner for the purpose of -

- i. Giving financial assistance to organize welfare scheme for the indigent, disabled or other advocates;
- ii. Giving legal aid or advice in accordance with the rules made in this behalf;
- iii. Establishing law libraries.

(3) A State Bar Council may receive any grants, donations, gifts or benefactions for all or any of the purposes specified in sub-section (2) which shall be credited to the appropriate fund or funds constituted under that sub-section.

***Powers of State Bar Council:***

***1. Admission as advocates on a State roll:***

If a person fulfils the conditions required for admission as advocates, he may be enrolled as an advocate by the State Bar Council, The conditions to be fulfilled for being enrolled as an advocate have been stated in Section 24 of the Advocates Act. An application for admission of admission as an advocate shall be made in the prescribed form to the State Bar Council within whose jurisdiction the applicant proposes to practice (Section 25).

A State Bar Council is required to refer every application for admission as an advocate to its enrolment committee which shall dispose of the application in the prescribed manner. Where the enrolment committee of a State Bar Council proposes to refuse any such application, it shall refer the application for opinion to the Bar Council of India and every such reference shall be accompanied by a statement of the grounds in support

of the refusal of the application. The enrolment committee of the State Bar Council is required to dispose of the application so referred to the Bar Council of India in conformity with the opinion of the Bar Council of India. Where the enrolment committee of the State Bar Council has refused any application for admission as an advocate on its roll, the State Bar Council shall, as soon as may be, send intimation to all other State Bar Councils about such refusal stating the name, address and qualifications of the person whose application was refused and grounds for the refusal. It is to be noted that the Bar Council of India may, if satisfied, either on a reference made to it in this behalf or otherwise than any person has got his name entered on the roll of advocates by misrepresentation as to an essential fact or by fraud or undue influence, remove the name of such person from the roll of advocates after giving him an opportunity of being heard (Section 26).

Section 26-A of the Advocates Act empowers a State Bar Council to remove from the State roll the name of any advocate who is dead or from whom a request has been received to that effect.

Section 27 of the Act provides that where a State Bar Council has refused the application of any person for admission as an advocate on its roll, no other State Bar Council shall entertain an application for admission of such person as an advocate on its roll, except with the previous consent in writing of the State Bar Council which refused the application and of the Bar Council of India.

The State Bar Council is required to issue a certificate of enrolment in the prescribed form to every person. Whose name is entered in the roll of advocates maintained by it under the Act (Section 22).

## **2. Maintenance of roll of advocates:**

Section 17 of the Advocates Act provides that every State Bar Council shall prepare and maintain a roll of advocates in which shall be entered the name and address of:

- (a)** all persons who were entered as advocates on the roll of any High Court under the Indian Bar Councils Act, 1926, immediately before the appointed day including persons being citizens of India who before 15-8-1947, were enrolled as advocates under the said Act in any area which before the said date was comprised within India as defined in the Government of India Act, 1935 and who, at any time, express an intention in the prescribed manner to practise within the jurisdiction of the Bar Council;
- (b)** all other persons who are admitted to be advocates on the roll of the State Bar Council under this Act on or after the appointed date.

Each such roll of advocates shall consist of two parts, the first part containing the names of senior advocates and the second part, the names of other advocates.

Entries in each part of the roll of advocates prepared and maintained by a State Bar Council under this section shall be in the order of seniority and subject to any rule that may be made by the Bar Council of India in this behalf, such seniority shall be determined as follows:

- (i)** the seniority of an advocate referred to in clause (a) (stated above) shall be determined in accordance with his date of enrolment under the Indian Bar Councils Act, 1926;
- (ii)** the seniority of any person who was a senior advocate of the Supreme Court immediately before the appointed day shall, for the first part of the State roll, be determined in accordance with such principles as the Bar Council of India may specify;

**(iii)** the seniority of any other person who, on or after the appointed day, is enrolled as a senior advocate or is admitted as an advocate shall be determined by the date of such enrolment or admission, as the case may be;

**(iv)** notwithstanding anything contained in clause (1), (stated above), the seniority of an attorney enrolled, whether before or after the commencement of the Advocates (Amendment) Act, 1980 as an advocate shall be determined in accordance with the date of 'his enrolment as an attorney - Section 17(3).

This section makes it clear that no person shall be enrolled as an advocate on the roll of more than one State Bar Council.

Section 19 of the Advocates Act requires the State Bar Council to send copies of rolls of advocates to the Bar Council of India. It provides that every State Bar Council shall send to the Bar Council of India an authenticated copy of the roll of advocates prepared by it for the first time under this Act and shall, thereafter communicate to the Bar Council of India all alterations in and addition to, any such roll as soon as the same have been made.

### **3. Rule-making power:**

The State Bar Council has been empowered to make rules to carry out the purposes of Sections 16 to 27 of the Advocates Act dealing with the admission and enrolment of the advocates. According to sub-section (1) of Section 28 of the Act a State Bar Council may make rules to carry out the purposes of Chapter III (Sections 16 to 28) of the Act. Section 28(2) provides that in particular and without prejudice to the generality of the foregoing power, such rules may provide for:

**(i)** the time within which and form in which an advocate shall express his intention for the entry of his name in the roll of a State Bar Council under Section 20;

**(ii)** the form in which an application shall be made to the Bar Council for admission as an advocate on its roll and the manner in which such

application shall be disposed of by the enrolment committee of the Bar Council;

**(iii)** the conditions subject to which a person may be admitted as an advocate on any such roll; and

**(iv)** the instalments in which the enrolment fee may be paid.

Sub-section (3) of Section 28 of the Act makes it clear that the rules so made shall not have effect, unless they have been approved by the Bar Council of India.

**(iv) Power to punish for professional or other misconduct:**

The State Bar Council has power to punish an advocate for professional or other misconduct. Section 35 of the Advocates Act provides that where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee and thereafter the disciplinary committee shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and, the Advocate-General of the State. The disciplinary committee after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following order:

**(a)** dismiss the complaint or where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

**(b)** reprimand the advocates;

**(c)** suspend the advocate from practice for such period as it may deem fit;

**(d)** remove the name of the advocates from the State roll of advocates.

Where an advocate is suspended from practice under clause (c), stated above, he shall, during the period of suspension, be debarred from practising in any Court, or before any authority or person in India.

According to Section 36-B of the Advocates Act the disciplinary committee of a State Bar Council shall dispose of the complaint received expeditiously and in each case the proceedings shall be concluded within a period of one year from the date of the receipt of the complaint or the date of initiation of the proceedings at the instance of the State Bar Council, as the case may be, failing which such proceedings shall stand transferred to the Bar Council of India for disposal. However, where on the commencement of the Advocates (Amendment) Act, 1973, any proceedings in respect of any disciplinary matter against an advocate is pending before the disciplinary committee of a State Bar Council, that disciplinary committee of a State Bar Council shall dispose of the same within a period of 6 months from the date of such commencement or within a period of one year from the date of the receipt of the complaint as the case may be, the date of initiation of the proceedings at the instance of the State Bar Council whichever is later, failing which such proceeding shall stand transferred to the Bar Council of India for disposal.

Any person aggrieved by an order of the disciplinary committee of a State Bar Council or the Advocate-General of the State may, within 60 days of the date of the communication of the order to him, prefer an appeal to the Bar Council of India(Section 37).

Every such appeal shall be heard by the disciplinary committee of the State Bar Council of India which may pass such order including an order varying the punishment awarded by the disciplinary committee of the State Bar Council thereon as it deems fit:

Provided that no order of the disciplinary committee of the State Bar Council shall be varied by the disciplinary committee of the Bar Council India so as to prejudicially affect the person aggrieved without giving him reasonable opportunity of being heard.

The person aggrieved by an order made by the disciplinary committee the Bar Council of India under Section 36 or 37 or the Attorney general of India or the Advocate-General of State concerned, as the case may be,

may prefer an appeal to the Supreme Court under section 38 of Advocates Act.

Section 44 of the Advocates Act makes provision in respect of the review of orders passed by the disciplinary committee. It provides that disciplinary committee of a Bar Council may, of its own motion or otherwise review any order within 60 days of the date of that order passed by it. However, no such order of review of the disciplinary committee of a State Bar Council shall have effect, unless it has been approved by the Bar Council of India.

#### **5. Appointment of committees and Staff members:**

A Bar council establishes several committees. According to section 9 of the Advocates Act a Bar Council shall constitute one or more disciplinary committee, each of which shall consist of three persons of whom two be persons elected by the Council from amongst its members and the other shall be a person co-opted by the Council from amongst who possess the qualifications specified in the proviso to Section 3(2) of the Act and who are not members of the Council and the senior most advocate amongst the members of a disciplinary committee shall be the chairman thereof.

In addition to above, a Bar Council may constitute one or more legal aid committees each of which shall consist of such number of member not exceeding nine, 'but not less than five, as may be prescribed. The qualifications, the method of selection and the term of office of the members of a legal aid committee shall be such as may be prescribed. Besides, a State Bar Council shall constitute the following standing committees, namely-

- (a)** an executive committee consisting of five members elected by the Council from amongst its members of, and
- (b)** an enrolment committee consisting of three members elected by the Council from amongst its member.

Sub-section (3) of Section 10 of the Advocates Act makes it clear that a State Bar Council, may constitute from amongst its members such other committees as it may deem necessary for the purpose of carrying out the provisions of the Advocates Act.

Section 11 of the Advocates Act empowers the Bar Council to appoint staff-members. It provides that every Bar Council shall appoint a secretary and may appoint an accountant and such member of other persons on its staff as it may deem necessary. The secretary and accountant shall possess such qualifications as may be prescribed.

#### **6. Maintenance of account, etc:**

Section 12 of the Advocates Act provides that every Bar Council shall cause to be maintained such books of accounts and other books in such form and in such manner as may be prescribed. The account of the Bar Council is required to be audited by the -auditors duly qualified to act as auditors of companies under the Companies Act, 1956 at such times and in such manner as may be prescribed. As soon as may be practicable at the end of each financial year but not later than the 31st day of December of the year next following, a State Bar Council shall send a copy of its account together with a copy of the report of the auditors thereon to the Bar Council of India and shall cause the same to be published in the official Gazette. As soon as may be practicable at the end of each financial year but not later than the 31st December of the year next following, the Bar Council of India shall send a copy of its accounts together with a copy of the report of the auditors there onto the Central Government and shall cause the same to be published in the Gazette of India.

### **III PROFESSIONAL AND OTHER MISCONDUCT**

Section 35 of the Advocates Act provides in respect of punishment for professional or other misconduct. It provides that where on receipt of the complaint or otherwise, a State Bar Council has reason to believe that any

advocate on its roll, has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. Section 35 empowers the disciplinary committee to reprimand the advocate and suspend the advocate from practice for such period as it may deem fit or remove the name of the advocate from the State roll of advocates. However, an appeal against the order of the disciplinary committee may be preferred, to the Bar council of India<sup>9</sup> and thereafter to the Supreme Court against the order of the Bar Council of India<sup>10</sup>. Section 35 of the Advocates Act specifically mentions that an Advocate can be punished not only for professional misconduct but also other misconduct.

In case of ***State of Punjab v. Ram Singh, AIR 1992 SC 2188***, the Supreme Court has explained the term "misconduct" in connection with the misconduct of the personnel in the Police Department but may be applied in determining whether or not conduct implies to misconduct. The Supreme Court has observed that the term 'misconduct' may involve moral turpitude, it must be improper or wrong behaviour, wilful in character forbidden act, a transgression of established or definite rule of action or code of conduct, but not mere error of judgment, carelessness or negligence in performance of duty.

According to **Black's Dictionary** the term "misconduct" is defined as a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behaviour.

In ***Nortanmal Chauaisia v. M. R. Murli, 12 2004 AIR SCW 2894***, the Supreme Court has held that misconduct has not been defined in the Advocates Act, 1961. Misconduct, inter alia, envisages breach of discipline, although it would not be possible to lay down exhaustively as to what would constitute misconduct and indiscipline, which, however is wide enough to include wrongful omission or commission, whether done or omitted to be done intentionally or unintentionally. It means improper behaviour, intentional wrong doing or deliberate violation of a rule of standard of behaviour'.

In the matter of ***P1, AIR 1963 SC 1313***, the Court has held that an advocate may be punished not only when he is guilty of professional misconduct but also if he is guilty of other misconduct which may not be directly concerned with the professional activity as such, may nevertheless be of such dishonourable or infamous character as to invite the punishment due to professional misconduct.

### **The Body or Authority Empowered to Punish for Professional or Other Misconduct:**

1. State Bar Council And Its Disciplinary Committee:

**Organization:** Section 35 of the Advocates Act makes it clear that on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for its disposal to disciplinary committee - Section 35. It is one of the functions of the State Bar Council to entertain and determine the cases of misconduct against the advocate on its roll - Section 6(c). Section 9 of the Act requires the Bar Council to constitute one or more disciplinary committees - Section 9(1). Each of such committee is required to consist of three persons of whom two shall be persons elected by the council from amongst its members and other shall be a person co-opted by the council from amongst its member advocates who possess the qualifications specified in the provisions to sub-section (2) of section 3 and who are not members of council and the senior most advocate amongst the members of the disciplinary committee shall be the chairman thereof.

**Procedure-** Section 35 provides that after giving the advocate concerned and the Advocate- General an opportunity of being heard, the disciplinary committee of a State Bar Council may make any of the following orders-:

1. dismiss the complaint or where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;
2. reprimand the advocate;

3. suspend the advocate from practice for such period as it may deem fit;
4. remove the name of the advocate from the State roll of advocates - Section 35(3).

It is that when the advocate is suspended from the practice under the aforesaid clause (3), he shall, during the period of suspension, be debarred from practicing in any Court or before any authority or person in India - Section 35(4).

## 2. BAR COUNCIL OF INDIA AND ITS DISCIPLINARY COMMITTEE

**Organization:** Section 36 of the Advocates Act empowers the Bar Council of India to refer, in certain circumstances, the case for disposal to its disciplinary committee. Section 9 provides that the a Bar Council shall constitute one or more disciplinary committees, each of which shall consist of three persons of whom two shall be person selected by the Council from amongst its members and the other shall be a person elected by the council amongst advocates who possess the qualifications specified in the provision to sub-section (2) of Section 3 and who are not members of the council and the senior most advocate amongst the members of disciplinary committee shall be the chairman thereof.

**Powers:** Section 42 deals with the powers of the disciplinary committee of a Bar Council. The provisions of Section 42 have already been stated in context of powers of the disciplinary committee of the State Bar Council. Section 42-A makes it clear that the provisions of Section 42 shall, so far as may be, apply in relation to the disciplinary committee of the Bar Council of India. Section 43 makes it clear that the disciplinary committee of the Bar Council of India may make such order as to the costs of any proceedings before it as it may draw fit and any such order shall be executable as if it were an order of the Supreme Court.

In **Hikmat Ali Khan v. Ishwar Prasad Arya and Others, AIR 1997 SC 864**, one Ishwar Prasad Arya who was an advocate practicing at Badaun in U.P. he assaulted his opponent, Radhey Shyam in the court-room of

Munsif as Badaun with a knife. After investigation he was prosecuted for offences under section 307 IPC and section 25 of the Arms Act and he was sentenced for three years imprisonment. But he remained free on a fraudulent letter said to have come from the governor spending the conviction. The III Additional District and Sessions Judge, Badaun sent a complaint containing these facts to the Chairman, Bar Council of U.P. The disciplinary committee of U.P Bar Council debarred him from practicing for a period of two years. The advocate appealed to the Bar Council of India which set aside the order of the Bar Council of U.P. The appellant Himat Ali Khan complained against the advocate and prayed for fresh inquiry. In the said proceedings, the advocate appeared and filed his return statement but thereafter he did not appear. Hence, the Bar Council of U.P proceeded ex-parte against him and the disciplinary committee of the state Bar Council of U.P debarred for a period of three years. The advocate again appealed to the Bar Council of India and it had set aside the punishment. Then Himat Ali filed appeal to the Supreme Court. The Supreme Court held that his conduct was such that his name should be removed from the state rule of advocates as he was found guilty of an offence attempting to commit murder and convicted for it and as he was unworthy of remaining in the profession.

#### **IV RIGHTS AND PRIVILEGES OF ADVOCATES:**

##### **Right of Advocates:**

**1. Right to Practice:** The most important of right conferred to a lawyer is his/her right to practice but there are a plethora of conditions which has to be fulfilled for allowing a lawyer to exercise his right to practice. This is the only right of advocates that has been codified and placed in the Advocates Act, 1961 with the duties and code of conduct of lawyers. This is an exclusive right and has been conferred to a set of people who are deemed to be qualified to represent others. Earlier even friends and family could represent an accused on facts but due to demand of

unification of bar, Section 29 was incorporated whereby there will be only one recognized class of persons entitled to practice the profession of law i.e. the advocates.<sup>3</sup> Advocates have been conferred rights to practice not only in all courts including the Supreme Court but also before any tribunal or person legally authorized to take evidence and also 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.<sup>4</sup> Section 30<sup>5</sup> lays down the right in clear words and Section 33<sup>6</sup> that is worded negatively to exclude everyone other than an advocate from practicing.

As a rule, a person who is not an advocate on roll of a high court can not represent accused but there are situations where the courts have used their discretion to allow a power of attorney holder to plead on behalf of the parties. However it is imperative to mention here that an advocate does not include a person in whose favour a power of attorney has been executed to take proceedings in court as he cannot be placed in the position of an advocate, who has been given a *vakalatnama*.<sup>7</sup>

However, the right of a lawyer to practice is not an absolute right as there are a number of fetters placed upon the same. Section 34<sup>8</sup> of the Act

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<sup>3</sup> Section 29 - Advocates to be the only recognized class of persons entitled to practice law: Subject to the provisions of this Act and any rules made there under, there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely advocates

<sup>4</sup> Section 29 and 30 of the Advocate Act, 1961.

<sup>5</sup> Right of advocates to practice – Subject to provisions of this Act, every advocate whose name is entered in the 1[State roll] shall be entitled as of right to practise throughout the territories to which this Act extends, – (i) In all Courts including the Supreme Court; (ii) Before any tribunal or person legally authorised 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.

<sup>6</sup> Section 33- Advocates alone entitle to practise. 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 practise in any court or before any authority or person unless he is enrolled as an advocate under this Act.

<sup>7</sup> *Amita Misri v. State of J & K*, (1988) Kash LJ 353.

<sup>8</sup> Section 34. Power of High Courts to make rules. (1) The High Court may make rules laying down the conditions subject to which an advocate shall be permitted to practise in the High Court and the courts subordinate thereto. [(1A) The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of the fees of his adversary's advocate upon all proceedings in the High Court or in any Court subordinate thereto. 2[(2) Without prejudice to the provisions contained in sub-section (1), the High Court at Calcutta may make rules providing for the holding of the Intermediate and the Final examinations for articled clerks to be passed by the persons referred to in Section 58 AG for the purpose of being admitted as advocates on the State roll and any other matter connected therewith.]

empowers high court to make rules prescribing conditions subject to which an advocate will be permitted to practice in the High Court and the courts below. Hence, an advocate's right to practice in all courts is subject to the rules made by High Court.

One thing to be noted in this regard is that Section 30 has not come into operation as yet. Section 1(3) of the Act suggests that the provisions of the Act will come into effect from the day notified by the Central Government and since no such date has been notified in the Official Gazette, the Act has not come into full force. This position was substantiated by the Supreme Court in the case of ***Altmeish Rein v. Union of India*, AIR 1988 SC 1768 at 1771**, wherein the Apex Court held that a person enrolled as an advocate is not ipso facto entitled to a right of audience unless this section is first brought into force. This also means that Section 30, in its present form, does not confer an absolute right to practice but is subject to other provisions of the Act.

There have been several instances where this right of advocates has upheld by the Courts for instance in case of ***Jaswant Kaur v. State of Haryana*, AIR 1977 P&H 221**, where a full Bench of Punjab and Haryana High Court held that the provisions under Haryana Ceilings on Holdings Act prohibiting an advocate from appearing before any authority except Financial Commissioner, were unconstitutional in light of the Section 14 of the Bar Council's Act, even though Section 30 has not been brought into effect.

However, there have been enough instances wherein the right has been restricted for other reasons. One of the most important cases in this regard is that of ***Paradip Port Trust v. Their Workmen*, AIR 1977 SC 36**, where Section 36(4) of the Industrial Disputes Act that forbids parties to industrial dispute to be represented by a lawyer except with the consent of other parties and permission of the labour court, tribunal etc. The court held that Section 30 of the Advocate's Act would not be

applicable in this case as Industrial Disputes Act is legislation with avowed object of labour welfare and representation before adjudicatory authorities has been specially provided. It was also held that a special Act would override the provisions of Advocate's Act which is a general law.

There are a number of other restrictions placed upon the right to practice of a lawyer as they do not have a right to represent others in departmental enquiries. It is also to be noted that the Section does not confer any right on the litigant to be represented by the lawyer but only on a lawyer to practice.

Once a lawyer has been engaged in a case, his right continues to be in existence unless and until it is terminated by writing signed by him or his client with the leave of the court; it will also come to an end with the termination of the proceedings or with the death of the lawyer or that of the client.

It is however to be noted here that the right to practice the profession of law is a statutory right and not a fundamental right<sup>9</sup>. It is also to be noted that only advocates, who are enrolled as per this Section can practice, while others not so entitled and illegally practicing are punishable under Section 45<sup>10</sup> of the Act.

Section 32 of the Act provides for an exception to the application of Section 30 and provides for situations where persons other than advocates enrolled with the Bar can represent others with the permission of the court. This provision acts as an antithesis to the provision under Section 30 as the court has been given discretion to allow any person, not an enrolled advocate to practice law. However, this might be a necessity in certain cases and we need to rely upon the wisdom of the courts to

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<sup>9</sup> *Basudeb Dutta v. State of WB*, (1981) II Cal HN 56.

<sup>10</sup> Penalty for persons illegally practicing in courts and before other authorities. Any person who practises in any court or before any authority or person, in or before whom he is not entitled to practise under the provisions of this Act, shall be punishable with imprisonment for a term which may extend to six months.

take the right decision in this regard. This position was substantiated by the case of ***T.K Kodandaram v. E. Manohar***,<sup>11</sup> where no lawyer was ready to defend the case, the court decided to allow the petitioner's brother to represent him. However, it is to be kept in mind that the powers under this Section have been given to the courts and tribunals for special circumstances and they ought to be exercised judiciously.

Another important aspect that is needed to be considered here is the power of High Court to make rules regarding right to practice of the advocates. However, it has been specified that the words 'laying down the conditions subject to which an advocate shall be permitted to practice' under Section 34 must be given a restricted meaning of permitting physical appearance of the advocate and not his general right to practice.

## **2. Right to Fee:**

One of the important rights of the advocate is right to fee. An advocate has a right to his fee and this right is absolute as it does not depend upon winning or losing of the case and in either case the client will have to pay up the fee. A lawyer has no legal remedy if his/her fee is not paid, but he accepts what the client is willing to pay in accordance with the bargain but in such cases advocate can refuse to appear before the court. The advocate has also a right to waive this right and take up a case without charging any fee at all.

Another aspect to be taken into account here is that an advocate can be denied agreed fees when he makes default or is found guilty of misconduct but he cannot be deprived of agreed fees where the case has been withdrawn for policy reasons and the advocate has done some work in that particular case<sup>12</sup>.

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<sup>11</sup> 1985 Mad LJ (Cr) 124.

<sup>12</sup> *Ram Babu Sharma v. State of MP*, AIR 1989 MP 261.

### **3 Lawyers Right To Lien Over Client's Papers:**

Before India attained independence different High Courts in India had adopted different views regarding the question whether an advocate has a lien over the litigation files kept with him. **In P. Krishnamachariar vs. The Official Assignee of Madras<sup>13</sup>**, a Division Bench held that an advocate could not have such a lien unless there was an express agreement to the contrary. A Full Bench of the Patna High Court in **In re B.N. Advocate<sup>14</sup>**, held the view that an advocate could not claim a right to retain the certified copy of the judgment obtained by him on the premise that an appeal was to be filed against it. The Bench further said that if the client had specifically instructed him to do so it is open to him to keep it.

After independence the position would have continued until the enactment of the Advocates Act 1961 which has repealed a host of enactments including Indian Bar Council Act. When the new Bar Council of India came into existence it framed Rules called the Bar Council of India Rules as empowered by the Advocates Act. Such Rules contain provision specifically prohibiting an advocate from adjusting the fees payable to him by a client against his own personal liability to the client. As a rule an Advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client, (vide Rule 24). In this context a reference can be made to Rules 28 and 29 which are extracted below:

*Rule 28. After the termination of the proceeding, the Advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amount paid or sent to him for*

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<sup>13</sup> AIR 1932 Madras 256.

<sup>14</sup> AIR 1933 Pat 571.

*expenses, or any amount that has come into his hands in that proceeding.*

*Rule 29. Where the fee has been left unsettled, the Advocate shall be entitled to deduct, out of any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Court, in force for the time being, or by then settled and the balance, if any, shall be refunded to the client.*

The issue was settled by the decision of the Supreme Court in **R.D. Saxena v. Balram Prasad Sharma**<sup>15</sup> wherein the Supreme Court declared in the negative. In holding that giving the right of lien (unlike what is allowed to a Solicitor in England) would lead to disastrous consequences in as much as the flow of justice would be impeded. Court also noted that given the socio-economic conditions prevailing in the country, holding such a right of the legal practitioner may be susceptible to great abuse and exploitation. The Court setting aside the technical objection that such papers were under an agreement of bailment declared that it was upon the ordinary process of law that the lawyer should recover his dues but not by retaining the files of the client. The Supreme Court also went on to declare that while it was a professional duty and moral obligation of the lawyer to return the brief when the client required to change counsel but also declared that not returning the files would be considered as professional misconduct on the part of the erring lawyer.

#### **4 Right to Access to Judge:**

One right of the lawyer is to have access to the judge. Though the scope of this right has not been defined anywhere, it is understood that it is the right of a lawyer to have access to the Judge in urgent judicial matters at any time during the day or night and the judge has to look into it. Another right of a lawyer that has been considered quite odd is that a

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<sup>15</sup> AIR 2000 SC 3039.

lawyer has a right to refuse to recognize and appear before a presiding judge, who is not in the prescribed robe of a judge in the court. The legal profession seems to be more comfortable with the idea of allowing a judge to disallow a lawyer in improper robe but not to this right of lawyers as a result of which it is never exercised.

### **Privileges of Advocates:**

Though the rights and privileges of advocates are similarly worded and similarly treated, objectively there are minor differences between the two concepts. It can be said that privileges are granted to a person by a higher authority for specific purpose or being on a certain post, while rights are vested in a person by virtue of his being in a particular position. One simple example is that of right to vote that is vested in all citizens of a country, while the privileges attached to the post of an ambassador are by virtue of that post.

In context of lawyers, there is hardly any difference between the two as the rights as well as privileges of the lawyers are derived from his duties and have been granted to him for better conduct of his duties in the court of law and hence, the words rights and privileges can be and have been used interchangeably. Some of the privileges of the lawyers have been discussed below.

One of the most important privileges of an advocate is to claim audience from the court of law. In other words, any person who fulfils the prescribed qualifications of the Bar and becomes member of the Bar; it is his/her privilege to represent his clients in the court of law and to claim the audience in courts and courts have to listen to him as long as he is acting in accordance with the decorum of the court.

It is not be noted that the English law doctrine of absolute privilege for acts and statements of lawyers in not applicable to the criminal law of defamation in India, however a lawyer going to the court to attend a

matter or while returning from the court is exempt from arrest under civil process other than a process issued by such court for contempt of that court.

One of the special things about this profession is that the lawyer is privileged to defend his client till the last despite knowing that he is guilty of the crime. However, this is still not a personal privilege of the lawyer.

A lawyer is also entitled to enter public and political life without any restrictions or fear and hence has the privilege of a political life of his choice. He can contest elections and become a member of Central or State legislature as well.

Another privilege that a lawyer has is that of being offered judgeship, which means that he is made eligible for holding an office of a Judge, District Government counsel, Advocate General of a State, Attorney General or Solicitor General of India.

In addition to this the Governments ensures that

1. Lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
2. Lawyers are able to travel and to consult with their clients freely both within their own country and abroad; and
3. Lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics, which is not the case in India.

Last but not the least important privilege that an advocate has is that of independence. This is to say that a lawyer has the privilege of being frank, fearless and independent as he stands for justice and fights for justice along. This privilege might not be absolute as there are certain

reasonable restrictions on the same but the reality is that the lawyers are more often than restricted on one or the other ground from being honest and fearless, one such restriction being the fear of contempt of court in addition to the others.

## **V RECIPROCITY AS PARTNERS IN ADMINISTRATION OF JUSTICE:**

1. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice;
2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others;
3. In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals - Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;
4. In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence

information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law;

5. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process;
6. As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest;
7. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the

approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service;

8. A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private;
9. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system;
10. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts;

11. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice;
12. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves;
13. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.