

Indian Council of Legal Aid and Advice

Vs

Bar Council of India and Another

Writ Petn. (Civil) No. 786 of 1993

(A. M. Ahmadi, S. Mohan, K. S. Paripoornan JJ)

17.01.1995

JUDGEMENT

AHMADI, C.J.I.:-

1. The Bar Council of India by Resolution No.64/93 dated 2nd August, 1993 added R.9 in Chapter III of Part VI of the Bar Council of India Rules which resolution was Gazetted on 25th September, 1993. The said newly added rule reads as under :

"A person who has completed the age of 45 years on the date on which he submits his application for his enrolment as an advocate to the State Bar Council shall not be enrolled as an advocate."

All the State Bar Councils in the country were duly informed about the insertion of the said rule. The legality and validity of the said rule is questioned in this batch of petitions as inconsistent with Arts. 14, 19(1)(g) and 21 of the Constitution and S. 24 of the Advocates Act, 1961, hereinafter called 'the Act.'

2. The Act came into force with effect from 19th May, 1961. The dictionary of the Act is to be found in S.2, C1.(a) whereof defines an Advocate as a person entered in any roll under the provisions of the Act as such and the term 'roll' according to C1.(k) means a roll of advocates prepared and maintained under the Act. S.3 provides that there shall be a Bar Council for each of the States to be known as the Bar Council of that State. S.4 next provides for a Bar Council for the territories to which the Act extends to be known as the Bar Council of India. The functions of the State Bar Council and the Bar Council of India have been set out in Ss.6 and 7, respectively. The functions of the State Bar Council include admission of persons as advocates on its roll, preparation and maintenance of such roll, safeguarding the rights, privileges and interests of advocates on its roll and to do all things necessary for discharging the above functions. The functions of the Bar Council of India include the laying down of standards of professional conduct and etiquette for advocates and for safeguarding their rights, privileges and interests. Chapter III which deals with 'Admission and Enrolment of Advocates' comprises of Ss.16 to 28. S. 16 provides that there shall be two classes of advocates, senior advocates and other advocates; S.17 sets out how every State Bar Council shall prepare and maintain a roll of advocates; S.18 deals with the transfer of name of an advocate from one State roll to another; S.19 enjoins upon every State Bar Council to send a copy of the roll of advocates to the Bar Council of India; S.20 makes special provision for enrolment of every advocate who was entitled to practice in the Supreme Court immediately before the appointed day in the roll of a State Bar Council; S.21 relates to the fixation of seniority; S.22 provides for issuance of certificate of enrolment and S. 23 confers the right of pre-audience on the Attorney

General of India, the Solicitor General of India, the Additional Solicitor General of India, etc. S.24 to the extent it is relevant for our purpose provides as under:

"24. Persons who may be admitted as advocates on a State roll-(1) Subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:-

- (a) he is a citizen of India;
- (b) he has completed the age of twenty-one years; and
- (c) he has obtained a degree in law."

Section 24A provides that no person shall be admitted as an advocate on a State roll, for the period indicated in the proviso, if he is convicted of an offence involving moral turpitude, or if he is convicted of an offence under the provisions of Untouchability (Offences) Act, 1995 or if he is dismissed or removed from employment or office under the State on any charge involving moral turpitude; S. 25 indicates the authority to whom applications for enrolment may be made; S. 26 provides for the disposal of such applications; S. 26A confers powers on the State Bar Council to remove any name from its roll; S. 27 provides that where State Bar Council has refused the application of any person for admission as an advocate, no other State Bar Council shall entertain his / her application for admission on its roll except with the previous consent of the former and of the Bar Council of India and S. 28 confers power on a State Bar Council to make rules to carry out the purposes of the Chapter which may in particular, inter alia, provide for the conditions subject to which a person may be admitted as an advocate on its roll. Chapter IV deals with the 'Right to Practice.' S.29 says that subject to the provisions of the Act and any rule made thereunder there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates. According to S. 30 every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which the Act extends in all Courts including the Supreme Court of India, before any Tribunal or person legally authorised to take evidence and before any authority or person before whom such advocate is, by or under any law for the time being in force, entitled to practice. S.33 further provides that 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 the Act. Chapter V deals with 'Conduct of Advocates.' Under S.35 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. S.37 provides for an appeal to the Bar Council of India against an order made by the Disciplinary Committee of a State Bar Council S.36 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 not entered on any State roll has been guilty of professional or other misconduct, it shall refer the case to the Disciplinary Committee. Any person aggrieved by an order made by the Disciplinary Committee of the Bar Council of India under S.36 or 37 may prefer an appeal to the Supreme Court of India under S.38 of the Act. The powers of the Disciplinary Committee have been enumerated in S. 42. Chapter VI deals with 'Miscellaneous' matters. We are concerned with S.49 which empowers the Bar Council of India to make rules for discharging its functions under the Act., Cls.(ag) and (ah) of sub-sec.(1) of S.49, inter alia, empower the Bar Council of India to make rules (i) prescribing the class or category of persons entitled to be enrolled as advocates, and (ii) laying down the conditions subject to which an advocate shall have the right to

practice and the circumstance under which a person shall be deemed to practice as an advocate in a Court. These, in brief, are the relevant provisions of the Act which have a bearing on the question of legality and validity of the newly added R.9 in Chapter III of Part VI of the Rules.

3. It will be seen from the above provisions that unless a person is enrolled as an advocate by a State Bar Council, he shall have no right to practice in a Court of law or before any other Tribunal or authority. Once a person fulfils the requirements of S. 24 for enrolment, he becomes entitled to be enrolled as an advocate and on such enrolment he acquires a right to practice as stated above. Having thus acquired a right to practice he incurs certain obligations in regard to his conduct as a member of the noble profession. The Bar Councils are enjoined with the duty to act as sentinels of professional conduct and must ensure that the dignity and purity of the profession are in no way undermined. Its job is to uphold the standards of professional conduct and etiquette. Thus every State Bar Council and the Bar Council of India has a public duty to perform, namely, to ensure that the monopoly of practice granted under the Act is not misused or abused by a person who is enrolled as an advocate. The Bar Councils have been created at the State level as well as the Central level not only to protect the rights, interests and privileges of its members but also to protect the litigating public by ensuring that high and noble traditions are maintained so that the purity and dignity of the profession are not jeopardised. It is generally believed that members of the legal profession have certain social obligations, e.g., to render 'pro bono publico' service to the poor and the under-privileged. Since the duty of a lawyer is to assist the Court in the administration of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct befitting the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society. That is why the functions of the Bar Council include the laying down of standards of professional conduct and etiquette which advocates must follow to maintain the dignity and purity of the profession.

4. In the above background it was contended on behalf of the Bar Council of India that the need to uphold standards of professional conduct and etiquette cannot be over-emphasised. The Act, besides highlighting the essential functions of the Bar Council of India in this behalf, provides for the enforcement of the same and sets up disciplinary authorities to chastise and, if necessary, punish members of the profession for misconduct. The punishment may include suspension from practice as well as removal of the name from the roll of advocates. S.49(1) confers power on the Bar Council of India to make rules, inter alia, for discharging its functions under the Act. S. 49(1)(ag) when read with S. 24 of the Act confers wide powers on the Bar Council of India to indicate the class or category of persons who may be enrolled as advocates which power would include the power to refuse enrolment in certain circumstances. The obligation to maintain the dignity and purity of the profession and to punish erring members carries with it the power to regulate entry into the profession with a view to ensuring that only profession-oriented and service-oriented people join the Bar and those not so oriented are kept out. Counsel submitted that a person who has already spent the best years of his life in pursuing some other profession or occupation cannot be said to have the correct attitude of a service-oriented-professional and cannot be expected to maintain the high standards of professional conduct. According to the respondent-Bar Council of India persons who retire from various Government, quasi-Government and other institutions when admitted to the legal profession use their earlier contacts to canvass for cases; a conduct which brings down the standard of professional ethics expected to be maintained by a member of the profession and that has a very adverse influence on the minds of young fresh entrants to the profession. It is no answer to state that disciplinary action can be taken against those who deviate from the standard of conduct expected of a member of the Bar because all cases of infraction of the Code of Conduct do not come to the notice of the Bar Council and behaviour leaves a lingering effect on the profession. It is in

order to uphold the high standards of professional morality and integrity that the Bar Council of India was compelled to enact a rule restricting the entry into the legal profession by prescribing the age limit of 45 years. The Bar Council of India contends that it has acted bona fide within the framework of the Act and the Constitution. According to it the right to practice as an advocate not being a fundamental right but only a privilege conferred by the Act can always be withdrawn and in any case reasonable restrictions can be imposed even if it were a fundamental right under Art.19(1)(g) of the Constitution. The restriction imposed by the newly added rule is to serve a public purpose and can never be termed as unreasonable violative of Art.14 of the Constitution. Since the upper age limit has been fixed to save the legal profession from decay and deterioration it is, contends the Bar Council, difficult to comprehend how it can be said to be inconsistent with Art.21 and for that matter Art.14 of the Constitution. The prescription of the higher age limit does not violate S.24 of the Act and since S.49 permits classification and categorisation which even Art.14 permits, the newly added rule is clearly intra vires the Act and the Constitution. That, in brief, is the defence set up by the Bar Council of India in support of the rule impugned before us.

5. It is clear from the above averments found in the counter filed on behalf of the Bar Council of India that the rationale is that the profession of law being a pious and honourable profession, its main object being service of mankind by serving the system of administration of justice, it is the pious duty of the Bar Council to protect its public image by restricting the inflow of a large number of retired personnel who seek to enter a legal profession solely for additional gains. Such persons are not inspired by lofty ideals of the profession but their only motive is money-making for which they are prepared to stoop to any levels which has a very negative influence on young minds who join the profession after graduation. Can the restriction imposed on this rationale be sustained? That is the short question.

6. We have briefly noticed the relevant provisions of the Act in the earlier part of this judgment. We may now briefly indicate the scheme. Before we do so it may not be out of place to mention that the profession of law is one of the oldest professions and was practised in one form or the other in the hoary past. After the advent of the British in India, certain rules in regard to the practice of law were introduced. Before independence there were Mukhtars and Vakils who were permitted to practice law in moffusil Courts even though not all of them were Law graduates. However, slowly and gradually they were allowed to wither away and their place was taken by Pleaders who were, after securing degree in law, permitted to practice at the district level. Those who were enrolled as advocates could practise in any Court subordinate to the High Court including the High Court. The difference between a Pleader and an advocate was merely on account of the fee charged for enrolment. After independence, came the Act which was enacted 'to amend and consolidate the law relating to legal practitioners and to provide for the Constitution of Bar Councils and an all-India Bar.' The Act creates an all-India Bar with only one class of legal practitioners namely, advocates, who of course are classified as senior advocates and other advocates (Section 126). The general superintendence of ethics and etiquette of the profession is the responsibility of the Bar Councils created under the Act and they have been charged with the duty to punish their members for misconduct. The Act envisages the existence of a Bar Council for every State. The function of admission of persons as advocates is entrusted to every State Bar Council which is required to prepare and maintain a roll for that purpose. While disciplinary jurisdiction is conferred on the State Bar Councils to punish its members for misconduct, it is at the same time charged with the duty to safeguard their rights, privileges and interests. They must perform all the functions conferred on them by or under the Act and do everything that is necessary to discharge the functions set out in S.6. So far as the Bar Council of India is concerned, its functions are of a more general nature, e.g., to lay down standards of professional conduct and etiquette for advocates, to safeguard their rights,

privileges and interest, to supervise and control the working of the State Bar Council, to promote legal education, to recognise Universities, to organise legal aid to the poor and to perform all other functions conferred by or under the Act and do everything that may be necessary to discharge the functions enumerated in S.7. Besides the above it too is required to exercise discipline and control over the members of the profession. Thus the functions are divided between the State Bar Councils and the Bar Council of India, although for obvious reasons overlaps are unavoidable. The rule making power has been conferred on the State Bar Councils under Ss.15 and 28 and on the Bar Council of India under S.49 of the Act.

7. The power conferred by Section 15 is to make rules providing for the elections of the members of the Bar Council, its Chairman and Vice-Chairman and matters incidental thereto. These rules shall not have effect unless approved by the Bar Council of India. We are not concerned with the rule making power under this provision. Section 28 empowers the State Bar Council to make rules which may, inter alia, provide for the form in which an advocate must express his intention for entry of his name in the roll of a State Bar Council, the form in which an application must be made for admission as an advocate on its roll and the conditions subject to which a person may be admitted as an advocate on any such roll. These rules also must be approved by the Bar Council of India before they come into force. We have already indicated earlier the matters in regard to which the Bar Council of India may make rules for discharging its functions under the Act. Besides the State Bar Councils and the Bar Council of India Section 34 confers power on the High Courts to make rules laying down the conditions subject to which an advocate may be permitted to practice in the High Court and Courts subordinate thereto. Power is also conferred on the Central Government by Section 49-A to make rules by notification in the Official Gazette for carrying out the purpose of the 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. Thus the rule making power of the Central Government is wide enough to embrace matters for which the Bar Council of India or a State Bar Council has power to make rules. These rules may, inter alia, lay down the qualifications and disqualifications for membership of a Bar Council, the manner in which the Bar Council of India must exercise supervision and control over State Bar Councils, the class or category of persons entitled to be enrolled as advocates under the Act, the category of persons who may be exempted for undergoing a course of training and passing an examination prescribed under Section 24(1)(d), the manner in which seniority among advocates may be determined, the procedure to be followed by the disciplinary committee of the Bar Council for hearing cases and any other matter which may be prescribed. These, in brief, are the rule making powers conferred on various agencies under the Act.

8. The newly added rule seeks to bar the entry of persons who have completed the age of 45 years on the date of application for enrolment as an advocate from being enrolled as such by the concerned State Bar Council. While Section 24 of the Act prescribes the minimum age for enrolment as twenty-one years complete, there is no provision in the Act which can be said to prescribe the maximum age for entry into the profession. Since the Act is silent on this point the Bar Council of India was required to resort to its rule making power. The rules made by the Bar Council of India under Section 49(1) of the Act are in seven parts, each part having its own chapters. Part VI is entitled 'Rules Governing Advocates' and the said part has three chapters. Chapter I sets out the restrictions on senior advocates and is relatable to Sections 16(3) and 49(1)(g) of the Act, Chapter II lays down the standards of professional conduct and etiquette and is relatable to Section 49(1)(c) read with the proviso thereto and Chapter III deals with 'Conditions for right to practise' and is stated to be made in exercise of power under clause (ah) of sub-section(1) of Section 49 of the Act. That clause reads as under :

"(ah) the conditions subject to which an advocate shall have the right to practice and the circumstance under which a person shall be deemed to practice as an advocate in a Court;"

On the plain language of the said clause it seems clear to us that under the said provision the Bar Council of India can lay down the 'conditions' subject to which 'an advocate' shall have the right to practice. These conditions which the Bar Council of India can lay down are applicable to an advocate, i.e., a person who has already been enrolled as an advocate by the concerned State Bar Council. The conditions which can be prescribed must apply at the post-enrolment stage since they are expected to relate to the right to practice. They can, therefore, not operate at the pre-enrolment stage. By the impugned rule, the entry of those who have completed 45 years at the date of application for enrolment is sought to be barred. The rule clearly operates at the pre-enrolment stage and cannot, therefore, receive the shelter of clause (ah) of Section 49(1) of the Act. Under the said clause conditions applicable to an advocate touching his rights to practice can be laid down, and if laid down he must exercise his right subject to those conditions. But the language of the said clause does not permit laying down of conditions for entry into the profession. We have, therefore, no hesitation in coming to the conclusion that clause (ah) of Section 49(1) of the Act does not empower the Bar Council of India to frame a rule barring persons who have completed 45 years of age from enrolment as an advocate. The impugned rule is, therefore, ultra vires the said provision.

9. Can the rule be saved under any other provision of the Act? As stated earlier the Act in Section 24(1)(b) provides that the person who seeks enrolment as an advocate must have completed the age of twenty-one years. Nowhere does the Act provide the maximum age beyond which a person shall not be entitled to enrolment as an advocate nor does the Act make any specific provision empowering the Bar Council of India to frame such a rule. Reliance was, however, placed on clause (ag) of Section 49(1) which reads as under :

"(ag) the class or category of persons entitled to be enrolled as advocates."

Can persons who have completed 45 years of age be said to constitute a class or category to entitle the Bar Council of India to debar them from being enrolled as advocates? Rule (Section) 49(1) empowers the Bar Council of India to make rules for discharging its functions under the Act and in particular those enumerated in clauses (a) to (j) thereof. None of the functions under Section 7 specifically provides for laying down such a condition debarring persons of a certain age group from enrolment as advocates. The clause relied upon is couched in positive terms, namely, it says the rules may prescribe the class or category of persons who may be admitted to the legal profession. Therefore, under this rule the class or category of persons 'entitled to be enrolled' as advocates may be prescribed. The rule can, therefore, specify the class or category of persons 'entitled' to be enrolled as advocates, but the rule gives no indication that it can debar persons belonging to a certain age group from being enrolled as advocates. Where a provision is couched in positive language and is in the nature of an enabling provision, there is no canon of construction which says that by necessary implication the rule making authority can make a provision disentitling admission or enrolment to the profession. Such a submission is difficult to countenance.

10. But the larger question needs to be answered and that is whether the said clause applies to persons belonging to a certain age group. Section 28(1)(d) of the Act authorises a State Bar Council to make rules prescribing the conditions subject to which a person may be admitted as an advocate. The power to specify the class or category of persons entitled to be enrolled as advocates is conferred on the Bar Council of India under Section 49(1)(ag) and on the Central Government

under Sec.49A of the Act. The rule which a State Bar Council has to play under Section 28 is distinct from that the Bar Council of India has to play under S.49(1)(ag) of the Act, in that, after the class or category is identified, they do not automatically get admitted or enrolled they still have to abide by the requirements for admission to the State roll. Therefore, apart from a class or 'group being declared 'entitled to enrolment', the other conditions or norms evolved by the State Bar Council for entry of the individual on its roll would have to be satisfied.

11. It seems Parliament while enacting the Act created agencies at the State level as well as at the Central level in the form of State Bar Councils and Bar Council of India and invested them with rule making powers on diverse matters touching the legal profession, presumably because it must have realised that matter pertaining to the profession are best left to informed bodies comprising of members of the said profession. However, while doing so it provided for basic substantive matters, e.g., eligibility for entry into the profession (Section 24), disqualification for enrolment (Section 24A), authority entitled to grant admission (Section 25 and 26), the authority which can remove any name from the roll (Section 26A), etc. and placed them within the domain of a State Bar Council. Thus it is the State Bar Council which alone must decide on the question of enrolment of an applicant on its roll. Under Section 24 a person who is a citizen of India and possesses a degree in law becomes qualified to be admitted as an advocate if he has completed twenty-one years of age, subject of course to the other provisions of the Act. No doubt he must fulfil the other conditions specified in the rules made by the State Bar Council (Section 24(1)(e)). Every person whose name is entered in the list of advocates has a right to practice in all Courts including the Supreme Court, before any tribunal or other authority. It is, therefore, within the exclusive domain of the State Bar Councils to admit persons as advocates on their rolls or to remove their names from the rolls. There is no provision in Chapter III dealing with the admission and enrolment of advocates which restricts the entry of those who have completed 45 years as advocates. Nor has the State Bar Council made any such rule under its rule making power.

12. There is no specific provision in Section 7 of the Act which enumerates the functions of the Bar Council of India empowering it to fix maximum age beyond which entry into the profession would be barred. That is why reliance is placed on the rule making power of the Bar Council of India enshrined in Section 49. That Section empowers the making of rule by the Bar Council of India 'for discharging its functions' under the Act, and, in particular, such rules may prescribe the class or category of persons entitled to be enrolled as advocates. The functions of the Bar Council of India enumerated in Section 7 do not envisage laying down a stipulation disqualifying persons otherwise qualified from entering the legal profession merely because they have completed the age of 45 years. On the other hand Section 24A was introduced by Section 19 of Act 60 of 1973 with effect from 31st January, 1974 to disqualify certain persons from entering the legal profession for a limited period. By the impugned rule every person even if qualified but who has completed 45 years of age is debarred for all times from enrolment as an advocate. If it had been possible to restrict the entry of even those class or category of persons referred to in Section 24A by a mere rule made by the Bar Council of India, where was the need for a statutory amendment? That is presumably because matters concerning disqualification even for a limited period was considered to be falling outside the ken of rule making power, being a matter of public policy. It is difficult to accept the interpretation that all those above the age group of 45 years constitute a class within the scope of clause (ag) of Section 49(1) of the Act to permit the Bar Council of India to debar their entry into the profession for all times. In the guise of making a rule the Bar Council of India is virtually introducing an additional clause in Section 24 of the Act prescribing an upper age ceiling of completed age of 45 years beyond which no person shall be eligible for enrolment as an advocate or is inserting an additional clause in Section 24A of the Act prescribing a disqualification. Viewed

from either point of view we are clearly of the opinion that the rule making power under clause (ag) of Section 49(1) of the Act does not confer any such power on the Bar Council of India. We are unable to subscribe to the view that all those who have completed the age of 45 years and are otherwise eligible to be enrolled as advocates constitute a class or category which can be disqualified as a single block from entering the profession. Besides, as stated above clause (ag) (sic) identification and specification of a class or category of persons 'entitled' to be enrolled and not 'disentitled' to the enrolled as advocates. We, therefore, are of the opinion that the impugned rule is beyond the rule making power of the Bar Council of India and is, therefore, ultra vires the Act.

13. The next question is, is the rule reasonable or arbitrary and unreasonable? The rationale for the rule, as stated earlier, is to maintain the dignity and purity of the profession by keeping out those who retire from various Government, quasi-government and other institutions since they on being enrolled as advocates use their past contacts to canvass for cases and thereby bring the profession into disrepute and also pollute the minds of young fresh entrants to the profession. Thus the object of the rule is clearly to shut the doors of the profession for those who seek entry into the profession after completing the age of 45 years. In the first place, there is no reliable statistical or other material placed on record in support of the inference that ex-Government or quasi-Government servants or the like indulge in undesirable activity of the type mentioned after entering the profession. Secondly, the rule does not debar only such persons from entry into the profession but those who have completed 45 years of age on the date of seeking enrolment. Thirdly those who were enrolled as advocates while they were young and had later taken up some job in any Government or quasi-Government or similar institution and had kept the sanad in abeyance are not debarred from reviving their sanads even after they have completed 45 years of age. There may be a large number of persons who initially entered the profession but later took up jobs or entered any other gainful occupation who revert to practise at a later date even after they have crossed the age of 45 years and under the impugned rule they are not debarred from practising. Therefore, in the first place there is no dependable material in support of the rationale on which the rule is founded and secondly the rule is discriminatory as it debar one group of persons who have crossed the age of 45 years from enrolment while allowing another group to revive and continue practise even after crossing the age of 45 years. The rule, in our view, therefore, is clearly discriminatory. Thirdly, it is unreasonable and arbitrary as the choice of the age of 45 years is made keeping only a certain group in mind ignoring the vast majority of other persons who were in the service of Government or quasi-Government or similar institutions at any point of time. Thus, in our view the impugned rule violates the principle of equality enshrined in Article 14 of the Constitution.

14. In the view that we take on the aforesaid points we do not consider it necessary to examine the larger question whether or not the impugned rule violates Article 19(1)(g) of the Constitution. We, therefore, do not express any view on the said question.

15. In the result, these petitions succeed. The new Rule 9 inserted in Chapter III extracted in the opening paragraph of this judgment is struck down as ultra vires the Act and opposed to Article 14 of the Constitution. The Bar Council of India and the State Bar Councils are directed not to implement the said rule. No order as to costs. Petition allowed.

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