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भारतीय विधिज्ञ परिषद्
BAR COUNCIL OF INDIA

(Statutory Body Constituted under the Advocates Act, 1961)
21, Rouse Avenue Institutional Area, Near Bal Bhawan, New Delhi - 110002

Date: 18.09.2020

To,

The Hon'ble Chief Justice and Companion Judges ,
Madras High Court,
Chennai.

Respected Lordships

The Bar council of India commends and appreciate the services of the Hon'ble Chief Justice and companion Judges for effectively handling the COVID 19 situation and thereby keeping the doors of justice open and rendering justice without any hassle.

This reminds of a Latin legal maxim *"Fiat justifiably rust caelum"*-Let justice be done though the heavens fall. The maxim signifies the belief that justice must be realized regardless of consequences.

At this juncture the views of the major section of bar is to have physical hearing of courts and we hope and trust the Hon'ble Chief Justice and companion Judges will endeavour to resume the physical hearings soon.

Your lordships is aware of it that the Bar council of India and State Bar Council extends its unstinted support for the effective functioning of the Judiciary at all times.

Your lordships are aware that this statutory body plays a very important, responsible and constructive role in the justice delivery system. The Bar council of India and State Bar Council are not only discharging their functions as disciplinary authority under the statute, but are also entrusted with the responsibilities of welfare of the Advocates/Senior Advocates fraternity.

This Letter is to bring to your lordship's kind attention about the difficulties the aspiring advocates and Senior Advocates are facing due to the recently notified *"The Madras High Court Designation of Senior Advocates Rules 2020"*

1. DEMARCATION OF THE POWERS UNDER THE ADVOCATES ACT

A. RULE MAKING POWER UNDER SECTION 34(1)

Your lordships are aware that The Advocates Act 1961 completely demarcates the power and functions of each authority. The Hon'ble Supreme Court also in many judgments has clearly set out the Rule making powers of the High Courts while invoking Section 34 of the Advocates Act.

It's not in dispute that the Hon'ble Supreme Court in the case of Indira Jaising reported in 2017(9) SCC 766 has issued uniform guidelines to be followed for designation of Advocates as Senior Advocates. While we welcome the Judgment of Hon'ble Supreme Court for framing uniform guidelines for designation of Advocates as Senior advocates, but it is relevant to note that one cannot go beyond the statutory powers entrusted to the authority under the Advocates Act 1961.

It's trite in law that an authority has to function within the Statute or not at all. Any judgment of Supreme court can be treated as a law under Article 142(2) subject to a Parliamentary Laws. Therefore as long as Section 16 and 34 of Advocates Act 1961 remain intact, its has to be applied and followed.

The Supreme Court in the Indira Jaising's case, has laid down the norms/guidelines which henceforth would govern the exercise of designation of Senior Advocates by the Supreme Court and all High Courts in the country. Therefore the Supreme Court has never asked High courts to frame rules in this case or designation of Senior advocate by exercising power under rule 34(1). The supreme court has asked only to follow the directions as guidelines /norms and the Hon'ble supreme court at Paragraph 74 of the aforesaid judgment the Supreme Court has observed as follows:-

> *We are not oblivious of the fact that the guidelines enumerated above may not be exhaustive of the matter and may require reconsideration by suitable additions/deletions in the light of the experience to be gained over a period of time. This is a course of action that we leave open for consideration by this Court at such point of time that the same becomes necessary*

My Lord!

In this regard the Bar council of India invites the kind attention of your Lordships to the Judgment of the Hon'ble Supreme court rendered in *RK Anand Vs Delhi High court* reported in 2009(8)SCC Page 196 (paragraph 243) wherein the Hon'ble supreme court has called upon all the High Courts to

frame rules invoking Section 34(1). That power cannot be mingled with the powers to designate provided under Section 16(1).

Under Section 16 of Advocates Act, Parliament in its wisdom has given the power to designate a class of advocates as senior advocates with their consent, if the Supreme Court or a High Court is of opinion that by virtue of his ability ,standing at the Bar or special knowledge or experience in law, he is deserving of such designation.

Section 34(1) is circumscribed/qualified *for laying down the conditions subject to which an advocate shall be permitted to practise in the High Court or in any court subordinate thereto.* Whether Section34(2) is applicable to Senior Advocates as they are a separate class by themselves is a debatable question.
To understand the power given by the Parliament to designate an advocate as senior Advocate, section 16 is extracted hereunder:-

> 16. Senior and *other advocates.*—
>
> (1) There shall be two classes of advocates, namely, senior advocates and *other advocates.*
>
> (2) An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability ,standing at the Bar or special knowledge or experience in law, he is deserving of such distinction.
>
> (3) Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interest of the legal profession, prescribe.
>
> (4) An advocate of the Supreme Court who was a senior advocate of that Court immediately before the appointed day shall, for the purposes of this section, be deemed to be a senior advocate:
>
> Provided that where any such senior advocate makes an application before the 31st December, 1965 to the Bar Council maintaining the roll in which his name has been entered that he does not desire to continue as a senior advocate, the Bar Council may grant the application and the roll shall be altered accordingly.

Thus beyond forming opinion by the Supreme court and High Court as contemplated in section 16(1) to designate an advocate as Senior advocate and to lay down the guidelines/norms for the purpose of designating an advocate as Senior Advocate, the high court cannot exercise any power in the garb of Section 34 (1) of the Act which is applicable only to frame rules for an advocate.

The power to impose restriction is vested with Bar Council as per Rule 16(3) which states that *Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interest of the legal profession, prescribe.*

Therefore the question arises as what could be the powers of high court to lay down the conditions to practise. The Hon'ble constitution bench of Supreme court in *EX capt Harish Uppal vs Union of India* reported in 2003 (2)SCC Page 45, at paragraph 34 has observed thus:

> *"One last thing which must be mentioned is that the right of appearance in Courts is still within the control and jurisdiction of Courts. Section 30 of the Advocates Act has not been brought into force and rightly so. Control of conduct in Court can only be within the domain of Courts. Thus Article 145 of the Constitution of India gives to the Supreme Court and Section 34 of the Advocates Act gives to the High Court power to frame rules including rules regarding condition on which a person (including an Advocate) can practice in the Supreme Court and/or in the High Court and Courts subordinate thereto. Many Courts have framed rules in this behalf. Such a rule would be valid and binding on all. Let the Bar take note that unless self restraint is exercised, Courts may now have to consider framing specific rules debarring Advocates, guilty of contempt and/or unprofessional or unbecoming conduct, from appearing before the Courts. Such a rule if framed would not have anything to do with the disciplinary jurisdiction of Bar Councils. It would be concerning the dignity and orderly functioning of the Courts. The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc. Such a rule would have nothing to do with all the acts done by an advocate during his practice. He may even file Vakalat on behalf of client even though his appearance inside the court is not permitted. Conduct in Court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the Court could also be regulated by them in exercise of their disciplinary powers. The right to practice, no doubt, is the genus of which the right to appear and conduct cases in the Court may be a specie. But the right to appear and conduct cases in the Court is a matter on which the Court must and does have major supervisory and controlling power. Hence Courts cannot be and are not divested of control or supervision of conduct in Court merely because it may involve the right of an advocate. A rule can stipulate that a person who has committed contempt of Court or has behaved unprofessionally and in an unbecoming manner will not have the right to continue to appear and plead and conduct cases in Courts. The Bar Councils cannot overrule such a regulation concerning the orderly conduct of Court proceedings. On the*

contrary it will be their duty to see that such a rule is strictly abided by. Courts of law are structured in such a design as to evoke respect and reverence to the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the Court. Proceedings inside the Courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate, who is guilty of contempt of Court or of unbecoming or unprofessional conduct, standing in the court would erode the dignity of the Court and even corrode the majesty of it besides impairing the confidence of the public in the efficacy of the institution of the Courts. The power to frame such rules should not be confused with the right to practise law. While the Bar Council can exercise control over the latter, the Courts are in control of the former. This distinction is clearly brought out by the difference in language in Section 49 of the Advocates Act on the one hand and Article 145 of the Constitution of India and Section 34(1) of the Advocates Act on the other. Section 49 merely empowers the Bar Council to frame rules laying down conditions subject to which an Advocate shall have a right to practice i.e. do all the other acts set out above. However, Article 145 of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the Court including inter-alia rules as to persons practising before this Court. Similarly Section 34 of the Advocates Act empowers High Courts to frame rules, inter-alia to lay down conditions on which an Advocate shall be permitted to practice in Courts. Article 145 of the Constitution of India and Section 34 of the Advocates Act clearly show that there is no absolute right to an Advocate to appear in a Court. An Advocate appears in a Court subject to such conditions as are laid down by the Court. It must be remembered that Section 30 has not been brought into force and this also shows that there is no absolute right to appear in a Court. Even if Section 30 were to be brought into force control of proceedings in Court will always remain with the Court. Thus even then the right to appear in Court will be subject to complying with conditions laid down by Courts just as practice outside Courts would be subject to conditions laid down by Bar Council of India. There is thus no conflict or clash between other provisions of the Advocates Act on the one hand and Section 34 or Article 145 of the Constitution of India on the other"

The Hon'ble Supreme court in 1998(4)SCC Page 409 at paragraph 57 draws the dichotomy between an advocate found guilty of committing of contempt of court and guilty of committing professional misconduct and that two jurisdictions are separate and distinct exercisable by different forums by following separate and distinct procedure. Power to punish an advocate for proven professional misconduct vest exclusively in the Bar Council of India and State Bar Council created under the Advocates Act 1961 while the jurisdiction to punish him for committing contempt of court vest exclusively in the courts.

The Hon'ble Supreme court in the case of *Bar Council of India Vs High Court of Kerala* reported in 2004(6)SCC Page 311 (paragraph 29) made the distinction between punishment for commission of contempt and

punishment for misconduct, professional or other misconduct. While the former is with the court, the latter is with the Bar council. The court held that in a case of professional or other misconduct, it can only direct the Bar council of India to proceed against the advocate. The court also said in case of contempt it may not allow an advocate to practise in its court unless he purges himself of contempt.

Therefore the power which the high court traces under Sec. 34(1) is interpreted by Hon'ble supreme court as power to control appearance inside the court in the event of punishing a person for contempt.

In the latest judgment of Hon'ble Supreme Court in the case of R Muthukrishnan vs Registrar General Madras High Court reported in 2019 (16) SCC 407, the Hon'ble supreme court while striking down the amendment to the disciplinary rules framed by High court in the year 2016 way of introducing Rule 14 A to Rule 14 D has clearly settled down the rule making power of High Court. The Hon'ble Supreme court at Paragraph 57 has thus held :-

> 56. It is apparent from the aforesaid provisions and scheme of the Act that Advocates Act has never intended to confer the disciplinary powers upon the High Court or upon this Court except to the extent dealing with an appeal under Section 38.
>
> 57. By amending the High Court Rules in 1970, the High Court of Madras has inserted impugned Rules 14(A) to 14(D). The rules have been framed in exercise of the power conferred under Section 34 of the Advocates Act. *Section 34 of the Act does not confer such a power to frame rules to debar lawyer for professional misconduct. The amendment made by providing Rule 14(A)(vii) to (xii) is not authorized under the Advocate Act. The High Court has no power to exercise the disciplinary control. It would amount to usurpation of the power of Bar Council conferred under Advocates Act. However, the High Court may punish advocate for contempt and then debar him from practicing for such specified period as may be permissible in accordance with law, but without exercising contempt jurisdiction by way of disciplinary control no punishment can be imposed. As such impugned rules could not have been framed within the purview of Section 34. Provisions clearly impinge upon the independence of the Bar and encroach upon the exclusive power conferred upon the Bar Council of the State and the Bar Council of India under the Advocates Act. The amendment made to the Rules 14(A) to 14(D) have to be held to be ultra vires of the power of the High Court.*

The Hon'ble supreme court further held at paragraph 86 as follows:-

> *86. We have no hesitation to hold that the High Court has overstretched and exceeded its power even in the situation which was so grim which appears to have compelled it to take such a measure. In fact, its powers are much more*

in Contempt of Courts Act to deal with such situation court need not look for Bar Council to act. It can take action, punish for Contempt of Courts Act in case it involves misconduct done in Court/proceedings. Circumstances may be grim, but the autonomy of the Bar in the disciplinary matters cannot be taken over by the Courts. It has other more efficient tools to maintain the decorum of Court. In case power is given to the Court even if complaints lodged by a lawyer to the higher administrative authorities as to the behaviour of the Judges may be correct then also he may be punished by initiating disciplinary proceedings as permitted to be done in impugned Rules 14 A to D that would be making the Bar too sycophant and fearful which would not be conducive for fair administration of justice. Fair criticism of judgment and its analysis is permissible. Lawyers' fearlessness in court, independence, uprightness, honesty, equality are the virtues which cannot be sacrificed. It is duty of the lawyer to lodge appropriate complaint to the concerned authorities as observed by this Court in Vinay Chandra Mishra (supra), which right cannot be totally curtailed, however, making such allegation publicly tantamounts to contempt of court and may also be a professional misconduct that can be taken care of either by the Bar Council under the Advocates Act and by the Court under the Contempt of Courts Act. The misconduct as specified in Rule 14-A may also in appropriate cases tantamount to contempt of court and can be taken care of by the High Court in its contempt jurisdiction"*

Thus only in a case of contempt and punishing a senior advocate holding him for contempt, the withdrawal of designation as found in Rule 10 can be exercised. The High court cannot frame any disciplinary rules under Section 34(1) as held in *R Muthukrishnan's case.* Section 34(1) cannot be invoked for any disciplinary measure. Such power under Rule 10 of impugned rules is thus not in consonance with the Advocates Act. Further the independence of Senior Advocates to argue in the courts without any fear is under peril and runs counter to the dictates of Hon'ble supreme court in *R Muthukrishnan's case.*

(B) RESTRICTION/REGULATION OF PRACTISE OF SENIOR ADVOCATE

A Senior Advocate who is designated by High Court or Supreme Court is entitled to appear in that capacity in all Courts including Tribunals and all authorities without any fetter or restrictions. Bringing in regulations/ restriction on senior advocate on their practice lies within the domain of the Bar council of India. In this regard section 16(3) is extracted for your lordships kind consideration.

section 16(3)

"Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interest of the legal profession, prescribe".

II. The Bar Council of India would like to offer its comments on the following specific rules:-

(a) Fixing of Age

Rule 4(1)(a) is fixing inflexible minimum age as 45 years for Qualification. In *Indira Jaising case* the Hon'ble supreme court while considering fixing of minimum age chose to fix the experience instead of age. Paragraph 72 of the judgment in Indira Jaising is extracted for easy understanding

> *A word with regard to minimum age and income as conditions of eligibility would be appropriate at this stage. From the narration contained hereinabove with regard to the norms and guidelines prevailing in different High Courts, it is evident that varying periods of practice and different slabs of income have been, inter alia, prescribed as minimum conditions of eligibility for consideration for designation as a Senior Advocate. If merit and ability is to be the determining factor, in addition to standing in the Bar and expertise in any specialized field of law, we do not see why we should insist on any minimum income as a condition of eligibility. The income generated by a lawyer would depend on the field of his practice and it is possible that a lawyer doing pro bono work or who specializes in a particular field may generate a lower return of income than his counterpart who may be working in another field of law. Insistence on any particular income, therefore, may be a self-defeating exercise. Insofar as age is concerned, we are inclined to take the view that instead of having a minimum age with a provision of relaxation in an appropriate case it would be better to go by the norm of 10 years practice at the Bar which is also what is prescribed by Article 217 of the Constitution as a condition of eligibility for being considered for appointment as a Judge of the High Court.*

The Judgment itself carves out a provision for relaxation of 10 years experience in appropriate cases. Therefore what is laid down by the Hon'ble supreme court is number of years of experience and not the age. In Para 34 the Apex Court did was not inclined to prescribe any minimum age and that it would be better to go by the norm prescribed in Article 217 namely 10 years of practice .

(b) RULE 4

The stipulation of 15 Judgements to the credit of a candidate in the preceding 5 years to prove that he has contributed to the growth of law under Rule 4(1)(e) needs appears to be highly impossible.

(c) Formation of Permanent Committee

We find that in the rules a permanent committee has been introduced which comprises of Hon'ble Chief Justice and two senior judges besides

Advocate General and a Senior Advocate to be nominated by the judges. The functions of the permanent committee in our respectful submission appears to be in direct conflict to Section 16(2) of Advocates Act. In our opinion the creation of such committees and exercise of power by external authorities other than the High court referred in Section 16(2) is not in accordance with the Act. Under Section 16(2) An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability ,standing at the Bar or special knowledge or experience in law, he is deserving of such distinction. Thus creation of the Permanent committee consisting of Attorney General/Advocate General and Senior advocates at the level of Supreme Court and High court and their presence in the Permanent committee to perform certain functions as set out in the impugned Rules 5 to 7 is causing violence to Section 16(2) of Advocates Act. The opinion to be formed by high court under Section 16(2) cannot include the opinion of Advocate General or Senior Advocate nominated by members of permanent committee even at the initial stage of forming opinion. Art 216 sets out the constitution of a *High Court.* It states that every high court shall consist of a Chief Justice and such other judges as the President may from time to time deem if necessary to appoint. The inclusion of Advocate General and a Senior advocate in the Permanent Committee to form *opinion of high court* goes against the spirit of Section 16(2) and turns out not in consonance with the constitution and Advocates Act. The legislature has used the word High court in section 16(2) which shall form opinion. It cannot be stretched to include Advocate General and Senior Advocate. We are not here to say that the Learned Advocate General is not part of High Court or for that matter the Senior Advocate also. But the requirement of Section 16(2) requires say so. In the impugned rules 5,6,7 the power and functions of the Permanent committee is stated. This includes scrutiny, consideration , assessing the proposal/ applications, interaction, clearance and shortlisting. Thus the committee has two aliens inside viz the Advocate General and a Senior Advocate nominated by Permanent committee. Another important fact is independence of an aspiring advocate to become Senior advocate is at stake if he appears against State Government. The Advocate General is the representative of the Executive in the High Court. This will hamper the fearless practise of any advocate against the State Government. There would be no need for an advocate general or a Senior advocate to judge ability or special knowledge of an advocate as there was no necessity of an advocate to appear before them. Therefore it doesn't serve any purpose for inclusion of Advocate General or Senior Advocate. More over the Chief justice and two senior judges as contemplated in Rule 3 for composition of committee is also not in accordance with Section 16(2). The Chief Justice and two senior judges alone cannot substitute for *High court* as found in Art 216 even though the role of permanent committee is restricted. Hence the composition of permanent committee under rule 4 runs counter to section 16

(d)Rule 5

The Rule 5 stipulates that Senior Advocates of only 15 years standing can propose candidates with a cap of two proposals in a year. This will not help an advocate who has strived to develop by himself without assistance of any designated senior advocate all along in his carrier. Hence the relaxation could be made as to the proposal without any qualification as to the numbers of years of standing of Senior Advocate or any cap being fixed for proposal by a Senior Advocate. There are hardly few senior advocates who have put in 15 years of practice as Senior Advocates in Madras High Court. This clause of proposal with 15 years standing is highly unreasonable and this will prohibit Advocates who have no access to all the senior advocates for being considered as Senior Advocates.

(e) Rule 8

Rule 8(1)(d) as stated above will bring in discrimination between Senior Advocates designated by High court and Senior advocates designated by other high courts appearing before Madras High court. Practising in courts include mentioning and adjournments. When the court itself can regulate proceedings during the hearing of a case, there cannot be any abstract rule creating ban on practise viz for mentioning and adjournments by a Senior Advocate which is within the domain of Bar council of India. Further the rule discriminates restriction of practise between a Senior Advocate and an Advocate.

The injustice which Rule 8(1)(f) is going to cause on the Law officers including Learned Advocate General and ASG would be tremendous. In absence of the definition of word "standing counsel", any one advising the State and Central Government would find foul of this rule

(f) Rule 10

In Rule 10 the word *"guilty of any professional conduct"* is too vague, ambiguous and gives untrammelled power to be exercised for withdrawal of designation. The High court cannot frame any disciplinary rules under Section 34(1) as held in *R Muthukrishnan's case.* Rule 34(1) cannot be invoked for any disciplinary measure. Such power under Rule 10 of impugned rules is thus not in accordance with Advocates Act. Further the independence of Senior Advocates to argue in the courts without fear is under peril and runs counter to the dictates of Hon'ble supreme court in *R Muthukrishnan's case.*

(g) Evaluation criteria under Appendix B

In Appendix B giving points for evaluation, the income of candidate may not be given much leverage.

Those who have done considerable probono works, legal service or associated with Legal Service authorities may be given additional points.

This could also include the works associated with prisoners rights, human rights, woman rights, child rights, migrant and construction workers, environmental matters etc.

The evaluation like 15 points for publications can be totally taken away as this will create unnecessarily devotion of time for an advocate to spend all his earnings to catching hold of press and law journal publication to publish his article. We have come across regular complaints from section of the bar that the Law journals carries articles of some advocates alone and reports cases which does not even settle any law.

Another disturbing factor is giving 25 points for personality. This is not a criteria under Section 16 for designating an Advocate as Senior. This will affect the candidates from downtrodden and oppressed class.

The clearance certificate from state bar council should also be made as a condition before designation of senior advocates is considered. This would enable state bar council to certify that there are no pending disciplinary proceedings initiated by state bar council against the candidate.

(h)<u>Rules cannot be static</u>

Another important aspect is that in *Indira Jaising case* the Hon'ble supreme court while laying guidelines for designation of senior advocates felt that the guidelines should not be static. Therefore framing inflexible Rules instead of guidelines is unwarranted and unnecessary

III. Therefore, the Bar Council of India is of the humble opinion that there is no necessity to bring in rules for designation of Advocate as senior advocate. Section 16 of the Advocates Act has already set out the authority, who could confer and the criteria or basis on which the designation could be made. There is no qualm on the basic fundamental proposition that the authority which grants designation has all the powers to withdraw the same. When such inherent power lies with the High court even to strip off the senior gown it has granted, then in our respectful opinion the rules are unnecessary. Guidelines can be framed by the High court for designation of Senior Advocates instead of framing rules for withdrawal of Designation. In case of any misconduct by any Advocate or Senior Advocate, the Advocate Act has already empowered the Bar Councils to suspend the Certificate of Practices of such issuing Advocates. The Act is very exhaustive and therefore, power cannot be usurped by the High Court taking shelter of section 34 of the Act. The Rules framed by Madras High Court have resulted in strong resentment among the Legal Fraternity of the Country and the Lawyers are viewing it as a device to shut the mouths of Senior advocates, The Courts have the power under contempt of Courts Act and u/s 34 of the Advocate Act, but these provision do not empower the High Court to make any Law which could give a sword in the hand of the Hon'ble Judges to use against the Senior Advocates whenever and

wherever any judge feels aggrieved by any conduct/submission of a Senior Advocate.

IV. Therefore, the undersigned on behalf of Bar Council of India would request the Hon'ble Chief Justice and his Companion Judges of Madras high Court to recall the *"The Madras High Court Designation of Senior Advocates Rules 2020"* and to have a uniform guideline concerning designation of senior advocates. Until the guideline are framed, we request your Lordship to keep the aforesaid rules in abeyance.

Thanking you,

With warm regards

Manan Kumar Mishra
Senior Advocate
Chairman
Bar Council of India

S. Prabakaran
Senior Advocate
Co- Chairman
Bar Council of India