

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

ORIGINAL SIDE

WRIT PETITION NO.1526 OF 1995

Lawyers Collective

... Petitioner

Versus

Bar Council of India & Ors.

... Respondents

Ms. Indira Jaising with Mr. Anand Grover
and Ms F. Moosa for Petitioner

Mr. S.A. Diwan instructed by Gagrut & Co.
for Respondent No.4

Mr. S.U. Kamdar with Mr. K.B. Swamy and Ms
Madhusmita instructed by Bhasin & Co. for
Respondent No.6

Mr. Satish Shah with Mr. R.A. Dada, Mr.
T.U. Khatri and Mr. H.D. Rathod for
Respondent Nos.7, 10 and 11 Mr. T.R.
Andhyarujina instructed by Crawford Bayley
& Co. for Respondent No.8

Mr. Atul Setalwad with Mr. N.H. Seervai
instructed by Little & Co. for Respondent
No.12

Mr. R.A. Kapadia with Mr. S.J. Vazifdar
instructed by Bhaishankar Kanga & Co. for
Respondent No.13

Mr. Iqbal M. Chagla with Mr. D.J.
Khambatta instructed by Kanga & Co. for
Respondent No.14

CORAM: M.B. SHAH, C.J. & S.H. KAPADIA, J.

DATE : OCTOBER 4 & 9, 1995

ORAL ORDER (Per Shah, C.J.)

Rule.

Learned Counsel appearing for the Respondents waive service of notice on behalf of their respective clients.

1. The question involved in this Petition is what meaning can be given to the phrase "to practice the profession of law" used in Section 29 of the Advocates Act, 1961 (hereinafter referred to as "the Act") --

Would this phrase only mean "practice in any Court or before any authority or person" ? or

Whether the said phrase would include general legal practice, including carrying on negotiations, drafting, advising, and by holding out that they are specialists in a particular field of law ?

The issue involved in this Petition is to be decided in context of Sections 29, 30 and 33 of the Advocates Act, which are as under :-

" 29. Advocates to be the only recognised class of persons entitled to practice Law.-

Subject to the provisions of this act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.

30. Right of Advocates to practice.-

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

- Act*
- (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.

33. Advocates alone entitled to practice - Except as otherwise provided in this act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under this Act. "

Section 29 is a general provision which provides that only Advocates are entitled to practice the profession of law. Section 30 is an empowering provision which, inter alia, provides that an advocate whose name is entered in the State roll shall be entitled to practice throughout the territories to which this Act extends in all Courts including the Supreme Court or before any tribunal or other authority or person. As against this, Section 33 is a prohibitory Section in the sense that it debars any person from appearing before any Court unless he is enrolled as an advocate under this Act. In short, Section 29 provides that only Advocates are entitled to practice the profession of law; Section 30 provides that only Advocates can appear in all Courts or before any tribunal or person or authority and Section 33 prohibits any

other person (except an Advocate) to practice in any Court or before any authority or person.

In view of three different provisions, it would be difficult to hold that all these Sections viz., Sections 29, 30 and 33, deal only with practice before the Court, tribunal or authority. If the contention that "to practice the profession of law" only means appearance before Courts is accepted, there was no necessity of having Section 29. Therefore, in our view, prima facie, it appears that the phrase "to practice the profession of law" is wide and would include (a) appearance before Courts i.e. to practice in Courts and (b) to practice the profession of law outside the Court by giving legal advice as attorney and counsel-at-law or by drafting or drawing legal documents or advising clients on international standards and customary practice relating to clients' transactions, broadly referred to hereinafter as non-contentious matters.

In our view, establishing a firm for rendering legal assistance and/or for executing documents, negotiations and settlement of documents would certainly amount to practice of law.

Brief Facts

2. The aforesaid question is to be dealt with in this petition in context of the following facts :-

"Lawyers Collective", which is a Society registered under the Societies Registration Act and the Bombay Public Trusts Act, 1950, has filed this Petition wherein it has been mainly contended that Respondent Nos.12, 13 and 14 are not entitled to establish firms "to practice the profession of law" in this country. Various prayers are made in this Petition and it has been submitted that Respondent Nos.12 to 14 are practising the profession of law in this country without being entitled to do so as provided under Section 29 of the Advocates Act, 1961.

On facts it is contended that in the guise of liaisoning, the Foreign Law Firms have started practising the profession of law not only in breach of Section 29 of the Advocates Act but also in breach of Section 29 of the FERA.

3. The activities carried on by Respondent Nos.12 to 14 at present is required to be dealt with on the basis of statements made in the affidavit in reply filed on behalf of the Respondents. In the affidavit in reply filed on behalf of Respondent No.12 in reply to the Petition, it has been stated that consequent upon its application dated 15th June 1994, the Reserve Bank of India, vide its letter dated 6th July 1994 (Exhibit 2 to the said affidavit), granted to the 12th Respondent permission under Section 29(1)(a) of the FERA for opening a Liaison Office in India. It has been further stated in paragraph 2(f) of the affidavit that independent of the Liaison Office activities, the 12th Respondent has both before and since establishment of the Liaison Office received and fulfilled mandates to advise and assist non-Indian clients in connection with their activities in India and Indian clients in connection with their activities in India and outside India. This work consisted of drafting documents, reviewing and providing comments on documents, conducting negotiations and advising clients on international standards and customary practice relating to the client's transaction. It is, however, averred that the 12th Respondent does not advise clients on

issues relating to Indian law but engages Indian lawyers to render such service.

It has been further stated that as regards the activities undertaken by the said Liaison Office, the said activities, inter alia, comprise of -

- (i) acting as a communication conduit between other offices of the 12th Respondent and prospective clients and clients in India;
- (ii) receiving requests from prospective clients in India for information about the 12th Respondent and providing such information;
- (iii) conducting market research to assess the feasibility of providing international legal services in India; and
- (iv) providing office support services to lawyers from other offices of the 12th Respondent visiting India etc.

Further, in paragraph 17, it has been stated that lawyers of the 12th Respondent have been present in India acting in an advisory capacity, conducting negotiations on behalf of its clients, drafting documents and reviewing and providing comments on documents and that such services were performed in furtherance of the 12th Respondent's wholly proper role as legal consultants on matters of international practice.

In paragraph 20, it has been further averred as follows :-

" I say that the 12th Respondent, through its Liaison Office at Bombay, conducts meetings, prepares and presents materials to clients and prospective clients to describe the capabilities and the services of the 12th Respondent. I say that this is primarily done at the behest of the prospective client or clients. I say that this is beneficial to the prospective client or clients. "

4. From the aforesaid facts it can be held that Respondent Nos. 12 to 14 have established

liaison offices in this country; they are carrying on work of drafting documents, reviewing and providing comments on documents, conducting negotiations and advising clients on international standards and customary practice relating to clients' transactions; gathering information from prospective clients in India and conducting market research to assess the feasibility of providing legal services in India.

3. It has been contended by the learned Counsel for Respondent No.12 to 14 that "to practice the profession of law" would mean only practice of law by appearing before a Court or an authority or a person, as provided under Section 33 of the Advocates Act. According to the learned Counsel, under Section 33 of the Advocates Act there is no prohibition or restriction which provides that a person shall not be entitled to give any legal advice on legal matters. For this purpose he pointed out that in America practising or appearing as attorney-at-law without being admitted and registered is controlled by the New York Judiciary Law, while in this country there is no such regulation nor the Advocates Act provides for such prohibition. In support of this

contention the learned Counsel relied upon Paragraph 47B of the New York Judiciary Law, which reads as under :-

" 47B. Practicing or appearing as attorney-at-law without being admitted and registered.

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney or counselor, or attorney or counselor or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other

persons or person has, owns, conducts or maintains a law office and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath. "

He also cited paragraph 356 from Halsbury's Laws of England, Fourth Edition, page 469, which reads as follows:-

" 356. Unqualified person drawing documents.

Any unqualified person, not being a barrister or duly certificated notary public, is guilty of an offence, unless he proves that the act was not done for or in expectation of any fee, gain or reward, either directly or indirectly, if he:

- (1) draws or prepares any instrument, not being a will or other testamentary instrument, an agreement not under seal, a letter or power of attorney, or a

transfer of stock containing no trust or limitation thereof, relating to real or personal estate, or any legal proceedings; or

(2) draws or prepares any instrument of transfer or charge for the purposes of the Land Registration act, 1925 or makes any application or lodges any document for registration under that Act at the registry; or

(3) takes instructions for a grant of probate or of letters of administration; or

(4) draws or prepares any papers on which to found or oppose any such grant.

The prohibition under heads (1) and (2) do not apply to any public officer drawing or preparing instruments or applications in the course of his duty or to any person employed merely to engross any instrument, application or proceeding. Proceedings under these provisions must be brought at any time before

the expiration of two years from the commission of the offence or six months from its first discovery by the prosecutor, whichever period expires first. "

6. In our view, considering the aforesaid quotations from the New York Judiciary Law and Halsbury's Laws of England, it is apparent that the phrase "to practice the profession of law" would be wide enough which would include not only appearance before the Court but also to carry on such activities which are specifically provided in the aforesaid paragraphs which provide for restrictions on unqualified persons against drawing of preparing any instrument, agreement, power of attorney or such other things. If that was not so, there was no necessity of restricting it by specific regulations.

For ascertaining the meaning of the phrase "to practice the profession of law", we would refer to the Statement of Objects and Reasons of the Advocates Act. It specifically states that the main feature of the Bill are "(1) the establishment of an All India Bar Council and a common roll of advocates, and advocate on the common roll having a right to practice in any part

7. of the country and in any Court, including the Supreme Court and (2) the integration of the bar into a single class of legal practitioners known as advocates". This would mean that the object of the Advocates Act was to have a common roll of advocates who are entitled to practice in any part of the country and in any Court, including the Supreme Court. This indicates that practice in any part of the country and appearance and practice before the Court are two different concepts.

In this context, we would refer to some portion of the Report of the All-India Bar Committee made in 1953 which was constituted to examine and report with regard to Bar and legal education; the establishment of an All India Bar Council and a common roll of advocates, and advocate on the common roll having a right to practice in any part of the country and in any Court, including the Supreme Court, and such other matters, including the matter whether the dual system of counsel and solicitor (or agent) should be continued or not. While deciding the question of the continuance or abolition of the dual system of counsel and solicitor (or agent), in paragraph 69 of the said Report, it is observed as under :-

" As a statement of fact it is not quite correct to say that the dual system is unknown except in Great Britain. There is a division of legal practitioners in France into two categories - 'avocat' and 'avoue', which brings about a dual system of a sort. The avocat appears and pleads in Court like the Barrister in England. The avoue advises the client, prepares the case but does not appear in Superior Courts and is the French counterpart of the English Solicitor. "

The aforesaid aspect would indicate that the work of legal practice can be divided in two parts, namely, (1) of appearing before the Court and (2) of preparing pleadings and other documents. Similar distinction is also pointed out in the subsequent discussion that in Italy also there are two classes of lawyers, namely, 'avvocati' and 'procuratori', and it is observed as under :-

" The avvocato in general performs broader and more responsible functions: he advises the client, drafts all papers and briefs (though they need not be signed by him), and argues the case. The distinction is also of some

importance in non litigation matters, most of which are handled by avvocati, although a procuratore may perform some of the more ministerial functions, such as records, execution of documents, etc. "

It has been further observed that the distinction is not as rigid as it is in Great Britain or even as it is in France, for, in practice, the distinction in Italy tends to disappear since a single individual may be both an 'avvocato' and a 'procuratore' by qualifying for both positions.

By the Advocates Act, the same position is achieved. A single individual is both an 'avvocato' and a 'procuratore', that is, an Advocate is entitled to practice before the Court as well as draft all papers and documents or can discharge the functions of execution of documents.

As there is no direct decision on the question involved, the learned Counsel appearing for the Petitioner has brought to our notice a decision rendered by the Court of Appeals of New York, In the Matter of New York County Lawyers Association v. Lorenzo J. Roel, (165 N.Y.S. 2d 31,

page 14, wherein the Court has interpreted Section 270 of the Penal Law which, inter alia, provides as under :-

" It shall be unlawful for any natural person to practice ... as an attorney-at-law ... or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, ... or advertise the title of lawyer ... in such manner ... or advertise the title of lawyer ... in such manner as to convey the impression that he ... conducts or maintains a law office ... without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath. "

In that case it was contended by the appellant that his practice is restricted to Mexican law and he does not practice law in New York since he only gives advice and prepares instruments based on Mexican law and Mexican law is not "law" in New York. Therefore he is not covered by Section 270 of the Penal Law. The Court negatived the said contention by holding that

whether a person gives advice as to New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice. It was further held that when legal documents are prepared for a layman by a person in the business of preparing such documents, that person is practicing law whether the documents be prepared in conformity with the law of New York or any other law. The Court further observed that to hold otherwise would be to state that a member of the New York Bar only practices law when he deals with local law. It was further observed: "A foreign lawyer who is familiar with the law of the country in which he is a lawyer is in a similar position. He is a specialist in a particular field of the law, but is nevertheless a layman in this state when he is not a member of the Bar here". The Court held that protection of the members of the lay public of State, when they seek legal advice -- and that was what defendant purported to furnish -- was the basis of the requirements of licensing of attorneys by the State.

7. From the aforesaid discussion, the submissions made before this Court and the affidavit in reply filed on behalf of Respondent

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Nos.12, 13 and 14, prima facie, it appears that the activities mentioned above carried on by Respondent Nos.12 to 14 would amount to practising the profession of law. As stated above, Respondent Nos.12 to 14 have established liaison offices in this country; they are carrying on work of drafting documents, reviewing and providing comments on documents, conducting negotiations and advising clients on international standards and customary practice relating to clients' transactions; gathering information from prospective clients in India and conducting market research to assess the feasibility of providing legal services in India.

If, therefore, ~~the said activities are~~ held to be not covered by the phrase "to practice the profession of law", then the whole objects of the Advocates Act would be frustrated, in the sense that there would not be any disciplinary control nor these activities can be controlled by any method.

B. The next question is, what interim relief can be granted by the Court. Admittedly, Respondent Nos.12 to 14 were permitted to establish their office in this country by the Reserve Bank of

India by granting permission under Section 29 of the FERA. The said Section, so far as relevant for the present purpose, reads as under :-

" 29. Restrictions on establishment of place of business in India. - (1) Without prejudice to the provisions of Section 28 and Section 47 and notwithstanding anything contained in any other provision of this Act or the provisions of the Companies Act, 1956 (1 of 1956), a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India, or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company, shall not, except with the general or special permission of the Reserve Bank, -

(a) carry on in India, or establish in India a branch, office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for the carrying on of which permission of the

Reserve Bank has been obtained under
Section 29; or

(b) ... "

Admittedly no prior permission of the Reserve Bank
is obtained under Section 30 of the FERA, which
provides for grant of permission to practice any
profession.

9. It has been pointed out that in the
licence granted by the Reserve Bank of India under
Section 29(1)(a) of the FERA as under it is
provided as under :-

" We advise that we are agreeable to your
establishing a liaison office at Bombay
and New Delhi initially for a period of
three years for the purpose of
undertaking purely liaison activities
viz. to collect information from the
parties in India and to act as a
communication channel between Head
Office and parties in India. "

In paragraph 4 of the said licence it has been specifically further stated that the permission granted is limited to and for the purpose of the provisions of Section 29 only and shall not be construed in any way as regularising, condoning or in any manner validating any irregularising, contraventions or other lapses, if any, under the provisions of any other law for the time being in force.

10. Section 29 of the FERA, inter alia, provides for grant of general or special permission by the Reserve Bank of India to carry on in India, or establish in India, a branch office or other place of business for carrying on any activity of a trading, commercial or industrial nature, other than an activity for which permission under Section 28 has to be obtained. As against this, Section 30 of the FERA specifically empowers the Reserve Bank of India for grant of permission to practice any profession or carry on any occupation or trade or business in India. Admittedly, no permission is granted to Respondent Nos.12 to 14 as provided under Section 30 to practice any profession and, therefore, the permission which is granted to Respondent Nos.12 to 14 is only to establish a

Branch Office or office of business for carrying on
any activity of a trading and that too limited by
the conditions, as stated above, of undertaking
purely liaison activities, that is to say, to
collect information from the parties and to act as
a communication channel between the Head Office and
their parties in India. Therefore the aforesaid
permission or licence would not mean that
Respondent Nos.12 to 14 are entitled to practice
the profession of law.

11. The permissions granted to Respondent
Nos.12 to 14 specifically provide that they would
act as a communication channel between the Head
Office and the parties in India. There are also
other conditions to the effect that "except the
proposed liaison work, the office in India will not
undertake any other activity of a trading,
commercial or industrial nature nor shall it enter
into any business contracts in its own name without
our prior permission". Prima facie, it appears
that the permission to Respondent Nos.12 to 14
nowhere allows them to practice the profession of
law, that is to say, to draft documents and render
legal advice in preparing and execution of the said
documents. This fact is also made clear by the

affidavit in reply filed by S.G. Sargankar, Deputy General Manager, Exchange Control Department of the Reserve Bank of India, wherein it has been stated that "it prima facie appears that Respondent No.13 is acting in violation and beyond the scope of the permission granted to them by Respondent No.8 (Reserve Bank of India) for posting a representative for liaison purposes". It is also stated therein as under :-

" I say that Section 30 is applied only when the permission that is sought and/or granted is to practice any profession in India. I say that permission granted under Section 29 is for a wholly different purpose. Permission granted under Section 29 is restricted to opening a liaison office and does not extend to permission for practicing a profession in India. "

12. Hence, by way of interim relief, Respondent Nos.8 and 9 are directed to conduct an inquiry in accordance with the provisions of law as discussed above into the various activities, transactions or assignments undertaken by Respondent Nos.12 to 14 in India and to take

appropriate action, if there is breach of any of the provisions of law.

13. Other interim reliefs as prayed for are refused.

14. Liberty to apply for further appropriate reliefs.

15. Issuance of certified copy of this order is expedited.

M.B. SHAH, C.J.

S.H. KAPADIA, J.