

IN THE HIGH COURT OF JUDICATURE AT MADRAS

SPECIAL ORIGINAL JURISDICTION

WRIT PETITION NO. 5614 OF 2010



In the matter of:

A.K. Balaji

...Petitioner

Versus

Union of India and Ors.


...Respondents

COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT NO. 7

I, J.R. Sharma, aged 46 years, son of late Shri R.S. Sharma, working as Officiating Secretary, Bar Council of India, 21, Rouse Avenue, New Delhi, do hereby solemnly affirm and state on oath as under as under:

1. I state that I am the Officiating Secretary of Respondent No. 7 herein, and am therefore well acquainted with the facts and circumstances of the case and authorized to file the present Counter Affidavit. I have perused the Affidavit dated March 2010 filed by the Petitioner.
2. At the outset, I state that the issue raised in the present writ petition is no longer *res integra*, and has been settled by judgment and order of the High Court of Judicature at Bombay dated 16<sup>th</sup> December 2009 in Writ Petition No. 1526 of 1995, in the matter of *Lawyers Collective v. Bar Council of India*. The Bombay High Court has therein held that practice of law would include even non-litigious practice and therefore, foreign lawyers i.e. lawyers not enrolled as Advocates under the provisions of the Advocates Act, 1961 would not be entitled to practice:

51. It was contended that the 1961 Act does not contain any penal provisions for breaches committed by a person practicing in non-litigious matter and, therefore, the 1961 Act cannot apply to persons practising in non-litigious matters. There is no merit in this contention, because, section 34 Judgment W.P.1526/1995 35 of the 1961 Act provides punishment to an advocate who is found to be guilty of professional or other misconduct. The fact that section 45 of the 1961 Act provides imprisonment for persons illegally practising in Courts and before other authorities, it cannot be said that the 1961 Act does not contain provisions to deal with the persons found guilty of misconduct while practising in non litigious matters. Once it is held that the persons entitled to practise the profession of law under the 1961 Act covers the persons practising the profession of law in litigious matters as well as non-litigious matters, then, the penal provisions contained in section 35 of the 1961 Act would apply not only to persons practising in litigious matter, but would also apply to persons practising the profession of law in non-litigious matters. The very object of the 1961 Act and the Rules framed by the Bar Council of India are to ensure that the persons practising the profession of law whether in litigious matters or in non litigious matters, maintain high standards in professional conduct and etiquette and, therefore, it cannot be said that the persons practising in non litigious matters are not governed by the 1961 Act.



54. It is not the case of the respondents that in India individuals / law firms / companies are practising the profession of law in non-litigious matters without being enrolled as advocates under the 1961 Act. It is not even the case of the respondents that in the countries in which their head office as well as their branch offices are situated, persons are allowed to practice the profession of law in non-litigious matters without being subjected to the control of any authority. In these circumstances, when the Parliament has enacted the 1961 Act to regulate the persons practising the profession of law, it would not be correct to hold that the 1961 Act is restricted to the persons practising in litigious matters and that the said Act does not apply to persons practising in non litigious matters. There is no reason to hold that in India the practise in non litigious matters is unregulated.

It is submitted that the judgment of the Bombay High Court, not having been appealed against to the Hon'ble Supreme Court of India, has attained finality and consequently the present petition deserves to be dismissed.

3. I state that the Bar Council of India is the apex regulatory and representative body for the legal profession in the country. The duties and functions to be performed by the Bar Council of India are provided for under Section 7(1) of the Advocates Act, 1961, wherein, in conjunction with the State Bar Councils, the Bar Council of India is responsible for all matters relating and incidental to admission, practice, ethics, privileges, regulations, discipline and improvement of the profession.

4. I state that the Advocates Act, 1961 is the regulatory framework governing enrollment and practice of law by advocates in the territory of India. Chapter III of the Act deals with Admission and Enrollment of Advocates, while Chapter IV deals with the Right to Practice.

5. I state that under Section 17 of the Act, the State Bar Councils are enjoined to maintain the roll of advocates. The conditions for enrollment are provided for under Section 24, and can be summarized as follows:

- a) The person applying to be enrolled should be a citizen of India;



- b) Subject to the other provisions contained in the Act, a national of any other country may be admitted as an advocate on a State roll, if citizens of India, duly qualified, are permitted to practice law in that other country;
- c) The person should have completed 21 years of age;
- d) The person have obtained a degree in law from any University as provided for under sub-clauses (i) to (iv) of Section 24(1)(c);
- e) The person fulfills such other conditions specified in the rule made in this regard by the State Bar Councils;
- f) The person has paid the requisite fee as provided under Section 24(1)(f).

Importantly, Section 24(1)(c)(iv) provides that a person may be qualified to be enrolled if he has obtained such other foreign qualification in law as is recognized by the Bar Council of India for such purpose. It is submitted that the conditions provided under Section 24(1) are clearly cumulative.

6.

I state that Section 29 of the Act provides that advocates shall be the only class of persons entitled to practice the profession of law. Section 30 extends such right to practice throughout the territory of India in all courts including the Supreme Court, before any tribunal or person legally authorized to take evidence, and before any other authority or person before whom such advocate is by/under any law entitled to practice. Section 33 provides that only persons enrolled as advocates shall be entitled to practice in any court or before any





authority. Section 32 provides that notwithstanding anything in Chapter IV, any court, authority or person may permit any person, not enrolled as an advocate under the Act to appear before it/him in a particular case.


7. I state that, importantly, Section 47 (Chapter VI) deals with the issue of reciprocity. Sub-section (1) provides that where any country (as notified by the Government in the Official Gazette) prevents citizens of India from practicing the profession of law or subjects them to unfair discrimination, no subject of any such country shall be entitled to practice the profession of law in India. Further, however, sub-section (2) provides that the Bar Council may prescribe the conditions subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognized for the purpose of admission as an advocate under the Act. Under Section 49(1)(c), the Bar Council is provided with the power to prescribe rules for recognizing foreign qualifications in law obtained by persons other than citizens of India for the purpose of admission as an advocate under the Act.

8. I state that by virtue of a conjoint reading of Sections 24 and 29, it is only persons who are citizens of India and are thus eligible to be enrolled under Section 24, who are allowed to practice as understood under Chapter IV of the Advocates Act, 1961. However, the Bar Council of India does have the power - under Section 47(2) read with Section 49(1)(c) - to provide for a relaxation to such a condition.



9. I further state that as a consequence of the territorial application of the Advocates Act, 1961, any practice of law – including practice of foreign law – within the territory of India would be subject to regulation by the Bar Council of India. The practice of foreign law would thereby include within its meaning practice even by practitioners registered or recognized within their domestic jurisdictions.

10. I state that the Bar Council of India, being the statutory body for the representation and regulation of the legal profession in the country, has decided not to relax any of the statutory norms for practice of law in India by exercise of its powers under Section 47(2) read with Section 49(1)(e) of the Advocates Act, 1961. It is submitted that the same was resolved at a Joint Consultative Conference of the Members of the Bar Council of India and the Chairmen, Vice-Chairmen and Chairmen, Executive Committee of the State Bar Councils held at Kochi on 17<sup>th</sup>-18<sup>th</sup> November 2007, wherein the decision was arrived at after consultations with the representatives of the respective State Bar Councils.



A true and correct copy of Resolution No. 1 passed at the Joint Consultative Conference held at Kochi on 17<sup>th</sup>-18<sup>th</sup> November 2007 is annexed herewith and marked as **Annexure No. R-1**.

11. I further state that the Bar Council of India is also of the firm view that 'practice' of law under Chapter IV of the Advocates Act, 1961 encompasses myriad functions performed by a lawyer and is not

confined to mere appearances/arguments before courts, tribunals or other authorities. It is submitted that in this regard, it has been held by a Constitution Bench of the Hon'ble Supreme Court of India in *Ex-Capt. Harish Uppal v. Union of India*, (2003) 2 SCC 45 that "...The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators etc..." Therefore, it would not be correct to state that non-litigious practice would not be regulated by the provisions of the Advocates Act, 1961. As averred above, the provisions of the Advocates Act, 1961 apply with equal force to both litigious and non-litigious practice of law and it is only persons enrolled under Section 24 who can engage in the same.

12. I state that in view of the above said facts and circumstances, this Hon'ble Court may pass orders as it deems fit in the ends of equity, justice and good conscience.



13. I crave leave and liberty of this Hon'ble Court to file a detailed para-wise reply, if necessary, with the leave of the Court.

  
(DEPONENT)

### VERIFICATION

I, the above named deponent, do hereby verify that the contents of paragraphs 01 are based on my personal knowledge, while contents of paragraph 02 to 13 are based on the information and knowledge derived from the records which I believe to be true. I further state that nothing material has been concealed there from.

Verified at New Delhi on this the 29 day of July 2011

  
(DEPONENT)

ATTESTED





29 JUL 2011



# BAR COUNCIL OF INDIA

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Proceeding of the Consultative Conference held  
at Kochi on  
17<sup>th</sup> and 18<sup>th</sup> November 2007.

The Bar Council of India organized a two day Joint Consultative Conference of the Members of the Bar Council of India. The Chairmen, Vice-Chairmen, Chairmen Executive Committee of the State Bar Councils had been invited to participate in the said Conference. The said Conference was attended by the representatives of all the State Bar Councils in the country and all the Members of the Bar Council of India. The following topics were discussed at the two day conference.

1. Entry of foreign Law firms and foreign lawyers into India.
2. Demand for advertisement by lawyers and a re-look at Rule 36, Section VI, Chapter II, Part VI of the Bar Council of India Rules.
3. Role of Lawyers in ADR particularly in arbitration. Necessity for bringing in requisite amendments in the Arbitration Act for institutionalizing arbitrations and for lawyers' involvement as arbitrators.
4. Periodical renewal of enrolment of advocates on remitting a renewal fee and filing declaration / affidavit.
5. Uniform implementation of Advocates Welfare Schemes in all the States.
6. Introduction of Common Model Bye Laws for the Bar Association in the Country.
7. Major amendments needed in Advocates Act.
  - a. Restricting Upper Age limit for enrolment.
  - b. Power to revise the Enrolment fee by Bar Council of India
  - c. Enhancement of time provided for under Section 36B of the Advocates Act in respect of complaint cases referred to the Bar Council of India from the State Disciplinary Committees.
  - d. Periodical renewal of enrolment.
  - e. Introduction of Pre or Post Enrolment Training Scheme.

After deliberating on the above subjects the Conference unanimously passed the following resolutions:-

1. **RE:- ENTRY OF FOREIGN LAW FIRMS AND FOREIGN LAWYERS INTO INDIA.**

## **RESOLUTION NO.1**

This joint consultative conference of the Bar Council of India and the Chairmen, Vice-Chairmen and Chairmen, Executive Committee of all State Bar Councils in India hereby unanimously resolve to support and affirm the resolution of the Bar Council of India No. 17/2006 dated 12.2.2006 and further resolves to request the Government of India not to open up Indian Legal profession to foreign lawyers or foreign law firms at this juncture and not to permit the entry of foreign lawyers or foreign law firms into India for function or practice in any form in India as advocates, lawyers or solicitors. It is further resolved to authorize the Bar Council of India to continue the dialogue and interaction with the Government of India, represented by Ministry of Law and Justice and also the Ministry of Trade and Commerce and with the Law Councils and Law Societies of the

foreign countries i.e. the counterparts of the Bar Council of India in the respective countries to ponder into the Principle of reciprocity in this subject and to ascertain the details procedure of reciprocal arrangements and the restriction imposed for Indian lawyers to practice in the respective countries. It is further resolved to authorize the Bar Council of India to take the final decision in the matter in consultation with all the State Bar Councils in due course of time and at the appropriate stage as to whether entry of foreign lawyers and law firms could be permitted into the legal practice in India in any form or manner and subject to any limitations and restrictions imposed in the changed circumstances and as and when the situation ripens and in the best interest of the legal profession of India and that of the country and people. It is further resolved to protest against the Government of India's attitude in filing a counter affidavit in the Mumbai High Court adopting the stand that the Advocates Act has nothing to do with and does not bar the practice of foreign lawyers in India, while they are simultaneously in dialogue with the Bar Council of India and seeking the views of the Bar Council of India in the matter. Therefore, it is further resolved to request the Govt of India not to take any final decision in the matter of entry of foreign lawyers and foreign law firms into India without being consulted with and obtaining the approval of the Bar Council of India.

2. **Role of Lawyers in ADR particularly in arbitration. Necessity for bringing in requisite amendments in the Arbitration Act for institutionalizing arbitrations and for lawyers' involvement as arbitrators**

#### **RESOLUTION NO. 2**

This joint consultative conference of the Bar Council of India and the Chairman, Vice-Chairman and Chairman Executive Committee of all the State Bar Councils in India while expressing its deep concern on the wrong direction to which our arbitration scheme under the Arbitration and Conciliation Act 1996 proceeds and the vices and maladies in the present arbitration system in India resulting from the lacunas and uncertainties in the Act, unanimously resolves to request the Government of India to institutionalize the arbitration proceedings in India by bringing necessary and appropriate amendments in the Act for fixing up the fee, venue, number of sittings etc and also to ensure and enlist competent advocates to be appointed as arbitrators, mediators and conciliators, so as to ensure the active participation of the Indian Bar along with the Bench in the effective and meaningful implementation of the ADR system and for achieving the legislative object of affording speedy and less expensive justice to the litigants.

3. **Periodical renewal of enrolment of advocates on remitting a renewal fee and filing declaration / affidavit.**

**RESOLUTION NO. 3**

This joint consultative conference of the Bar Council of India and the Chairman, Vice-Chairman and Chairman Executive Committee of all the State Bar Councils in India while expressing its deep concern on the fact that because of migration of advocates to other careers after their enrolment, the statutory profession is losing its compact, and disciplined nature and accountability to the clients and professional body, resulting in creation of two categories of advocates in the country viz. practicing and non practicing advocates, unanimously resolve to request the Government of India to carry out necessary amendments in the Advocates Act and the Rules for the purpose of renewal of enrolment / re-registration periodically and at prescribed duration by all advocates on the rolls of all the State Bar Councils in India by filing an affidavit that he is in active practice in the profession with the details prescribed and by remitting a registration / renewal fee of Rs.500/- each with the State Bar Council concerned, which should be apportioned between the State Bar Council concerned and the Bar Council of India as prescribed.

4. **Uniform implementation of Advocates Welfare Schemes in all the States.**

**RESOLUTION NO. 4**

This joint consultative conference of the Bar Council of India and the Chairman, Vice-Chairman and Chairman Executive Committee of all the State Bar Councils in India hereby resolve to request the Govt of India and all the State Governments in India to implement a uniform scheme of Advocates Welfare Fund throughout the country in all the states with the same amount of benefit and the same Rules and procedure. It is further resolved to request the Union and State Governments to compensate by way of requisite grant the shortage in corpus of the fund so as to uniformly implement the scheme on a national basis.

5. **Demand for advertisement by lawyers and a re-look at Rule 36, Section VI, Chapter II, Part VI of the Bar Council of India Rules.**

**RESOLUTION NO. 5**

This joint consultative conference of the Bar Council of India and the Chairman, Vice-Chairman and Chairman Executive Committee of all the State Bar Councils in India hereby resolve to amend the Rules of the professional conduct and Ethics so as to permit the advocates to provide website information regarding their address, standing, qualification and specialty through website in the form prescribed by the Bar Council of India and under the scrutiny and verification of the Bar Council of India and the State Bar Councils and in the event of any violation to treat the same as a professional misconduct of advertising.



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W.P. No. 5614 of 2010

A.K.Balaji

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Petitioner

-Vs.-

Union of India  
And others

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Respondents

COUNTER AFFIDAVIT FILED BY THE 7<sup>TH</sup>  
RESPONDENT

TRUE COPY

  
Counsel for Respondent  
Appellant/Respondent

Mr. K. VENKATAKRISHNAN

COUNSEL FOR 7<sup>TH</sup> RESPONDENT