***** **THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 8327 OF 2011**

% Pronounced on: 13.2.2012

BALRAJ SINGH MALIK **….PETITIONER**

Through: Md. Izhar Alam and Mr. M.P. Singh, Advocates with Petitioner in person.

VERSUS

SUPREME COURT OF INDIA THROUGH ITS REGISTRAR GENERAL **. . . RESPONDENT**

Through: Mr. R.F. Nariman, Solicitor General of India with Mr. Sushil Kr. Jain, President (SCAORA), Mr. Shivaji M. Jadhav, V. P. (SCAORA), Mrs. Sunita B. Rao, Secretary (SCAORA) and Mr. Atulesh Kumar, Executive Member (SCAORA) [All appear as per order dated 25.11.11 of this Court]

Mr. Triparari Ray, Advocate with Mr. Ravi Shankar Kumar, Mr. Vishal Malik, Mr. B.K. Chaudhary, Mr. Sudhir Bista and Mr. Arun Kumar, Advocates for SCAA (Non-AOR)

Dr. J.C. Batra, Sr. Advocate with Dr. Ranjit Singh, Advocate for Senior Advocate Association of India.

Mr. Bankey Bihari Sharma, Advocate-on- Record (Affected Party).

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. This petition is filed by the Petitioner, who has appeared in person before us, praying for the declaration of rule 2, 4and 6 (b) of Order IV of the Supreme Court Rules, 1966 (hereinafter referred to as '1966 Rules') as null and void and for allowing the filing of cases by the Petitioner and other Non Advocates on Record (AOR) advocates in the Hon'ble Supreme Court of India. To put it otherwise, the petitioner pleads for prohibiting the creation of further classification of advocates into AOR and non-AOR and restricting only AOR to file cases in the Hon'ble Supreme Court. Thus, it is prayed that category of AOR be dispensed with.

2. Amongst others, the main grievance raised by the Petitioner is that at present the role played by an AOR is merely of a name lender for filing cases without being responsible for the conduct of the case, thereby the very purpose of having the system is defeated and after the notifying of section 30 of the Advocates Act, 1961 (hereinafter referred to

as '1961 Act') on 15th June, 2011 nothing is left to continue the system of AOR, to hold exam for AOR and allot exclusive facilities to AOR.

3. The subject of constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such court), and the fees taken therein; persons entitled to practice before the Supreme court falls under List-I which is the Union List. Therefore, the Parliament is competent to pass legislations for this very purpose.

4. The Advocates Act, 1961 which is the law relating to legal practitioners in India was enacted by the Parliament under Article 246 of the Constitution of India. One of the objects and purpose of the enactment was to empower the Supreme Court to make rules for determining the persons who shall be entitled to plead before that court.

5. Article 145 of the Constitution grants power to the Supreme Court to make rules for regulating generally the practice and procedure of the court subject to the provisions of any law made by the Parliament with the approval of the President of India. Article 145 of the Constitution of India reads as under:-

> Rules of Court, etc.- (1) **Subject to the provisions of any law made by the Parliament, the Supreme**

Court from time to time, with the approval of the President may make rules for regulating generally the practice and procedure of the Court including—

(a) Rules as to the persons practicing before the Court;

(b) Rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;

(c) Rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;

(cc) Rules as to the proceedings in the Court under Article 139A;

(d) Rules as to the entertainment of appeals under sub clause (c) of clause (1) of Article 134;

(e) Rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entertained;

(f) Rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged I respect of proceedings therein;

(g) Rules as to granting of bail;

(h) Rules as to stay of proceedings;

(i) Rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

(j) Rules as to the procedure for inquiries referred to in clause (1) of Article 317.

6. Under Article 145 of the Constitution of India Supreme Court framed "The Supreme Court Rules, 1966". The relevant provisions which are under consideration are reproduced below.

> **Rule 6(b) of Order IV** of the Supreme Court Rules, 1966
> "6(b). No advocate other than an advocate on record shall be entitled to file
> an appearance or act for a party in the Court."
> **Rule 10 of Order IV** of the 1966 Rules
> "10. No advocate other than an advocate on record shall appear and plead
> in any matter unless he is instructed by an advocate on record."
> **Explanation to Order IV Rule 2** states that - (i) 'acting' means filing an appearance or any pleadings or applications in any Court or Tribunal in India, or any act (other than pleading) required or authorized by law to be done by a party in such Court or Tribunal either in person or by his recognized agent or by an advocate or attorney on his behalf.

7. At this juncture let us take note of the important provisions of the Advocates Act which are 1961 Act are as follows

> **Section 30 of the Advocates Act**:
> Subject to the 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 the Act extends,-

(i) In all courts including the Supreme Court;

(ii) Before any tribunal or person legally authorized to take evidence;

(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.

Section 16 of the Advocates Act, 1961 states:

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 senior advocate of that Court immediately before the appointed day shall, for the purposes of this section, be deemed to be a senior advocate;

Section 52 of the Advocates Act, 1961:

> **52. Saving-** Nothing in this Act shall be deemed to affect the power for the Supreme Court to make rules under Article 145 of the Constitution-
> a. for laying down the conditions subject to which a senior advocate shall be entitled to practice in that Court.
> b. For determining the persons who shall be entitled to act or plead in that Court.

8. As mentioned above, the petitioner who is a practicing advocate appeared in person. However, in addition, Mohd. Izhar Alam and Mr. M.P.Singh Advocates also argued for him. Dr. J.C. Batra, Sr. Advocate with Dr. Ranjit Singh appeared for the intervener "Senior Advocate Association of India" and few other advocates representing SCAA (non-AOR) supported the cause in this petition by advancing various submissions as well.

9. All these counsels have argued that the 1961 Act was passed under Article 246 of the Constitution of India and Section 16 of the Advocates Act in chapter III has provisions for only two types of advocates in the country namely Senior and other Advocates. So there is no purpose or object to continue AOR system and it should be abolished.

10. It is contended that the power granted under Article 145 of the Constitution of India is to supplement and not supplant the spirit of the Constitution and/or the Advocates Act, 1961. The power of the Supreme Court under Article 145 of the Constitution is subject to the provisions of any law made by the Parliament, hence Supreme Court has no power to continue the AOR system in light of the Advocates Act. Supreme Court under Article 145 has only the power to regulate the persons who can practice before it but not restrict anyone from practicing before the Apex Court.

11. In brief the argument of the petitioner is that the right to practice under section 30 of the Advocates Act, 1961is being denied by virtue of rule 6 and 10 of Order IV of the 1966 Rules. It is brought to the notice of this court that this discrimination not only stops them from filing the cases in their name but also stop them from getting facilities like chambers and registration of their clerks etc.

12. It is also contended that the classification between Non AOR Advocates and Advocates on record created by the 1966 Rules is violative of Article 14 and 19(1) (g) of the Constitution of India. Such

classification is creating a creamy layer of advocates who want to grab the Apex Judicial system of the country.

13. We had requested Mr. R.F. Nariman, Solicitor General of India to assist us in the matter. He appeared and defended the system of AOR. Mr. Sushil Kumar Jain, President, Supreme Court Advocates on Record Association and some other office bearers also appeared and opposed the prayers made in this petition.

14. Mr. Nariman, leading the opposition, drew our attention to Section 52 of the Advocates Act, 1961 which was a saving provision and argued that in no uncertain term the said provision saves the powers of the Supreme Court to make rule under Article 145 of the Constitution and, therefore, the power of the Supreme Court had to be given supremacy. He argued that Clause (b) of Section 52 of the Advocates Act clearly vests jurisdiction in the Supreme Court to make rule for determining the persons who shall be entitled to act or plead in that Court and this was not subject to the provision of the Advocates Act. On the contrary, the provisions of Advocates Act, (which would include Section 30 as well) were subject to this power of the Supreme Court. His submission was that the expression "persons" appearing in Section 52 would include even

advocates and rebutting the contention of the petitioners that under the aforesaid provision the Supreme Court could only regulate the persons other than advocates. Mr. Nariman painstakingly narrated the history of the provisions relating to Advocates Act viz-a –viz Supreme Court Rules and the creation of AOR system. He heavily relied upon the judgment of Supreme Court in re: ***Lily Isabel Thomas 1964 SCR (6) 229*** to corroborate his aforesaid submission.

15. By relying on Section 52 the Respondents has tried to forward an argument that the rule making power regarding the determination of persons who shall be entitled to act or plead in the Supreme Court is not subject to the provisions of the Advocates Act, 1961. In order to nullify the effect of section 52 the petitioner has contended that "persons" in section 52 does not include advocates and it is also contended that section 52 only saves the constitutional power but does not empower to put a blanket ban on the right of majority of advocates.

16. As regards the submission of the petitioner regarding classification under Article 14 of the Constitution is concerned the Respondents has put forth his argument that the saving clause under section 52(b) itself

provides for creation of a category and therefore this classification cannot be treated as discriminatory.

17. The Respondents have also referred to Rule 5 (ii)(b) Order IV of the 1966 Rules which states that under some circumstances the Chief Justice may give away the requirement of the training period for an AOR. The relevant provision of the section is as follows:

> 5. No advocate shall be qualified to be registered as an advocate on record unless: -
> (b) the Chief Justice may, in appropriate cases, grant exemption-
> (1) from the requirement of training under this clause in the case of an advocate, whose name is borne on the roll of any State Bar Council and has been borne on such roll for a period of not less than ten years:
> (2) from the requirement of clause (i) and from training under this clause in the case of an advocate having special knowledge or experience in law.

18. Learned Solicitor General also put forth that it is in the interest of the litigating public that the practice before the Apex Court is regulated by way of introduction of the provision of Advocate on Record. The court system being pyramidal in structure makes the Supreme Court as the Court of last resort so it is helpful to have someone who is equipped to deal with all kinds of matters. It is also of some substance that in all cases

senior counsel cannot be engaged so having someone experienced advocate like an AOR will ensure the proper dispensation of justice.

OUR ANALYSIS:

19. We have given our due and thoughtful consideration to the contentions urged by counsel on either side. In the first instance, we would like to take note of the discussion contained in ***Lily Isabel Thomas*** *(supra)* simply because of the reason that this very aspect was dealt with in the said judgment in all its length and breadth. In that case, the petitioner had challenged the validity of Rule 16 of Order IV (which is akin to Rule 4 and 5 of the present Rules) of the Supreme Court Rules on identical ground namely she was entitled to practice in the Supreme Court as a right not merely to plead but to act and the aforesaid Rules prescribing qualification before she could be permitted to act was, therefore, invalid. The position as per the provisions (which prevails under the amended rule as well) is that, though every advocate whose name is maintained in the common roll of Advocates prepared under Section 20 of the Advocates' Act is entitled to plead, only those advocates who are registered as "Advocates on Record" are entitled to act as well. The contention of the petitioner was predicated on Section 58

(3) of the Advocates Act, which was a transitory provision and was to the following effect:

> "58.(3) Notwithstanding anything in this Act, every person who, immediately before the 1st day of December, 1961, was an advocate on the roll of any High Court under the Indian Bar Councils Act, 1926 or who has been enrolled as an advocate under this Act shall, until Chapter IV comes into force, be entitled as of right to practice in the Supreme Court, subject to the rules made by the Supreme Court in this behalf."

20. The petitioner's argument was that she had the "right to practice" in the Apex Court and right to practice would not merely include right to plead but also right to act as well. The Court, agreed that it would be the position if there was no rules made by the Supreme Court or the rules which were made now were invalid. Since the rules had been made, in this context, the Supreme Court examined as to whether rules in question were valid and pointed out that answer to this would depend upon the proper construction of Article 145(1)(a) of the Constitution in exercise of which the impugned rule had been framed. The interpretation which ensued explaining the scope and extent of Article 145 goes as under:-

> "As regards this Article there are two matters to which attention might be directed. By the opening words of the Article the rules made by this Court are subject to the provision of any law made by

> Parliament, so that if there is any provision in a law made by parliament by which either the right to make the rule is restricted or which contains provisions contrary to the rules, it is beyond dispute that the law made by parliament would prevail."

21. The Court then dealt with the submission of the petitioner that Section 58(3) of the Advocates Act was such a law made by the Parliament which had granted absolute right to persons in position of the petitioner (i.e. the advocate) to practice as a right and it cannot be controlled by rules made by the Supreme Court. This contention, however, was not accepted by the Supreme Court pointing out that Section 58 (3) of the Act which confers right on the advocate to practice in Supreme Court was itself subject to rules made by the Supreme Court. The Court ruled that this position was reinforced by Section 52 of the Act which was a saving provision and specifically save the powers of the Supreme Court to make such rules under Article 145 of the Constitution. The Court held that these provisions namely Section 58 read with Section 52 of the Act clearly provided the answer that there was no question of rule restricting the right to act to certain class of advocates as being contrary to law made by the Parliament.

22. After giving this answer namely rule making power of the Supreme Court under Article 145 of the Constitution could be restricted by the Parliament and it was not a case here, the Court thereafter dealt with the pivotal issue namely whether Article 145 (1)(a) is sufficient to empower the Apex Court to frame the impugned rules ? In order to give answer to this question, the Court considered the meaning of the word "rules as to the persons practicing before the Court" occurring in Clause (a) of the sub Article (1) of Article 145 of the Act. In this behalf, the Court proceeded to note the argument of the petitioner that entry 77 of the Union List in Schedule-VII the last portion of which reads "Persons entitled to practice before the Supreme Court." And "persons practicing" occurring in Article 145 (1)(a) were different expression and contrast between the two meant that Article 145 (a) gave the Supreme Court the power only to determine the manner in which persons who obtained right to practice in a law made by the Parliament by virtue of power under entry 77 could exercise that right. The Court noted the contention of the petitioner that the persons entitled to practice is exclusive domain of the Parliament as per entry 77. This argument was, however, rejected by the Apex Court in the following manner:-

"We feel unable to accept this argument. We do not agree that the words "persons practising before the Court" is narrower than the words "persons entitled to practise before the Court". The learned Additional Solicitor-General was well-founded in his submission that if, for instance, there was no law made by Parliament entitling any person to practise before this Court, the construction suggested by the applicant would mean that this Court could not make a rule prescribing qualifications for persons to practise in this Court. In this connection it is interesting to notice that the words used in Art. 145(1)(a) have been taken substantially from s. 214(1) of the Government of India Act, 1935. That section ran, to quote the material words :

> "The Federal Court may from time to time, with the approval of the Governor-General in his discretion make rules of Court for regulating generally the practice and procedure of the Court including rules as to the persons practising before the Court....."

The Government of India Act, 1935 did not in its legislative lists have a provision like as we have in entry 77 of List I (vide entry 53 of List I). The Federal Court immediately on its formation made rules and under Order IV of those rules provision was made prescribing qualifications for the enrolment as Advocates of the Federal Court. Advocates entitled to practise in the High Courts with a standing of 5 years on the rolls of High Court and who satisfied certain requisite conditions were entitled to be enrolled as Advocates, while for enrolment as Senior Advocates a standing of 10 years as an Advocates a of a High Court Bar was prescribed. We are

> pointing this out only for the purpose of showing that the words "as to the persons practising before the Court" were then used in a comprehensive sense so as to include a rule not merely as to the manner of practice to but also of the right to practise or the entitlement to practice. Those words which are repeated in Art. 145(1)(a) have still the same content. We ought to add that there is no anomaly involved in the construction that this Court can by its rules make provision prescribing qualifications entitling persons to practise before it, and that Parliament can do likewise. There is no question of a conflict between the legislative power of Parliament and the rule-making power of this Court, because by reason of the opening words of Art. 145, any rule made by this Court would have operation only subject to laws made by Parliament on the subject of the entitlement to practise. We are, therefore, clearly of the opinion that on the express terms of Art. 145(1)(a) the impugned rules 16 and 17 are valid and within the rule-making power.

23. The aforesaid ruling clearly lays down that the words " as to the persons practicing before a Court" appearing in Article 145 (i) (a) of the Constitution are comprehensive enough to include a rule not merely as to the manner of practice but also of the right to practice or the entitlement to practice and, therefore, there was no question of conflict between the legislative power of the Parliament and rule making power of the Supreme Court given under Article 145. This Constitution Bench judgment of the Supreme Court explaining the extent and scope of rule

making power conferred upon it under Article 145 of the Constitution is the law of the land and has the binding effect even today.

24. Keeping this position in law in mind, we have to answer as to whether amendment in Section 30 of the Advocate (Amendment) Act, 1993 has made any difference. Various provisions of the Advocates Act, 1961 were amended by Act no.70 of 1993. This was done on the basis of the proposals made by the Bar Council of India and certain other bodies and the experience gained in the administration of Advocates Act. The State of objects and Reasons attached to the amendment bill made, interalia, the following stipulation:-

> "(vi) empower the Supreme Court of India to make rules for determining the persons who shall be entitled to plead before that Court."

25. As a consequence, apart from amending Section 30, Section 52 of the Advocates Act was also amended and for the word "act", the words "act or plead" has been substituted. Keeping in view this position, let us have a look at Section 30 and 52 of the Act as they stand now:

> "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,-
> (i) In all Courts including the Supreme Court;

(ii) Before any tribunal or person legally authorized 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.

52. **Saving-** Nothing in this Act shall be deemed to affect the power for the Supreme Court to make rules under Article 145 of the Constitution-
(a) for laying down the conditions subject to which a senior advocate shall be entitled to practice in that Court;
(b) for determining the persons who shall be entitled to [act or plead] in that Court."

26. Section 30 of the Act entitles every advocate, as of right, to practice throughout the territories to which this Act extends and specifically mentions all Courts including the Supreme Court. Thus, no doubt, right to practice in the Supreme Court is conferred. Section 52 however, categorically states that nothing in this Act shall be deemed to effect the power of the Supreme Court to make rules under Article 145 of the Constitution. This means that notwithstanding what is contained in the Advocates Act Section 52 of the Act keeps the powers of the Supreme Court under Article 145 of the Constitution intact. Reading these two provisions in harmonious way as mentioned above, an inescapable conclusion would be that the Apex Court has the power to lay down the rules about the entitlement of persons not only to act but

also to plead before it. It, thus, clearly follows that amendment of Section 30 has not altered the position which was prevailing earlier and explained by the Supreme Court in ***Lily Isabel Thomas*** *(supra).*We are not oblivious of the situation, as highlighted by the petitioner, that there are some noises that AOR system is not working satisfactorily. There may be some truth in the same. However, if some anomalies and unhealthy practices have crept in the AOR system, the proper remedy is to find solution to rectify the same. That may not be a cause for dispensing with the system of AOR altogether.

27. But would it not be unfair to say that merely because a provision is not properly implemented, it should be done away with? The answer has to be in the negative. Despite of holding a provision, in such conditions, to be unconstitutional it would be more appropriate that the present practice of the AOR is regulated to ensure that they play a constructive role in justice delivery system.

28. Once we find that the provisions under challenge are not unconstitutional then the question regarding the regulation of the practice of AORs need not be gone into by us as precisely this very issue is

pending in the Supreme Court namely ***Vijay Dhanji Chaudhary*** *Vs.* ***Suhas Jayant Natawadkar*** SLP(C) No. 18481 of 2009.

29. In this case, we are to answer the question raised and, therefore, the entire issue is to be examined from that perspective alone. When the Parliament in the provisions made in the Advocates Act have not touched upon the power of the Supreme Court to frame rules by limiting the category of persons who can act or plead and not, exercise of that power under which the rules are framed, prescribing the eligibility conditions before an advocate could act or plead and nomenclature of "Advocate On Record" is given to those who fulfilled those conditions, it cannot be treated as discriminatory or violative of article 14 of the Constitution. The rule is based on intelligible differentia with objective sought to be achieved, as highlighted by the learned Solicitor General namely it is in the interest of litigating public that the practice before the Apex Court is regulated by way of prescribing such qualification/eligibility conditions for advocates to become 'Advocate on Record' and to be entitled to act or plead. The Court system being pyramidal in structure makes the Supreme Court as the Court of last resort so it is helpful to have someone who is equipped to deal with all kinds of matters where the litigant is not able to afford the Senior

Counsel or some other counsel. No doubt, AOR can engage a counsel other than a Senior Counsel and in that sense every advocate has right to argue before the Supreme Court. However, with this system, the other advocates who may be authorized by AOR would be an advocate who has experience and confidence of the litigant. Furthermore, there are various responsibilities cast upon the AOR who files the case on behalf of his client and such an AOR has to have necessary qualification to act in that capacity. Prescription of these qualifications which include passing of exam therefore is not a mere formality and has laudable objective behind it.

30. We are also not in agreement with the argument of the petitioner that expression "persons" occurring in 145(1)(a) of the Act would mean litigant or persons other than the advocates.

31. We, thus, do not find any merit in this petition which is accordingly dismissed. The pending application also stands dismissed.

ACTING CHIEF JUSTICE

(RAJIV SAHAI ENDLAW)
JUDGE

FEBRUARY 13, 2012/skb