

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

TUESDAY, THE 30TH DAY OF MARCH 2021 / 9TH CHAITHRA, 1943

WP(C).No.21946 OF 2011(S)

PETITIONER:

ADV. K. G. SURESH
S/O. K. V. GOPALAN, SOMALAYAM, MALAYALAPPUZHA ERAM,
KOZHENCHERRY TALUK, PATHANAMTHITTA DISRICT.

BY ADVS. SRI. V.SETHUNATH
SRI.V.R.MANORANJAN (MUVATTUPUZHA)
SRI.PRAKASH KESAVAN
SRI.V.VINAY

RESPONDENTS:

- 1 THE UNION OF INDIA,
MINISTRY FOR LAW AND SOCIAL WELFARE,
REPRESENTED BY SECRETARY, RASHTRAPATI BHAVAN,
NEW DELHI, PIN-110004.
- 2 THE STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM, PIN:695001.
- 3 THE BAR COUNCIL OF INDIA,
REPRESENTED BY THE OFFICIATING SECRETARY, 21,
ROSE AVENUE, INSTITUTIONAL AREA, NEW DELHI, PIN:110 002.
- 4 THE BAR COUNCIL OF KERALA,
REPRESENTED BY THE SECRETARY, BAR COUNCIL OF KERALA,
BAR COUNCIL BUILDINGS, ERNAKULAM, COCHIN, PIN:682031.

R1 BY ADV. SRI. P. VIJAYAKUMAR, ASG
R2 BY SRI. V.TEK CHAND, SENIOR GOVERNMENT PLEADER
R3 BY ADVS. SRI. RAJIT, SC
SRI. LEO GEORGE, SC
R4 BY ADVS. SRI.GEORGE MATHEWS
SMT.CELINE JOSEPH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30.03.2021,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

J U D G M E N T

S. Manikumar, CJ

Petitioner, claiming to be an Advocate practicing in the Pathanamthitta courts, has filed the instant writ petition, seeking the following reliefs:-

- “(i) Issue a writ, order or direction to declare that Section 17 of the Maintenance & Welfare of parents and Senior Citizens Act, 2007, is *ultra vires* the Constitution, and void, repugnant to Section 30 of the Advocates Act, 1960.
- (ii) Issue a writ of mandamus or any appropriate writ, order or direction, declaring the right of the Advocates / Legal practitioners to represent the either parties before the Tribunal / Appellate tribunals / court, constituted under Act 56 of 2007.”

2. Facts leading to the filing of this writ petition are that petitioner has challenged the validity of Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, (Act 56 of 2007). He has contended that the said provision is against the authority or right conferred by Section 30 of the Advocates Act, 1961, which speaks about the right of advocates to practice.

3. Petitioner has further stated that Government of India have notified Section 30 of the Advocates Act, 1961, with effect from 15.06.2011, which according to him, is a subsequent legislation and

overrides Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. According to him, by virtue of Section 30 of the Advocates Act, Section 17 of the Act 56 of 2007 is invalid.

4. Petitioner has further stated that as per Section 30 of the Act, every advocate shall be entitled, as of right, to practice before any Court, Tribunal or person, legally authorised to take evidence. The said provision also enables the lawyers to practice in the courts across the country, irrespective of their enrollment in any Bar Council, without the need to transfer licence to their desired States.

5. Referring to Sections 6(4) and 8(2) of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, petitioner has stated that the Tribunal is empowered to take evidence and conduct inquiry, and, therefore, an Advocate and Legal Practitioner, is entitled as of right to appear before the Tribunal.

6. Petitioner has further stated that the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, came into effect from 31.12.2007. By virtue of Section 1(3) of the Act, 2007, it came into force in the State of Kerala with effect from 24.09.2008, as per Notification SRO 999/2008.

7. Advocates for the last so many years have been claiming the

right to practice in all the courts, as of right, and have been agitating for the enforcement of Section 30 of the Act in that behalf. Almost 50 years have passed since the Act was enacted and the provisions have been brought into force only w.e.f 15.06.2011.

8. In this context, petitioner has relied on the decision in ***Aeltemesh Rein v. Union of India and Others*** [AIR 1988 SC 1768], wherein a writ of mandamus was issued to the Central Government, to consider, within six months, whether Section 30 of the Advocates Act, 1961 should be brought into force or not. The Hon'ble Supreme Court, however, held that it was the discretion of the Central Government to bring this Section into force by issuing a notification in that behalf.

9. Petitioner has further stated that pursuant to the abovesaid direction of the Hon'ble Apex Court, rendered in the year 1988, Government of India have brought Section 30 of the Advocates Act, 1961, in force only on 15.06.2011, and therefore, advocates can practice as a matter of right in all Courts and Tribunals.

10. Petitioner has also referred to Article 19(1)(g) of the Constitution of India, which guarantees any person to carry on any profession, and Article 39(A), Directive Principles of State Policy,

which provides equal justice and free legal aid.

11. Petitioner has further stated that Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 nullifies his constitutional right to represent the parties before the Tribunal, constituted under the Act.

12. In the above circumstances, instant writ petition has been filed on the following grounds.

(a) Section 17 of the Maintenance & Welfare of Parents and Senior Citizens Act, 2007 is *ultra vires* the Constitution and repugnant to Section 30 of the Advocates Act, 1961. Therefore, Section 17 of the Act 56 of 2007 has to be declared as void and struck down.

(b) Even though Section 3 of the Act 56 of 2007 is having an overriding effect, the latter notification of Section 30 of the Advocates Act, 1961 would prevail over the Act 56 of 2007. In this context, petitioner has relied on the decision in **The Quarry Owners Association v. The State of Bihar and others** [AIR 2000 SC 2870], wherein the Hon'ble Apex Court held as follows:-

"It clearly indicates the guidelines which the Parliament is projecting. Every word of a language is impregnated with and is flexible to connote different meaning, when used in different context. That is why it is said, words are not static but dynamic and Courts must adopt its that dynamic meaning which uphold the validity of any provision. This dynamism is the cause of saving many statutes of it being declared void, it dissolves the onslaught of any rigid and literal interpretation, it gives full thrust and satisfaction to achieve the objectivity which the legislature intended. Whenever there are two possible interpretations, its true meaning and legislature's intent has to be gathered, from the 'Preamble', Statement of Objects and Reasons and other provisions of the same statute. In order to find true meaning of any word or what the Legislature intended, one has

to go to the principle enunciated in the Heydon's case (1584) 76 ER 637 : 3 Co Rep 7a, 9.7, which laid down the following principle as early in the sixteenth century. (1) What was the law before making of the Act; (2) What was the mischief or defect for which the law did not provide; (3) What is the remedy that the Act has provided; and (4) What is the reason of the remedy. The Court must adopt that construction which suppresses the mischief and advances the remedy."

13. Supporting the contentions raised by the petitioner in the writ petition, the Bar Council of India, respondent No. 3, has filed a counter affidavit. The 3rd respondent has submitted that Maintenance and Welfare of Parents and Senior Citizens Act, 2007 came into force on 24.09.2008, in the State of Kerala and Section 30 of the Advocates Act, 1961, which is notified on 15.06.2011 subsequent to Act 56 of 2007, would override Section 17 for the Act, 2007. Presumption has to be attributed to Parliament that the Parliament was aware of the legislation in place and accordingly, by notifying Section 30, the Parliament has intended and permitted advocates to appear in all Courts and Tribunals, as a matter of right.

14. That apart, it is contended by the 3rd respondent that lawyers, by virtue of Article 19(1)(g) of the Constitution of India, have fundamental rights to practice profession of law in India. Section 30 begins with the words 'Subject to the provisions of the Act...' which would mean that all advocates have the right to practice

in all Courts and Tribunals, except in cases where the Advocates Act specifically prohibits. The prohibition would be in cases where, if the licence to practice is suspended or advocate's name is removed from the roll of the State etc. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, which prohibits the advocates from appearing before the Tribunals, constituted by virtue of the Act, would be a handicap to the parties appearing before the Tribunals, because of lack of legal advice and assistance from lawyers.

15. It is also contended that the Tribunals are clothed with the the powers of Civil Courts, for the purpose of taking evidence, enforcing attendance, production of documents etc., and also the provisions of the Act state that Tribunals shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Criminal Procedure Code, 1973, and it would not be in the interests of the parties and justice that, legal assistance through advocates shall not be made available before the Tribunals.

16. Bar Council of India has further contended that it is evident from Sections 6(4) and 8(2) of the Act, 2007 that the Tribunal is clothed with powers of Civil and Criminal Courts, to take evidence, conduct inquiry, production of documents etc., and Section 30(ii) of

Advocates Act, 1961 would squarely apply in such instance and hence, there is repugnancy between the provisions. Therefore, principles of interpretation demand that Advocates Act, 1961, which governs the condition of practice of law in India, should be given predominance over the the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and the provisions be read, not in order to make Section 30 of the Advocates Act redundant and the issuance of notification under Section 30 of the Advocates Act futile.

17. Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is also not in consonance with Article 39A of the Constitution, which provides for equal justice and free legal aid to the citizens of India. Legal aid is a Constitutional right guaranteed under Article 21 of the Constitution of India and the impugned provision infringes the fundamental rights of the citizens before the Tribunals.

18. Respondent No. 4, the Bar Council of Kerala, has filed a counter affidavit contending that the blanket ban, restraining the advocates from appearing before tribunals, provided under Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, is violative of Articles 19(1)(g), 21 and 39(A) of the Constitution of

India and hence, has to be struck down as *ultra vires*.

19. Counter affidavit has also been filed on behalf of the State of Kerala, 2nd respondent, stating that the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is a Central Act and enacted by the Parliament of India. Though the provisions in the Act 56 of 2007, is against Section 30 of the Advocates Act, 1961, the said provision has to be amended by the Parliament. So the 2nd respondent have no right to amend the provisions contained in the Act 56 of 2007, and the relief sought by the petitioner cannot be granted by the 2nd respondent. The 2nd respondent has further contended that if Section 30 of the Advocates Act, 1961 overrides section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, the same has to be brought to the notice of the Government of India to amend the same.

20. Union of India, represented by the Secretary, Ministry of Social Justice and Empowerment, respondent No.1, has filed a statement, denying all the averments and allegations made by the petitioner in the writ petition. In the statement, the 1st respondent has given the reasons for barring the parties to be represented by a legal practitioner under Section 17 of the Act, as under:-

“(a) Since the main intention of the Maintenance and Welfare of

Parents and Senior Citizens Act, 2007 is to provide speedy and cost effective mechanism to the parents/senior citizens, to claim maintenance from their children/grandchildren/relatives, as the case may be, participation of advocates in the proceedings will jeopardise this objective;

(b) In addition, the parents/senior citizens who are in need of maintenance from their children/grandchildren/relatives to cover their basic needs may not be in a position to afford engaging a lawyer to represent their cases before the Tribunals whereas the children/grandchildren/relatives may be financially better positioned to claim the services of the best advocates in this regard;

(c) Since the legislation focuses to resolve disputes and differences between the parents and children amicably, it includes the role of a Conciliation Officer nominated by the Tribunal and abandons the role of legal practitioners to represent cases before the Tribunal;

(d) The makers of the Act foresaw that engagement of legal practitioners to represent cases will prolong the matter and will be more of a harassment for the parents in their last phase of life as judgment will be delayed."

21. That apart, the 1st respondent in the counter affidavit has stated that as regards the contention of the petitioner that he is entitled to appear before the Tribunal as a matter of right, the High Court of Punjab and Haryana, while disposing of Writ Petition No. 7282 of 2010, on the similar issue, *inter alia*, directed that a copy of the judgment dated 28.05.2014, be forwarded to the Ministry of Law. Similarly, the Hon'ble Madras High Court, Madurai Bench, while disposing of WPMD No. 13733 of 2012, *inter alia*, directed that

Section 17 of the Act requires a re-look. Accordingly, the matter was referred to the Ministry of Law and Justice for its views and further action and the same is pending.

22. When the matter came up for hearing on 15.09.2020, Mr. P. Vijayakumar, learned Assistant Solicitor General submitted that pursuant to the directions issued by the Hon'ble High Court of Punjab and Haryana in **Paramjit Kumar Saroya v. The Union of India and another** [AIR 2014 P&H 121], the matter requires reconsideration. He prayed for time to ascertain the steps taken for amendment of Section 17 of Act 56 of 2007.

23. On this day, when the matter came up for further hearing, no instructions are forthcoming. In such circumstances, we proceed to adjudge the issue raised.

24. Heard learned counsel for the parties and perused the material available on record.

25. Before advertng to the rival contentions, let us consider the relevant provisions.

26. Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is an Act to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognised under the Constitution and for matters connected therewith or incidental thereto.

Section 4 of the Act speaks about Maintenance of parents and senior citizens and it reads thus:

“4. Maintenance of parents and senior citizens.-(1) A senior citizen including parent who is unable to maintain himself from his own earning or out of the property owned by him, shall be entitled to make an application under section 5 in case of--

- (i) parent or grand-parent, against one or more of his children not being a minor;
- (ii) a childless senior citizen, against such of his relative referred to in clause (g) of Section 2.

(2) The obligation of the children or relative, as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

(3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.

(4) Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such citizen or he would inherit the property of such senior citizen:

Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.”

27. Section 5 of the Act, 2007 speaks about application for maintenance and it reads thus:

“5. Application for maintenance. (1) An application for maintenance under section 4, may be made--

- (a) by a senior citizen or a parent, as the case may be; or
- (b) if he is incapable, by any other person or organisation authorised by him; or
- (c) the Tribunal may take cognizance suo motu.

Explanation.--For the purposes of this section "organisation" means any voluntary association registered under the Societies Registration Act, 1860 (21 of 1860) or any other law for the time being in force.

(2) The Tribunal may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this section, order such children or relative to make a monthly allowance for the interim maintenance of such senior citizen including parent and to pay the same to such senior citizen including parent as the Tribunal may from time to time direct.

(3) On receipt of an application for maintenance under subsection (1), after giving notice of the application to the children or relative and after giving the parties an opportunity of being heard, hold an inquiry for determining the amount of maintenance.

(4) An application filed under sub-section (2) for the monthly allowance for the maintenance and expenses for proceeding shall be disposed of within ninety days from the date of the service of notice of the application to such person:

Provided that the Tribunal may extend the said period, once for a maximum period of thirty days in exceptional circumstances for reasons to be recorded in writing.

(5) An application for maintenance under sub-section (1) may be filled against one or more persons:

Provided that such children or relative may implead the other person liable to maintain parent in the application for maintenance.

(6) Where a maintenance order was made against more than one person, the death of one of them does not affect the liability of others to continue paying maintenance.

(7) Any such allowance for the maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or expenses of proceeding, as the case may be.

(8) If, children or relative so ordered fail, without sufficient cause to comply with the order, any such Tribunal may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole, or any part of each month's allowance for the maintenance and expenses of proceeding, as the case be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made whichever is earlier:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Tribunal to levy such amount within a period of three months from the date on which it became due."

28. Section 6 of the Act speaks about jurisdiction and procedure, and it reads thus:

"6. Jurisdiction and Procedure.- (1) The proceedings under section 5 may be taken against any children or relative in any district—

(a) where he resides or last resided; or

(b) where children or relative resides.

(2) On receipt of the application under section 5, the Tribunal shall issue a process for procuring the presence of children or relative against whom the application is filed.

(3) For securing the attendance of children or relative the Tribunal shall have the power of a Judicial Magistrate of first class as provided under the Code of Criminal Procedure, 1973 (2 of 1974).

(4) All evidence to such proceedings shall be taken in the presence of the children or relative against whom an order for payment of maintenance is proposed to be made, and shall be recorded in the manner prescribed for summons cases:

Provided that if the Tribunal is satisfied that the children or relative against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Tribunal, the Tribunal may proceed to hear and determine the case *ex parte*.

(5) Where the children or relative is residing out of India, the summons shall be served by the Tribunal through such authority, as the Central Government may by notification in the official Gazette, specify in this behalf.

(6) The Tribunal before hearing an application under section 5 may, refer the same to a Conciliation Officer and such Conciliation Officer shall submit his findings within one month and if amicable settlement has been arrived at, the Tribunal shall pass an order to that effect.

Explanation.—For the purposes of this sub-section “Conciliation Officer” means any person or representative of an organisation referred to in Explanation to sub-section (1) of

section 5 or the Maintenance Officers designated by the State Government under sub-section (1) of section 18 or any other person nominated by the Tribunal for this purpose. “

29. Section 7 of the Act speaks about constitution of Maintenance Tribunal, and it reads thus:

“7. Constitution of Maintenance Tribunal.—(1) The State Government shall within a period of six months from the date of the commencement of this Act, by notification in Official Gazette, constitute for each Sub-division one or more Tribunals as may be specified in the notification for the purpose of adjudicating and deciding upon the order for maintenance under section 5.

(2) The Tribunal shall be presided over by an officer not below the rank of Sub- Divisional Officer of a State.

(3) Where two or more Tribunals are constituted for any area, the State Government may, by general or special order, regulate the distribution of business among them.”

30. Section 8 of the Act speaks about summary procedure in case of inquiry, and it reads thus:

“8. Summary procedure in case of inquiry.—(1) In holding any inquiry under Section 5, the Tribunal may, subject to any rules that may be prescribed by the State Government in this behalf, follow such summary procedure as it deems fit.

(2) The Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such

other purposes as may be prescribed; and the Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rule that may be made in this behalf, the Tribunal may, for the purpose of adjudicating and deciding upon any claim for maintenance, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

31. Section 15 of the Act speaks about the constitution of Appellate Tribunal, and it reads thus:

“15. Constitution of Appellate Tribunal.—(1) The State Government may, by notification in the Official Gazette, constitute one Appellate Tribunal for each district to hear the appeal against the order of the Tribunal.

(2) The Appellate Tribunal shall be presided over by an officer not below the rank of District Magistrate.”

32. Section 16 of the Act speaks about appeals, and it reads thus:

“16. Appeals.- (1) Any senior citizen or a parent, as the case may be, aggrieved by an order of a Tribunal may, within sixty days from the date of the order, prefer an appeal to the Appellate Tribunal:

Provided that on appeal, the children or relative who is required to pay any amount in terms of such maintenance order shall continue to pay to such parent the amount so ordered, in the manner directed by the Appellate Tribunal:

Provided further that the Appellate Tribunal may, entertain the appeal after the expiry of the said period of sixty

days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) On receipt of an appeal, the Appellate Tribunal shall, cause a notice to be served upon the respondent.

(3) The Appellate Tribunal may call for the record of proceedings from the Tribunal against whose order the appeal is preferred.

(4) The Appellate Tribunal may, after examining the appeal and the records called for either allow or reject the appeal.

(5) The Appellate Tribunal shall, adjudicate and decide upon the appeal filed against the order of the Tribunal and the order of the Appellate Tribunal shall be final:

Provided that no appeal shall be rejected unless an opportunity has been given to both the parties of being heard in person or through a duly authorised representative.

(6) The Appellate Tribunal shall make an endeavour to pronounce its order in writing within one month of the receipt of an appeal.

(7) A copy of every order made under sub-section (5) shall be sent to both the parties free of cost.

33. Section 17 of the Act speaks about the right to legal representation, and it reads thus:

"Notwithstanding anything contained in any law, no party to a proceeding before a Tribunal or Appellate Tribunal shall be represented by a legal practitioner".

34. In exercise of the powers conferred by Section 32 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007,

the Government of Kerala have framed the Kerala Maintenance and Welfare of Parents and Senior Citizens Rules, 2009. Rule 5 of the rules speaks about preliminary scrutiny of the application and it reads thus:

“5. Preliminary Scrutiny of the application.- (1) On receipt of an application under sub-section (1) of section 5, the Tribunal shall satisfy itself that.-

(a) the application is complete; and

(b) the opposite party has, prima facie, an obligation to maintain the applicant in terms of section 4.

(2) In case where the Tribunal finds any lacunae in the application, it may direct the applicant to rectify such lacunae within a reasonable time limit.”

35. Rule 6 of the rules speaks about notice to the opposite party, and it reads thus:

“6. Notice to the Opposite Party. - (1) Once the Tribunal is satisfied on the points mentioned in sub-rule (1) of rule 5, it shall cause to be issued to each person against whom an application for maintenance has been filed, a notice in Form 'C' directing them to show cause why the application should not be granted, along with a copy of the application and its enclosures, in the following manner:-

(a) by hand delivery through the applicant if he so desires, else through a process server, or

(b) by registered post with acknowledgement due.

(2) The notice shall require the opposite party to appear in person, on the date to be specified in the notice and to show cause, in writing, as to why the application should not be

granted and shall also inform that, in case he fails to respond to it, the Tribunal shall proceed ex parte.

(3) Simultaneously with the issue of notice under sub-rules (1) and (2), the applicant(s) shall also be informed of the date mentioned in sub-rule (2), by a notice issued in Form 'C'.

(4) The provisions of Order V of the Code of Civil Procedure, 1908, shall apply, mutatis mutandis, for the purpose of service of notice under sub-rules (2) and (3)."

36. Rule 7 of the rules speaks about procedure in case of non-appearance by the opposite party, and it reads thus:

"7. Procedure in case of non-appearance by the Opposite Party. - In case, despite service of notice, the opposite party fails to show cause in response to a notice, the Tribunal shall proceed ex parte, by taking evidence of the applicant and making such other inquiry as it deems fit, and shall pass an order disposing of the application."

37. Rule 8 of the rules speaks about procedure in case of admission of claim, and it reads thus:

"8. Procedure in case of admission of claim. - If on the date fixed in the notice issued under rule 6, the opposite party appears and accepts his liability to maintain the applicant, and the two parties arrive at a mutually agreed settlement, the Tribunal shall pass an Order accordingly."

38. Rule 12 of the rules speaks about action by the Tribunal in case of settlement before a Conciliation Officer, and it reads thus:

“12. Action by the Tribunal in case of settlement before a Conciliation Officer. - (1) When the Tribunal receives a report from the Conciliation Officer under sub-rule (2) of rule 11, along with a memorandum of settlement, it shall give notice to both parties to appear before it on a date to be specified in the notice, and confirm the settlement.

(2) If on the date specified in the notice as above, the parties appear before the Tribunal and confirm the settlement arrived at before the Conciliation Officer, the Tribunal shall pass a final order in terms of such settlement.”

39. Rule 13 of the rules speaks about action by the Tribunal in other cases, and it reads thus:

“13. Action by the Tribunal in other cases.- (1) In case where-

(i) the applicant(s) and the opposite parties do not agree for reference to their dispute to a Conciliation Officer as per Rule 10, or

(ii) the Conciliation Officer appointed under rule 10 sends a report under sub-rule (3) of Rule 11, conveying his inability to arrive at a settlement acceptable to both the parties, or

(iii) no report is received from a Conciliation Officer within the stipulated time-limit of one month, or

(iv) in response to the notice issued under sub-rule (1) of Rule 12, one or both the parties decline to confirm the settlement arrived at by the Conciliation Officer, the Tribunal shall give to both the parties an opportunity of advancing evidence in support of their respective claims, and shall, after a summary inquiry as provided in sub-section (1) of Section 8, pass such order as it deems fit.

(2) An order passed under Rule 7, Rule 8 or under sub-rule (1) above shall be a speaking one, spelling out the facts of the case as ascertained by the Tribunal, and the reasons for such order.

(3) While passing an order under sub-rule (1), directing the opposite party to pay maintenance to an applicant, the Tribunal shall take the following facts into consideration:-

(a) amount needed by the applicant to meet his basic needs, especially food, clothing, accommodation, and health care.

(b) income of the opposite party.

(c) value of, and actual and potential income from the property, if any, of the applicant which the opposite party would inherit and/or is in possession of.

(4) A copy of every order passed, whether final or interim on an application, shall be given to the applicant(s) and the opposite party or their representatives, in person, or shall be sent to them through a process server or by registered post.”

40. Chapter III of the rules deals with procedure of Appellate Tribunal. Rule 15 in Chapter III of the rules speaks about form of appeal, and it reads thus:

“15. Form of appeal. - An appeal under sub-section (1) of section 16 shall be filed before the Appellate Tribunal in Form 'H', and shall be accompanied by a copy of the impugned order of the Maintenance Tribunal.”

41. Rule 16 of the rules speaks about registration, and acknowledgment of appeal and it reads thus:

“16. Registration and acknowledgement of appeal. - On receipt of an appeal, the Appellate Tribunal shall register it in a register to be maintained for the purpose in such form as the State Government may direct, and shall, after registering such appeal, give an acknowledgement to the appellant, specifying the appeal number in Form 'I'.

42. Rule 17 of the rules speaks about notice of hearing to the respondent, and it reads thus:

“17. Notice of hearing to the respondent. - (1) On receipt of an appeal, the Appellate Tribunal shall, after registering the case and assigning an appeal number, cause notice to be served upon the respondent under its seal and signature in Form 'J' requesting to appear before the Appellate Tribunal on the date specified;

(2) The notice under sub-rule (1) shall be issued through registered post with acknowledgement due, or through a process server;

(3) Simultaneously with the issue of notice under sub-rules (1) and (2) the appellant shall also be informed the date mentioned in sub-rule (1) by a notice in form 'J';

(4) The provisions of Order V of the Civil Procedure Code shall apply mutatis mutandis for the purposes of service of notice issued under sub-rule (1) and (3).”

43. Advocates Act, 1961 is an Act to amend and consolidate the law relating to the legal practitioners and to provide for the

constitution of Bar Councils and an All-India Bar. Section 2(a) defines “advocate” to mean an advocate entered in any roll under the provisions of this Act.

44. Section 30 of the Act speaks about rights of advocates to practice and the same reads thus:

“30. Right of advocates to practise.—Subject to the provisions of this Act, every advocate whose name is entered in the 3 [State roll] shall be entitled as of right to practise throughout the territories to which this Act extends,—

(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 practise.”

45. In exercise of the powers conferred by sub-section (3) of Section 1 of the Advocates Act, 1961, the Central Government have appointed 15th day of June, 2011 as the date on which Section 30 of the said Act shall come into force.

46. Article 19(1)(g) of the Constitution of India reads thus:

“19. Protection of certain rights regarding freedom of speech etc.-(1) All citizens shall have the right-

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- and
- (f) omitted
- (g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause.

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

47. Article 39A of the Constitution of India speaks about equal justice and free legal aid and the same reads thus:

"39A. Equal justice and free legal aid.- The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities

for securing justice are not denied to any citizen by reason of economic or other disabilities.”

48. Let us consider a few decisions on Section 30 of the Advocates Act, 1961, as notified by the Central Government, coming into force from 15.06.2011.

(i) On the aspect as to whether a litigant before the Family Court can engage a lawyer of his choice, pursuant to Section 30 of the Advocates Act, 1961, notified, as coming into force from 15.06.2011, a learned single Judge of this Court in **Saji C.P. v. Union of India** [2011 (3) KLT 936], at paragraphs 9 to 15, held thus:

“9. Yet another aspect to be considered, is whether any 'Sanction' to engage a Lawyer is necessary as on date. S.30 of the Advocates Act, is relevant in this regard; which reads as follows:

“30. **Right of Advocates to Practise.**-- 'Subject to the provisions of this Act, every advocate whose name is entered in the (State roll) shall be entitled as of right to practise throughout the territories to which this Act extends:

- (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 to practise.'

It remains a fact that S.30 was never notified for 5 decades, after giving effect to the legislation in the year 1961. Scope of S.13 of the Family Courts Act, 1984 dealing with the right

to legal representation (which speaks about the necessity to file 'sanction petition') has to be analyzed in the above background. The said provision reads as follows:

'13. Right to legal representation.-- Notwithstanding anything contained in any law, no party to a suit or proceedings before a Family Court shall be entitled, as of right, to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae.'

By virtue of the above provision, right of a litigant to be represented through a lawyer, before the Family Court is not automatic; but subject to the Sanction to be obtained.

10. Non - issuance of notification giving effect to S.30 of the Advocates Act, 1961 was the subject - matter of debate for many a decade. As a matter of fact, the Advocates Act 1961, received the assent of the President of India on 19th May, 1961. Sub-section (3) of S.1 of the Act provides that, it shall, in relation to the territories other than those referred to in sub-section (4) come into force as such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of the Act. Chap.1, Chap.2 and Chap.7 of the Act were brought into force on 16/08/1961, Chap.2 and S.50(2) on 01/12/1961, S.50(1) on 15/12/1961, S.51 and S.52 on 24/01/1962, S.46 on 29/03/1962, S.32 and Chap.6 (except S.46, S.50(1) and (2), 51 and 52 which had already come into force) on 04/01/1963, Chap.5 on 01/09/1963 and S.29, S.31, S.33 and S.34 of Chapter IV of the Act on 01/06/1969; while no notification was issued in respect of

'S.30 conferring the right to practise on every advocate before any Court / Tribunal or such other authorities as specified therein.

11. Since the above provision was not notified even after a quarter of century, interference of the Court was sought for. The issue was brought up for consideration before the Apex Court in *Aeltemesh Rein v. Union of Indian*, 1988 KHC 683 : AIR 1988 SC 1768 : 1988 (2) KLT SN 46 : 1988 (4) SCC 54 : 1988 SCC (Cri) 900, wherein it was observed by the Court that, in view of the law declared by the Constitution Bench of the Supreme Court in *A. K. Roy v. Union of India*, 1982 KHC 395 : AIR 1982 SC 710 : 1982 (1) SCC 271 : 1982 SCC (Cri) 152 : 1982 CriLJ 340 no Writ of Mandamus could be issued to the Central Government to bring a statute or a provision in a statute into force in exercise of the powers conferred by the Parliament in that statute. However, after hearing the learned Attorney General and the learned Additional Solicitor General, it was observed that, there was no hurdle in directing the Central Government to consider whether the time for bringing S.30 of the Advocates Act, 1961 into force had arrived or not. The Writ Petition was accordingly disposed of, directing the Central Government by a Writ in the nature of Mandamus, to consider the said aspect within six months.

12. As observed by the Apex Court in paragraph 4 of the decision cited supra, when S.30 of the Advocates Act is brought into force, every Advocate whose name is entered in the State roll will be entitled as of right to practise

throughout the territories to which the Act extends, before the Courts, Tribunals and other authorities or persons referred to therein. It is also observed in the very same paragraph that, there are various enactments in force in the country, which impose restrictions on the right of an Advocate to appear before certain Courts, Tribunals and authorities, like S.36(4) of the Industrial Disputes Act, 1947, S.13 of the Family Courts Act, 1984 (as involved herein)...etc.

13. It took more than another quarter of a century for the Central Government to have awakened from the slumber and to have felt the necessity to notify the provision. It is brought to the notice of this Court that after much deliberations things have now taken a positive turn, when the Union Government thought it fit to have S.30 of the Advocates Act notified. Accordingly, the said provision was notified in the Gazette of India dated 09/06/2011 declaring that the Government appointed, '15/06/2011' as the date for giving effect to S.30 of the Advocates' Act, 1961. In view of the notification as aforesaid, S.30 of the Advocates Act, 1961 - has been brought into force from 15/06/2011 and as it stands so, all the Lawyers have acquired a right to Practise before all Courts / Tribunals and such other Forum of India as a matter of right, which provision is having all the traits and effect of a subsequent legislation to override the restrictive covenants as contained in S.13 of the Family Courts Act. This being the position; the stipulation contained in S.13 of the Family Courts Act, 1984,

necessitating prior Sanction of the said Court has virtually become redundant.

14. In the above circumstances, this Court declares that it is open for a litigant to pursue the cause of action before the Family Court, engaging any Lawyer of his choice and such Lawyer is entitled to present the matter, on filing the Vakalath, as a matter of right. Ext. P1 issued by the 3rd respondent is set aside.

15. The writ petition is allowed. No cost. The Registry is directed to forward a copy of this judgment to all the Family Courts in Kerala.”

(ii) In **A. Latha Sumam v. District Collector, Alappuzha and Others** reported in [2013 (2) KLT 233], a learned single Judge of this Court, considered an issue with regard to the right of the petitioner therein to be represented through a lawyer before the Maintenance Tribunal & Revenue Divisional Officer in a proceeding filed under the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, and at paragraphs 5 to 7, held thus:

“5. The learned counsel for the petitioner however submits that, the idea and understanding of the second respondent with regard to the rights and liberties of the petitioner, to be represented through a lawyer, is not at all correct. More so, in view of the notification issued by the Central Government bringing S.30 of the Advocates Act

1961 in to force with effect from 15/6/2011.

6. The learned counsel also submits, that there is absolutely no basis in the claim projected by the second respondent and that there is no fault or lapse on the part of the petitioner as well. It is also stated that the second respondent, even at this age, has contracted marriage with a person who is stated as younger than the age of the petitioner and that the problem started only thereafter. It is with reference to the relevant facts to be projected before the concerned authority and the relevant provisions of law, that the petitioner sought for permission to have the assistance of a lawyer, which now stands to be a vested / declared right. It is also brought to the notice of this Court that, there was an occasion for this Court to have considered similar issue, with reference to S.30 of the Advocates Act, in respect of the proceedings before the Family Court, in the decision reported in 2011 (3) KLT 936 **Saji v. Union of India**. With regard to the decision sought to be relied on from the part of the second respondent, it is seen that it was with reference to the rights and liberties of the party to be represented before the forum under the Consumer Protection Act 1986, 'through an authorised agent'. It however does not relate to the right of a lawyer to enter appearance on behalf of a litigant by virtue of the mandate under S.30 of the Advocates Act, 1961.

7. After hearing both the sides, this Court finds that, there is no dispute as to the fact that S.30 of the Advocates Act,

which was lying dormant right from the date of incorporation, till the parliament decided to give effect to the said provision with effect from 15/6/2011. By virtue of the said provision, the provisions contained in various statutes, restricting the right of a Lawyer, placing an embargo with regard to the right to appear before the concerned forum Court / Tribunal has rather become watered down. The position has been discussed by this Court in detail as per the decision cited supra i.e., 2011 (3) KLT 936 Saji v. Union of India.”

(iii) In **Paramjit Kumar Saroya and Ors. v. The Union of India and Ors.** (AIR 2014 P & H 121), a Hon'ble Division Bench of the Punjab and Haryana High Court on the aspect as to whether Section 17 of the Maintenance And Welfare Of Parents And Senior Citizens Act, 2007 would come in the way of legal representation on behalf of the parties post 15.06.2011, in view of Section 30 of the Advocates Act, 1961 having come into force, held thus:

“33. We are thus of the view that Section 16(1) of the said Act is valid, but must be read to provide for the right of appeal to any of the affected parties.

RIGHT TO LEGAL REPRESENTATION:

34. The right to legal representation has been specifically denied under Section 17 of the said Act which reads as under:-

“17. ***Right to legal representation*** - Notwithstanding anything contained in any law, no party to a proceeding

before a Tribunal or Appellate Tribunal shall be represented by a legal practitioner.”

35. We may note that by an interim order dated 09.08.2011, this in fact has been stayed.

36. The aforesaid Section did receive the attention of the Members of the Parliament during the course of debate as is apparent from perusal of the debates. The Hon'ble Minister while piloting the Bill referred to section 125 of the Cr. P.C. incorporating the provision for maintenance of parents and in that context it was observed that going to the Court and engaging lawyers would be a very cumbersome process as well as time consuming apart from costs. The emphasis was put on conciliation and, thus, it was observed there would be no advocates. The Tribunal would follow summary procedure and the claims would be disposed of in a time bound manner. In fact, some reservation was expressed in this behalf in Parliament as to how the application would be drafted, service effected etc. without any legal assistance. One of the Members Sh. S.K. Kharventhan observed that since more Tribunals are being constituted, the powers of the Courts are shrinking. In that context, it was observed that Section 30 of the Advocates Act dealing with the right of advocates to practice, though forming a part of the original Act of 1961, had still not been implemented and, thus, was taking away the powers of the lawyers. He expressed concern that if the lawyers are not appearing, but NGOs appear in matters of conduct of cases and adducing evidence there would be a problem. There would be no accountability of such representatives contrary to the lawyers representing where there is the Bar Council.

37. We have referred to the aforesaid in the context of Section 30 of the Advocates Act having been brought into force as on the date of discussion or even the passing of the Bill and the said Act.

38. Learned Amicus Curiae submits that on a thorough examination of the judicial pronouncements in this behalf, the view which appears to prevail is that there can be such

exclusion. He, however, hastens to add that in most legislations like the Industrial Disputes Act, 1947 or the Consumer Protection Act, 1986, the right to be represented through a legal representative has been left at the discretion of the concerned Tribunal, authority or the consent of the opposite party. He pointed out the significance of Section 30 of the Advocates Act which reads as under:-

“30. *Right of advocates to practise* - Subject to provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practise 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 practise.”

39. The aforesaid provision confers a right to practise on the advocate throughout the territories before Courts, Tribunals and any other authority before whom such advocate is entitled to practise. He laid emphasis on the aspect "legally authorized to take evidence" to submit that the role of a legal practitioner becomes crucial where evidence has to be adduced, as under the provisions of the said Act, they no more remain simple proceedings of just determining maintenance upto Rs. 10,000/-, but deal with rights in immovable properties and declarations to nullify transfers under a deeming provision of fraud or coercion or undue influence. These are ticklish legal issues for which any forum would require proper legal assistance. A Tribunal can enforce attendance of parties and issue bailable & non-bailable warrants. Powers under Civil and Criminal Procedure Codes have been conferred practically on the lines of a Court to a forum. In such complexities, it is obvious that there is a very high chance of either the person who claims or the opposite side seeking assistance from a legal practitioner at a stage prior to filing. If that be the position, should such assistance of legal practitioners be debarred at the crucial stage of taking depositions and arguments thereafter as the prelims can always be done in

chambers of legal practitioners.

40. The judicial pronouncements brought to our notice for discussion and relied upon are as under:-

(a) Smt. Hemlata Kantilal Shah Vs. State of Maharashtra and another, [(1981) 4 SCC 647]. The issue related to legal representation before the Advisory Board under the COFEPOSA Act, 1974. There was no bar created on legal representation under Section 8(e), but it was left to the discretion of the Board. The Hon'ble Supreme Court negated the challenge on dual grounds that the Advisory Board was not a party and the decision would be academic. It was, however, observed that there may be certain cases which were complicated and assistance of lawyers may be necessary on behalf of parties to explain acts and laws involved in the case.

(b) Lingappa Pochanna Appealwar v. State of Maharashtra and another, [1985 AIR (SC) 389]. One of the questions raised was of the constitutional validity of Section 9A of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1975, which was couched in similar terms as Section 17 of the said Act beginning with the "notwithstanding" clause depriving the pleader's right to appear on behalf of parties in any proceedings under the Act before the Collector, Commissioner or the Maharashtra Revenue Tribunal. The plea raised was that it affected the fundamental right of an advocate enrolled to carry on his profession under Article 19(1)(g) of the Constitution of India as well as rights of the non-tribals to be represented by legal practitioners of their choice being terminated. In that context, it was observed in paras 34 and 35 as under:-

"34. That contention that an advocate enrolled under the Advocates Act, 1961 has an absolute right to practise before all Courts and Tribunals can hardly be accepted. Such a right is no doubt conferred by Section 30 of the Advocates Act. But unfortunately for legal profession, Section 30 has not been brought into force so far though the Act has been on the Statute Book for the last 22 years. There is very little that we can do in the matter and it is for the Bar to take it up elsewhere. A person enrolled as an advocate under the Advocates Act is not ipso facto entitled

to a right of audience in all Courts unless Section 30 of that Act is first brought into force. That is a matter which is still regulated by different statutes and the extent of the right to practise must depend on the terms of those statutes. The right of an advocate brought on the rolls to practise is, therefore, just what is conferred on him by Section 14(1) (a), (b) and (c) of the Bar Councils Act, 1926. The relevant provisions reads as follows:

“14(1) An advocate shall be entitled as of right to practise :

(a) subject to the provisions of sub-section (4) of 9, in the High Court of which he is an advocate, and

(b) save as otherwise provided by subsection (2) or by or under any other law for the time being in force in any other Court and before any other Tribunal or person legally authorized to take evidence, and

(c) before any another authority or person before whom such advocate is by or under the law for the time being in force entitled to practise.”

In view of the various authorities on the subject, we cannot but hold that Section 9A of the Act is not an unconstitutional restriction on advocates to practise their profession.

35. That brings us to the second aspect of the matter i.e. the so-called right of a litigant to be represented before the Collector in matters not covered by Section 3(1) and 4 of the Act. Now it is well-settled that apart from the provisions of Article 22(1) of the Constitution, no litigant has a fundamental right to be represented by a lawyer in any Court. The only fundamental right recognized by the Constitution is that under Article 22(1) by which an accused who is arrested and detained in custody is entitled to consult and be defended by a legal practitioner of his choice. In all other matters i.e. in suits or other proceedings in which the accused is not arrested and detained on a criminal charge, the litigant has no fundamental right to be represented by a legal practitioner. For aught we know, the legislature felt that for the implementation of the legislation, it would not

subserve the public interest if lawyers were allowed to appear, plead or act on behalf of the non-tribal transferees. It cannot be denied that a tribal and a non-tribal are unequally placed and non-tribal transferee being a person belonging to the more affluent class, would unnecessarily protract the proceedings before the Collector under Sections 3(1) and 4 of the Act by raising all kinds of pleas calculated to delay or defeat the rights of the tribal for restoration of his lands. The proceedings before the Collector have to be completed within sufficient dispatch and the transferred lands restored to a tribal under sub-section (1) of Section 3 and 4 of the Act without any of the law's delays."

The aforesaid discussion, thus, shows that the basic reasoning is predicated on Section 30 of the Advocates Act not being brought into force. In this context, while referring to Section 14 of the Bar Council Act, 1926, an emphasis was laid on the expression persons legally authorized to take evidence" before any "tribunal" or "persons". This attains significance in view of Section 30 of the Advocates Act which had unfortunately not been brought into force till then.

(c) *Aeltemesh Rein, Advocate, Supreme Court of India v. Union of India and others*, [(1988) 4 SCC 54]. An advocate of the Supreme Court approached the highest judicial forum for enforcement of Section 30 of the Advocates Act. The Hon'ble Supreme Court held that no writ of mandamus could be issued to bring a statute or a statutory provision into force when according to the said statute the date on which it should be brought into force is left to the discretion of the Central Government. This was in the context of the majority view of the Constitutional Bench of the Hon'ble Supreme Court in *A.K. Roy Vs. Union of India and another*, [AIR 1982 SC 710]. However, this did not come in the way of the Hon'ble Supreme Court in issuing a writ in the nature of mandamus to the Central Government to consider whether the time to bring Section 30 of the Advocates Act into force had arrived or not, as the matter could not lie over without application of mind. Six months' time was fixed for the said purpose. Para 6 of this judgment reads as under:-

“6. The effect of the above observations of the Constitution Bench is that it is not open to this Court to issue a writ in the nature of mandamus to the Central Government to bring a statute or a statutory provision into force when according to the said statute the date on which it should be brought into force is left to the discretion of the Central government. As long as the majority view expressed in the above decision holds the field it is not open to the Court to issue a writ in the nature of mandamus directing the Central Government to bring Section 30 of the Act into force. But, we are of the view that this decision does not come in the way of this Court issuing a writ in the nature of mandamus to the Central Government to consider whether the time for bringing Section 30 of the Act into force has arrived or not. Every discretionary power vested in the executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. The Act was passed in 1961 and nearly 27 years have elapsed since it received the assent of the President of India. In several conferences and meetings of lawyers resolutions have been passed in the past requesting the Central Government to bring into force Section 30 of the Act. It is not clear whether the Central Government has applied its mind at all to the question whether Section 30 of the Act should be brought into force. In these circumstances, we are of the view that the Central Government should be directed to consider within a reasonable time the question whether it should bring Section 30 of the Act into force or not. If on such consideration the Central Government feels that the prevailing circumstances are such that Section 30 of the Act should not be brought into force immediately it is a different matter. But it cannot be allowed to leave the matter to lie over without applying its mind to the said question. Even though the power under Section 30 [sic Section 1(3)] of the Act is discretionary, the Central Government should be called upon in this case to consider the question whether it should exercise the discretion one way or the other having regard to the fact that more than a quarter of century has elapsed from the date on which the Act received the assent of the President of India. The learned Attorney General of India did not seriously dispute the jurisdiction of this Court to issue the writ in

the manner indicated above.

41. In the course of arguments on 26.05.2014, a question arose whether this mandate had been fulfilled.

42. Learned counsel for the Union of India took time and produced notification dated 09.06.2011 on 27.05.2014 in terms whereof this provision had been brought into force w.e.f. 15.06.2011. The question which arises is as to the effect of this in the context of Section 17 of the said Act.

43. It is no doubt true that Section 17 of the said Act begins with the "notwithstanding" clause. However, while determining the right of representation by a legal practitioner, a complete phrase used is "notwithstanding anything contained in any law". The reference in law can only be a law which is in force. On the date when the said Act came into force on 31.12.2007, Section 30 of the Advocates Act did not exist in the statute book. This is so as the Parliament in its wisdom had given the right to the Executive to notify from which date this provision would be applicable. Thus, Section 30 of the Advocates Act would be "any law" only if it was on the statute book. This provision came on to the statute book only w.e.f. 15.06.2011.

44. No doubt, Section 30 has been part of the Advocates Act as passed by the Parliament in 1961. The said Act is a subsequent statute of the year 2007. However, this provision was not part of the law on account of the conscious will of the Parliament to leave the aspect of its enforcement to the Executive and the Executive thereafter in its wisdom brought it into force only on 15.06.2011 i.e. much after the said Act came into force. It is in that sense a subsequent law which has come into force. In fact, while enacting Section 17 of the said Act, as is also apparent from Parliamentary debates, the absence of enforcement of Section 30 of the Advocates Act was an aspect noticed. Thus, there was full consciousness in the debates in Parliament on Section 30 not existing as law on that date.

45. We have to also keep in mind that this provision is crucial specifically when we are dealing with the aspect of actual date. While dealing with any Tribunal or person who is legally authorized "to take evidence", the Tribunal under the said Act is authorized to take evidence. Such

evidence is crucial while dealing with Section 30 of the Advocates Act.

46. Learned *Amicus Curiae* has referred to Section 5 of the General Clauses Act, 1987 which reads as under:-

"5. Coming into operation of enactments-

[(1) Where any Central Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent-

(a) in the case of a Central Act made before the commencement of the Constitution, of the Governor-General, and

(b) in the case of an Act of Parliament, of the President]

(3) Unless the contrary is expressed, a [Central Act] or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

47. The reference aforesaid is in the context as to when a Central Act comes into force i.e. when it is not expressed to come into operation on a particular day, it is to be on the day when it receives the assent of the President; and on the expiry of the day preceding its commencement under sub section (3) of Section 5 of the General Clauses Act. However, this has a caveat that "unless the contrary is expressed" by the Parliament itself in terms of sub section (3) of Section 1 of the Advocates Act authorizing the Central Government to appoint different dates for different provisions of the Act. Thus, it did not come into force in terms of clause (b) and sub section (3) of Section 5 of the General Clauses Act and came into force almost five decades later. Thus, it became law posterior to the said Act.

48. In the conspectus of the discussions aforesaid, we are thus of the view that the decision vide section 30 of the Advocates Act has become law on a posterior date to Section 17 of the said Act which is sufficient for us to come to the conclusion that there cannot be an absolute bar to

the assistance by legal practitioners to a Tribunal or the Appellate Tribunal despite the "notwithstanding" clause. Both the enactments are Central enactments. While the said Act was being enacted, the absence of Section 30 of the Advocates Act was known. Not having conferred that right under Section 30 of the Advocates Act on the legal practitioner, the Parliament in its wisdom had found no reasons to give such rights under Section 17 of the said Act. However, the situation has subsequently changed on account of Section 30 of the Advocates Act having come into force. The right conferred under Section 30, subject to the provisions of the Advocates Act, is on every advocate so far his name is entered in the State roll to practise "throughout the territory to which this Act extends". Such right is qua all Courts including the Supreme Court. Such right is also before any Tribunal or person "legally authorized to take evidence". Thus, if a Tribunal is legally authorized to take evidence, there is right in the advocate to practise before the Tribunal. The Tribunal has the right to take evidence. That being the status of the Tribunal, there has been intrinsic right in the advocate to practise before such a Tribunal in view of Section 30 of the Advocates Act which cannot be taken away. The position would be the same before the Appellate Tribunal in view of the powers conferred on a Tribunal constituted under Section 7 of the said Act. Sections 6, 8 and 11 of the said Act leave no manner of doubt about the vast powers including taking the evidence on oath, enforcing attendance of witnesses, compelling discovery of documents, it being a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Cr. P.C. etc.

49. The over-riding provisions of the said Act under Section 3 in the context of Section 17 of the said Act have to be appreciated in the context of the law prevalent when the said Act was enacted. The ground reality has changed on account of Section 30 of the Advocates Act having come into force on 15.06.2011, while all the judgments taking contrary view are based on Section 30 not being notified and the consequence thereof. Section 30 was not law when the said enactment was enacted and brought into force.

50. The aforesaid anomaly apart from our observations aforesaid itself would be requiring the Central Government to look into the matter of Section 17 of the said Act formally still being on the statute book.

51. We, thus, conclude on the provisions of the Acts as under:-

(i) We would request the Central Government to have a re-look into the provisions of the said Act in view of our observations aforesaid, moreso in the context of Section 30 of the Advocates Act.

(ii) The right to appeal is conferred on a party aggrieved under Section 16 of the said Act.

(iii) Section 17 would not come in the way of legal representation on behalf of parties post 15.06.2011 in view of Section 30 of the Advocates Act having come into force.”

(iv) In **Mary George and Others v. Land Revenue Commissioner and Others** [2019 SCC Online 4292], a learned single Judge of this Court considered a case as to whether a litigant can be permitted to engage a lawyer of his choice before the District Collector in a proceeding under the Kerala Land Assignment Rules, 1964, and at paragraph (7), held as under:

“7. It has been held in various decisions as in *Paramjit Kumar Saroya v. UOI* reported in 2014 KHC 3407 that Sec.30 of the Advocates Act, has come into force on 15.6.2011 and hence an Advocate can represent himself before the Tribunal and that the Central Government should have a serious re-look into the matter of Sec.17 formally still being on the statute book. Further this Court has held in the decision in *Latha Sunam v. District Collector, Alappuzha*, reported in 2013 (2) KLT 233 = ILR 2013 (2) Ker. 44 that various provisions contained in various statutes like Sec. 17 of the Maintenance and Welfare of Parents & Senior Citizens Act, 2007, restricting or prohibiting the right of engagement of lawyers on the

choice of the parties will get whittled down and diluted due to the enforcement of the mandatory provisions contained in Sec.30 of the Advocates Act, 1961 as per notification dated 15.6.2011 issued by the Union Government. Going by the mandate of Sec. 30 of the Advocates Act, 1961, subject to the provisions of the Advocates Act, 1961, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which the Act extends, not only in all courts including the Supreme Court but also before any tribunal or person legally authorised to take evidence. The proceedings before the 3rd respondent Sub Collector is under Rule 8(3) of the Kerala Land Assignment Rules, 1964 in the matter of cancellation of patta/ registry issued in land assignment proceedings. Such proceedings will have grave adverse civil consequences on the affected party concerned and more over, many a time it would have vexed issues of the question of fact and law and even mixed questions of fact and law and any adverse decision so taken by the authority concerned as against the party concerned will inflict on him grave adverse civil consequences. That apart, many a time matters would require resolution of vexed factual issues, which may also involve adjudication of factual issues including adducing of evidence or at least appreciation of factual evidence. It would also certainly involve interpretation of various provisions in the Rules and the Act and also other related statutory provisions and may also have impact on the aspects borne out from general law. Therefore, in many a case it might require the fine tuned assistance of a legal practitioner. That apart, similar provisions for engagement of lawyers as contained in the provisions of the Family Courts Act, 1954 were also held to be unenforceable in view of the coming into force of Sec.30 of the Advocates Act in *Saji.C.P. v. UOI & Ors.* reported in 2013 (3) KHC = 2011 (3) KLT 936. There are no provisions in the Kerala Government Land Assignment Act, 1960 or the Kerala Land Assignment Rules, 1964 placing any restriction or prohibition for engagement of Advocate of the choice of the party concerned in proceedings under the said Act and the Rules. Therefore, going by the mandatory impact of the provisions

contained in Sec.30 of the Advocates Act, the stand of the 1st respondent Commissioner and the 3rd respondent Sub Collector that the parties cannot insist for engagement of Advocates of their choice is legally wrong and unreasonable. It is also reiterated that the contra stand of the 2nd respondent District Collector in Ext.P-2 series as mentioned hereinabove that the applicants have the right to be represented through the Advocates of their choice is correct and tenable. In the light of the above aspects, the impugned Ext.P-3 series of orders to the limited extent it has denied the right of representation of the petitioners through the Advocates of their choice will stand rescinded and set aside. Accordingly, it is ordered and declared that the petitioners will have the right to be represented and defended by the Advocate of their choice in the proceedings under the Kerala Land Assignment Rules, 1964, before the authorities like the 3rd respondent as well as the appellate and revisional authorities.....”

49. As rightly contended by the learned counsel for the Bar Council of India, Maintenance and Welfare of Parents and Senior Citizens Act, 2007 came into force on 24.09.2008 in the State of Kerala, whereas, Section 30 of the Advocates Act, 1961 has been notified on 15.06.2011. Therefore, the latter enactment has an overriding effect on Section 17 of the 2007 Act. When the Central Government, in exercise of the powers conferred under sub-section (3) of Section 1 of the Advocates Act, 1961, have appointed 15th June, 2011, as the date on which Section 30 of the said Act shall come into force, the same has to be given full effect from that date onwards.

50. Contention of the learned counsel for the petitioner and the Bar Council of India, that the Tribunals are clothed with the powers of Civil

Courts, for the purpose of taking evidence, enforcing attendance, production of evidence, and that denial of legal assistance to the parties before the Tribunal constituted under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, requires consideration, for the reason that parties to the *lis* are not expected to know the nuances of law, evidence, both oral and documentary , to be produced.

51. Legal aid is a constitutional right guaranteed under Article 21 of the Constitution of India and legal assistance cannot be confined only to legal advice, which, in our view, would not be sufficient, in the interest of the parties.

52. Contention of the Union of India, that since the main intention of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is to provide speedy and cost effective mechanism to the parents/senior citizens, to claim maintenance from their children/grandchildren/relatives, as the case may be, and participation of advocates in the proceedings will jeopardize this objective, cannot be accepted, for the reason that mere engagement of a lawyer would not delay the process of adjudication of a dispute before the Maintenance Tribunal.

53. Cost effective mechanism, cited as one of the reasons for denying legal assistance, also cannot be accepted, for the reason that if any litigant is

enable to engage a lawyer of his choice, Legal Services Authority, constituted under the Legal Services Authorities Act, 1987, comes into the aid of such litigant, by engaging a lawyer to assist him.

54. Union of India, cannot undermine the role of the Legal Services Authority, and the lawyers engaged by them, to assist the litigants, in comparison to the lawyers to be engaged by the children/ grandchildren/ relatives, solely on the ground that they are financially in a better position to avail the services of the best advocates.

55. True that the legislation, Maintenance and Welfare of Parents and Senior Citizens Act, 2007, has envisaged that the disputes and differences should be resolved amicably and in that context, laid emphasis on the role of a Conciliation Officer, nominated by the Tribunal, but he will not be a substitute for a lawyer.

56. Contention of the Union of India, that the makers of the Act foresaw that engagement of legal practitioners to represent cases will prolong the matter and will be more of a harassment for the parents in their last phase of life as judgment will be delayed, is wholly unacceptable.

57. As Section 30 of the Advocates Act, 1961 has been brought into force from 15.06.2011, Advocates enrolled under the said Act have been conferred with an absolute right thereof, to practice before all the Courts

and Tribunals. By virtue of Section 30 of the Advocates Act, 1961, coming into force from 15.06.2011, the restriction imposed is taken away and in such circumstances, Article 19 of the Constitution of India, which guarantees the freedom to practice any profession, enables the Advocates to appear before all the Courts and the Tribunals, subject to Section 34 of the Advocates Act, 1961.

In the light of the above discussion and decisions, Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, is declared as *ultra vires* of Section 30 of the Advocates Act, 1961 and thus, the petitioner is entitled for a declaration that he has a right to represent the parties before the Tribunal/Appellate Tribunal/Court, constituted under Act 56 of 2007. Accordingly, this writ petition is allowed.

Sd/-
S. Manikumar,
Chief Justice

Sd/-
Shaji P. Chaly
Judge

Eb & krj

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APPENDIX

PETITIONER'S/S EXHIBITS:

P1 COPY OF THE ENROLLMENT CERTIFICATE ISSUED TO THE PETITIONER.

RESPONDENTS' EXHIBITS:-

R3(A):- COPY OF THE NOTIFICATION DATED 9-6-2011.

//TRUE COPY//

P.A. TO JUDGE