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IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5831 of 2012

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Anju Mishra D/O S.N. Mishra Advocate, Member of Advocate Association, Patna High Court, R/O Mahabir Colony, Anishabad, Beur, Patna-2.

.... Petitioner/s

Versus

1. The High Court of Judicature at Patna through the Registrar General, Patna High Court, Patna.
2. The Registrar General, Hon'ble High Court of Judicature at Patna

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 10525 of 2012

==

Rakesh Kumar S/O - Shri Jageshwar Prasad Yadav, R/O- Village - Kasaha Post Office At :- Simariya Ghat, District :- Begusarai State :- Bihar Pin Code - 851126

.... Petitioner/s

Versus

1. The High Court of Judicature at Patna (through its Registrar General), Bihar, Patna

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 21447 of 2011

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1. Yogendra Prasad Azad, (aged-61), son of Late Ramavtar Swarnkar @ Ramavatar Prasad Khatri, Chamber No. 65, Bihar State Bar Council Bhawan, Patna High Court, Patna-800001, Resident of Magalpura Purani Chowki, Patna City, Patna-800008, P.S.-Khajekalan, District-Patna.
2. Girija Nandan Prasad Azad (aged-60), son of Late Ram Autar Prasad Swarnkar @ Ram Aautar Prasad Kharti, resident of Ram Autar Prasad Kharti Path, Gurhatta, Patna City-800008, P.S.-Khajekalan, District-Patna.

.... Petitioner/s

Versus

1. The Hon'ble Patna High Court of Judicature at Patna through the Registrar General, Patna High Court, Patna.
2. The Registrar General, Hon'ble Patna High Court Judicature at Patna.

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 10185 of 2010

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1. Chakrapani, son of S.S. Sharma, Chamber No. 137, Bihar Bar Council Bhawan, Patna High Court, resident of Saket East B.S.I.D.C. Colony, P.S.- S.K. Puri, District- Patna.

.... Petitioner/s

Versus

1. The Hon'ble High Court of Judicature at Patna through the Registrar General, Patna High Court, Patna.

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2. The Registrar General, Hon'ble High Court of Judicature at Patna.

.... Respondent/s

With

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Civil Writ Jurisdiction Case No. 19862 of 2010

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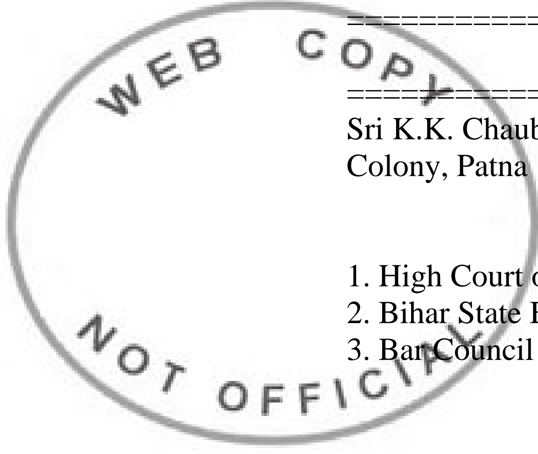

Sri K.K. Chaubey, S/O Sri Padma Narain Chaubey, R/O House No. 272, Pataliputra Colony, Patna

.... Petitioner/s

Versus

1. High Court of Judicature at Patna through Registrar General
2. Bihar State Bar Council through Secretary
3. Bar Council of India through Local Office in Bar Council

.... Respondent/s

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Appearance :

(In CWJC No. 5831 of 2012)

For the Petitioner/s : Ms. Anju Mishra (In-person)

For the Respondent/s : Mr. Bindhyachal Singh, Advocate
Ms. Smriti Singh, Advocate
Mr. Parijat Saurav, Advocate

(In CWJC No. 10525 of 2012)

For the Petitioner/s : Mr. Rakesh Kumar, Advocate (in person)

For the Respondent/s : Mr. Bindhyachal Singh, Advocate
Ms. Smriti Singh, Advocate
Mr. Parijat Saurav, Advocate

(In CWJC No. 21447 of 2011)

For the Petitioner/s : Mr. Yogendra Prasad Azad (in person)

For the Respondent/s : Mr. Bindhyachal Singh, Advocate
Ms. Smriti Singh, Advocate
Mr. Parijat Saurav, Advocate

(In CWJC No. 10185 of 2010)

For the Petitioner/s : Mr. Chakrapani (In Person)

For the Respondent/s : Mr. Bindhyachal Singh, Advocate
Ms. Smriti Singh, Advocate
Mr. Parijat Saurav, Advocate

(In CWJC No. 19862 of 2010)

For the Petitioner/s : Mr. K.K.Chaubey (in person)

For the Respondent/s: Mr. Bindhyachal Singh, Advocate
Ms. Smriti Singh, Advocate
Mr. Parijat Saurav, Advocate

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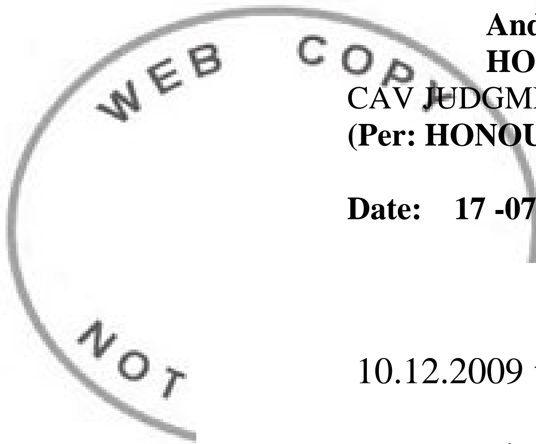
CORAM: HONOURABLE THE CHIEF JUSTICE
And
HONOURABLE MR. JUSTICE SHIVAJI PANDEY
And
HONOURABLE MR. JUSTICE SUDHIR SINGH



CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 17 -07-2015

In this batch of writ petitions, the amendment dated 10.12.2009 through which "Registration of Advocates as Advocates-on-Record of the Patna High Court Rules" were framed, under heading [D] in Chapter XXIV of Part V of the Patna High Court Rules, 1916, is challenged. For the sake of brevity, the impugned amendment is referred to as 'the Rules'. The High Court caused the amendment in exercise of power conferred under Section 34 of the Advocates Act, 1961 (For short, 'the Act').

The petitioners are the advocates, registered as such by the State Bar Council. Their contention is that amendment is contrary to the Articles 14 and 19(1) (g) of the Constitution of India; Section 30 of the Act and ultra vires to the power conferred upon the High Court under Section 34 of the Act.

The purport of the Rules is that an advocate, who is registered as such with the Bar Council of any State, would not be entitled to practise in the Patna High Court in any manner unless he passes the examination conducted by the High Court and is recognized as Advocate on Record (AOR). The conditions, subject

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to which an advocate can apply for appearing in the examination, are also stipulated. They are to the effect that an applicant must a) have an office in Patna, b) engage a registered Advocate's Clerk, c) complete internship with an advocate- on- record of not less than ten years standing, for a minimum period of one year, and d) have completed three years of standing after being enrolled.

The petitioners contend that the Bar Council of India and the respective Bar Councils of the State are conferred with the power to regulate the legal profession; including the conferment of right to practise in the Courts of various categories in India, and the amendment has the effect of scuttling the right of an Advocate, to practise in the Patna High Court. They plead that a) their fundamental right to pursue the profession is infringed, b) their legal right conferred under Section 30 of the Act is abrogated, c) the High Court has encroached into the powers of the Bar Council, and that d) the Rules are not only arbitrary and oppressive, but also are, discriminatory in nature.

The High Court as well as the State of Bihar filed separate counter affidavits. It is pleaded that Section 34 of the Act confers the power upon the High Court to frame Rules to lay down the conditions, subject to which an advocate shall be permitted to practise in the High Court and the Courts subordinate thereto, and

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the Rules were framed strictly in terms thereof. It is stated that the sole objective underlying the Rules is to enhance the quality of advocacy and to improve the standards in the legal profession. Other subsidiaries contentions are also advanced.

The arguments on behalf of the petitioners are advanced by Ms. Anju Mishra, Sri Indradeo Prasad, Sri Kumar Amitesh, Sri Chakrapani and Sri K.K.Choubey. In fact, some of the petitioners argued their own cases. The gist of their argument is that the activity of practising in the Courts of law is governed exclusively by the provisions of the Act, and the Rules made thereunder and the Bar Council of India at the national level, and the Bar Councils at the level of the State, are constituted thereunder for this purpose. It is pleaded that once a person, who acquired the qualification of law, is enrolled as an Advocate, he is entitled to practise in the courts all over the country, including the Supreme Court, and no other agency or authority has the right to prevent an advocate from practising in any Court so long as the enrollment or registration with the Bar Council subsists. They plead that whatever may have been the scope of the right conferred under Section 30 of the Act, till that provision was notified; at least with effect from 15.06.2011 the date, on which it was notified, the right of an advocate cannot be scuttled in any manner.

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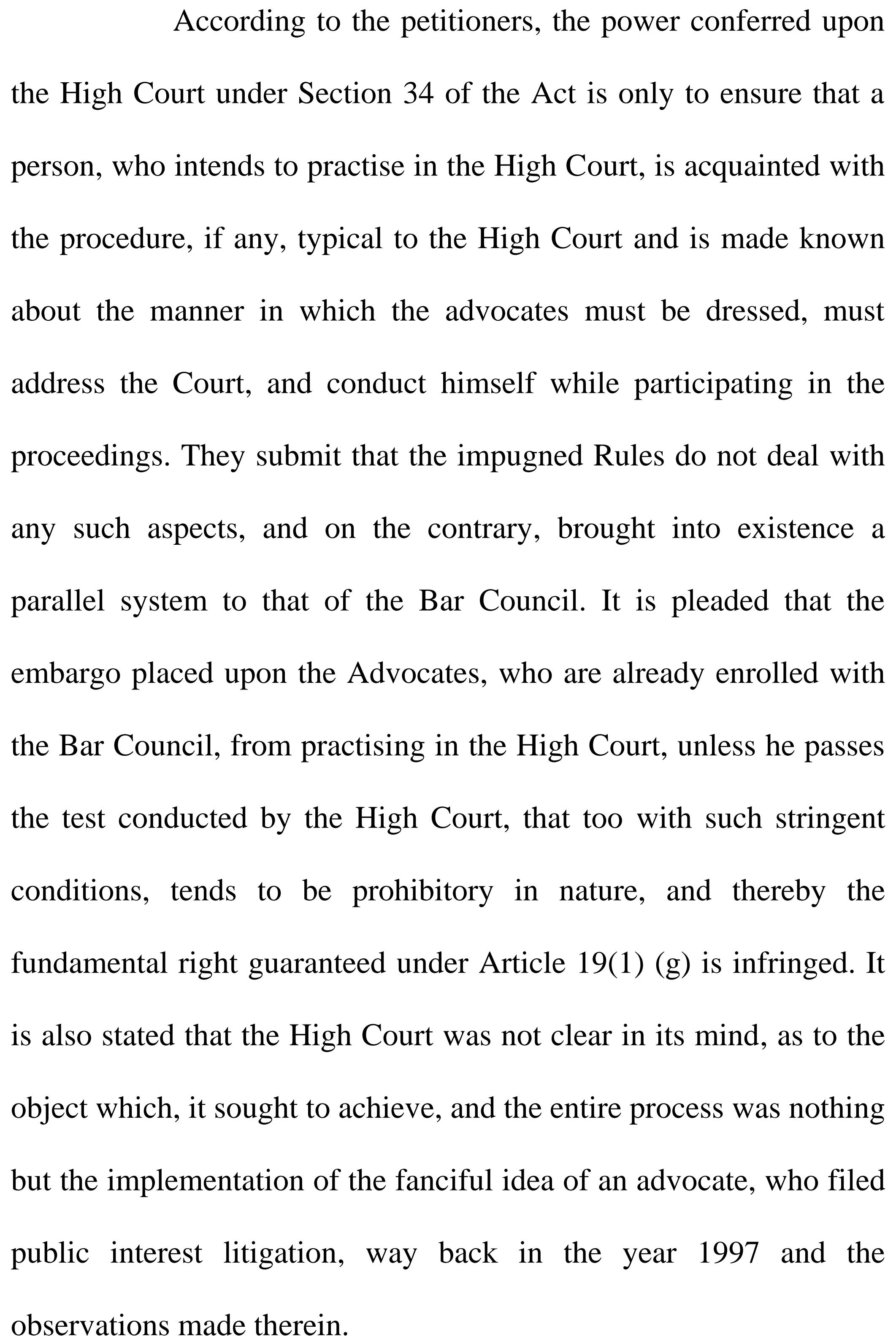

According to the petitioners, the power conferred upon the High Court under Section 34 of the Act is only to ensure that a person, who intends to practise in the High Court, is acquainted with the procedure, if any, typical to the High Court and is made known about the manner in which the advocates must be dressed, must address the Court, and conduct himself while participating in the proceedings. They submit that the impugned Rules do not deal with any such aspects, and on the contrary, brought into existence a parallel system to that of the Bar Council. It is pleaded that the embargo placed upon the Advocates, who are already enrolled with the Bar Council, from practising in the High Court, unless he passes the test conducted by the High Court, that too with such stringent conditions, tends to be prohibitory in nature, and thereby the fundamental right guaranteed under Article 19(1) (g) is infringed. It is also stated that the High Court was not clear in its mind, as to the object which, it sought to achieve, and the entire process was nothing but the implementation of the fanciful idea of an advocate, who filed public interest litigation, way back in the year 1997 and the observations made therein.

The petitioners have relied upon several precedents and the opinions expressed in the text books regarding right to practise, and submitted that the amendment in question is opposed to all of

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them, and plead that the Rules are liable to be set aside.

Sri Bindhyachal Singh, learned counsel argued on behalf of High Court. He submits that the maintenance of high standard in the legal profession and maintenance of discipline in the High Court is an immediate concern, and the very purpose of conferring power upon the High Court under Section 34 of the Act is to achieve those goals. He submits that the experience over the year has shown that the advocates were being enrolled, just on obtaining Bachelor's degree in law as, in the actual practise, their standard was found to be far from what is expected from a typical advocate and, accordingly the Rules were framed to ensure that advocates with basic understanding and knowledge are enabled to practise in the High Court. Learned counsel emphasised on the distinction between 'appearance' in the Court, on the one hand, and 'practise' on the other hand, and contends that the Rules deal with only 'the right to practise' and not the 'appearance' in the Court. According to the learned counsel, it is very much competent for the High Court to regulate the practice in it, and that the Rules cannot be found fault with. He placed reliance upon several precedents delivered by the Supreme Court and the High Courts.

Legal profession is one of the oldest calling in any Society. The persons practising it are naturally, expected to be

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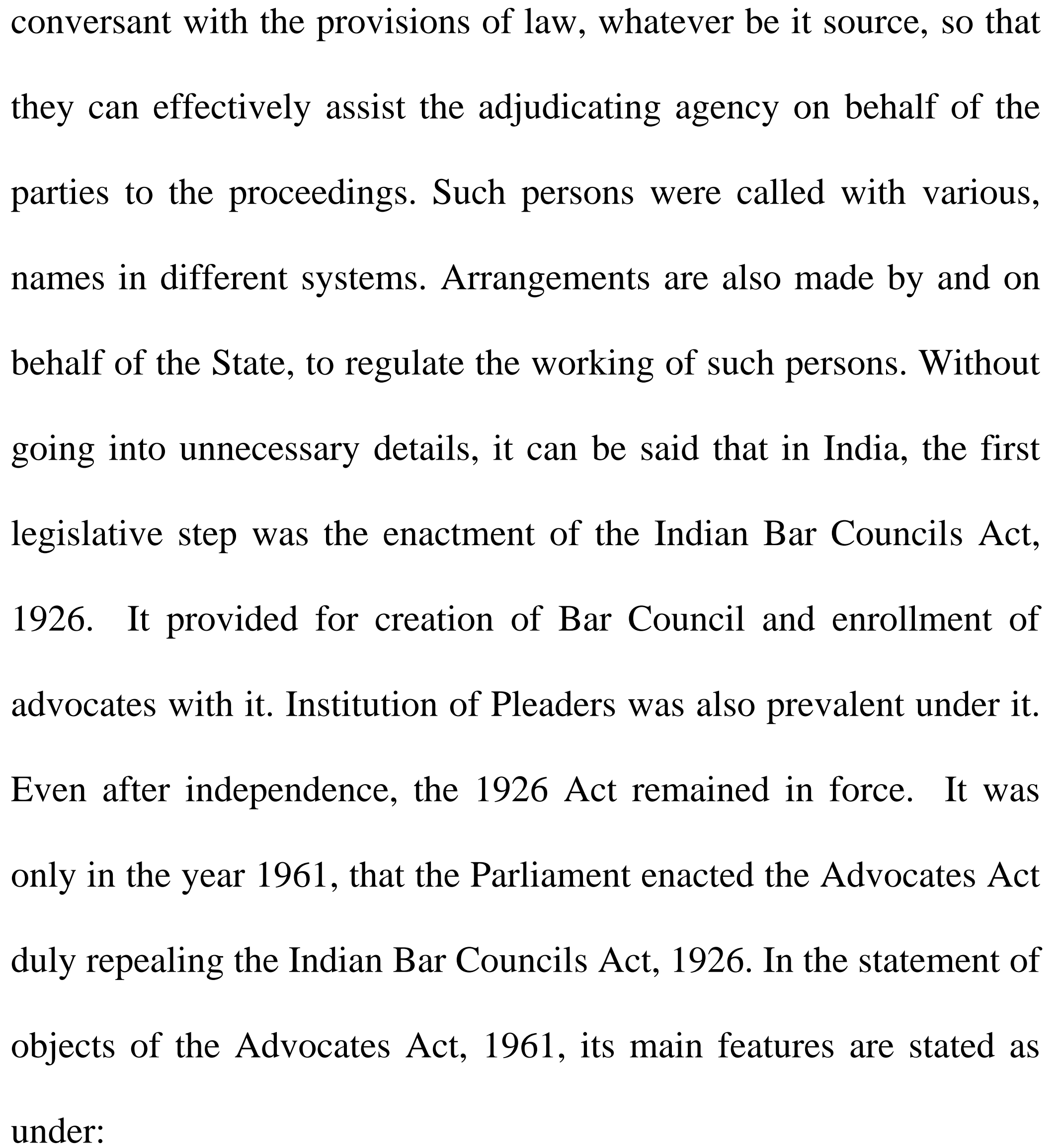

conversant with the provisions of law, whatever be it source, so that they can effectively assist the adjudicating agency on behalf of the parties to the proceedings. Such persons were called with various, names in different systems. Arrangements are also made by and on behalf of the State, to regulate the working of such persons. Without going into unnecessary details, it can be said that in India, the first legislative step was the enactment of the Indian Bar Councils Act, 1926. It provided for creation of Bar Council and enrollment of advocates with it. Institution of Pleaders was also prevalent under it. Even after independence, the 1926 Act remained in force. It was only in the year 1961, that the Parliament enacted the Advocates Act duly repealing the Indian Bar Councils Act, 1926. In the statement of objects of the Advocates Act, 1961, its main features are stated as under:

> (1) the establishment of an All India Bar Council and a common roll of advocates, and advocate on the common roll having a right to practise in any part of the country and in any Court, including the Supreme Court;
>
> (2) the integration of the bar into a single class of legal practitioners known as advocates;
>
> (3) the prescription of a uniform qualification for the admission of persons to be advocates;
>
> (4) the division of advocates into senior advocates and other advocates based on merit;

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(5) the creation of autonomous Bar Councils, one for the whole of India and on for each State.

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Chapter II of the Act provides for creation or constitution of State Bar Councils, and the matters related thereto. Chapter III provides for admission and enrolment of advocates. A separate chapter IV is provided to define the right of an advocate to practise. The conduct and disciplinary proceedings are dealt with under Chapter V.

Once an advocate is enrolled, as provided under Chapter III, he is issued a certificate of enrolment under Section 22. The rights that accrue to an Advocate, on enrolment and issuance of certificate are mentioned under Sections 29 and 30 of the Act. The provisions read as under:

> "**29. Advocates to be the only recognized class of persons entitled to practise law-** Subject to the provision of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practise the profession of law, namely, advocates.
>
> **30. Right of advocates to 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;

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(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 law for the time being in force entitled to practise."

Section 31 dealt with special provision for attorneys, was repealed in the year 1977. Section 32 confers upon the Courts, power to permit any person, not enrolled as an advocate under this Act, to appear before them in any particular case. Section 33 confers exclusive privilege upon the advocates, to practise in the Court, subject to however exceptions carved out under Section 32. Section 34 of the Act confers power upon the High Court to make rules. The provision reads as under:

> "**34. Power of High Courts to make rules-** (1) The High Court may make rules laying down the conditions subject to which an advocate shall be permitted to practise in the High Court and the courts subordinate thereto.
>
> (1A) The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of the fees of his adversary's advocate upon all proceedings in the High Court or in any Court subordinate thereto.
>
> 2. Without prejudice to the provisions contained in sub section (1), the High Court at Calcutta may make rules providing for the holding of the Intermediate and

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the Final examinations for articled clerks to be passed by the persons referred to in section 58AG for the purpose of being admitted as advocates on the State roll and any other matter connected therewith."

Here, it is necessary to mention that till recently any person, who completed a Bachelor's degree in law, was entitled to be enrolled as an advocate. The Bar Council of India framed regulations that provide for conducting of a test, passing of which is essential for an advocate to be issued certificate of registration. Certain transitional measures were also indicated. As the things stand now, a person can be enrolled as a full fledged advocate, only on passing the test conducted by the Bar Council of India. The test covers the substantive as well as procedural aspects of law.

The Supreme Court of India has conferred with special powers in this behalf under Article 145 of the Constitution of India, which reads as under:

"**145.Rules of Court, etc**.- (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including-

(a) rules as to the persons practising before the Court;

(*Remaining part of the Article 145 is not relevant for this case.)*

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As a measure to respect the extra-ordinary power of the Supreme Court under Article 145 of the Constitution of India, the Act also contains a corresponding provision in the form of Section 52, which saved the power of the Supreme Court to make rules under Article 145 of the Constitution of India. Section 52 reads as under:

> **"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 practise in that Court;
>
> (b) for determining the persons who shall be entitled to [act or plead] in that Court."

It is important to note that the word "Act" occurring in clause (b) of Section 52 was substituted in the year 1993 with the word '*act or plead*'.

Very few High Courts, mostly the chartered High Courts framed the Rules of practise concerning advocates. They are mostly about the original proceedings. The Act has also carved out exception with respect to the advocates practising in the Calcutta High Court, on certain aspects.

So far as the Patna High Court is concerned, it all started with the filing of public interest litigation (CWJC No.1185 of

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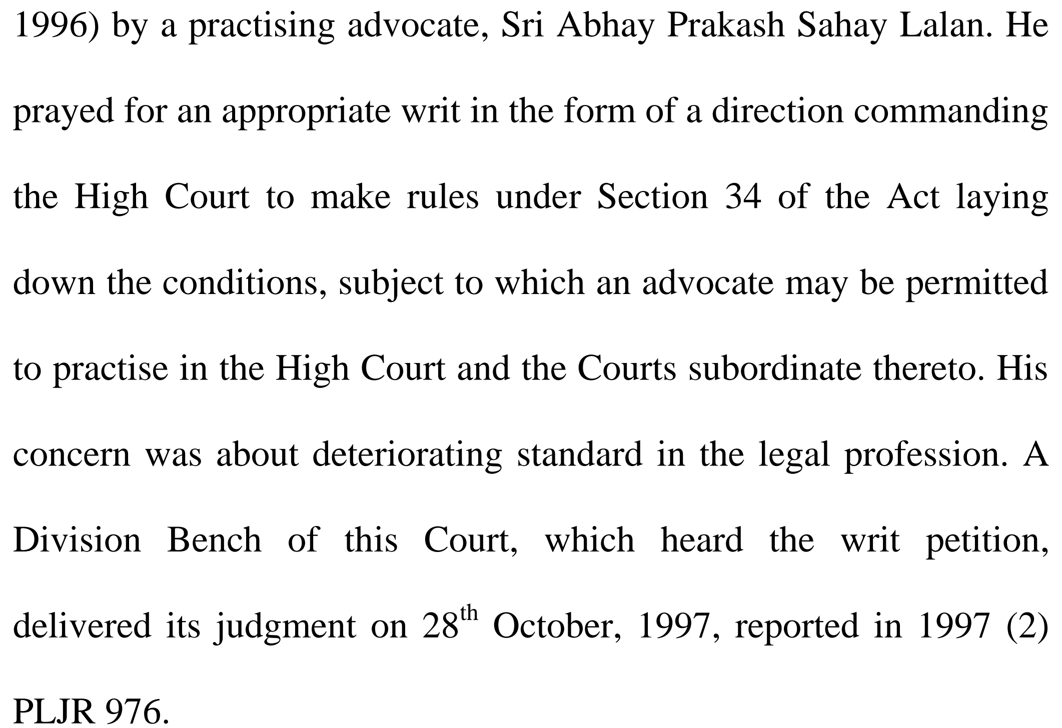

1996) by a practising advocate, Sri Abhay Prakash Sahay Lalan. He prayed for an appropriate writ in the form of a direction commanding the High Court to make rules under Section 34 of the Act laying down the conditions, subject to which an advocate may be permitted to practise in the High Court and the Courts subordinate thereto. His concern was about deteriorating standard in the legal profession. A Division Bench of this Court, which heard the writ petition, delivered its judgment on 28th October, 1997, reported in 1997 (2) PLJR 976.

Their lordships took the view that a writ cannot be issued directing the High Court to frame Rules under Section 34 of the Act. The petitioner therein was directed to approach the High Court through a representation and it was observed that in case, such representation is filed; it is open to the High Court to frame Rules. The writ petition was, accordingly, 'dismissed'. However, certain observations were made about the competence of the High Court to frame rules under Section 34 of the Act. It was held that there is no consistency between the Section 34 of the Act, on the one hand, and the various steps contemplated under Chapter VI (Miscellaneous) of the Act, on the other hand. The judgment of the Allahabad High Court in **Prayag Das Vs. Civil Judge, Bulandshahr and others**[1]**,**

[1] AIR 1974 Allahabad 133

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was referred with approval. The Allahabad High Court took the view that the High Court has power to make rules for regulating the appearance of advocates and proceedings inside the Court. It appears that an effort was made by this Court to equate the power of the High Court under Section 34 of the Act, with that of the Supreme Court under Article 145 (1) (a) of the Constitution of India. It was observed by the Division Bench, in paragraph 6 as under:

> "It has been held by the Allahabad High Court in Prayag Das v. Civil Judge, Bulandshahr.[AIR 1974 All 133], that the High Court has the power to make rules for regulating the appearance of advocates and proceedings inside the Courts. Obviously, the High Court is the only appropriate authority to be entrusted with this responsibility. However, so far as the basic qualification of an advocate entitling him to practice, without physically appearing in Court, or disentitling him from doing so, is concerned, the determination of such conditions must remain within the exclusive province of the Bar Council. It cannot be lost sight of that a similar power is vested in the Supreme Court under Article 145 of the Constitution of India. The framers of the law must have been aware of the constitutional provision, and yet there' is nothing in Chapter IV of the Advocates Act which creates an exception in favour of the rule-making power of the Supreme Court in this regard. If Sections 29, 30 and 33 are understood to mean that once a person is enrolled as an advocate he can practise before any

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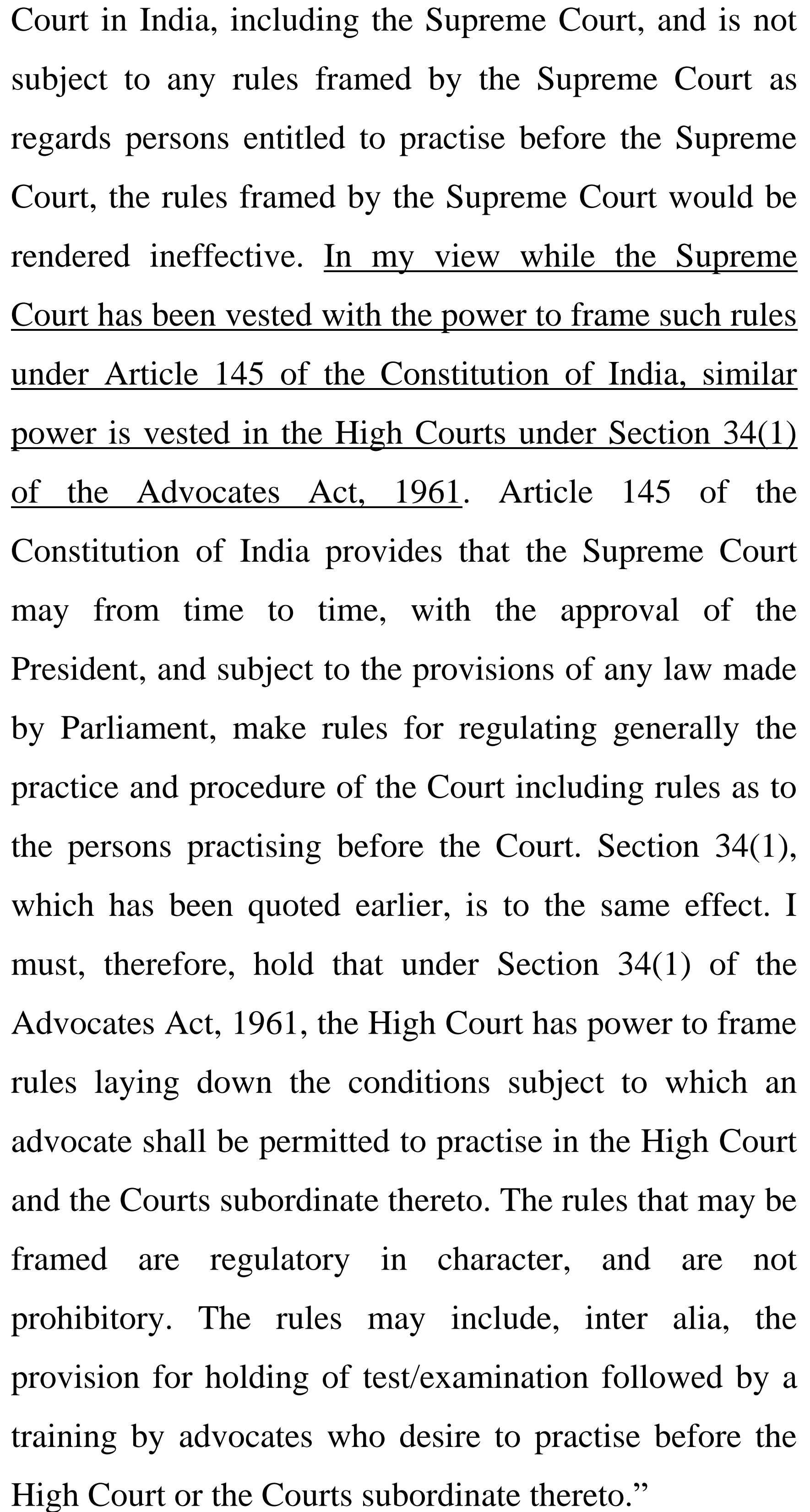

Court in India, including the Supreme Court, and is not subject to any rules framed by the Supreme Court as regards persons entitled to practise before the Supreme Court, the rules framed by the Supreme Court would be rendered ineffective. In my view while the Supreme Court has been vested with the power to frame such rules under Article 145 of the Constitution of India, similar power is vested in the High Courts under Section 34(1) of the Advocates Act, 1961. Article 145 of the Constitution of India provides that the Supreme Court may from time to time, with the approval of the President, and subject to the provisions of any law made by Parliament, make rules for regulating generally the practice and procedure of the Court including rules as to the persons practising before the Court. Section 34(1), which has been quoted earlier, is to the same effect. I must, therefore, hold that under Section 34(1) of the Advocates Act, 1961, the High Court has power to frame rules laying down the conditions subject to which an advocate shall be permitted to practise in the High Court and the Courts subordinate thereto. The rules that may be framed are regulatory in character, and are not prohibitory. The rules may include, inter alia, the provision for holding of test/examination followed by a training by advocates who desire to practise before the High Court or the Courts subordinate thereto."

It is important to note that the Division Bench proceeded on assumption that Parliament did not carve out an

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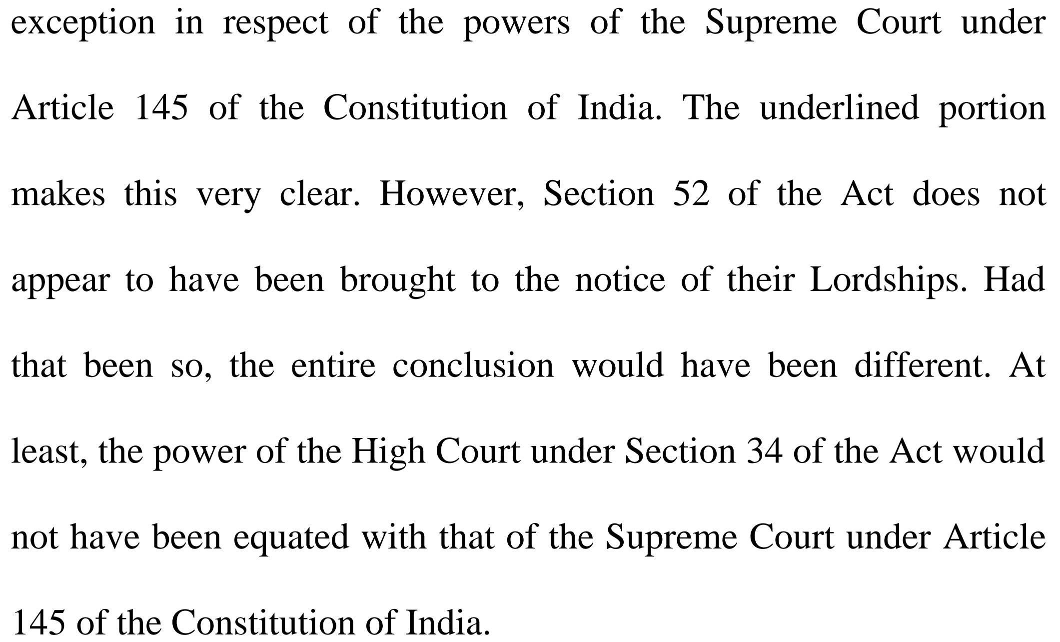

exception in respect of the powers of the Supreme Court under Article 145 of the Constitution of India. The underlined portion makes this very clear. However, Section 52 of the Act does not appear to have been brought to the notice of their Lordships. Had that been so, the entire conclusion would have been different. At least, the power of the High Court under Section 34 of the Act would not have been equated with that of the Supreme Court under Article 145 of the Constitution of India.

Another aspect is that once a Court dismisses a writ petition, the observations made therein cannot be treated as an authoritative pronouncement, on any aspect of law.

Secondly, the outcome of the proceedings instituted as public interest litigation, needs to be examined with a bit of care and caution unless the Court has addressed a legal issue with the participation of all the stake holders and particularly those who are immediately affected, on a view being taken therein. The reason is that an effective adjudication on any important issue can be expected only when the entire facts are brought before the Court and all view points are placed before it. The contesting parties would have an opportunity to assist the Court, with their respective factual and legal submissions and a judgment, which deals with all such contentions would bind the parties. In a public interest litigation, the person, who

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initiates the proceedings, would have nothing to loose. As a matter of fact, he is not supposed to have interest of his own in the subject matter. Hardly, there exists any adversary in such cases, and if one exists, it is incidental. Much would depend upon the stand which the State may take. Many a time, the State also would be willing to accede to certain prayers made in the public interest litigation. The legality or otherwise of such measures can be tested only when the really aggrieved person complains of, in a properly constituted proceedings. Therefore, even where the relief is granted in a public interest litigation, whether in the form of specific direction or declaration, the same cannot overshadow the proceedings, which are instituted by the real aggrieved parties, as a result of the State action, at a later point of time, even while the judgment in the PIL must be respected, to the extent possible. Therefore, the observations made by the Division Bench in **Prayag Das** (supra) cannot be treated as an authoritative pronouncement on the subject, more so, when they were made while dismissing the writ petition and the effected parties were not before it.

We are certainly in agreement with the contentions advanced on behalf of the High Court that Section 34 of the Act confers power upon it to frame rules relating to the manner in which an advocate can practise in the High Court and the Courts

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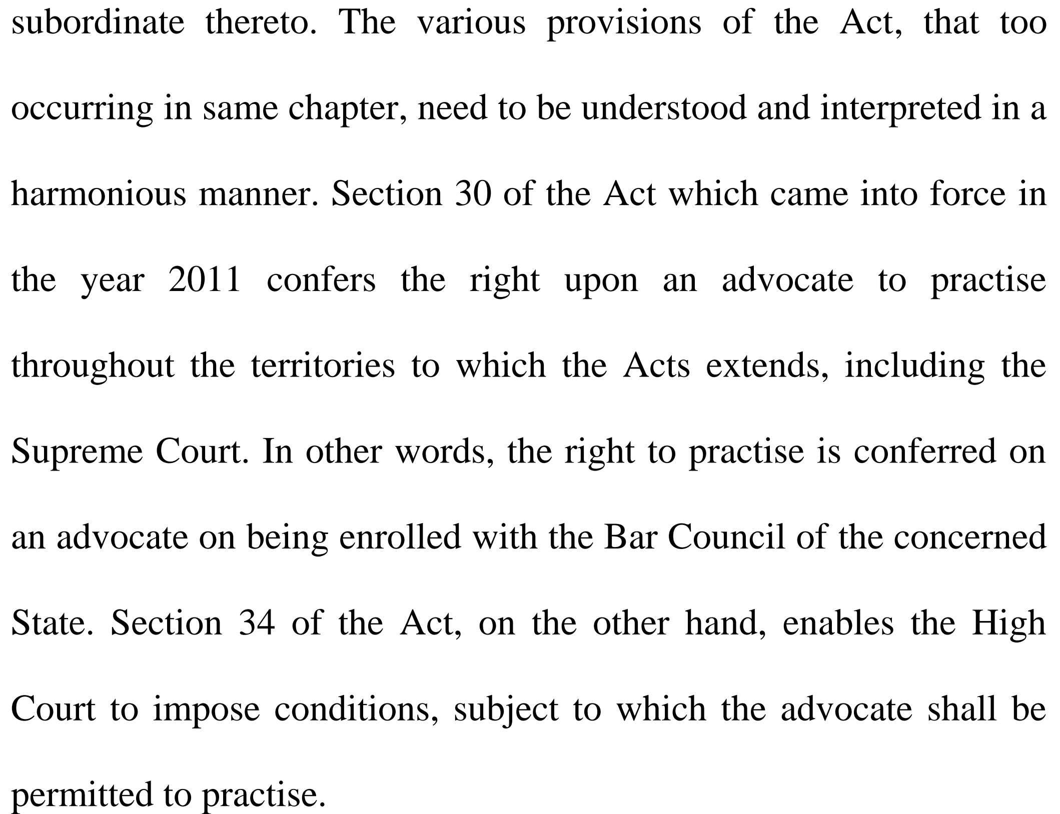

subordinate thereto. The various provisions of the Act, that too occurring in same chapter, need to be understood and interpreted in a harmonious manner. Section 30 of the Act which came into force in the year 2011 confers the right upon an advocate to practise throughout the territories to which the Acts extends, including the Supreme Court. In other words, the right to practise is conferred on an advocate on being enrolled with the Bar Council of the concerned State. Section 34 of the Act, on the other hand, enables the High Court to impose conditions, subject to which the advocate shall be permitted to practise.

In this regard, a subtle distinction needs to be maintained between the right to practise, on the one hand, and the conditions, subject to which an advocate can practice, on the other hand. By no means, Section 34 purports to confer right upon an individual, to practise as an advocate as a first measure. In other words, the High Court cannot enable a law graduate simplicitor to practice in it or in the subordinate courts. That is the exclusive prerogative of the Bar Councils under Sections 29 and 30 of the Act. As a matter of fact, Section 34 makes reference to 'advocate' which expression is defined under Section 2(1) (a) as meaning, the one whose name is entered in any roll under the provisions of the Act. Section 34 also recognizes his right to practise. It only purports to

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empower the High Court to lay down the conditions, subject to which the advocates can practise in them and the Courts subordinate thereto. This covers the second aspect mentioned above. In other words, even while recognizing the right of an advocate practice, Section 34 enables the High Court to stipulate the conditions therefor. While the first aspect relates inherence or acquisition of right to practise, the second contemplates certain regulatory measures.

It is fairly well settled that once a right is conferred upon a citizen, it cannot be abrogated directly or indirectly in the name, of regulation or stipulating the conditions for exercise thereof. The conferment of right to practise is in the exclusive realm of the State Bar Council. Such right can be taken away only through the process of disciplinary proceedings contemplated under the Act. The regulatory measures provided for under Section 34 cannot be, to the extent of negating the very right to practise. The Hon'ble Supreme Court and various High Courts took the view that the right of advocates to practise law comes within the ambit of Article 19(1) (g) of the Constitution of India and thereby assumes the character of fundamental right, in addition to being a statutory right. Naturally, any restriction, which can be placed upon it, must satisfy the test of reasonableness, under Article 19(6) of the Constitution.

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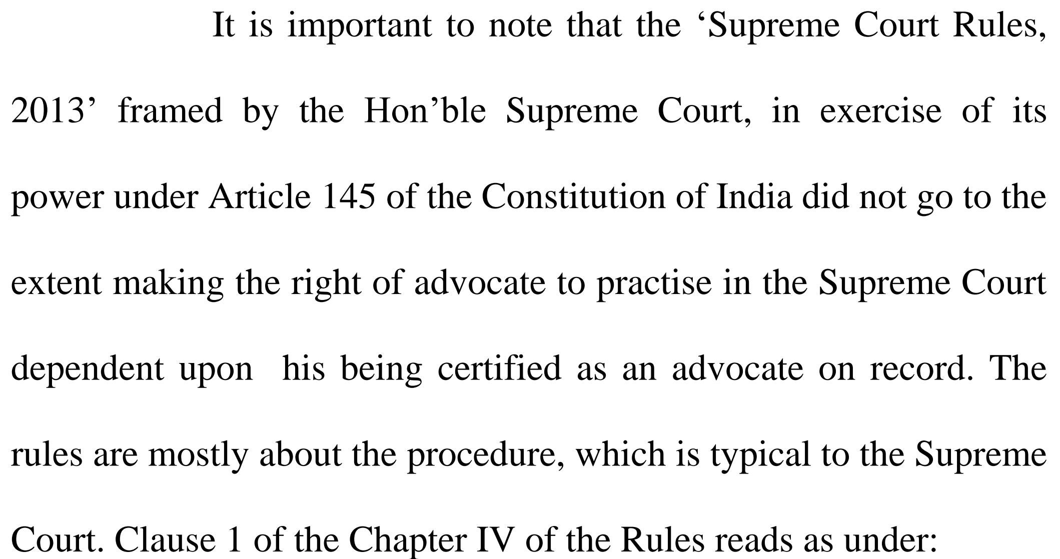

It is important to note that the 'Supreme Court Rules, 2013' framed by the Hon'ble Supreme Court, in exercise of its power under Article 145 of the Constitution of India did not go to the extent making the right of advocate to practise in the Supreme Court dependent upon his being certified as an advocate on record. The rules are mostly about the procedure, which is typical to the Supreme Court. Clause 1 of the Chapter IV of the Rules reads as under:

> 1. (a) Subject to the provisions of these rules an advocate whose name is entered on the roll of any State Bar Council maintained under the Advocates Act, 1961 (25 of 1961) as amended shall be entitled to appear before the Court:
>
> Provided that an advocate whose name is entered on the roll of any State Bar Council maintained under the Advocates Act. 1961 (25 of 1961), for less than one year, shall be entitled to mention mailers in Court for the limited purpose of asking for time, date, adjournment and similar such orders, but shall not be entitled to address the Court for the purpose of any effective hearing:
>
> Provided further that the Court may, if it thinks desirable to do so for any reason, permit any person to appear and address the Court in a particular case.
>
> (b) No advocate other than the Advocate-on-record for a party shall appear, plead and address the Court in a matter unless he is instructed by the advocate-on-record or permitted by the Court.

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(c) In petitions/appeals received from jail or a matter filed by a party-in- person or where a party-in person as respondent is not represented by an Advocate-on-Record, the Secretary General/Registrar may require the Supreme Court Legal Services Committee to assign an Advocate, who may assist the Court on behalf of such person:

Provided that whenever a party wants to appear and argue the case in person, he/she shall first file an application along with the petition seeking permission to appear and argue in person. The application shall indicate reasons as to why he/she cannot engage an Advocate and wants to appear and argue in person, and if he is willing to accept an Advocate, who can be appointed for him by the Court. Such application shall, in the first instance, be placed before the concerned Registrar to interact with the party-in-person and give opinion by way of office report whether the party-in-person will be able to give necessary assistance to the Court for proper disposal of the matter or an Advocate may be appointed as *Amicus Curiae*.

If the application is allowed by the Court then only the party-in-person will be permitted to appear and argue the case in person."

Clause 2 deals with the designation of senior advocates. Clause 3 is about the robes and costume that an advocate shall wear, while appearing in the Supreme Court. Clauses 4 onwards deal with

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advocate-on-record. Clause 7 reads as under:

"7. (a) An advocate-on-record shall, on his filing a memorandum of appearance on behalf of a party accompanied by a *vakalatnama* duly executed by the party, be entitled-

(i) to act as well as to plead for the party in the matter and to conduct and prosecute before the Court all proceedings that may be taken in respect of the said matter or any application connected with the same or any decree or order passed therein including proceedings in taxation and applications for review; and

(ii) to deposit and receive money on behalf of the said party.

(b) (i) Where the *vakalatnama* is executed in the presence of the Advocate-on-Record, he shall certify that it was executed in his presence.

(ii) Where the Advocate-on-Record merely accepts the *vakalatnama* which is already duly executed in the presence of a Notary or an advocate, he shall make an endorsement thereon that he has satisfied himself about the due execution of the *vakalatnama*.

(c) No advocate other than an advocate-on· record shall be entitled to file an appearance or act for a party in the Court.

(d) Every advocate-on· record shall keep such books of account as may be necessary to show and distinguish in connection with his practice as an advocate-on-record

(i) moneys received from or on account of and the

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moneys paid to or on account of each of his clients; and

(ii) the moneys received and the moneys paid on his own account.

(e) Every advocate-on-record shall, before taxation of the Bill of Costs, file with the Taxing Officer a Certificate showing the amount of fee paid to him or agreed to be paid to him by his client."

It is in this background that the Rules framed by the Patna High Court need to be examined. Here itself we make it clear that the Supreme Court Rules are referred to only for comparison and not for interpreting them. Clause 1 of the Rules is about nomenclature. Clause 2 is about the effective date and clause 3 contains definitions. What are mainly challenged in these writ petitions, are Rules 4, 5, 6, 7 and 10. They read as under:

"4. After expiry of two months from the date of coming into force of these Rules, no one shall be entitled to engage an advocate to act in connection with any litigation whether pending or to be instituted in the High Court as his /her Advocate-on-record unless he is registered as Advocate-on-Record.

5. Unless an advocate is possessed of the following, he shall not be entitled to register himself in the register of Advocates-on-Record.

(i) Has an office in the city of Patna.

(ii) Has a Registered Clerk working with him

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exclusively or with other advocates collectively; and

(iii) Has been recommended in writing at least by one Senior Advocate.

6. As a transitory measure within two months of coming in force of the Rules an advocate desiring to the registered as an Advocate-on-Record shall apply in writing in the prescribed format (Appendix-1) to the Registrar and in support thereof shall furnish the following:-

(i) The address of his office with telephone/Mobile No.:

(ii) The name and address of his Registered Clerk; and

(iii) The recommendation in writing of "senior advocate"/Advocates-on-Record of not less than ten years experience at the Bar.

7. (i) to (v) (omitted)

(vi) (a) No Advocate shall be eligible to appear at the examination unless he has received training from an Advocate-on-Record of not less than ten years Standing for a continuous period of one year commencing from the end of second year of date of his/her enrolment, ending on the 30th April or 30th November, of the year of the examination, as the case may be (This will however not prevent the concerned Advocate from receiving training for entire period of 2 years commencing from the date of his enrolment):

Provided that the Committee may, in appropriate

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cases, extend the period beyond the aforesaid dates Viz. 30th April and 30th November, and admit an Advocate to an examination subject to the condition that one year's training is completed and the certificate of completion of training along with a detailed report on his/her work by the concerned Advocate-on-Record is produced before the commencement of the examination.

(***Explanation.-*** If an Advocate has undergone the training for a continuous period of one year and furnished the necessary Certificate about the completion of his training but fails to appear at the next examination for sufficient cause or fails to pass the examination he need not to undergo fresh training).

(b) Every candidate receiving training from an Advocate-on-Record shall send to the Registrar General of this Court and intimation in writing of the name of Advocate-on-Record from whom he is receiving training together with the consent in writing to the Advocate concerned within seven days of the commencement of training.

(c) The Registrar General shall maintain a register in which address of the Advocate-on-Record, the date of intimation and the date of actual commencement of training.

(vii) to (xvi) (omitted)

10. Those Advocates who, on the date of the notification of these Rules, are already enrolled as advocates in the Bihar State Bar Council and members of any of the three associations of this Court or

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practising in any court/tribunal and a member of any Bar Association within a radius of ten kilometers from the seat of Patna High Court and fulfill the conditions of Rules 5 and 6 above shall be entitled to be registered as Advocates on Record, being at par with the aforesaid three associations, without having appeared in the Advocates on Record examination:

Provided that the said Advocates within a period of one month from the date of notification of this Rule, apply before the Registrar giving all the details mentioned above in Rules 5 and 6, so that it may be verified and recorded."

Rest of the rules is not extracted as they are not of immediate concern.

Other rules, mostly prescribe the procedure. In clear and categorical terms, Rule 4 prohibits any advocate from being engaged by parties, unless he is registered as an advocate -on -record. To our mind, this runs contrary to Sections 29 and 30 of the Act. Such a total prohibition against an advocate being engaged unless registered as an advocate- on- record would amount to either ignoring Section 30 or re-writing that provision. On its part, the Act contemplates only two categories of advocates, namely senior advocates and advocates. The category of 'advocates- on –record' can very well be brought into existence by the High Court, and that it can even confer

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certain prerogatives or benefits on persons registered or recognized as such. However, the High Court cannot disable an advocate, who is enrolled with the Bar Council from being engaged by the parties on their behalf.

The second area of concern is about the conditions stipulated for an advocate to become an advocate- on- record. Rule 5 is to the effect that an advocate shall not be entitled to register himself unless he fulfills the conditions stipulated therein. It is not clear as to whether the conditions mentioned therein are to be fulfilled before an application is made, or whether fulfillment of those conditions would enable an advocate to be conferred to be registered as an Advocate-on-record. Since the progress of training is required to be monitored by the Registrar, naturally, the application must be filed in advance. When Rule 4 prohibits an advocate from practising unless he is recognized as advocate on record, the question of his being required to have an office or to engage a clerk does not arise. Rule 7 provides for conducting of an examination comprising of four papers, (1) practice and procedures of Patna High Court, (2) drafting in two parts, (3) elementary knowledge of book keeping and Accounts and professional ethics and (4) leading cases. Each paper shall be for 100 marks. To qualify as an Advocate-on-record, one must obtain 60 per cent in aggregate with minimum of 50 per cent of

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marks in each paper. The Rules contemplate the constitution of a committee as well as Board of Examiners. The Committee is conferred with the power to prevent a candidate from appearing for a specific period if it is of the opinion that his performance in the examination was not satisfactory.

Rule 7(vi) (a) prescribes another important condition. This is to the effect that an advocate who is already enrolled with the Bar Council is not entitled to appear in the examination unless (a) he has completed two years of standing after enrolment and (b) has undergone training for one year from an Advocate-on-record of not less than 10 years standing. A sort of concession is given for an advocate to receive training for a continuous period of two years commencing from the date of enrolment. The training which an advocate is required to undergo from an advocate-on-record is subject to scrutiny by the Registrar of the High Court.

Rule 10 of the Rules is to the effect that an advocates, who, on the date of the Notification, are already enrolled as members of the three associations, namely the Bar Association, Advocates Association, and the Lawyers Association of the Patna High Court or members of any association within a radius of ten kilometers from the seat of Patna High Court and fulfill the conditions of Rules 5 and 6 shall be entitled to be registered as an advocate-on-record, without

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the necessity of clearing the examination.

In the counter affidavit filed on behalf of the High Court, it was mentioned that necessity to frame the Rules was felt on account of representation made from advocates and the same is repeated in the arguments. A perusal of the record however, did not substantiate this contention. Be that as it may, one would have certainly appreciated if the representation was made by the advocates who have already passed the test or those were willing to pass the test. On the one hand, the advocates who are already practising and members of certain Associations, were conferred the status of advocates-on- record, without subjecting them to any test, and on the other hand, those who did not become members, were subjected to the rigor of not only disabling from being engaged by parties, but also of being required to appear in the test with stringent conditions. We are of the view that distinction made in this behalf does not satisfy the test of reasonable classification and of *intelligible differentia*. That however, is not the only factor that one can fall back on.

We have already expressed our views vis-à-vis Rule 4. Assuming that it is in the interest of the institution to have the category of advocates-on-record, it must be such that the right of an advocate, who was enrolled with the Bar Council, is not eroded by it.

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There cannot be any objection for stipulating a minimum standing for an advocate to appear in the examination for advocates-on-record. However, he must not be disabled from practising during that period. The High Court must be clear in its mind as to the purpose for which the concept of advocates- on- record is introduced. If the intention is to improve the standard, it was expected to put every advocate to the same test. The mere fact that an advocate is a member of an Association does not make him to stand on a higher footing. Secondly, if it is a case of maintenance of decency and decorum in the Court, certainly necessary provisions in this regard could have been made. However, the Rules are blissfully silent in this regard. Neither any typical dress code nor the manner in which an advocate must act in the High Court, different from the one in which he acts and pleads in other courts was indicated.

Further, the Rules are only in relation to the advocates who intend to practise in the Patna High Court. Section 34 confers power upon the High Court to frame Rules in respect of advocates who intend to practise in the concerned High Court and the Courts subordinate thereto. It is not uncommon that an advocate who practises in the trial court may pursue the proceedings in the High Court also. As a matter of fact, the Supreme Court itself provides such a facility. In a given case, the party may not be able to afford to

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engage another advocate in the High Court or he may be of the view that his advocate in trial court is in complete control of the entire brief. The Rule that disables the advocate practising in the trial Court, from appearing in the High Court, compels the parties to engage another counsel. This runs contrary to the concept of justice at door step and at an affordable cost. When the Parliament felt it necessity of inserting Article 39 A to the Constitution of India to provide equal justice and free legal aid, any restriction placed upon the advocates to practise in the High Court would certainly be untenable.

More often than not, lack of clarity arises in understanding the true purport of ‘practise’, on the one hand, and the ‘appearance’, on the other hand, of an advocate. By and large, both of them were taken as interchangeable or as the facets of the same activity. However, it is only when a micro analysis is made, that the distinction may become visible.

It is apt to refer to the judgment of the Allahabad High Court in **Prayag Das** (supra). A division Bench of the Allahabad High Court observed in paragraph-9 of the judgment as under:

> “9. It is correct that the High Court does not possess the power to take away an Advocate's right to practise in courts. That power can be exercised only by the Bar Council which may also frame rules under

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Section 49(ab) of the Advocates Act. But in our opinion the High Court has a power to regulate the appearance of Advocates in Courts. The right to practise and the right to appear in courts are not synonymous. An Advocate may carry on chamber practice or even practise in court is various other ways, e.g., drafting and filing of pleadings and Vakalatnama for performing those acts. For that purpose his physical appearance in court may not at all be necessary. For the purpose of regulating his appearance in court the High Court should be the appropriate authority to make rules and on a proper construction of Section 34(1) of the Advocates Act it must be inferred that the High Court has the power to make rules for regulating the appearance of Advocates and proceedings inside the courts. Obviously the High Court is the only appropriate authority to be entrusted with this responsibility. However, so far as the basic qualifications of an Advocate entitling him to practise without physically appearing in court, or disentitling him from doing so are concerned, the determination of such conditions must remain within the exclusive province of the Bar Council. The same division of functions is borne out by the difference in the language of the two provisions. Whereas Clause (ab) of Section 49 refers to the conditions subject to which an Advocate shall have the right to practice, Section 34(1) deals with the conditions subject to which an Advocate shall be permitted to practise. The expression

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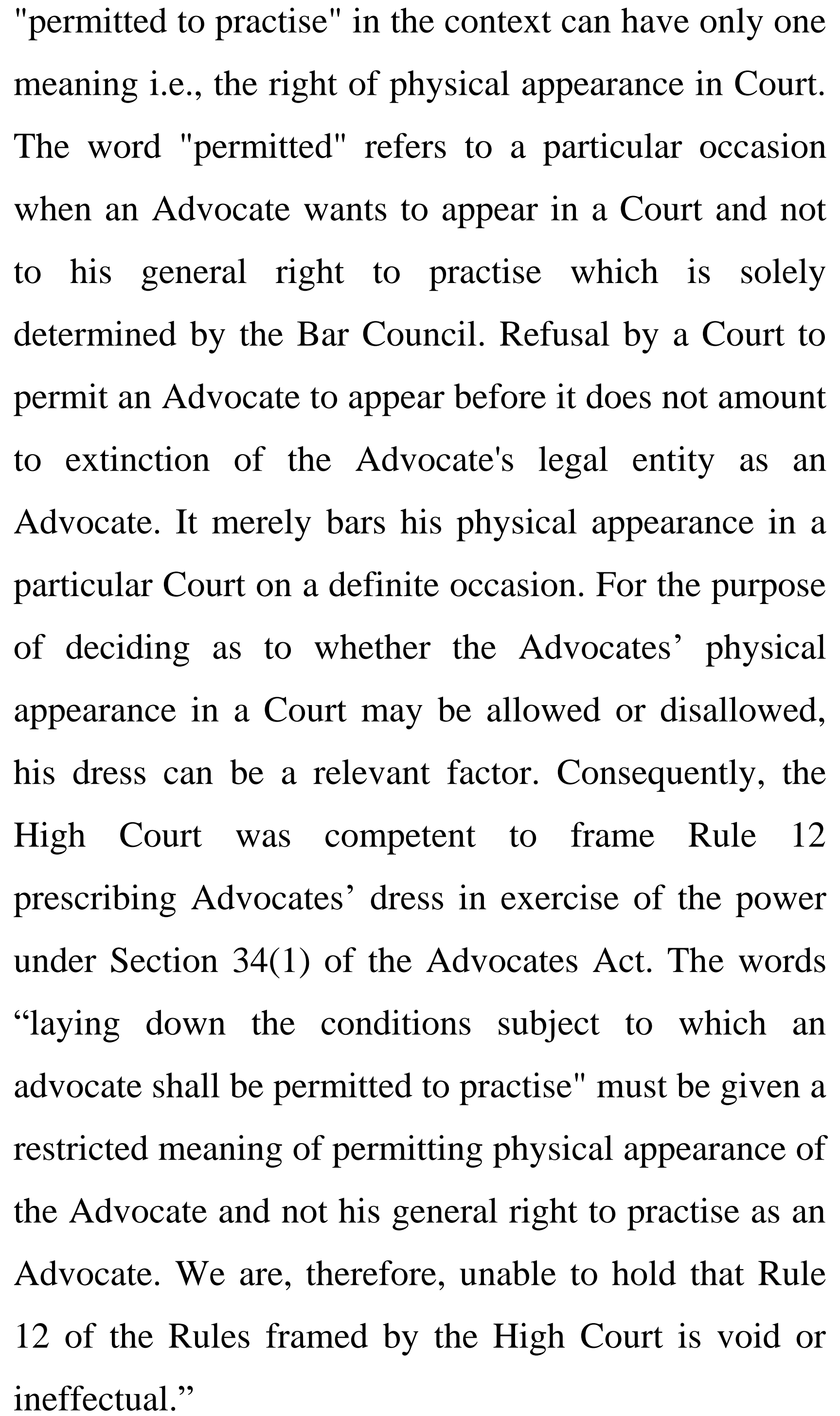

"permitted to practise" in the context can have only one meaning i.e., the right of physical appearance in Court. The word "permitted" refers to a particular occasion when an Advocate wants to appear in a Court and not to his general right to practise which is solely determined by the Bar Council. Refusal by a Court to permit an Advocate to appear before it does not amount to extinction of the Advocate's legal entity as an Advocate. It merely bars his physical appearance in a particular Court on a definite occasion. For the purpose of deciding as to whether the Advocates' physical appearance in a Court may be allowed or disallowed, his dress can be a relevant factor. Consequently, the High Court was competent to frame Rule 12 prescribing Advocates' dress in exercise of the power under Section 34(1) of the Advocates Act. The words "laying down the conditions subject to which an advocate shall be permitted to practise" must be given a restricted meaning of permitting physical appearance of the Advocate and not his general right to practise as an Advocate. We are, therefore, unable to hold that Rule 12 of the Rules framed by the High Court is void or ineffectual."

We are in respectful agreement with the said propositions and observations.

The question as to whether the High Court can regulate the conduct of the advocate touching upon his right to practise was dealt with by the Hon'ble Supreme Court in **Supreme Court Bar**

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Association Vs. Union of India[2] . Their Lordships observed in paragraphs 71 and 72 as under:

> " 71. Thus, after the coming into force of the Advocates Act, 1961 with effect from 19.05.1961, matters connected with the *enrolment* of advocates as also their punishment for professional misconduct is governed by the provisions of that Act only. Since, the jurisdiction to grant licence to a law graduate to practise as an advocate vests exclusively in the Bar Councils of the State, the jurisdiction to suspend his licence for a specified term or to revoke it also vests in the same body.
>
> 72. The letters patent of the Chartered High Courts as well of the other High Courts earlier did vest power in those High Courts *to admit* an advocate to practise. The power of suspending from practice being incidental to that of admitting to practice also vested in the High Courts. However, by virtue of Section 50 of the Advocates Act, with effect from the date when a State Bar Council is constituted under the Act, the provisions of the Letters patent of any High Court and "of any other law" in so far as they relate to the admission and enrolment of a legal practitioner or confer on the legal practitioner the right to practice in any court or before any authority or a person as also the provisions relating to the "suspension or removal" of legal practitioners, whether under the letters patent of any High Court or of any other law, have been repealed.

[2] (1998) 4 SCC 409

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> These powers *now* vest exclusively, under the Advocates Act, in the Bar Council of the State concerned. Even in England the Courts of justice are now relieved from disbarring advocates from practice after the power of calling to the Bar has been delegated to the Inns of Court. The power to disbar the advocate also now vests exclusively in the Inns of Court and a detailed procedure has been laid therefor."

In the present case, we are not concerned with the disciplinary proceedings to be initiated against the advocates. However, the relevance of the judgment is felt on account of the fact that the Rules, insofar as they disable an advocate from practising in the High Court till he clears the examination of the AOR have the effect of preventing him from practising, though not as a punitive measure. Whatever be the cause, the effect on advocate is the same. In a way, an advocate may not have any genuine grievance if he is prevented, on account of disciplinary proceedings, but he can certainly protest his being disabled from practising in the Patna High Court, despite his having been registered with the State Bar Council. It is fairly well settled that what is prohibited from being done directly, cannot be permitted to be done indirectly.

Heavy reliance is placed by the learned counsel for the petitioners on the judgment in the case of **Harish Uppal vs. Union**

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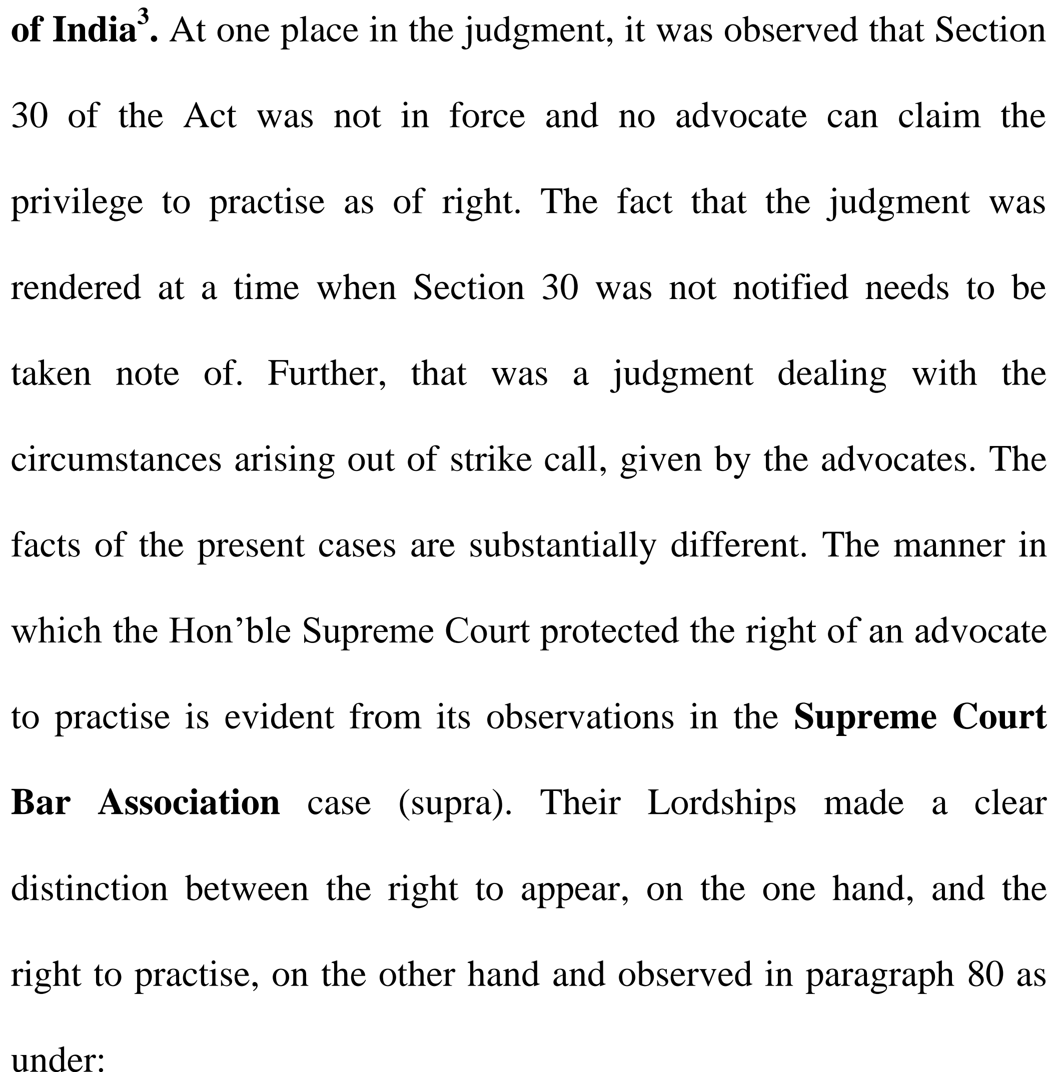

of India[3]. At one place in the judgment, it was observed that Section 30 of the Act was not in force and no advocate can claim the privilege to practise as of right. The fact that the judgment was rendered at a time when Section 30 was not notified needs to be taken note of. Further, that was a judgment dealing with the circumstances arising out of strike call, given by the advocates. The facts of the present cases are substantially different. The manner in which the Hon'ble Supreme Court protected the right of an advocate to practise is evident from its observations in the **Supreme Court Bar Association** case (supra). Their Lordships made a clear distinction between the right to appear, on the one hand, and the right to practise, on the other hand and observed in paragraph 80 as under:

> "In a given case it may be possible, for this Court or the High Court, the prevent the contemner advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debarring him to practice as an advocate. In a case of contemptuous, contumacious, unbecoming or blameworthy conduct of an Advocate-on-Record, this court possesses jurisdiction, under the Supreme Court Rules itself, to withdraw his privilege to practice as an Advocate-on-Record because that privilege is conferred by this

[3] (2003) 2 SCC 45

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> court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practice as an advocate in other courts or Tribunals."

Thus, when the right or license to practise is intact even where the right to appear is suspended, the question of disabling an advocate from practising just because he did not pass AOR examination does not arise. To be cautious, we reiterate that the right to practise is one thing and imposition of conditions subject to which such right can be exercised, is another. The conditions can be on the aspects such as the manner in which the brief must be prepared, the advocate must be dressed and arguments must be advanced. Beyond that, the right to practise as such, cannot be curtailed through the Rules framed under Section 34 of the Act.

Though reliance is placed upon some other precedents also, we do not feel necessity of dealing with the same in detail, since the principle that runs through them is common and has been dealt with in the preceding paragraphs.

The stringence of the Rules is evident from the fact that ever since they were notified not more than 10 advocates qualified in each of the examinations. In many cases, it will be difficult for a person hailing from weaker section of the society and coming from

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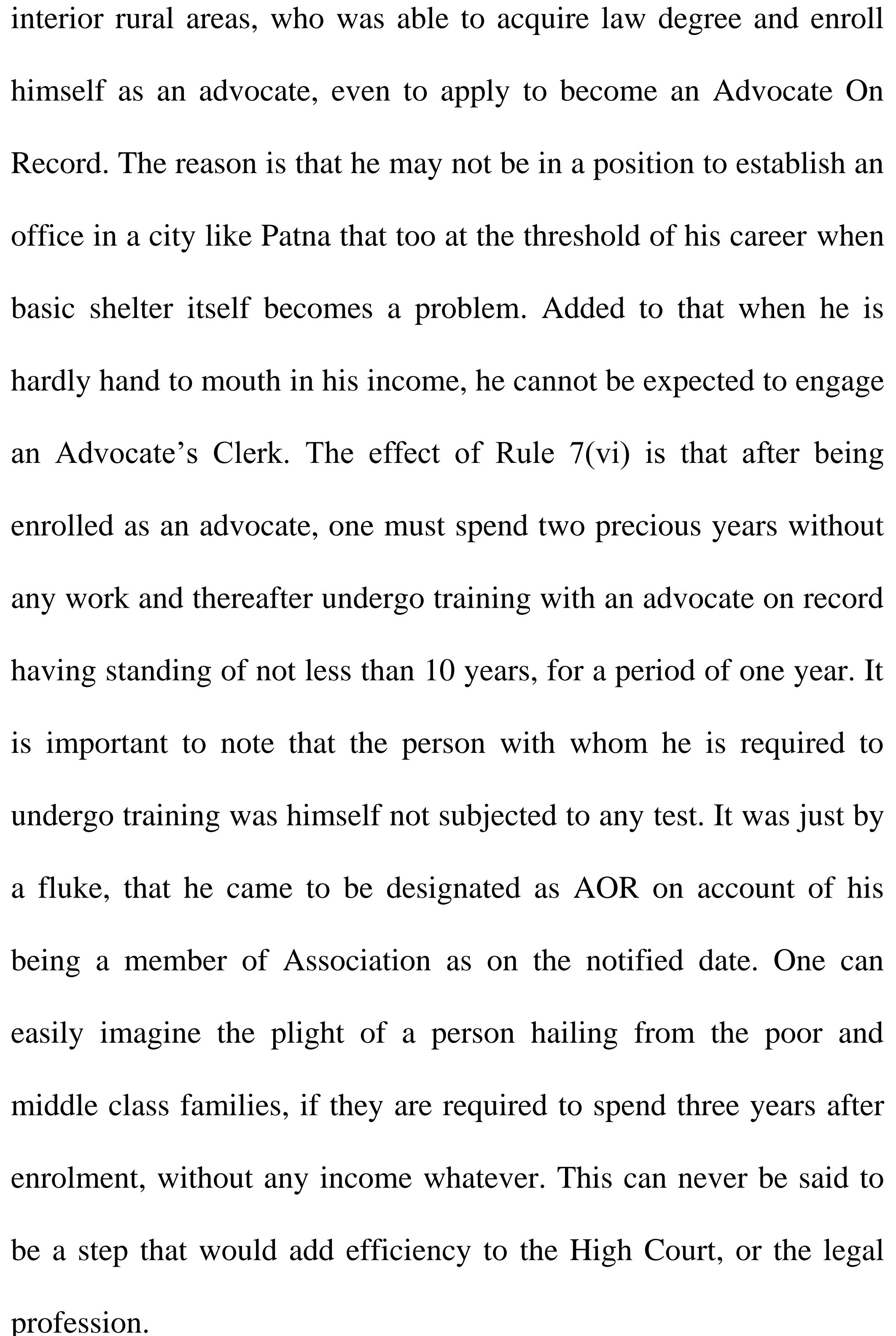

interior rural areas, who was able to acquire law degree and enroll himself as an advocate, even to apply to become an Advocate On Record. The reason is that he may not be in a position to establish an office in a city like Patna that too at the threshold of his career when basic shelter itself becomes a problem. Added to that when he is hardly hand to mouth in his income, he cannot be expected to engage an Advocate's Clerk. The effect of Rule 7(vi) is that after being enrolled as an advocate, one must spend two precious years without any work and thereafter undergo training with an advocate on record having standing of not less than 10 years, for a period of one year. It is important to note that the person with whom he is required to undergo training was himself not subjected to any test. It was just by a fluke, that he came to be designated as AOR on account of his being a member of Association as on the notified date. One can easily imagine the plight of a person hailing from the poor and middle class families, if they are required to spend three years after enrolment, without any income whatever. This can never be said to be a step that would add efficiency to the High Court, or the legal profession.

There is a possibility of treating the training under the Advocate on record as the one equivalent to the training which an employee receives at the threshold or in the middle of the career. The

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substantial difference is that an employee gets training even while receiving full wages, and instances are not likely where the so-called training is received or enjoyed as a paid holiday. In contrast, an advocate is required to undergo training at the whims of the advocate on record who he approaches and is forced to starve of any income.

Equally, a client who was otherwise convinced about the ability of an advocate would be deprived of his choice, on account of the advocate not being an AOR, thereby forced either to put up with injustice or to pool the resources to engage an advocate by paying huge fees. This runs contrary to the spirit and basic tenets of the noble profession of law. Many in the field excelled with dint of hard work and by treating every case as a test for them. Further, the theory of survival of the fittest operates more profoundly in the field of law.

We are of the view that stipulation of 60% minimum qualifying marks is too stringent. Such a harsh major would only inject an element of frustration into enthusiastic youngsters. We are of the view that minimum aggregate marks can be reduced to 50% and the minimum marks in each subject to 40%.

We, therefore, partly allow the writ petitions holding that:

(a) The High Court does have the power to frame

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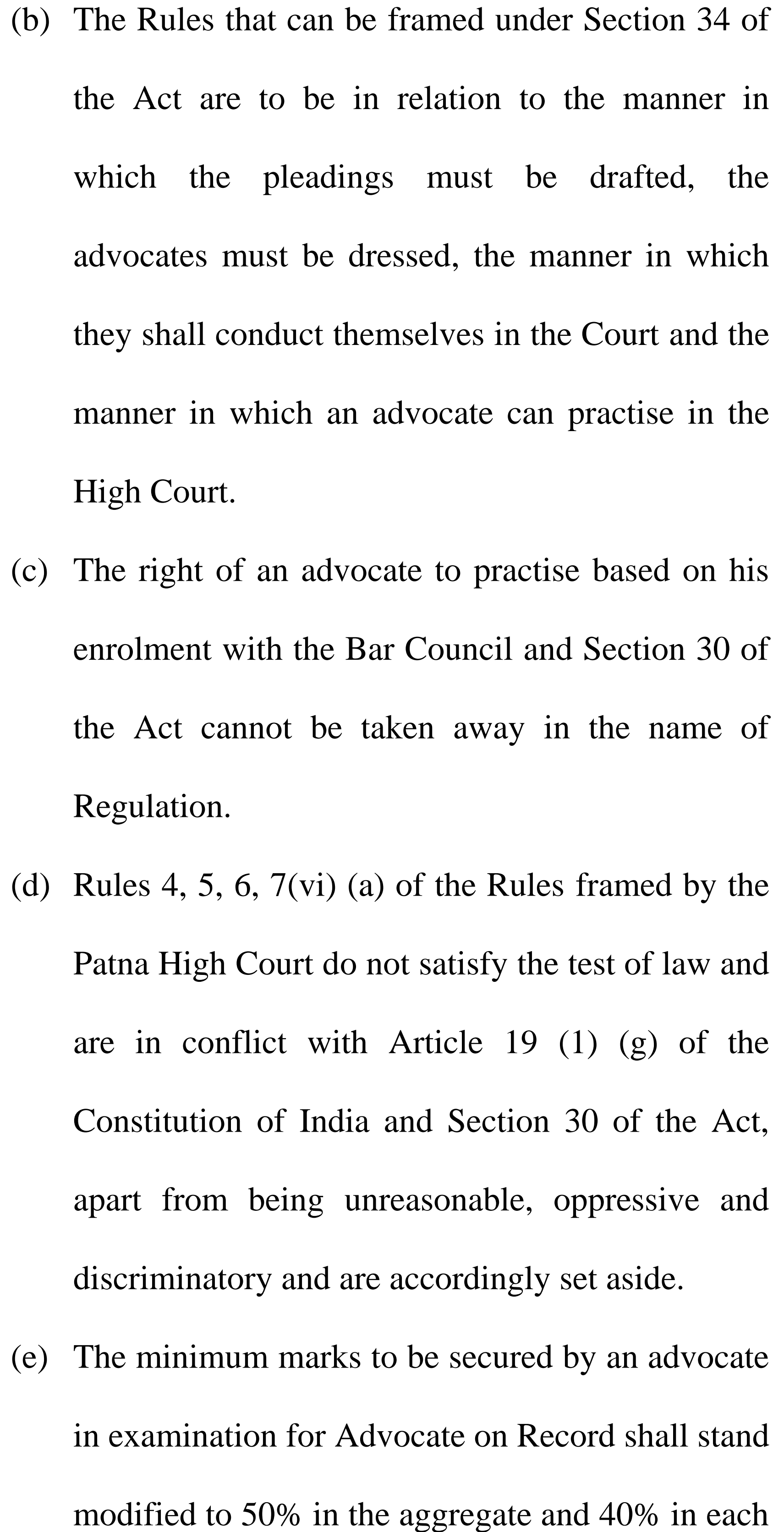

Rules under Section 34 of the Act, but in such a manner that the right to practise is not taken away.

(b) The Rules that can be framed under Section 34 of the Act are to be in relation to the manner in which the pleadings must be drafted, the advocates must be dressed, the manner in which they shall conduct themselves in the Court and the manner in which an advocate can practise in the High Court.

(c) The right of an advocate to practise based on his enrolment with the Bar Council and Section 30 of the Act cannot be taken away in the name of Regulation.

(d) Rules 4, 5, 6, 7(vi) (a) of the Rules framed by the Patna High Court do not satisfy the test of law and are in conflict with Article 19 (1) (g) of the Constitution of India and Section 30 of the Act, apart from being unreasonable, oppressive and discriminatory and are accordingly set aside.

(e) The minimum marks to be secured by an advocate in examination for Advocate on Record shall stand modified to 50% in the aggregate and 40% in each

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subject.

(f) It is left open to the High Court to frame the said Rules, afresh.

WE
NOT

(L. Narasimha Reddy, CJ)

Shivaji Pandey, J. **I agree.**

(Shivaji Pandey, J)

Sudhir Singh, J. **I agree.**

(Sudhir Singh, J)

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