
(1979) 01 BOM CK 0029

In the Bombay High Court

Case No : Special Civil Application No. 1335 of 1977 with C.A. No. 2623 of 1978

P.S. Mudholkar

APPELLANT

Vs

Bar Council of India and Another

RESPONDENT

Date of Decision : 25-01-1979

Acts Referred:

Advocates Act, 1961 — Section 49(1)

Advocates Rules, 1961 — Rule 7

Constitution of India, 1950 — Article 14, 19(1), 220, 226

Citation : AIR 1980 Bom 38 : (1980) 82 BOMLR 1 : (1979) MhLj 415

Hon'ble Judges : Deshmukh, C.J.;Sawant, J

Bench : Division Bench

Advocate : Kumar Mehta, M.D. Angal, for the Appellant; V.H. Gumaste, S.B. Jaisinghani and H.A. Solkar, for the Respondent

Judgement

Sawant, J.—The petitioner was enrolled as a District Pleader in the erstwhile Nagpur High Court in the year 1956 and practised as such Pleader at Akola, After the reorganisation of the States, the sanad issued by the Nagpur High Court was renewed by this Court in the year 1958. In the year 1961, the petitioner entered judicial service as a Civil Judge, Junior Division and Judicial Magistrate, First Class. In that capacity he worked at Ahmednagar, Pusad, Nagpur, Gondia and Amravati. In the year 1974, he was promoted as a Civil Judge, Senior Division and posted at Thane. On 7-6-1977 the petitioner resigned from judicial service and applied for a sanad of an Advocate, to the Bar Council of Maharashtra. The Maharashtra Bar Council issued the sanad on 27-6-1977 subject to Rule 7 of the Rules framed by the Bar Council of India u/s 49(1)(ah) of the Advocates Act 1961 which are hereinafter referred to as the said Rules and the said Act respectively. The said Rule 7 prohibits the petitioner from practicing for a period of two years from the date he ceased to be in service, in the area in which he exercised judicial powers at the said date in a Court which is not a Court of superior jurisdiction to the one in which he held the office. The petitioner therefore has filed the present writ petition under Article 226 of the Constitution

challenging the validity of the said Rule on various grounds. To the petition, both the Bar Council of India which has framed the said Rules as well as the Bar Council of Maharashtra which has issued the sanad subject to the said Rule 7 are made party-respondents. Both the respondents have filed their returns disputing the various contentions raised in the petition attacking the validity of the said Rule.

2. Mr. Angal, the learned Counsel appearing for the petitioner, raised following contentions in support of the petition: -- (1) the Bar Council of India has no power under the said Act to make the said Rule 7; (2) assuming that it has such power, Section 49 under which the said Rule is made does not lay down any guideline and hence the delegation to make the said rule is arbitrary and therefore illegal; (3) the said rule is bad inasmuch as it prohibits practice in an area and not before the Courts or authorities in the area, irrespective of whether the judicial powers exercised by the person at the date he ceased to be in employment had anything to do with the practice before such Courts or authorities; (4) the said rule casts an unreasonable restriction on the right of the petitioner to practise his profession and therefore is violative of the petitioner's fundamental rights under Article 19(1)(g) of the Constitution; (5) the said rule is also violative of the right to equality guaranteed by Article 14 inasmuch as it makes discrimination between judicial Officer and quasi-judicial Officer, and secondly because It makes a distinction between subordinate Judges and High Court Judges and such discrimination has no reasonable nexus with the object sought to be achieved by the said rule, and (6) the said rule is discriminatory also on the ground that it does not apply to Advocates who were enrolled prior to coming into operation of the said rule and applies to those who were enrolled thereafter.

3. We have not thought it necessary to deal with all the said contentions raised on behalf of the petitioner, since we are satisfied for reasons stated hereafter, that the said rule is liable to be struck down on the short ground that it makes unjustifiable discrimination between persons who were not permanent Judges of a High Court and those who were Judges permanent or otherwise, of Courts subordinate to the High Court. In order to appreciate the rival contentions on this point, it is necessary to quote the said Rule 7 as it stands today. The said Rule 7 is as under:--

"7. A person who has exercised judicial powers at the time of his retirement or otherwise ceasing to be in service shall not practise for a period of two years from the date of his retirement or ceasing to be in service as the case may be in the area in which he exercised judicial powers at the said date :

Provided that nothing in this Rule shall prevent any such person from practising in any Court of Superior jurisdiction to the one in which he held the office :

Provided further that nothing in this Rule shall apply to any Judge of a High Court who is not a permanent Judge thereof.

Explanation : A Court of Session, a District Court or the City Civil Court shall be a Court of Superior jurisdiction in relation to a Magistrate's Court or Small Causes Court, even though no appeal may lie from the latter to the former."

4. It may be stated that the second proviso to the said rule was added by way of an amendment effected on 7-3-1976. According to us, the effect of this amendment is that a person who presided as a Judge of a High Court but who was not a permanent Judge thereof can practise in any Court and before any authority from the lowest to the highest from the date he ceased to be such a Judge. However, a person who presided as a Judge in a Court subordinate to the High Court, whether such a Judge was a permanent Judge or a temporary Judge thereof, cannot practise for a period of two years from the date he ceased to be in service, before any authority in the area in which he exercised judicial powers at the date he ceased to be in service, unless the Court in which he practises happens to be a Court of Superior Jurisdiction to the one in which he presided as such judicial officer at the time he ceased to be in service. Admittedly, the healthy and laudable purpose for which such restriction on practice by ex-judicial officers is placed is that justice should not only be done but should be seen to have been done. When an ex-judicial officer is briefed by one of the parties to the litigation to plead his cause before an authority or a Court, holding a position which was either subordinate to or comparable with that held by such officer, the other party to the litigation is bound to entertain apprehension that the balance of justice is likely to be tilted in favour of the side represented by such officer on account of the aura of the office held by the ex-officer. His colleagues, officers holding similar posts and subordinates are likely to be influenced by the clothes of office till recently held by such officer. The social and official intercourse between such officers which ceased only recently is not unlikely to weigh on the mind of decision-making authorities at the time of considering the merits of the case before them. Whether in actuality the decisions are affected by such considerations or not, the litigants are bound to entertain, and can reasonably be expected to entertain, such apprehensions. It is to avoid such pernicious results and apprehensions that the said rule prohibiting practice at least for a period of two years has been enacted. The further presumption under the said rule is that after a lapse of a reasonable period of two years the influence of the ex-judicial officers may wane and the decision-making authorities are not likely to be swayed by such influence thereafter. If this is the admitted object underlying the framing of the said rule, then it is difficult to understand as to how the exception made in favour of a person who presided as a Judge over no less a Court than the High Court would in any way be justified. On the contrary, we should have thought that on this principle, a person who presided as a Judge over the High Court should be the first to come under the bar enacted by the said rule. Having presided over the highest Court in the State, his influence is likely to be felt by all the Courts and the authorities in the entire State. Yet, inexplicably and quite irrationally, we find that such a person is exempted from the bar enacted by the said rule.

5. Mr. Gumaste, the learned counsel appearing for the first respondent-Bar Council of India, tried to argue faintly that this exception was consistent with the provisions of Article 220 of the Constitution inasmuch as the said Article prohibited only a permanent Judge of a High Court from pleading or acting in any Court or before any authority in India except the Supreme Court and the other High Courts. Mr. Gumaste therefore submitted that the exception made in favour of a Judge of a High Court who was not a permanent Judge and who was not prohibited even by the Constitution from practising, was consistent with the provisions of the said Article. The Bar Council of India, argued Mr. Gumaste, has done nothing more or less than stating the said exception made in favour of the erstwhile non-permanent Judge of the High Court by way of the said second proviso to Rule 7. This argument, to say the least, is fallacious and ignores that what has fallen for consideration in the present case is not the provision of Article 220 of the Constitution in respect of a permanent or a non-permanent Judge of a High Court. The question for decision is the validity of the discrimination made between a non-permanent Judge of a High Court and the Judges, whether permanent or non-permanent, of the Courts Subordinate to the High Court. Just as there is no prohibition on practice by a non-permanent Judge of a High Court, in the Constitution, there is also no such prohibition against the permanent or non-permanent Judges of the Courts Subordinate to the High Court. This being the case, a body such as the Bar Council of India which on its own makes a rule like the said Rule 7, prohibiting ex-judicial officers from practicing as provided in the said rule, must justify that prohibition with reference to the discrimination it seeks to make between different judicial officers. The Constitution has not made it obligatory to make any such rule. It is the Bar Council of India which has made the said rule, undoubtedly for a good purpose and in the interests of fair administration of justice. However, while making the said rule, it has cut at the very root of the object underlying the said rule since the discrimination made between the erstwhile non-permanent Judges of the High Court and the ex-Judges of the Courts Subordinate to it has no nexus or relevance with the said object.

6. Mr. Gumaste then contended that it was possible to sever the said proviso to the said rule making discrimination in favour of non-permanent Judges of the High Court, from the rest of the rule. In this connection, he submitted that prior to 7-3-1976 when the said proviso was added by way of an amendment, the rule was not discriminatory and it should not be struck down on the ground of the violation of Article 14 of the Constitution. The intention of the Bar Council prior to the said amendment is manifest on the face of the rule as it stood prior to the said amendment. He therefore submitted that if the said second proviso is void the same alone may be struck down and the rest of the Rule may be saved. In support of this contention of the severance of the invalid portion from the valid portion of the Rule, he relied upon four decisions viz. (1) AIR 1951 SC 318 R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), Anandji Haridas and Co. (P.) Ltd. Vs. S.P. Kushare, S.T.O. Nagpur and Others, Harakchand Ratanchand

Banthia and Others Vs. Union of India (UOI) and Others, Harakchand Ratanchand Banthia v. Union of India . It is not necessary to discuss the facts and the law enunciated in all the four decisions separately and in detail. Suffice it to say that these decisions lay down a proposition of law which is by now well settled. The proposition of law that emerges from the decisions is as follows. The doctrine of severability rests on a presumed intention of the legislature that if a part of a statute turns out to be void that should not affect the validity of the rest of it and that that intention is to be ascertained from the terms of the statute itself. The test is, would the legislature have enacted the valid part if it had known that the rest of the statute was invalid, and further whether the part saved could stand by itself without the invalid part. A perusal of these decisions further shows that what had to be struck down was the part which became discriminatory and not the part which made the said other part discriminatory.

7. In our case it must be remembered that the Bar Council added the said second proviso by way of an amendment, deliberately, knowing fully well that the rest of the Rule which stood on the Statute book for a long time was a valid piece of legislation. It is difficult to hold that the Bar Council of India had no intention to make the said amendment and enact the said proviso in the circumstances of the case, since it enacted the said proviso with the express intention to exempt the non-permanent Judges of the High Courts from the bar of the said Rule. Could it be said that the Bar Council would not have made the said provision if it had known that thereby the rest of the Rule would be rendered invalid ? Or could it be that the Bar Council would have scrapped the whole rule if it was operating to the prejudice of the non-permanent Judges of the High Courts ? It is not for us to find out what exactly was the intention of the Bar Council, for to strike one and save the other on the test as contended by Mr. Gumaste, would in the present case require us to legislate for the Bar Council of India on the basis of the presumed intention of that body. Secondly, the most important reason which prevents us from embarking upon the task of severing the said proviso from the rest of the Rule is that the said proviso standing by itself is not discriminatory. The Constitution has not thought it fit to place any restriction on the practice of a non-permanent Judge of the High Court. To allow a non-permanent Judge of a High Court to practise without restriction also does not affect adversely anybody. Therefore there is no reason to strike down the said second proviso on any ground. What the said proviso however does is to introduce discrimination against the Judges of the Courts subordinate to the High Court to practice in the specified area and during the stipulated period. Thus it is the rest of the provision which has become discriminatory by virtue of the said second proviso. To sever the second proviso from the rest of the rule and to strike it down would amount to striking down a provision which by itself is not invalid. The principle of severability of the Statute dictates against such a course. What has to be struck down is the provision which acts as discriminatory. It is immaterial for this purpose as to on what account the said provision becomes discriminatory. It is therefore not possible, in the present case, to sever the said second proviso and

strike it down, and save the rest of the Rule. Since the second proviso by itself cannot stand alone and since it is the rest of the rule which has become discriminatory, the whole of the Rule will have to be struck down. It is for this reason that we are constrained to reject Mr. Gumaste's argument, and to strike down the whole of the said Rule 7. If the intention of the Bar Council is that the Bar enacted under the said Rule should apply to all Judges, nothing prevents it from enacting a fresh Rule avoiding discrimination.

8. In the result, on this short ground, we allow the petition and strike down the whole of the said Rule 7 as being violative of Article 14 of the Constitution. The Rule is made absolute accordingly with costs.

9. In view of the above order in the main petition, there will be no orders in Civil Application No. 2623 of 1978.

10. Petition allowed.