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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE P.PONGIAPPAN

W.P. No. 10926 of 2021
and
W.M.P. No. 11559 of 2021

P.Krishnan

... Petitioner

Vs.

1. The Bar Council of Tamil Nadu
and Puducherry
Rep. by its Registrar
High Court Building
Chennai - 600 104.

2. K.E.Dayalan

... Respondents

PRAYER : Petition filed under Section Article 226 of the Constitution of India, praying for issuance of Writ of Certiorarified Mandamus, calling for the records relating to the impugned order dated 10.03.2021 on the file of the First Respondent in transferring the Complaint in D.C.C. No. 3 of 2020 to the Learned Disciplinary Committee No.X, Chennai from Learned Disciplinary Committee No. VI, Chennai, quash the same and consequently direct the Learned Disciplinary Committee No. VI, Chennai to dispose of the complaint in D.C.C. No. 3 of 2020 within the time frame to be fixed by this Hon'ble Court.

For Petitioner : Mr. V.Srikanth

For Respondents : Mr. C.K.Chandrasekaran (For R1)
: Mr. N.S.Sivakumar (For R2)

ORDER

(Order of the Court was passed by N.KIRUBAKARAN, J)
The matter was heard through 'Video Conference'.

"Whether Lawyers' body can itself violate the Law
enacted by the Parliament?"

The above question arises in this matter, as the Petitioner



alleges that the Advocates Act, 1961 (hereinafter referred to as "the Act" for short) enacted by the Parliament has been violated by the Chairman assuming certain powers, which have not been vested with him as per the Act.

2. The Petitioner is an Advocate practising after getting enrolled before the Bar Council of Tamil Nadu in the year 1990. A complaint was given by the Second Respondent, alleging professional misconduct against the Petitioner, as he had engaged the Petitioner for rendering professional services for his case. The complaint in Complaint No.34 of 2018 was taken on file, on 20.12.2018, by the First Respondent. The First Respondent /Bar Council issued a notice, for which the Petitioner gave a reply on 08.05.2019. Considering the allegations made in the reply, the First Respondent passed Resolution No. 436 of 2019 dated 14.12.2019 for taking the Complaint on file in D.C.C. No.3 of 2020 and referred to Learned Disciplinary Committee No.VI.

3. After issuance of summons, the Petitioner appeared before the Committee and filed his Statement of defence, along with necessary documents. The Committee had framed three charges in D.C.C. No. 3 of 2020 on 28.11.2020. After framing of charges, the Second Respondent has to file a Proof-Affidavit. However, the Second Respondent has been dragging on the matter till date, in spite of being given sufficient opportunities.

4. When things stand so, the Petitioner received a fresh notice on 18.03.2021, from the First Respondent / Bar Council, for his appearance on 10.04.2021. On appearance only, the Petitioner came to know that D.C.C. No.3 of 2020 was already transferred to Learned Disciplinary Committee No.X, without any reason or notice to the Petitioner. Aggrieved by that only, the present Writ Petition has been filed, challenging the proceedings of the First Respondent / Bar Council dated 10.03.2021, transferring the Complaint in D.C.C. No.3 of 2020 from Learned Disciplinary Committee VI, Chennai to Learned Disciplinary Committee No.X, Chennai.

5. Heard Mr. V.Srikanth, Learned Counsel appearing for the Petitioner and Mr. C.K.Chandrasekaran, Learned counsel appearing for the First Respondent, and perused the materials placed on record.

6. As it is evident, there is no dispute with regard to the facts of the case. It is admitted by all parties that the Second Respondent filed the Complaint against the Petitioner / Advocate, for alleged professional misconduct. The said complaint was filed before the First Respondent /Bar Council on 20.12.2018. After getting a reply from the Petitioner on 08.05.2019, the First Respondent passed Resolution No.436 of 2019, alleging that the Complainant /Second Respondent has made



out a prima facie case against the Petitioner, and referred the matter in D.C.C. No.3 of 2020 to the Learned Disciplinary Committee No.VI. As stated earlier, after filing the Statement of defence by the Petitioner, charges were framed on 28.11.2020. Thereafter, the Second Respondent has to file a Proof-Affidavit as per the procedure. As stated in the Petition, in spite of giving opportunities of six hearings, Proof-Affidavit of the Second Respondent has not been filed till date.

7. While so, without notice to the Petitioner, the First Respondent /Bar Council transferred the case /proceedings from the Learned Disciplinary Committee VI, Chennai to Learned Disciplinary Committee X, Chennai vide order dated 10.03.2021.

8. According to Mr. V.Srinkanth, Learned Counsel for the Petitioner, the impugned order has to be set aside, as it has been passed

- 1.without notice to the Petitioner
2. for lacking of reason to be stated in the impugned order and
3. for violation of Section 35 of the Advocates Act.

The aforesaid contentions are forced.

9. A perusal of the impugned order would show that no reasons have been given as to why the pending proceedings have to be transferred. It is stated by the First Respondent /Bar Council that an interim application was filed by the Complainant in I.A. on 02.03.2021, which was received by the office on 03.03.2021, seeking to transfer the proceedings in D.C.C. No. 3 of 2020 from Disciplinary Committee No. VI to Disciplinary Committee No.X. If such an I.A. had been filed, the Petitioner should have been put on notice in that I.A. and the Petitioner should have been heard, based on the allegations made in that I.A., filed by the Second Respondent /Complainant. No such procedure has been followed. In the absence of issuance of notice, principles of natural justice have been violated. On that score alone, the transfer order is liable to be set aside.

10. It has been pleaded in paragraph No.6 of the Counter-Affidavit that on 10.03.2021, the Chairman, as head of the Bar Council, upon noticing the apprehension raised by the Complainant invoking powers under section 35(1) of the Act, transferred the proceedings in D.C.C. No. 3 of 2020 from the Learned Disciplinary Committee VI to Learned Disciplinary Committee X. The said contention is liable to be rejected for the reason that if serious complaints were made against the Committee, the Chairman, as head of the Bar Council, cannot transfer the said complaint without issuing notice under Section 35(1) of the Act. Section 35 of the Act mandates only the Bar Council to consider the complaint and therefore 'the Bar Council' only means the general council consisting of elected



Bar Council members and Advocate General and not the Chairman alone. Section 35 of the Act reads as follows:-

“CONDUCT OF ADVOCATES

35. Punishment of advocates for misconduct.-(1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.

3[(1A) The State Bar Council may, either of its own motion or on application made to it by any person interested, withdraw a proceeding pending before its disciplinary committee and direct the inquiry to be made by any other disciplinary committee of that State Bar Council.]

(2) The disciplinary committee of a State Bar Council shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State.

(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely:-

- (a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;
- (b) reprimand the advocate;
- (c) suspend the advocate from practice for such period as it may deem fit;
- (d) remove the name of the advocate from the State roll of advocates.

(4) Where an advocate is suspended from practice under clause (c) of sub-section (3), he shall, during the period of suspension, be debarred from practising in any court or before any authority or person in India.

(5) Where any notice is issued to the Advocate-General under sub-section (2), the Advocate-General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf.

5[Explanation.-In this section, 3[section 37 and section 38], the expressions “Advocate-General” and



"Advocate-General of the State" shall, in relation to the Union territory of Delhi, mean the Additional Solicitor General of India.] "

From the above, it is clear that the phraseology "State Bar Council" would mean the elected members of the State Bar Council and not the Chairman alone. It is relevant to read Section 2(m) of the Act, which defines 'State Bar Council' as one constituted under Section 3 of the Act. Section 3 of the Act reads as follows:-

"3. State Bar Councils.-(1) There shall be a Bar Council-

(a) for each of the States of Andhra Pradesh, Bihar, Gujarat, 6[Jammu and Kashmir,] 7[Jharkhand], 8 [Madhya Pradesh and Chhattisgarh], 9***, 10***, 11 [Karnataka], Orissa, Rajasthan 12[Uttar Pradesh, 13 [Uttaranchal, Meghalaya, Manipur and Tripura], to be known as the Bar Council of that State;

1[(b) for the States of Arunachal Pradesh, Assam, Mizoram and Nagaland to be known as the Bar Council of Arunachal Pradesh, Assam, Mizoram and Nagaland;]

(c) for the State of Kerala and the Union territory of 2[Lakshadweep] to be known as the Bar Council of Kerala;

3[(cc) for the 4[State of Tamil Nadu] and the Union territory of Pondicherry to be known as the Bar Council of Madras;]

5[(ccc) for the States of Maharashtra and Goa and the Union territories of Dadra and Nagar Haveli and and Daman and Diu, to be known as the Bar Council of Maharashtra and Goa;]

6[(d) for the States of Punjab and Haryana and the Union territory of Chandigarh, to be known as the Bar Council of Punjab and Haryana;

(dd) for the State of Himachal Pradesh, to be known as the Bar Council of Himachal Pradesh;]

(e) for the State of West Bengal and the 7[Union territory of Andaman and Nicobar Islands], to be known as the Bar Council of West Bengal; and

(f) for the Union territory of Delhi, to be known as the Bar Council of Delhi.

(2) A State Bar Council shall consist of the following members, namely:-

(a) in the case of the State Bar Council of Delhi, the Additional Solicitor-General of India, ex officio; 8[9[in the case of the State Bar Councils of Assam, Arunachal Pradesh, Mizoram and Nagaland, the Advocate-General of each of the States of Assam, Arunachal Pradesh , Mizoram and Nagaland] ex



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officio; in the case of the State Bar Council of Punjab and Haryana, the Advocate-General of each of the States of Punjab and Haryana, ex officio;] and in the case of any other State Bar Council, the Advocate-General of the State, ex officio;

10[(b) in the case of a State Bar Council with an electorate not exceeding five thousand, fifteen members, in the case of a State Bar Council with an electorate exceeding five thousand but not exceeding ten thousand, twenty members, and in the case of a State Bar Council with an electorate exceeding ten thousand, twenty-five members, elected in accordance with the system of proportional representation by means of the single transferable vote from amongst advocates on the electoral roll of the State Bar Council:]

11[Provided that as nearly as possible one-half of such elected members shall, subject to any rules that may be made in this behalf by the Bar Council of India, be persons who have for at least ten years been advocates on a State roll, and in computing the said period of ten years in relation to any such person, there shall be included any period during which the person has been an advocate enrolled under the Indian Bar Councils Act, 1926 (38 of 1926).]

1[(3) There shall be a Chairman and a Vice-Chairman of each State Bar Council elected by the Council in such manner as may be prescribed.

(3A) Every person holding office as Chairman or as Vice-Chairman of any State Bar Council immediately before the commencement of the Advocates (Amendment) Act, 1977 (38 of 1977), shall, on such commencement, cease to hold office as Chairman or Vice-Chairman, as the case may be:

Provided that every such person shall continue to carry on the duties of his office until the Chairman or the Vice-Chairman, as the case may be, of each State Bar Council, elected after the commencement of the Advocates (Amendment) Act, 1977 (38 of 1977), assumes charges of the office.]

1[(4) An advocate shall be disqualified from voting at an election under sub-section (2) or for being chosen as, and for being, a member of a State Bar Council, unless he possesses such qualifications or satisfies such conditions as may be prescribed in this behalf by the Bar Council of India, and subject to any such rules that may be made, an electoral roll shall be prepared and revised from time to time by each State Bar Council.

(5) Nothing in the proviso to sub-section (2) shall



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affect the term of office of any member elected before the commencement of the Advocates (Amendment) Act, 1964 (21 of 1964), but every election after such commencement shall be held in accordance with the provisions of the rules made by the Bar Council of India to give effect to the said proviso.]

2[(6) Nothing in clause (b) of sub-section (2) shall affect the representation of elected members in any State Bar Council as constituted immediately before the commencement of the Advocates (Amendment) Act, 1973 (60 of 1973), until that State Bar Council is reconstituted in accordance with the provisions of this Act.] "

The above Section 3(2)(b) of the Act refers to a State Bar Council consisting of 25 elected members, First Respondent comes under that category. Therefore, General Body of the Bar Council alone is entitled to take a decision with regard to the transfer of case and not the Chairman alone. When the Complaint is taken on file, the said complaint has to be placed before the Disciplinary Committee, by virtue of the decision of the General Body of the Bar Council, thereby the statutory adjudication proceedings are set in motion. When a decision has been taken by the General Body of the Bar Council, the Chairman, who is nothing but the head of the State Bar Council cannot assume power which is not available and transfer the case from one Committee to another Committee, as it is a decision to be taken by the General Council of the State.

11. When a statutory adjudication is under process by way of disciplinary proceedings before a disciplinary committee, by virtue of an administrative order, that too by a non-speaking order, the Chairman has got no power to transfer the case. The impugned order has to fail, for the reason as it is a non-speaking order. The noting made by the chairman on 10.03.2021 is extracted as follows:-

"Place before the DC X

(signature)

10.03.2021"

12. When Section 35 of the Act states that the State Bar Council means the entire elected members of the Bar Council and not the Chairman alone, the First Respondent / Bar Council relying upon the Resolution passed by the Bar Council dated 06.03.1994, would contend that the Chairman has got the power to transfer the proceedings. The said Resolution as found in the Counter Affidavit (page No.10) reads as follows:

"Resolution No. 85/1994 dated 06.03.1994:-

Resolved to dispense with the procedure hitherto



obtaining in the Bar Council office of calling comments from the advocate in every complaint received by the office.

Resolved further to authorize the Chairman, Bar Council to scrutinize every complaint received by the office against advocates and decide whether or not comments are to be called for from the advocate. In case the Chairman decides to call for comments from the advocates concerned the procedure obtaining in the office may be followed. In the alternative of the Chairman decides not to call for comments from the advocates the office is directed to put up the complaint with the Chairman's note in the form of the gist before the meeting of the Bar Council for its consideration and decision."

A perusal of the said resolution would reveal that it is contrary to the Statute, viz., Advocates Act 1961, which contemplates even elected members of the Bar Council cannot pass such a resolution contrary to the Act, authorising an individual to discharge the statutory powers and it would deprecate the responsibility to be discharged by the Bar Council as a whole. Whims and fancies of an individual alone would get prominence and an individual cannot be clothed with the powers of the Bar Council, as it is a collective responsibility. The resolution dated 06.03.1994 gave enormous and unchanneled power to an individual, which is capable of being misused.

13. The procedure contemplated and followed by the Bar Council authoring the Chairman of the Bar Council to take a decision with regard to calling for comments from an individual Advocate, in the event of receiving complaint against an Advocate, itself is against the Statute. If at all, the entire Bar Council alone could take a decision with regard to the complaint as to whether comments to be called for from Advocates concerned or not, based on the complaint given by parties, and an opportunity to be given or not. The resolution is nothing but in the nature of administrative instructions and the said resolution cannot supplant the law. The First Respondent /Bar Council resolution dated 06.03.1994 cannot be used to circumvent the Central Act. The administrative convenience cannot be an excuse to avoid compliance of the central Statute. Therefore, Resolution No.85 of 1994 dated 06.03.1994 itself is suo motu quashed, as it is contrary to the Act.

14. Even assuming for a moment that the State Bar Council Chairman has been authorised properly by a Resolution dated 06.03.1994, it could be, at best, used for discharging administrative functions and the said Resolution cannot be used to interfere with the statutory functions like the one contemplated under section 35 of the Act.



15. Any decision which has been taken contrary to Section 35 of the Act is vitiated. It is well settled law that even Bar Council cannot supplant the law and it could, at best, supplement gaps in enactments and Rules. The following decisions would support the above proposition.

- (1) State of U.P. v. Daulat Ram Gupta reported in [(2002) 4 SCC 98];
- (2) S.K. Kacker (Dr) v. All India Institute of Medical Sciences reported in [(1996) 10 SCC 734]
- (3) Virender Singh Hooda v. State of Haryana reported in [(2004) 12 SCC 588] held that the executive instructions contrary to the Act and rules are valid. paragraph 24 of the order is extracted as follows:-

"24. The aforesaid circular is general in nature and does not refer to any particular service or service rules. In law if an executive instruction is contrary to statutory rules, the rules will prevail and not the executive instructions. Further reading of the aforesaid circular shows that it is applicable to pre-existing vacancies."

Based on the above decisions also, the impugned order as well as the Resolution dated 06.03.1994, are liable to be quashed.

16. It is stated in paragraph no.9 of the Counter-Affidavit that the Second Respondent expressed difficulties in appearing before the Disciplinary Committee No.VI, Chennai and therefore, considering the age of the Second Respondent, who is a senior citizen and his health issues, the case has been transferred. As far as the Petitioner is concerned, he was not put on notice and he was not aware of the allegations made. The plea made by the First Respondent that no prejudice would be caused to the Petitioner by the transfer of case, cannot be a ground to sustain the impugned order. That apart, the reasons for transfer have been given only by way of Counter-Affidavit, whereas, the transfer order is a non-speaking order. It is well settled law that the impugned order cannot be improved by way of filing Counter-Affidavit, as held by the Hon'ble Supreme Court in Mohinder Singh Gill -vs- The Chief Election Commissioner, New Delhi reported in [1978 AIR 851]. Therefore, the said contention of the First Respondent is rejected. When such reason is absent in the impugned order, the First Respondent / Bar Council cannot put forth such a plea for the first time. It is held by the Apex Court in State of MP -vs- Narasinghdas reported in [AIR 1969 SC 115], State of Gujarat -vs- Patel Raghavnath reported in [AIR 1964 SC 1297] that if no reasons are given in the order, the order could be treated as void. Hence, the transfer order passed in this case is void.



17. A perusal of the rules framed by the Bar Council of Tamil Nadu dated 17.02.1985 as approved by the Bar council of India clearly disclose that the powers to transfer a case from one Disciplinary Committee to another Disciplinary Committee is nowhere contemplated. If at all, the Chairman could exercise General Control and supervision to over see the administration of the Bar Council, and the transfer of a case from one Disciplinary Committee to another Disciplinary Committee is not coming under the exercise of General Control and supervision.

18. Moreover, the Bar Council has to act only through the Secretary, as per Rule 55 of the Advocates Act. The Secretary is the Registrar of the Disciplinary proceedings and he has to execute all the General Council's decision and he is the effective controller of the internal administration. Therefore, the rules clearly prove, the Secretary is the administrative head entrusted with powers to perform all acts on behalf of the Bar Council.

19. The Secretary was not given any role even for numbering the I.A. filed by the Second Respondent. Merely receiving the complaint in I.A. from the second Respondent/complainant and suo motu transferring the proceedings in D.C.C. No. 3 of 2020 from the Learned Disciplinary Committee VI to Learned Disciplinary Committee X, without notice to the party is unknown to law, apart from being violative of principles of natural justice. Therefore, the impugned order is set aside.

20. In the I.A. filed by the Second Respondent, without even numbering, without notice to the party to the disciplinary proceedings viz., the Petitioner, without disclosing any reason for transfer, the Chairman has passed the said order violating all the principles of law. Therefore, the transfer order is set aside and for the reasons stated above, this Court holds that,

- (1) State Bar Council, as mentioned in Section 35 of the Advocate Act, would mean only the elected body.
- (2) The definition of State Bar Council, as defined in Section 2(m) and as employed in Section 35 of the Advocate Act, would refer the elected members and the Advocate General, as stated in Section 3 (2) (b) of the Advocate Act.
- (3) At the risk of repetition, it is made clear that State Bar Council means the elected members of the entire Bar Council and the Advocate General and not any individual.
- (4) The exercise of powers under the Advocates Act could be carried out only by the Bar Council viz., the collective body of elected members.



(5) If the chairman has got any power, it is only an administrative control as per the Resolution dated 17.02.1985, as approved by the Bar Council of India.

22.(a) The transfer order dated 10.03.2021 is set aside as non speaking order, which has been passed without notice to the Petitioner, violating the principles of natural justice.

(b) The State Bar Council shall take a decision collectively after discussion as to whether comments have to be obtained from an individual Advocate based on the complaint received against the individual Advocate and thereafter, follow the procedure as per law, as to the commencement of disciplinary proceedings against an individual Advocate and it should only be done by the General Council.

(c) The Resolution dated 06.03.1994 not in accordance with the Advocates Act and is quashed.

(d) I.A. filed by the Second Respondent making allegations against the Disciplinary Committee VI shall be numbered and after issuing notice to the Petitioner, the General Council shall decide about the transfer.

(e) The power of transfer from one Committee to another Committee shall lie only with the General Council alone and not with any individual and the said procedure should be followed scrupulously, as violation of the same would amount to contempt of Court, for which, the aggrieved party could initiate contempt proceedings before the Court.

23. With the above, the writ Petition is allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

Maya

To

1. The Registrar,
Bar Council of Tamil Nadu
and Puducherry
High Court Building
Chennai - 600 104.



2. The Learned Disciplinary Committee No.X, Chennai

3. The Learned Disciplinary Committee No. VI, Chennai

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JP-II (CO)
CT (23/09/2021)