

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.**

WRIT PETITION (L) NO.1827 OF 2012

Brihanmumbai Mahanagarpalika & Anr. ...Petitioners.
Vs.
The Secretary, Bar Council of Maharashtra
& Goa & Anr. ...Respondents.

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Dr.Milind Sathe, Senior Advocate with Mr.Jernold J.Xavuer and Mr.H.C.
Pimple for the Petitioners.
Mr.Atul G.Damle for Respondent Nos.1 and 2.

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**CORAM : DR.D.Y.CHANDRACHUD,
V.M. KANADE AND
A.A. SAYED, JJJ.**

October 17, 2012.

JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

In exercise of the powers conferred by Section 49(1)(ah) of the Advocates Act, 1961, the Bar Council of India framed Rule 49 under which there is a prohibition on an Advocate being a full time salaried employee of any person, government, firm, corporation or concern, so long as he or she continues to practise. Upon taking such employment, an Advocate is required to intimate that fact to the Bar Council on whose rolls the name appears. Thereupon, such a person would cease to practise as an Advocate so long as he continues in employment. An exception was engrafted into Rule 49 as it was originally framed in regard to a Law Officer of the Central Government or the Government of a State or of any public corporation or body constituted by the State who is entitled to be enrolled under the rules of the State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) despite being a full time salaried employee. The Bar Council of Maharashtra and

Goa framed rules under which persons who are Law Officers of the Central Government or the Government of a State were excepted from the prohibition on an Advocate accepting full time salaried employment. On 22 June 2001, the Bar Council of India resolved to delete the exception carved out in Rule 49. Following that, the State Bar Council passed a resolution on 21 July 2002 deleting the rule allowing Law Officers to appear as Advocates, though they were in full time and salaried employment. In these proceedings, the right to act, appear and plead in courts is sought to be asserted on behalf of municipal advocates in the full time salaried employment of the Municipal Corporation of Greater Mumbai.

2. These proceedings under Article 226 of the Constitution have been instituted in order to impugn the validity of (i) The resolution of the Bar Council of India dated 22 June 2001 amending Rule 49; (ii) A clarification issued by the Bar Council of India in its resolution dated 22/25 December 2001; and (iii) The resolution of the Bar Council of Maharashtra and Goa dated 21 July 2002. There is a consequential challenge to a communication addressed by the Chairperson of the State Bar Council on 12 October 2007 and to a communication dated 7 June 2012 of the Bar Council of India rejecting a representation made by a Law Officer of the Municipal Corporation of Greater Mumbai.

3. The Petitioners before the Court are the Municipal Corporation of Greater Mumbai and its Principal Law Officer. The Municipal Corporation has a full fledged legal department consisting of full time salaried Advocates, who

attend to and appear in legal proceedings in various Courts and Tribunals, including before this Court. The Advocates appointed by the Municipal Corporation are designated as Law Officer, Joint Law Officer, Deputy Law Officer, Assistant Law Officer and Junior Law Officer. The powers and duties of the officers and employees of the Municipal Corporation are prescribed in a manual an extract of which has been placed on the record. The Law Officer is the administrative head and over all incharge of the Legal Department. His duties are to attend to the entire administrative work and to supervise the day-to-day work of the Department. The incumbent has to attend to important matters before this Court and the Supreme Court, hold conference with Counsel, supervise and guide the other Law Officers, attend meetings with the Municipal Commissioner and the Additional Municipal Commissioner and to take all necessary steps to defend the matters filed against the Corporation. Deputy Law Officers are sectional heads in the Legal Department and function under the guidance and supervision of the Law Officer. The work of the Deputy Law Officers entails appearing before the Court and drafting, pleading matters before the Court, holding conferences with Counsel, supervising Assistant Law Officers, Junior Law Officers, Legal Assistants and the Court Superintendent of his Section and attending meetings with the Municipal Commissioner, Additional Municipal Commissioners, Deputy Municipal Commissioners and other Heads of Departments regarding pending legal proceedings. The Deputy Law Officer is also required to give legal opinions to various Departments of the Corporation as allocated by the Law Officer. There is a Deputy Law Officer whose functions relate to conveyancing. Assistant Law Officers work under the supervision of the

Deputy Law Officers in various Sections of the Legal Department. Assistant Law Officers are comprised in Grade I and Grade II. Besides attending to Court matters and appearing in Court, the work of Assistant Law Officers entails instructing subordinates, examining judgments and preferring appeals and attending conferences with Counsel and meetings with the Deputy Municipal Commissioners and other Municipal Officers. An Assistant Law Officer is required to perform any other work which is assigned by his or her superiors. The post of Junior Law Officer, the Court is informed at the hearing, has been abolished.

4. In or about 1978, municipal advocates were designated as Municipal Prosecutors and Advocates and Senior Municipal Prosecutors and Advocates. The Bar Council of Maharashtra and Goa addressed a communication to the Municipal Commissioner recording that it was not satisfied that the present designation of Municipal Advocates amounted to designation as Law Officer within the meaning of the rules framed by the State Bar Council and by the Bar Council of India. The Bar Council of Maharashtra and Goa granted an exemption for a period of six months with a view to prevent any hardship to the municipal administration in order that during that period steps may be taken to designate persons engaged by it as Law Officers. On 4 July 1978, the State Bar Council accepted the proposal made by the Municipal Corporation to designate Municipal Advocates as Law Officers "with appropriate distinguishing epithets". On 9 November 1978, the then Municipal Commissioner addressed a communication to the Chairman of the State Bar Council stating that Senior Municipal Prosecutors and

Advocates were redesignated as Deputy Law Officers, Municipal Prosecutors and Advocates as Assistant Law Officers and Assistant Municipal Prosecutors and Advocates as Junior Law Officers. The Petitioners aver that the Municipal Corporation appoints Advocates with a minimum of three and five years' practice as Junior Law Officer and Assistant Law Officer respectively which are entry level posts. Promotions are granted to the posts of Deputy Law Officer, Joint Law Officer and Law Officer on seniority-cum-merit basis.

Advocates Act, 1961 and the rules:

5. Section 24 of the Advocates Act, 1961 provides for persons who may be admitted as Advocates on a State roll. Under sub-section (1) of Section 24, a person shall be qualified to be admitted as an Advocate on a State roll, if he fulfills certain conditions namely, of being a citizen of India, completing twenty-one years of age, obtaining a degree in law of the nature specified and fulfilling such other conditions as may be specified in the rules made by the State Bar Council under the Chapter. Section 28 confers upon the State Bar Councils, the power to make rules to carry out the purposes of the Chapter. Sub-section (2) of Section 28 stipulates that without prejudice to the generality of the power, the rules may provide for "the conditions subject to which a person may be admitted as an Advocate on any such roll".¹ The Bar Council of India is entrusted with a rule making power under Section 49(1) for discharging its functions under the Act. Among other things, clause (ah) provides that the rules may prescribe "the conditions subject to which an Advocate shall have the right to practise and the circumstances under which a

¹ Section 28(2)(d)

person shall be deemed to practise as an Advocate in a court”.

6. Rule 49 of the Rules framed by the Bar Council of India, as originally made, provided as follows:

“49. An Advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise and shall, on taking up any such employment intimate the fact to the Bar Council on whose rolls his name appears, and shall thereupon cease to practise as an Advocate so long as he continues in such employment.

Nothing in this rule shall apply to a Law Officer of the Central Government or the Government of a State or of any public Corporation or body constituted by the State who is entitled to be enrolled under the rules of his State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full time salaried employee.

Law Officer for the purpose of this Rule means a person who is so designated by the terms of his appointment and who by the said terms, is required to act and/or plead in Courts on behalf of his employer.”

The Bar Council of Maharashtra and Goa had framed rules under Section 28(2)(d) read with Section 24(1)(e) which inter alia provided as follows:

“1. A person who is otherwise qualified to be admitted as an Advocate but is either in full or part-time service or employment or is engaged in any trade, business or profession shall not be admitted as an Advocate:-

Provided however that this rule shall not apply to -

(i) Any person who is a Law Officer of the Central Government or the Government of a State;

(ii) Any person who is an Articled clerk of an Attorney;

(iii) Any person who is an assistant to an Advocate or to an attorney who is an Advocate;

(iv) Any person who is in part-time service as a Professor,

Lecturer or Teacher-in-law;

(v) Any person who by virtue of being a member of a joint Hindu family has an interest in a joint Hindu family business, provided he does not take part in the management thereof; and

(vi) Any other person or class of persons as the Bar Council may from time to time exempt.

2. Every person applying to be admitted as an Advocate shall in his application make a declaration that he is not in full or part-time service or employment and that he is not engaged in any trade, business or profession. But in case he is in such full or part-time service or employment or is engaged in any trade, business or profession, he shall in the declaration disclose full particulars of his service, employment or engagement. He shall also undertake that if, after his admission as an Advocate, he accepts full or part-time service or employment or is engaged in any trade, business or profession disqualifying him from admission he shall forthwith inform the Bar Council of such service or employment or engagement and shall cease to practise as an Advocate.”

The decisions of the Supreme Court:

7. Rule 49 framed by the Bar Council of India came up initially for consideration before a bench of three learned judges of the Supreme Court in **Sushma Suri vs. Govt. of National Capital Territory of Delhi.**² The Appellant before the Supreme Court was an Advocate on record and was appointed as an Assistant Government Advocate, following which she was promoted to the post of Additional Government Advocate in the Supreme Court. She had applied in response to an advertisement for recruitment to the Delhi Higher Judicial Service. Rule 7 of the Delhi Higher Judicial Service Rules, 1970 stipulates two modes of recruitment, the first being from members of the Delhi Judicial Service who have completed not less than ten years of service in that service and the second being recruitment from the

2 (1999) 1 SCC 330

Bar. Article 233(2) of the Constitution provides that a person not already in service is eligible for appointment as a District Judge if he has been for not less than seven years an Advocate or a pleader and is recommended for the purposes by the High Court. The Appellant before the Supreme Court moved the Delhi High Court since she was not called for an interview. The High Court dismissed the Petition holding that she was not entitled to be considered for appointment. The Supreme Court held that since the expression "Advocate or pleader" was used in Article 233(2), to ascertain its meaning reference would be made to the Advocates Act and the Rules framed by the Bar Council. After adverting to the provisions of Rule 49 framed by the Bar Council of India, the Supreme Court held that for the purposes of the Advocates Act and the Rules framed thereunder, a Law Officer (Public Prosecutor or Government Counsel) will continue to be an Advocate. The Supreme Court held as follows:

"Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, **an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply.** An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does – whether he acts or pleads in court on behalf of his employer or otherwise.

If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate."³ (emphasis supplied)

Rule 49 as it stood when the judgment in **Sushma Suri's** case was delivered included both the prohibition and the exception in the case of Law Officers of a stated description. To be a Law Officer, two tests were laid down in the third para of Rule 49: (i) designation as a Law Officer by the terms of appointment; and (ii) being required by the terms of appointment to act and/or plead on behalf of the employer in Courts.

8. In **Satish Kumar Sharma vs. Bar Council of H.P.**,⁴ the Appellant was appointed as an Assistant (Legal) by the State Electricity Board of Himachal Pradesh and was redesignated as Law Officer, Grade II. When his application for seeking enrollment was submitted, the Bar Council requested the Electricity Board to first designate him as Law Officer. The Appellant was thereupon redesignated and was issued a certificate of enrollment. A notice to show cause was issued to the Appellant as to why his enrollment should not be withdrawn and a resolution to that effect was eventually passed. The High Court dismissed the petition under Article 226 of the Constitution. The Supreme Court explained the underlying basis of the prohibition contained in the substantive part of Rule 49 of the Rules framed by the Bar

³ At para 10 pages 336 & 337

⁴ (2001) 2 SCC 365

Council of India thus:

“As is clear from the rules contained in Chapter II of the Rules an advocate has a duty to the court, duty to the client, duty to the opponent and duty to colleagues unlike a full time salaried employee whose duties are specific and confined to his employment. Rule 49 has a specific purpose to serve when it states that an advocate shall not be a full time salaried employee of any person, Government, firm corporation or concern. As already noticed above, Section 24(1) specifically states that a person in addition to satisfying other conditions has also to satisfy the provisions of the Act and the Rules. In other words, the Rules made by the Bar Council of India are to be satisfied. Mere non-framing of rules by a State Bar Council under Section 28(2)(d) read with Section 24(1)(e) of the Act cannot dispense with obedience to Rule 49.

...

...the provisions of the Act and the Rules made thereunder inter alia aimed to achieve the same ought to be given effect to in their true letter and spirit to maintain clean and efficient Bar in the country to serve the cause of justice which again is a noble one.”⁵

The Supreme Court relied upon its earlier decision in **Dr.Haniraj L.Chulani vs. Bar Council of Maharashtra and Goa**,⁶ in which the Court had rejected a plea by medical practitioner seeking enrollment as an Advocate after obtaining a law degree. The Supreme Court had taken the view that the simultaneous practice of the medical profession with the legal profession would result in a conflict of loyalty. In **Satish Kumar Sharma's** case, the Supreme Court observed that under his conditions of service, the Appellant :

- (i) Was a full time salaried employee on a fixed scale of pay;
- (ii) Was governed by conditions of service applicable to the State Electricity Board, including disciplinary proceedings;
- (iii) In his duties was not exclusively or mostly confined to acting and pleading in Courts; and
- (iv) Had received promotions from time to time on the recommendation of the Departmental

⁵ At paras 9 and 10 pages 373 and 374

⁶ (1996) 3 SCC 342

Promotion Committee. Explaining the import of Rule 49, the Supreme Court held as follows:

“(i) the main and opening paragraph of the rule prohibits or bars an advocate from being a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practice and an obligation is cast on an advocate who takes up any such employment to intimate the fact to the Bar Council concerned and he shall cease to practice so long as he continues in such employment;

(ii) para 2 of the rule is in the nature of an exception to the general rule contained in main and opening paragraph of it. **The bar created in para 1 will not be applicable to Law Officers of the Central Government or a State or any public corporation or body constituted by a statute, if they are given entitlement under the rules of their State Bar Council. To put it in other way, this provision is an enabling provision. If in the rules of any State Bar Council, a provision is made entitling Law Officers of the Government or authorities mentioned above, the bar contained in Rule 49 shall not apply to such Law Officers despite they being full time salaried employees;**

(iii) not every Law Officer but only a person who is designated as Law Officer by the terms of his appointment and who by the said terms is required to act and/or plead in courts on behalf of his employer can avail the benefit of the exception contained in para 2 of Rule 49.” (emphasis supplied)

No rules were framed by the State Bar Council of Himachal Pradesh entitling a Law Officer appointed as a full time salaried employee to enroll as an Advocate. The Supreme Court held that if there were no rules in that regard, there would be no entitlement. The Court observed that the position of the Appellant as a full time salaried employee of the State Electricity Board would give rise to a conflict of duties and interest, particularly having regard to the fact that he was amenable to the disciplinary jurisdiction of his own employer as well as that of the Bar Council. The earlier judgment in **Sushma Suri** was distinguished on the ground that on the facts relating to the employment of the

Appellant as well as in the absence of the rules made by the State Bar Council entitling a Law Officer to enroll as an Advocate despite being a full time salaried employee, the Appellant was not entitled to enrollment as an Advocate. In other words, the Supreme Court noted that a positive requirement was contained in paragraph 2 of Rule 49 that unless a State Bar Council has framed rules entitling Law Officers to enroll as an Advocate even if they are full time employees, they are not entitled to enrollment.

Amendments to the Rules:

9. The Bar Council of India passed a resolution at a meeting held on 22 June 2001, noting that after considering the views received from the State Bar Councils, it was resolved that the second and third paragraphs of rule 49 providing for the enrollment of Law Officers stand deleted. The following resolution was passed:

“RESOLVED that the Second and Third paras of Rule 49, Section VII, Chapter II, Part VI of the Bar Council of India Rules providing for enrollment of 'Law Officers' be and is hereby deleted as the responses received from the majority of the Bar Councils are in favour of deletion of the Rule.”

This was published in the Gazette of India, dated 13 October 2001.

10. On 22/25 December 2001, the Bar Council of India passed a clarificatory resolution in the following terms:

“RESOLVED and further clarified that as the Supreme Court has struck down the appearance by Law Officers in Court even on behalf of their employers the Judgment will operate in the case of all Law Officers. Even if they were allowed to appear on behalf of their employers, all such Law Officers who are till now appearing on behalf of their employers shall not be allowed to appear as advocates. The State Bar Council should also ensure that those

Law Officers who have been allowed to practice on behalf of their employers will cease to practice. It is made clear that those Law Officers who after joining services obtained enrollment by reason of the enabling provision cannot practice even on behalf of their employers.”⁷

At a meeting held on 21 July 2002, the Bar Council of Maharashtra and Goa acted on the resolution of the Bar Council of India and passed the following resolution:

“In furtherance of the Judgment of the Hon'ble Supreme Court and the directions issued by the Bar Council of India, this House RESOLVED that the Office should communicate to all the Bar Associations and District Courts about the Implementation and strict compliance of those directions and copies of this resolution as well as Supreme Court citation also be sent.

Explanation : In view of the above Resolutions, the proviso to Rule 1 of the Bar Council of Maharashtra and Goa framed under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961, allowing Law Officers to appear as Advocates, is deleted.”⁸ (emphasis supplied)

11. On 12 October 2007, the Bar Council of Maharashtra and Goa issued a communication to the Municipal Commissioner and to the Law Officer recording that it was reported “that day in and day out municipal advocates are appearing in the court thereby committing contempt of court” and that in spite of sufficient opportunity, they are continuing to appear. The Municipal Commissioner was, therefore, called upon to make suitable arrangement so that full time Advocates working in the office of the Municipal Commissioner may not appear in Courts.

7 B.C.I. Resolution No.156 of 2001

8 B.C.I. Resolution No.181 of 2002

12. A Petition under Article 226 of the Constitution was instituted before this Court.⁹ The Bar Council of India stated before the Court that the representation submitted by the Petitioner would be decided within a period of one year. As for the arrangement to be made during that period, the Court observed as follows:

“We have been informed that the present practice of permitting employees of the Corporation to appear in Court is in force right from the year 1961. Though it has been discontinued in the year 2002, as a matter of fact their employees have been appearing in Court as Advocates because of the statement made on behalf of the Bar Council of Maharashtra and Goa. Considering the volume of litigation pending in various Courts filed by the Bombay Municipal Corporation and against it and considering the number of years for which the practice is prevalent, we suggested to the learned counsel appearing for Bar Council of Maharashtra and Goa that as a transitory period, assuming that the representations made to the Bar Council of India do not receive favourable response, the practice be allowed to be continued. The learned counsel appearing for the Bar Council of Maharashtra and Goa therefore, made a statement before us that the Bar Council of Maharashtra and Goa will continue to abide by the statement which is already made and recorded previously in this petition for a period of one year from today. In view of this statement, petition is disposed off.”

At a meeting held on 1 June 2012, the Bar Council of India rejected the representation in the following terms:

“The representation of Smt.V.K.Khatu has no merit and the Bar Council of India and the State Bar Councils are to be governed by Rule 19, Chapter II, Part VI of the Bar Council of India Rules which clearly says that a full time salaried employee of any corporate including the Municipal Corporation shall cease to practice as an advocate so long as he/she continues in such employment. In view of this aforementioned Rule, it is not permissible for Smt.V.K.Khatu or any other similar person continue to practice as an advocate so long as he/she is an employee of any person, government, firm, corporation or concern (Municipal Corporation) or any other”.

⁹ Brihanmumbai Mahanagarpalika and anr. vs. Bar Council of Maharashtra and Goa and anr., Writ Petition 2154 of 2008.

13. The present petition was admitted by a Division Bench of this Court and was directed to be heard together with Writ Petition 1916 of 2011 and PIL 53 of 2012. In Writ Petition 1916 of 2011, a Division Bench of this Court has made a reference to the Full Bench. That Petition has been instituted by full time salaried Assistant Public Prosecutors in the employment of the State Government who asserted that they are eligible for appointment as District Judges under Article 233(2) of the Constitution. The present Petition has been heard together with Writ Petition 1916 of 2011 and PIL 53 of 2012. For convenience of exposition, we are delivering this judgment in the present case. Learned Counsel for all the contesting parties have urged their submissions for final disposal of the petition. Hence, the petition has been taken up by consent for final hearing.

Submissions :

14. On behalf of the Petitioners, it has been urged by Learned Senior Counsel that:

- (i) Sections 24 and 28 of the Advocates Act, 1961, govern who is eligible to be enrolled as an Advocate;
- (ii) Sections 29, 30 and 33 regulate the right to practise;
- (iii) Section 49(1)(ah) empowers the Bar Council of India to frame rules in regard to the conditions subject to which an Advocate may practise;
- (iv) In the decisions in **Sushma Suri's** case and **Satish Kumar Sharma's** case what has weighed with the Supreme Court is whether the Law Officers were engaged for work in the Court. If they are so engaged, no

matter what the terms of engagement are, the exemption under Rule 49 would apply;

(v) Municipal Law Officers fell within the purview of the second and third paragraphs of Rule 49 and Rule 1(vi) of the Rules framed by the Bar Council of Maharashtra and Goa. Since an exemption was granted under proviso (vi) to Rule 1 of the Rules framed by the State Bar Council, Municipal Law Officers are entitled to the benefit of the exception carved out by Rule 49;

(vi) The logic underlying the second and third paragraphs of Rule 49 still continues. The resolution passed by the Bar Council of India to delete the second and third paragraphs is arbitrary and violates Article 14 of the Constitution. The clarificatory resolution dated 22/25 December 2001 proceeds on the basis that the Supreme Court has struck down appearances by Law Officers in Court on behalf of their employers which is not a correct appreciation of the judgment of the Supreme Court in **Satish Kumar Sharma's** case. The deletion of the exception in Rule 49 is violative of Article 14.

15. On the other hand, Counsel appearing on behalf of the Bar Council of Maharashtra and Goa and the Bar Council of India, who are Respondents to these proceedings, submitted that :

(i) The Bar Council of India acted within the scope and purview of its power to frame subordinate legislation while deciding to delete the second and third paragraphs of Rule 49;

(ii) Before taking a decision to delete the exception carved out in Rule 49, the Bar Council of India had taken into consideration the views of the

State Bar Councils, a majority of whom were in favour of deleting the exception;

(iii) The judgment of the Supreme Court in **Satish Kumar Sharma's** case must be read as a whole. The Supreme Court adverted to the reason why a person in full time employment should not be allowed to practise in a Court and noted that such employment may give rise to conflicting loyalties or a conflict between duties and interest;

(iv) The Bar Council as a rule making authority vested with the power to frame subordinate legislation was entitled to delete the exception carved out to the general principle that an Advocate should not accept any full time salaried employment and that upon accepting such employment, he or she would cease to practise at the Bar;

(v) In any event, even if the resolution of the Bar Council of India to delete the second and third paragraphs of Rule 49 is set aside (though it is submitted that the deletion is valid) that would not result in the revival of the exception which was in force prior to the deletion. A writ of Mandamus cannot be issued by the Court to revive a rule, particularly, a rule which has been deleted as a result of a conscious decision.

Interpreting the Act and Rules:

16. Section 24 of the Advocates Act, 1961, deals with the admission of Advocates on the State roll and is subject to the provisions of the Act and the Rules. Under Clause (e) of sub-section (1), the State Bar Councils are empowered to specify conditions which are to be fulfilled by a person who seeks enrollment as an Advocate. A specific rule making power to prescribe

the conditions subject to which a person may be admitted as an Advocate on a State roll is conferred on the State Bar Councils by Section 28(2)(d). The rule making power of the Bar Council of India under Section 49(1)(ah) extends to prescribing the conditions subject to which an Advocate shall have a right to practise and the circumstances under which a person shall be deemed to practise as an Advocate in a Court.

17. Rule 49 of the Rules framed by the Bar Council of India contains in its substantive part, a bar on an Advocate being a full time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise. Moreover, on taking up such employment, an Advocate is under a duty to intimate that fact to the Bar Council on whose rolls his name appears and he would thereupon cease to practise as an Advocate so long as he continues in such employment. The exception in the second paragraph of Rule 49 as originally engrafted applied to a Law Officer of the Central Government or the Government of a State or of any public corporation or body constituted by the State. A Law Officer was defined as a person who is so designated by the terms of his appointment and who by the terms of appointment is required to act and plead in Court on behalf of the employer. However, before the exception contained in the second paragraph of Rule 49 would apply, it was necessary that the rules framed by the State Bar Councils under Section 28(2)(d) read with Section 24(1)(e) recognised an entitlement of such a person to be enrolled despite his being a full time salaried employee. If the rules framed by a State Bar Council did not affirmatively recognise the entitlement of a Law Officer (as defined in the third

paragraph) to be enrolled despite being a full time salaried employee, the exception in the second paragraph of Rule 49 would not have been attracted. Rule 49 was, hence, in the nature of an enabling provision under which the embargo on an Advocate taking up full time salaried employment was allowed to be lifted in the case of a Law Officer of a specified description, provided the rules framed by the State Bar Council concerned conferred an entitlement to be enrolled despite being a full time salaried employee.

18. The facts in **Sushma Suri's** case and **Satish Kumar Sharma's** case lay on opposite ends of the spectrum. As a result the exemption in Rule 49 was attracted in the former case and was not in the latter case. The significant aspect which has to be noted is that when both these decisions were rendered by the Supreme Court, Rule 49 in its unamended form was in existence. In its unamended form, Rule 49 contained both the prohibition on an Advocate accepting full time salaried employment and the exception made in favour of Law Officers as defined. In **Satish Kumar Sharma's** case, the rules framed by the State Bar Council did not specifically recognise a right of enrollment in a full time salaried employee who was engaged as a Law Officer by the State Electricity Board. The Supreme Court noted that the bar created in paragraph 1 of Rule 49 would not apply to a Law Officer of the Central or State Government or any public corporation or a body constituted by the statute, if in the rules of the State Bar Council a provision is made entitling the Law Officer of the Government or of such authority to enroll despite such a person being a full time salaried employee. The Supreme Court emphasised that the enabling provision which was contained in the second paragraph of

Rule 49 would apply only if the rules of the State Bar Council contained a recognition of the entitlement of a full time salaried Law Officer to be enrolled as an Advocate. But for the exception contained in the second paragraph, there would indeed be no entitlement and the prohibition contained in the first paragraph of Rule 49 would continue to apply.

19. The rules framed by the Bar Council of Maharashtra and Goa under Section 28(2)(d) read with Section 24(1)(e) contained at the material time provisions for exemption from the bar on the acceptance of full time salaried employment. The substantive part of Rule 1 of the State Rules stipulated that a person who is otherwise qualified to be admitted as an Advocate but is either in full or part time service or employment or engaged in any trade, business or profession shall not be admitted as an Advocate. The proviso contained several exceptions. Clause (i) was in regard to any person who is a Law Officer of the Central Government or the Government of a State. Clause (vi) provided that the rule shall not apply to any other person or class of persons as the Bar Council may from time to time exempt.

20. The Bar Council of Maharashtra and Goa by its letter dated 4 May 1978, intimated the Municipal Commissioner that the designation of Municipal Advocates did not amount to designation as Law Officer within the meaning of proviso (i) to Rule 1 of the Rules framed by the State Bar Council together with the first paragraph of Rule 49 framed by the Bar Council of India. As already noted earlier, the second paragraph of Rule 49 requires that before a person could be called a Law Officer, he should be so designated by the

terms of his appointment and in addition, that the terms of appointment should require him to act or plead in Court on behalf of the employer. The Municipal Commissioner was informed that the State Bar Council was allowing a period of six months to prevent any hardship to the municipal administration during which period steps were required to be taken to designate Municipal Advocates as Law Officers. The Municipal Corporation appears to have complied with the request and on 4 July 1978, the Bar Council communicated its approval to a proposal to redesignate Municipal Law Officers and required the Corporation to "do the needful" and intimate the change brought about within six months of the date of the earlier resolution. On 9 November 1978, the Municipal Commissioner informed the Bar Council of the redesignation of Senior Municipal Prosecutors and Advocates, Municipal Prosecutors and Advocates and Assistant Municipal Prosecutors and Advocates as Deputy Law Officers, Assistant Law Officers and Junior Law Officers respectively.

21. Proviso (i) of Rule 1 to the Rules of the State Bar Council made a provision of the nature contemplated in the second paragraph of Rule 49 of the Bar Council of India Rules by recognizing an entitlement to enrollment in respect of a Law Officer of the Central Government or the Government of a State. Proviso (i) did not extend to Law Officers of all bodies but to only Law Officers of the Union and State governments. Law Officers employed by the Municipal Corporation are not Law Officers of the Central Government or of the Government of a State. Municipal Corporations are statutory bodies constituted under specific enactments such as the Mumbai Municipal Corporation Act, 1888 or the Bombay Provincial Municipal Corporation Act,

1949. The State Bar Council, however, had made an enabling provision in clause (vi) of the proviso to exempt any person or class of persons, other than those specified in clauses (i) to (v). The correspondence which was exchanged between the Bar Council of Maharashtra and Goa and the Municipal Corporation would indicate that the State Bar Council was satisfied about the redesignation of Municipal Advocates as Municipal Law Officers and once that was done had no objection to their continuing to appear and plead before Courts. We therefore proceed on a reasonable construction of the events that transpired that the Bar Council of Maharashtra and Goa had granted an exemption to Law Officers engaged on a full time salaried basis by the Municipal Corporation of Greater Mumbai from the rigours of Rule 1, under clause (vi) of the proviso.

22. But, as a result of the deletion of the second and third paragraphs of Rule 49 by the Bar Council of India on 22 June 2001, no Advocate would be entitled to be in full time salaried employment of a person, government, firm, corporation or concern. On taking up such employment such a person is under an obligation to inform the State Bar Council and “shall thereupon cease to practise as an advocate so long as he continues in such employment”. The exception which was available under the second paragraph of Rule 49 stood deleted. Municipal Law Officers in the full time employment of the Municipal Corporation of Greater Mumbai can no longer assert an entitlement to act, appear and plead in any Court.

Constitutional validity:

23. The deletion of the exception to Rule 49 and the corresponding deletion of the proviso to Rule 1 of the State Bar Council Rules is, however, challenged on the ground that it is arbitrary. The vires of subordinate legislation can undoubtedly be questioned on the ground of unreasonableness,¹⁰ since what is unreasonable would violate Article 14 of the Constitution. But, a distinction has to be made in regard to the power of judicial review when the constitutional validity of legislation or of subordinate legislation is questioned as distinct from when an action of the executive is challenged on the ground of unreasonableness. The validity of executive action, when it is challenged as unreasonable can be assessed with reference to inter alia the following considerations:

- “(i) whether the discretion conferred upon the statutory authority had been properly exercised;
- (ii) whether the exercise of such discretion is in consonance with the provisions of the Act;
- (iii) whether while taking such action, the executive Government had taken into consideration the purport and object of the Act;
- (iv) whether the same subserved other relevant factors which would affect the public at large;
- (v)
- (vi) whether in arriving at such a decision, both substantive due process and procedural due process had been complied with.”¹¹

As the Supreme Court held in **Bombay Dyeing:**

“Judicial review of administrative action and judicial review of

10 Bombay Dyeing & Mfg.Co. Ltd. vs. Bombay Environment Action Group, (2006) 3 SCC 434.

11 Bombay Dyeing & Mfg. Co.Ltd. (supra) para 197 at page 510.

legislation stand on a different footing. What is permissible for the court in case of judicial review of administrative action may not be permissible while exercising the power of judicial review of legislation.”¹²

The test which has been laid down in regard to arbitrariness, where legislation is challenged on the ground of unreasonableness, is the test of manifest arbitrariness.¹³ An arbitrary exercise of legislative power has to be determined with reference to the purpose and object of the statute. The same principle must apply to delegated legislation and unless the exercise which has been undertaken by the rule making authority results in subordinate legislation which is manifestly arbitrary, the Court would not exercise the power of judicial review.

24. In **Sharma Transport Represented by D.P.Sharma vs. Government of A.P.**,¹⁴ the Supreme Court held as follows:

“The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression “arbitrarily” means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.”

The same principle was enunciated in an earlier judgment of the Supreme Court in **Khoday Distilleries Ltd. v. State of Karnataka**.¹⁵

“So long as the policy as formulated in the amended Rules is not manifestly arbitrary or wholly unreasonable, it cannot be

12 At para 198 page 510

13 At para 205 page 511

14 (2002) 2 SCC 188

15 AIR 1996 SC 911

considered as violative of Article 14.”

25. The rationale underlying Rule 49 of the Bar Council of India Rules is that employment in a full time salaried capacity detracts from the primary role of an Advocate as an independent professional who is subservient to none else than the cause of justice. A conflict of duties and interest may arise. A member of the Bar engaged on behalf of a client is expected to utilise his or her knowledge, experience and professional skill in an objective and fair presentation of the case of a client. In doing so, an Advocate does not cease to possess a sense of professional autonomy accompanied as it is by a duty towards the cause of justice. The means which are deployed are as significant as the ultimate end of pursuing justice for a client. The adage that the ends do not justify the means, has a special sanctity in the profession of law. Adversarial battles between litigating parties involve not only the parties and the lawyers who represent them, but there is above all, a commitment to the cause of justice that the institution of the Court embodies. Lawyers have traditionally been regarded as officers of the Court precisely for this reason. At one level, this is based on the principle that the conduct of a lawyer even when he or she represents a client must be consistent with the need to secure justice. The reason why a full time salaried employee is handicapped in performing that role is because as an employee, the paramount concern is to protect the interest of the employer. A lawyer who is engaged by a client is undoubtedly engaged to pursue the case of the client. But the difference between a professional who holds a brief and a full time salaried employee is not merely one of degree. A full time salaried employee is subject to the

administrative control of the employer and is answerable to the employer for every aspect of the work rendered in the course of employment. A full time salaried employee receives a prescribed salary, is borne on the establishment of the employer and is subject to the disciplinary jurisdiction of the employer. Within the service, the prospects for career advancement are determined by the employer on the recommendations of a Departmental Promotion Committee. They are subject to the hierarchies of service. Such a position may, therefore, involve the employee in a conflict of duties and interest.

26. The Law Officers of the Municipal Corporation have been appearing in Courts and Tribunals as part of their duties. But, they are in the full time salaried employment of the Corporation. They are borne on the establishment of the Municipal Corporation. They receive prescribed salaries in accordance with applicable pay scales. They receive promotions and are subject to the administrative control of their superiors. They are required to hold meetings with the Municipal Commissioner, Additional Municipal Commissioner, Deputy Municipal Commissioners, Heads of Department and other officers of the Corporation. They form part of a full fledged legal department of the Municipal Corporation.

27. The Supreme Court in **Satish Kumar Sharma's** case emphasized this possibility of a conflict of interest and duty when a Law Officer is a full time salaried employee in the following observations :

“.. there may be various challenges in courts of law assailing or relating to the decisions/actions taken by the appellant himself such as challenge to issue a statutory regulation, notification or

order; construction of statutory regulation, statutory orders and notifications, the institution/withdrawal of any prosecution or other legal/quasi-legal proceedings etc. In a given situation the appellant may be amenable to disciplinary jurisdiction of his employer and/or to the disciplinary jurisdiction of the Bar Council. There could be conflict of duties and interests. In such an event, the appellant would be in an embarrassing position to plead and conduct a case in a court of law.”

28. The Bar Council of India in the exercise of its rule making power under Section 49(1) of the Advocates Act, 1961 is entitled to make rules for discharging its functions under the Act. The conditions subject to which an Advocate shall have a right to practise is under clause (ah) a specific subject of the rule making power conferred by Parliament upon the Bar Council of India. Hence, when it originally framed Rule 49, both with the substantive prohibition as well as with the exception that was carved out in the case of a Law Officer, the Bar Council of India acted within the purview of its statutory jurisdiction. The Bar Council of India was entitled in law in the exercise of its power to frame delegated legislation to delete the exception. The basis on which the exception has been deleted, is not arbitrary or ultra vires the functions of the Bar Council. A body which is vested with the power of making subordinate legislation and in exercise of that power to formulate the conditions subject to which an Advocate shall have a right to practise is entitled to stipulate a condition to the effect that an Advocate shall not be a full time employee of any person, government, firm, corporation or concern, so long as he continues to practise and that upon taking such employment, he or she shall cease to practise as an Advocate. Just as in the considered exercise of the power of framing subordinate legislation, such a body may carve out a

limited exception from the rule which is framed in the exercise of its power of delegated legislation, it is equally open to the law making body to reconsider whether the exception should continue to subsist. An exception is indeed a deviation from the general principle which is enacted into law and if the legislature or its delegate in the exercise of the power of subordinate legislation abrogates an exception, that would not be ultra vires its statutory powers. We have already underlined the rationale for the prohibition in Rule 49. The Rule is intended to protect the dignity, independence and autonomy of the Bar. The Bar is a vital element in the dispensation of justice in our country. A fearless Bar contributes to the objective and independent dispensation of justice. The prohibition contained in Rule 49 is intended to protect against inroads into the professionalism of the Bar. The rule making body is entitled to perceive full time salaried employment as detracting from the role which the Advocates Act, 1961 envisages for Advocates. The prohibition in Rule 49 is based on rational considerations. That being valid, the abrogation of the erstwhile exception cannot be regarded as unreasonable.

29. But it was sought to be urged that the clarificatory resolution which was passed by the Bar Council of India on 22/25 December 2001 proceeded on the basis that the Supreme Court “has struck down the appearances by Law Officers in Court” and that the judgment will operate in the case of all Law Officers even if they were appearing on behalf of their employers earlier. This, it is urged, is not a correct reading of the judgment of the Supreme Court in **Satish Kumar Sharma's** case. The sequitor to that submission is that since

the reason on the basis of which the Bar Council has abrogated the exception is erroneous, the deletion of the exception became unreasonable and must be struck down. We are unable to accept the submission for a number of reasons. Firstly, the deletion of the second and third paragraphs of Rule 49 took place in pursuance of a decision which was taken on 22 June 2001 and was gazetted on 13 October 2001. The deletion had already taken effect. The clarificatory resolution of 22/25 December 2001 would, therefore, not be dispositive of the power of the Bar Council of India to effect the deletion of the second and third paragraphs of Rule 49. Secondly, the judgment of the Supreme Court in **Satish Kumar Sharma's** case interpreted Rule 49. Undoubtedly, one aspect of **Satish Kumar Sharma's** case was that there was no rule framed by the State Bar Council of Himachal Pradesh recognising the entitlement of a full time salaried Law Officer of a Corporation to practise as an Advocate and hence, the basis of the exception in the second paragraph of Rule 49 was not fulfilled. The judgment of the Supreme Court, however, explains the basis of the underlying rationale for the prohibition contained in Rule 49. The Supreme Court emphasized that a person in full time employment in the service of the employer and subject to the disciplinary jurisdiction of the employer would likely be involved in a conflict of interest and duty while appearing in a Court of law. The judgment has to be read and construed from a holistic perspective. The Bar Council of India was entitled as a subordinate law making body to take a considered view on whether the interests of the legal profession would warrant a reconsideration of the exception that it had carved out to Rule 49 in the case of full time salaried Law Officers. The observations of the Supreme Court in **Satish Kumar Sharma's**

case were certainly material and the Bar Council of India cannot be held to have relied on a circumstance extraneous to its law making authority. The decision of the Supreme Court in **Satish Kumar Sharma's** case certainly had a material bearing on the issue.

30. For these reasons, we have arrived at the conclusion that the deletion of the second and third paragraphs of Rule 49 and the corresponding deletion by the State Bar Council of the exception cannot be regarded as ultra vires or unreasonable. Moreover, we must also take note of the position in law that the Court cannot issue a writ of Mandamus to the legislature to enact a law and similarly a Court cannot direct a subordinate legislative body to enact a particular rule.¹⁶ In **State of Tamil Nadu vs. K. Shyam Sunder**,¹⁷ the Supreme Court held that if an amending Act of the legislature is struck down for want of legislative competence or on the ground that it is violative of the fundamental rights in Part-III of the Constitution, it would be unenforceable in view of Article 13(2) and the old Act would revive. But this proposition of law, the Supreme Court held, is not applicable to subordinate legislation. Hence, even if the Court were to strike down the amendment made to Rule 49, that would not result in a revival of Rule 49 in its original form. We must, however, clarify that for the reasons that we have already indicated, we have come to the conclusion that the deletion of the second and third paragraphs of Rule 49 was valid.

¹⁶Narindra Chand Hem Raj vs. Lt. Governor, Administrator, Union Territory, H.P., AIR 1971 SC 2399 and State of J. and K. vs. A.R. Zakki, AIR 1992 SC 1546 at para 10.

¹⁷(2011) 8 SCC 737

31. For these reasons, we do not find any merit in the petition. The Petition shall accordingly stand dismissed. In the circumstances of the case, there shall be no order as to costs.

32. On the conclusion of the judgment Mr. Sathe, learned Senior Counsel requests the Court to grant adequate time to the Municipal Corporation to make administrative arrangements consistent with the judgment of the Court. Learned counsel states that a period of one year may be granted in order to enable the Municipal Corporation to make necessary arrangements for being represented in Courts and Tribunals in litigation involving the Corporation. Having due regard to the fact that in an earlier order of a Division Bench of this Court, a period of one year was granted by the Court to the Municipal Corporation, we are of the view that a period of six months would be sufficient in the interests of justice. We accordingly allow the Municipal Corporation a period of six months to make necessary administrative arrangements so as to ensure due compliance with the rules framed by the Bar Council of India and the State Bar Council.

(Dr.D.Y.Chandrachud, J.)

(V.M.Kanade, J.)

(A.A. Sayed, J.)