

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 26TH DAY OF JUNE, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.1912 OF 2023 (GM – RES)

R

BETWEEN:

K.SRINIVAS GANIGA
S/O LATE BACHA GANIGA
AGED ABOUT 82 YEARS
R/AT NO.7-51, SHREE SATYA NIDHI
OPPOSITE TO GANESH MARBLES, NITTUR
NITTUR POST, PUTTUR, AMBALAPADI
UDUPI DISTRICT – 576 103.

... PETITIONER

(BY SRI MOHAN KUMARA D., ADVOCATE)

AND:

- 1 . UNION OF INDIA
DEPARTMENT OF LAW AND
PARLIAMENTARY AFFAIRS
REPRESENTED BY ITS
CABINET SECRETARY
ADDRESS: 4TH FLOOR, A-WING
RASHTRAPATI BHAWAN
NEW DELHI – 110 004.
- 2 . STATE OF KARNATAKA BY
THE DEPUTY COMMISSIONER AND
DISTRICT MAGISTRATE'S OFFICE

UDUPI DISTRICT, "RAJATADRI",
MANIPAL
UDUPI DISTRICT – 576 104.

- 3 . NAGRAJ GANIGA
S/O SRINIVAS GANIGA
AGED ABOUT 46 YEARS.
4. VADIRAJ GANIGA
S/O SRINIVAS GANIGA
AGED ABOUT 43 YEARS.

BOTH RESPONDENT NO.3 AND 4 ARE:
RESIDING OPPOSITE TO GANESH MARBLE,
NITTOOR, PUTTUR VILLAGE, UDUPI TALUK,
UDUPI DISTRICT – 574 201.

... RESPONDENTS

(BY SRI SHANTHI BHUSHAN, DSGI FOR R-1;
SMT.K.P.YASHODHA, HCGP FOR R-2;
SRI AJITH ANAND SHETTY, ADVOCATE FOR R-3;
R4 – SERVED;
AMENDED CAUSE TITLE VIDE ORDER DATED 01.06.2023)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND
227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH OR SET
ASIDE THE ORDER DATED 22.12.2022 PASSED BY THE R1 VIDE
ORDER NO.CDS.MAG.ASR29/2022.23 VIDE ANNEXURE-B.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED
FOR ORDERS ON 15.06.2023, COMING ON FOR PRONOUNCEMENT
THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

Petitioner is before this Court seeking a declaration to declare Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as 'the Act' for short), to be unconstitutional and has further sought quashment of an order dated 21-02-2023 passed by the Deputy Commissioner denying representation of the petitioner by an Advocate in the appeal proceedings before the Deputy Commissioner.

2. Facts, in brief, germane are as follows:-

The petitioner purchases a property situated at Puttur Village, Udupi District in the years 1972 and 2003. At that point in time the petitioner was residing with his son/the 3rd respondent. It is the allegation that respondents 3 and 4 transferred the property owned by the petitioner to their names and thereafter the 3rd respondent began to torture the petitioner, both physically and mentally. After coming into force of the Act, the petitioner knocked at the doors of the Assistant Commissioner invoking the provisions of the Act seeking restoration of property to his name alleging that the

settlement deed dated 26-11-2014 is fraudulently made by respondents 3 and 4/children of the petitioner.

3. The Assistant Commissioner by his order dated 22-12-2022 allows the petition in part, directs that the petitioner and his wife should not be disturbed from the property and they will remain in the property till their life time and their needs also should be taken care of by the children. The petitioner then calls the order of the Assistant Commissioner in question before the Deputy Commissioner by filing an appeal under the Act through a legal practitioner. The Deputy Commissioner in terms of endorsement dated 21-02-2023 rejected the request of the petitioner on the ground that Section 17 of the Act prohibits representation of legal practitioner before the Assistant Commissioner or the Deputy Commissioner in the original proceedings or in the appeal proceedings.

4. Heard Sri K. Raghavendra Gowda and Sri Mohan Kumara D, learned counsel for petitioner; learned Deputy Solicitor General of India Sri Shanthi Bhushan, for respondent No.1; Sri B.V.Krishna, learned Additional Government Advocate appearing for respondent

No.2 and Sri Ajith Anand Shetty, learned counsel appearing for respondent No.3.

5. The learned counsel for the petitioner would contend that the Act was envisaged for protection of rights of senior citizen and towards the said right the petitioner ought to have been permitted the assistance of a legal practitioner before the Assistant Commissioner itself as the petitioner was 82 years old at the time he approaches the Assistant Commissioner. Against the said order, the petitioner prefers an appeal before the Deputy Commissioner as obtaining under the Act. Even there he submits a representation to be assisted/defended by a legal practitioner. This is rejected by the Deputy Commissioner on the ground that Section 17 of the Act prohibits or places an embargo upon any applicant being assisted by a legal practitioner and therefore turns it down.

6. The learned counsel would further submit that he placed reliance upon the judgment of the Delhi High Court to contend that it has been held that applicants are entitled to be defended by legal practitioners. This is also turned down by an endorsement dated 21-02-2023. It is, therefore, the petitioner is now before this Court

seeking a declaration that the embargo under the Act is unconstitutional as it runs counter to Section 30 of the Advocates' Act which permits an Advocate to practice before any judicial *fora*/Tribunal. He would seek to place reliance upon the judgment of the Delhi High Court in **PAWAN RELEY AND ANOTHER v. UNION OF INIDA AND OTHERS**¹.

7. On the other hand, the learned Additional Government Advocate would refute the submissions to contend that the statute clearly prohibits engagement of any legal practitioner before both the *fora*/Tribunal – one before the Assistant Commissioner and the other before the Deputy Commissioner. Since there is statutory bar, no fault can be found with the actions of the Deputy Commissioner or the Assistant Commissioner. He would submit that the relief sought by the petitioner cannot be granted in the teeth of the statute. He would contend that his arguments be considered to be his objections to the petition.

8. Since provisions of the Act are called in question, the learned Deputy Solicitor General of India, Sri Shanthi Bhushan, was

¹ 2022 SCC OnLine Delhi 3221

notified and the learned Deputy Solicitor General of India has filed his objections and placed certain documents for the perusal of the Court. He would submit that in the light of the embargo under Section 17 of the Act, no order can be passed that would run counter to the Act.

9. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record. In furtherance whereof, the issue that falls for consideration is -

Whether Section 17 of the Act is ultra vires Section 30 of the Advocates' Act, 1960 and resultantly unenforceable?

10. To consider the said issue, it is necessary to have a little walk around facts of the case. The petitioner alleges that a deed of settlement is arrived at by fraud, creating fraudulent document on 26-11-2014 by which the property which is owned by the petitioner is bartered away amongst respondents 3 and 4 which was not the intention of the petitioner at any point in time. Contending that it was a forged document the petitioner, an octogenarian on his

behalf and on behalf of his wife sexagenarian knocks at the doors of the Assistant Commissioner, stating that he has six daughters and two sons and complaining against his two sons who are respondents 3 and 4 by registering proceedings under the Act. The allegation was that his property is transferred to the name of the 3rd respondent by way of a settlement deed. The claim is that the petitioner comes to know of it in the year 2014 when his children began to torture the petitioner and his wife without providing them even the basic facilities. The Assistant Commissioner, after hearing the parties and examination of records, passes the following order:

“ಈ ಹಿನ್ನೆಲೆಯಲ್ಲಿ ಈ ಕೆಳಕಂಡ ಆದೇಶ

—:ಆದೇಶ:—

ಫಿರ್ಯಾದಿದಾರರ ಫಿರ್ಯಾದಿಯನ್ನು ಭಾಗಶಃ ಪುರಸ್ಕರಿಸಿದೆ. ಫಿರ್ಯಾದಿದಾರರು ಮತ್ತು ಅವರ ಪತ್ನಿ ತಮ್ಮ ಜೀವಿತ ಕಾಲದವರೆಗೂ 1ನೇ ಪ್ರತಿವಾದಿಯವರೊಂದಿಗೆ ಬಂದು ವಾಸಿಸುವಂತೆಯೂ ಹಾಗೂ 1ನೇ ಪ್ರತಿವಾದಿಯವರು ಅವರಿಗೆ ಯಾವುದೇ ಮಾನಸಿಕ ಹಾಗೂ ದೈಹಿಕ ಹಿಂಸೆಯನ್ನು ನೀಡದೇ ಅವರು ನಿರ್ಭೀತರಾಗಿ ಜೀವನ ನಡೆಸಲು ಅನುಕೂಲವಾಗುವಂತೆ ಅವರನ್ನು ಉತ್ತಮ ರೀತಿಯಲ್ಲಿ ನೋಡಿಕೊಳ್ಳುವಂತೆ 1 ಮತ್ತು 2ನೇ ಎದ್ವುದಾರರಿಗೆ ಆದೇಶಿಸಿದೆ.

ಈ ಆದೇಶವನ್ನು ಉತ್ತರೇಖನ ನೀಡಿ, ಗಣಕೀಕರಿಸಿ, ಪರಿಶೀಲಿಸಿ, ಕರಡನ್ನು ತಿದ್ದಿ ನನ್ನ ಸಹಿಯೊಂದಿಗೆ ಈ ದಿನ ದಿನಾಂಕ 22-12-2022 ರಂದು ಬಹಿರಂಗ ನ್ಯಾಯಾಲಯದಲ್ಲಿ ಘೋಷಿಸಲಾಯಿತು.”

(Emphasis added)

The Assistant Commissioner directs that respondents 3 and 4 herein should not torture their parents and the parents without any fear

should lead their life in the house in which the children are staying. Accordingly, the Assistant Commissioner allows the petition in part. Claiming to be aggrieved by the said order, the petitioner approaches the Deputy Commissioner by filing an appeal under the Act. In the said appeal, the petitioner causes a notice upon the Deputy Commissioner on 16-01-2023 that he be permitted to be represented by an Advocate. This is turned down by an endorsement dated 21-02-2023 by the Deputy Commissioner. The endorsement reads as follows:

“ಹಿಂಬರಹ:

ವಿಷಯ: ಜಿಲ್ಲಾಧಿಕಾರಿಗಳ ನ್ಯಾಯಾಲಯದ ಪ್ರಕರಣಗಳು - ಮೇಲ್ಮನವಿ ಪ್ರಕರಣಗಳನ್ನು ಹಿಂದಿರುಗಿಸುವ ಕುರಿತು.

ಉಲ್ಲೇಖ: ಶ್ರೀ ಮೋಹನ್ ಕುಮಾರ್ ಡಿ. ವಕೀಲರು, ಒಂದನೇ ಮಹಡಿ, 14ನೇ ಮೈನ್ ರೋಡ್, ಅತ್ತಿಗುಪ್ಪೆ, ವಿಜಯನಗರ, ಬೆಂಗಳೂರು - 560 040 ಇವರ ಮನವಿ ದಿನಾಂಕ:16/01/2023

= = =

ಪೋಷಕರು ಮತ್ತು ಹಿರಿಯ ನಾಗರಿಕರ ಪಾಲನೆ ಹಾಗೂ ಕಲ್ಯಾಣ ಕಾಯಿದೆ 2007 ಅಡಿ ಅಧ್ಯಕ್ಷರು, ನಿರ್ವಹಣಾ ನ್ಯಾಯ ಮಂಡಳಿ ಹಾಗೂ ಉಪ ವಿಭಾಗದ ದಂಡಾಧಿಕಾರಿಯವರು, ಕುಂದಾಪುರ ಉಪ ವಿಭಾಗ ಕುಂದಾಪುರ ಇವರ ನ್ಯಾಯಾಲಯದ ಆದೇಶ ಸಂಖ್ಯೆ:ಸಿಡಿಎಸ್‌ಎಂಎಜಿ ಎಸ್.ಆರ್ 29/2021-22 ದಿನಾಂಕ:16/08/2022ರ ಆದೇಶವನ್ನು ಪ್ರಶ್ನಿಸಿ ತಾವು ಹಿರಿಯ ನಾಗರಿಕರಾದ ಶ್ರೀ ಶ್ರೀನಿವಾಸ ನಾಯಕ್ ಇವರ ಪರವಾಗಿ ವಕಾಲತ್‌ನೊಂದಿಗೆ ಮೇಲ್ಮನವಿಯನ್ನು ಉಲ್ಲೇಖದಂತೆ ಈ ಕಛೇರಿಗೆ ಸಲ್ಲಿಸಿರುತ್ತೀರಿ.

ನಿಮ್ಮ ಮನವಿಯ ಬಗ್ಗೆ ಪರಿಶೀಲಿಸಲಾಗಿದೆ. ಹಿರಿಯ ನಾಗರಿಕರ ಪಾಲಕರ ಪೋಷಣೆ, ಸಂರಕ್ಷಣೆ ಹಾಗೂ ಹಿರಿಯ ನಾಗರಿಕರ ರಕ್ಷಣಾ ಕಾಯ್ದೆ 2007 ರ ಕಲಂ 16ರ ಪ್ರಕಾರ, ನಿರ್ವಹಣಾ ಮಂಡಳಿಯ ಅಧ್ಯಕ್ಷರ ಆದೇಶದಿಂದ ಅನ್ಯಾಯವಾದಲ್ಲಿ ಹಿರಿಯ ನಾಗರಿಕರಿಗೆ ಮಾತ್ರ ನೇರವಾಗಿ ಮೇಲ್ಮನವಿ ಸಲ್ಲಿಸಲು ಅವಕಾಶವಿರುವುದು. ಅಲ್ಲದೆ ಹಿರಿಯ ನಾಗರಿಕರ ಪಾಲಕರ ಪೋಷಣೆ, ಸಂರಕ್ಷಣೆ ಹಾಗೂ ಹಿರಿಯ ನಾಗರಿಕರ ರಕ್ಷಣಾ ಕಾಯ್ದೆ 2007 ರ ಕಲಂ 17 ರಲ್ಲಿ “ಯಾವುದೇ ಕಾನೂನಿನಲ್ಲಿ ಏನೇ ಒಳಗೊಂಡಿದ್ದರೂ ನ್ಯಾಯಾಧಿಕರಣದ ಅಥವಾ ಅಪೀಲು ನ್ಯಾಯಾಧಿಕರಣದ ಮುಂದಿರುವ

ವ್ಯವಹಾರಗಳ ಯಾರೇ ಪಕ್ಷಗಾರನನ್ನು ನ್ಯಾಯವಾದಿಯು ಪ್ರತಿನಿಧಿಸತಕ್ಕದ್ದಲ್ಲ.” ಎಂದಿರುತ್ತದೆ. ತಾವು ಮೇಲ್ಮನವಿಯೊಂದಿಗೆ ಹಾಜರು ಪಡಿಸಿರುವ ಖಟ ಬಿಲೋಳ ಊಖಲೂ ಅಝಿಗಿಖಿಖಿ ಔಕ ಆಣವಲೂಖ ಂಟ ಆ ಓಣಘ ಆಣವಲೂಖ ಘ.ಕ.(ಅ) 3074/2019, ಘ.ಕ.(ಅ) 3911/2019, ಘ.ಕ.(ಅ) 4454/2019, ಘ.ಕ.(ಅ) 9061/2019 ರ ಆದೇಶವು ಸಂಬಂಧಪಟ್ಟ ಪ್ರಕರಣಗಳಿಗೆ ಮಾತ್ರ ಅನ್ವಯವಾಗುತ್ತದೆ ಹೊರತು ಎಲ್ಲಾ ಪ್ರಕರಣಗಳಿಗೂ ಅನ್ವಯವಾಗುವುದಿಲ್ಲ. ಮತ್ತು ಸದಿ ನ್ಯಾಯಾಲಯದ ಆದೇಶದಂತೆ ಹಿರಿಯ ನಾಗರಿಕರ ಪಾಲಕರ ಪೋಷಣೆ, ಸಂರಕ್ಷಣೆ ಹಾಗೂ ಹಿರಿಯ ನಾಗರಿಕರ ರಕ್ಷಣಾ ಕಾಯ್ದೆ 2007ರ ಕಾಯ್ದೆಯಲ್ಲಿ ಯಾವುದೇ ಬದಲಾವಣೆ ಆಗಿರುವುದಿಲ್ಲ. ಹಾಗಾಗಿ ವಕಾಲತ್ ನೊಂದಿಗೆ ಸಲ್ಲಿಸಿರುವ ತಮ್ಮ ಮೇಲ್ಮನವಿಯನ್ನು ಈ ನ್ಯಾಯಾಲಯದಲ್ಲಿ ದಾಖಲಿಸಿಕೊಳ್ಳಲು ಅವಕಾಶವಿಲ್ಲ. ಹಾಗೂ ಹಿರಿಯ ನಾಗರಿಕರ ಪಾಲಕರ ಪೋಷಣೆ, ಸಂರಕ್ಷಣೆ ಹಾಗೂ ಹಿರಿಯ ನಾಗರಿಕರ ರಕ್ಷಣಾ ಕಾಯ್ದೆ 2007 ರ ಕಲಂ 17 ರಂತೆ ಸಂಬಂಧಪಟ್ಟ ಹಿರಿಯ ನಾಗರಿಕರ ನೇರವಾಗಿ ಮೇಲ್ಮನವಿ ಸಲ್ಲಿಸಲು ಕಾನೂನಿನಲ್ಲಿ ಅವಕಾಶವಿದೆ. ಆದುದರಿಂದ ನಿಮ್ಮ ಮೇಲ್ಮನವಿ ಹಾಗೂ ಅದರೊಂದಿಗೆ ಸಲ್ಲಿಸಲಾದ ದಖಲಾತಿಗಳನ್ನು ಹಿಂದಿರುಗಿಸಲಾಗಿದೆ.

ಸಹಿ/-
(ಕೂರ್ಮಾರಾವ್ ಎಂ.)
ಜಿಲ್ಲಾಧಿಕಾರಿ
ಉಡುಪಿ ಜಿಲ್ಲೆ, ಉಡುಪಿ

ರಿಗೆ: ಶ್ರೀ ಮೋಹನ್ ಕುಮಾರ್ ಡಿ ವಕೀಲರು, ಒಂದನೇ ಮಹಡಿ, 14ನೇ ಎ ಮೈನ್ ರೋಡ್, ಅತ್ತಿಗುಪ್ಪೆ, ವಿಜಯನಗರ, ಬೆಂಗಳೂರು - 560040 ಇವರಿಗೆ ನೋಂದಾಯಿತ ಅಂಚೆ ಮೂಲಕ.”

(Emphasis added)

11. The contention of the learned counsel for the petitioner merits acceptance as the petitioner is an octogenarian and is seeking protection under the Act. Looking at the age of the petitioner, he could not defend himself in contra-distinction to the vehement defense put up by the children. This has undoubtedly resulted in a fractured order passed by the Assistant Commissioner as there is only a direction that the petitioner and his wife should not be disturbed from the house but there is no order to maintain

the petitioner. Such cases where the parties are more than 60, 70 or 80 years galore before the Tribunal, they would not be in a position to defend their own case and sometimes would become tongue tied on the vehement opposition put up by the children. The case at hand forms one such illustration of many such cases that would come before the Tribunal. Apart from the legality of the issue whether the Act would place an embargo or otherwise, the aforesaid facts of the case at hand are grave enough to permit assistance by a legal practitioner. Whether it should be on a case to case basis or every applicant has a right to be defended is what is to be answered. Therefore, the **kernel of this conundrum** becomes the constitutionality of the embargo under Section 17 of the Act and it being repugnant to Section 30 of the Advocates' Act.

12. To consider the marrow of the issue, I deem it appropriate to notice necessary provisions of law, both under the Act and the Advocates Act. Section 17 of the Act, runs as follows:-

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

(Emphasis supplied)

Section 17 specifically mandates that no party to a proceeding before the Tribunal or Appellate Tribunal shall be represented by a legal practitioner notwithstanding anything contained, in any law. The Act was specifically promulgated for the protection of lives of senior citizen as could be gathered from the objects and reasons of the Act. The objects and reasons read as follows:

"Traditional norms and values of the Indian society laid stress on providing care for the elderly. However, due to withering of the joint family system, a large number of elderly are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional neglect and to lack of physical and financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. Though the parents can claim maintenance under the Code of Criminal Procedure, 1973, the procedure is both time-consuming as well as expensive. Hence, there is a need to have simple, inexpensive and speedy provisions to claim maintenance for parents."

(Emphasis supplied)

If the object of the Act was to render protection to the senior citizen, the protection should not be ***illusive*** or ***collusive***.

13. The Advocates Act, 1961, permits Advocates to appear before any *fora* as depicted under Section 30 of the Advocates' Act. Section 30 of the Advocates' Act runs as follows:

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

- (i) in all courts including the Supreme Court;**
- (ii) before any tribunal or person legally authorised to take evidence; and**
- (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."**

(Emphasis supplied)

Section 30 comes into force from 15-06-2011 which mandates or gives an absolute right to an Advocate, enrolled under the said Act, to practice before all Courts, Tribunals and any *fora*. The Act creates two *fora* for a senior citizen for redressal of his grievance. They are the Tribunals. The first rung is before the Assistant Commissioner. Section 7 of the Act deals with constitution of Maintenance Tribunal and Maintenance Tribunal to be presided over by the Assistant Commissioner/Sub Divisional Officer of a State. Section 16 deals with appeal to the Tribunal to be headed by a District Magistrate. Therefore, the Appellate Tribunal is headed by

a Deputy Commissioner. Section 30 of the Advocates' Act (*supra*) gives absolute right to an Advocate to practice before any Court or Tribunal, a Tribunal, which would undoubtedly mean and include the Tribunal, created under the Act as well. Section 17 of the Act though begins with a non-obstante clause "notwithstanding anything contained in any law" it can be only with regard to the law that was in existence on the date of promulgation of the Act i.e., on 01-01-2008.

14. Section 30 of the Advocates Act comes into force, as observed hereinabove, in the year 2011 *i.e.*, on 15.06.2011. Therefore, right of an Advocate to practice before the Tribunal which is derived under Section 30 cannot be seen to be controlled by an enactment earlier to it, *i.e.*, in terms of Section 17 of the Act. The view of mine, in this regard, is fortified by the judgment rendered by the High Court of Punjab and Haryana in **PARAMJIT KUMAR SAROYA v. THE UNION OF INDIA AND ANOTHER**² wherein the Division Bench considers this very issue, *i.e.*, right to legal representation and answers that Section 17 should not come

² 2014 SCC OnLine P & H 10864

in the way of legal representation on behalf of parties post 15-06-2011 in view of Section 30 of the Advocates Act coming into force. The Division Bench of the High Court of Punjab and Haryana has held as follows:

"RIGHT TO LEGAL REPRESENTATION:

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

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

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

The aforesaid Section did receive the attention of the Members of the Parliament during the course of debate as is apparent from perusal of the debates. The Hon'ble Minister while piloting the Bill referred to section 125 of the Cr.P.C. incorporating the provision for maintenance of parents and in that context it was observed that going to the Court and engaging lawyers would be a very cumbersome process as well as time consuming apart from costs. The emphasis was put on conciliation and, thus, it was observed there would be no advocates. The Tribunal would follow summary procedure and the claims would be disposed of in a time bound manner. In fact, some reservation was expressed in this behalf in Parliament as to how the application would be drafted, service effected etc. without any legal assistance. One of the Members Sh. S.K. Kharventhan observed that since more Tribunals are being constituted, the powers of the Courts are shrinking. In that context, it was observed that Section 30 of the Advocates Act dealing with the right of advocates to practise, though forming a part of

the original Act of 1961, had still not been implemented and, thus, was taking away the powers of the lawyers. He expressed concern that if the lawyers are not appearing, but NGOs appear in matters of conduct of cases and adducing evidence there would be a problem. There would be no accountability of such representatives contrary to the lawyers representing where there is the Bar Council.

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

Learned Amicus Curiae submits that on a thorough examination of the judicial pronouncements in this behalf, the view which appears to prevail is that there can be such exclusion. He, however, hastens to add that in most legislations like the Industrial Disputes Act, 1947 or the Consumer Protection Act, 1986, the right to be represented through a legal representative has been left at the discretion of the concerned Tribunal, authority or the consent of the opposite party. He pointed out the significance of Section 30 of the Advocates Act which reads as under:-

"30. Right of advocates to practise - Subject to provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practise throughout the territories to which this Act extends-
(i) in all courts including the Supreme Court;

(ii) before any tribunal or person legally authorized to take evidence; and

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

The aforesaid provision confers a right to practise on the advocate throughout the territories before Courts, Tribunals and any other authority before whom such advocate is entitled to practise. He laid emphasis on the aspect "legally authorized to take evidence" to submit

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

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

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

(b) Lingappa Pochanna Appealwar v. State of Maharashtra, 1985 AIR (SC) 389. One of the questions raised was of the constitutional validity of Section 9 A of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1975, which was couched in similar terms as Section 17 of the said Act beginning with the "notwithstanding" clause depriving the pleader's right to appear on behalf of parties in any proceedings under the Act

before the Collector, Commissioner or the Maharashtra Revenue Tribunal. The plea raised was that it affected the fundamental right of an advocate enrolled to carry on his profession under Article 19(1)(g) of the Constitution of India as well as rights of the non-tribals to be represented by legal practitioners of their choice being terminated. In that context, it was observed in paras 34 and 35 as under:-

"34. That contention that an advocate enrolled under the Advocates Act, 1961 has an absolute right to practise before all Courts and Tribunals can hardly be accepted. Such a right is no doubt conferred by Section 30 of the Advocates Act. But unfortunately for legal profession, Section 30 has not been brought into force so far though the Act has been on the Statute Book for the last 22 years. There is very little that we can do in the matter and it is for the Bar to take it up elsewhere. A person enrolled as an advocate under the Advocates Act is not ipso facto entitled to a right of audience in all Courts unless Section 30 of that Act is first brought into force. That is a matter which is still regulated by different statutes and the extent of the right to practise must depend on the terms of those statutes. The right of an advocate brought on the rolls to practise is, therefore, just what is conferred on him by Section 14(1)(a), (b) and (c) of the Bar Councils Act, 1926. The relevant provisions reads as follows:

*"14(1) An advocate shall be entitled as of right to practise:
(a) subject to the provisions of sub section (4) of 9, in the High Court of which he is an advocate, and*

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

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

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

35. *That brings us to the second aspect of the matter i.e. the so called right of a litigant to be represented before the Collector in matters not covered by Section 3(1) and 4 of the Act. Now it is well settled that apart from the provisions of Article 22(1) of the Constitution, no litigant has a fundamental right to be represented by a lawyer in any Court. The only fundamental right recognized by the Constitution is that under Article 22(1) by which an accused who is arrested and detained in custody is entitled to consult and be defended by a legal practitioner of his choice. In all other matters i.e. in suits or other proceedings in which the accused is not arrested and detained on a criminal charge, the litigant has no fundamental right to be represented by a legal practitioner. For aught we know, the legislature felt that for the implementation of the legislation, it would not subserve the public interest if lawyers were allowed to appear, plead or act on behalf of the non tribal transferees. It cannot be denied that a tribal and a non tribal are unequally placed and non tribal transferee being a person belonging to the more affluent class, would unnecessarily protract the proceedings before the Collector under Sections 3(1) and 4 of the Act by raising all kinds of pleas calculated to delay or defeat the rights of the tribal for restoration of his lands. The proceedings before the Collector have to be completed within sufficient dispatch and the transferred lands restored to a tribal under sub section (1) of Section 3 and 4 of the Act without any of the law's delays."*

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

(c) Aeltemesh Rein, Advocate, Supreme Court of India v. Union of India, (1988) 4 SCC 54. An advocate of the Supreme Court approached the highest judicial forum for enforcement of Section 30 of the Advocates Act. The Hon'ble Supreme Court held that no writ of mandamus could be issued to bring a statute or a statutory provision into force when according to the

said statute the date on which it should be brought into force is left to the discretion of the Central Government. This was in the context of the majority view of the Constitutional Bench of the Hon'ble Supreme Court in A.K. Roy v. Union of India, 1982 AIR (SC) 710. However, this did not come in the way of the Hon'ble Supreme Court in issuing a writ in the nature of mandamus to the Central Government to consider whether the time to bring Section 30 of the Advocates Act into force had arrived or not, as the matter could not lie over without application of mind. Six months' time was fixed for the said purpose. Para 6 of this judgement reads as under:-

*"6. The effect of the above observations of the Constitution Bench is that it is not open to this Court to issue a writ in the nature of mandamus to the Central Government to bring a statute or a statutory provision into force when according to the said statute the date on which it should be brought into force is left to the discretion of the Central government. As long as the majority view expressed in the above decision holds the field it is not open to the Court to issue a writ in the nature of mandamus directing the Central Government to bring Section 30 of the Act into force. But, we are of the view that this decision does not come in the way of this Court issuing a writ in the nature of mandamus to the Central Government to consider whether the time for bringing Section 30 of the Act into force has arrived or not. Every discretionary power vested in the executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. The Act was passed in 1961 and nearly 27 years have elapsed since it received the assent of the President of India. In several conferences and meetings of lawyers resolutions have been passed in the past requesting the Central Government to bring into force Section 30 of the Act. **It is not clear whether the Central Government has applied its mind at all to the question whether Section 30 of the Act should be brought into force. In these circumstances, we are of the view that the Central Government should be directed to consider within a reasonable time the question whether it should bring Section 30 of the Act into force or not. If on such consideration the Central Government feels that the prevailing circumstances are such that Section 30 of the Act should not be brought into force immediately it is a different matter. But it cannot be allowed to leave the***

matter to lie over without applying its mind to the said question. Even though the power under Section 30 [sic Section 1(3)] of the Act is discretionary, the Central Government should be called upon in this case to consider the question whether it should exercise the discretion one way or the other having regard to the fact that more than a quarter of century has elapsed from the date on which the Act received the assent of the President of India. The learned Attorney General of India did not seriously dispute the jurisdiction of this Court to issue the writ in the manner indicated above."

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

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

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

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

from Parliamentary debates, the absence of enforcement of Section 30 of the Advocates Act was an aspect noticed. Thus, there was full consciousness in the debates in Parliament on Section 30 not existing as law on that date.

We have to also keep in mind that this provision is crucial specifically when we are dealing with the aspect of actual date. While dealing with any Tribunal or person who is legally authorized "to take evidence", the Tribunal under the said Act is authorized to take evidence. Such evidence is crucial while dealing with Section 30 of the Advocates Act.

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

"5. Coming into operation of enactments -

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

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

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

(3) Unless the contrary is expressed, a ¹[Central Act] or Regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement."

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

force in terms of clause (b) and sub section (3) of Section 5 of the General Clauses Act and came into force almost five decades later. Thus, it became law posterior to the said Act.

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

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

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

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

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

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

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

(Emphasis supplied)

This is subsequently followed by a learned single Judge of the High Court of Delhi, in the case of **PAWAN RELEY** (*supra*) wherein the High Court has held as follows:

"8. The Division Bench of the Punjab & Haryana High Court in Paramjit Kumar Saroya v. Union of India [Paramjit Kumar Saroya v. Union of India 2014 SCC OnLine P&H 10864] , after considering the Act and

various judgments passed from time to time, interpreted the import of Section 30 of the Advocates Act, 1961 in relation to the Maintenance Act, 2007. It was held that Section 30 of the Advocates Act, 1961 came into force on 15-6-2011, i.e. much after coming into force of the Maintenance Act in the year 2007. Section 30 of the Advocates Act, 1961 gives an absolute right to an advocate to practice before all courts and tribunals and would prevail over the Maintenance Act. The Division Bench of Punjab & Haryana High Court construed the provisions of Section 17 of the Maintenance Act and Section 30 of the Advocates Act, 1961 harmoniously.

....

48. In the conspectus of the discussions aforesaid, we are thus of the view that the decision vide Section 30 of the Advocates Act has become law on a posterior date to Section 17 of the said Act which is sufficient for us to come to the conclusion that there cannot be an absolute bar to the assistance by legal practitioners to a tribunal or the Appellate Tribunal despite the "notwithstanding" clause. Both the enactments are Central enactments. While the said Act was being enacted, the absence of Section 30 of the Advocates Act was known. Not having conferred that right under Section 30 of the Advocates Act on the legal practitioner, the Parliament in its wisdom had found no reasons to give such rights under Section 17 of the said Act. However, the situation has subsequently changed on account of Section 30 of the Advocates Act having come into force. The right conferred under Section 30, subject to the provisions of the Advocates Act, is on every advocate so far his name is entered in the State roll to practise "throughout the territory to which this Act extends". Such right is qua all courts including the Supreme Court. Such right is also before any tribunal or person "legally authorised to take evidence". Thus, if a tribunal is legally authorised to take evidence, there is right in the advocate to practise before the Tribunal. The Tribunal has the right to take evidence. That being the status of the Tribunal, there has been intrinsic

right in the advocate to practise before such a tribunal in view of Section 30 of the Advocates Act which cannot be taken away. The position would be the same before the Appellate tribunal in view of the powers conferred on a tribunal constituted under Section 7 of the said Act. Sections 6, 8 and 11 of the said Act leave no manner of doubt about the vast powers including taking the evidence on oath, enforcing attendance of witnesses, compelling discovery of documents, it being a civil court for all the purposes of Section 195 and Chapter 26 CrPC, etc.

49. The overriding provisions of the said Act under Section 3 in the context of Section 17 of the said Act have to be appreciated in the context of the law prevalent when the said Act was enacted. The ground reality has changed on account of Section 30 of the Advocates Act having come into force on 15-6-2011, while all the judgments taking contrary view are based on Section 30 not being notified and the consequence thereof. Section 30 was not law when the said enactment was enacted and brought into force.

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

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

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

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

(iii) Section 17 would not come in the way of legal representation on behalf of parties post 15-6-2011 in view of Section 30 of the Advocates Act having come into force."

9. The Punjab & Haryana High Court, by way of the said judgment, had requested the Central Government to have a relook into the provisions of the Maintenance Act in context of Section 30 of the Advocates Act, 1961.

10. We are informed that as of yet neither any decision has been taken in that respect nor any appeal has been filed against the judgment passed by Punjab & Haryana High Court."

(Emphasis supplied)

In the light of the afore-quoted judgments what would unmistakably emerge is, that the petitioner had a right to be represented by a legal practitioner before the Tribunal i.e., before the Assistant Commissioner. Apart from the afore-quoted provisions, it is germane to notice the procedure stipulated under Section 8 of the Act for holding an inquiry by the Tribunal on an application made by the aggrieved. Section 8 reads as follows:

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

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

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

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

(Emphasis supplied)

Sub-section (2) of section 8 mandates that the Tribunal shall have all the powers of the civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and compelling the discovery and production of documents. The Tribunal for all the aforesaid purposes would be deemed to be a civil Court. Appeal against orders of the Assistant Commissioner is under Section 16 of the Act. Section 16 of the act reads as follows:

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

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

Provided further that the Appellate Tribunal may, entertain the appeals after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

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

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

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

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

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

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

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

(Emphasis supplied)

The appeal is to be preferred by the aggrieved person against the order of the Assistant Commissioner and the Appellate Authority has vast powers to adjudicate and decide upon the appeal after both the parties are heard in person or through duly authorized representative. Parties to the *lis* cannot always be said to be conversant with terms, to be knowing the nuances of law of

evidence, both oral or documentary, as to what is to be produced before the Tribunal. It is, therefore, a legal aid is necessary to such a senior citizens. Legal aid, is trite, a facet of the constitutional right guaranteed under Article 21 of the Constitution of India and such legal aid or legal assistance cannot be stifled or crippled only to tendering advice.

15. In the teeth of the enactment, its purpose and the right of the Advocate under Section 30 of the Act, legal assistance by an advocate cannot but be given to the applicants before the Assistant Commissioner, as well as the Deputy Commissioner. The apprehension of the learned Additional Government Advocate that an entry of an Advocate would delay the proceedings or jeopardize the object behind the Act is noted only to be rejected. The presence of an advocate would neither delay the proceedings nor jeopardize the object of the enactment. In the considered view of this Court, it would streamline the proceedings to be in accordance with law.

16. Swinging back to the facts of the case, the matter is before the Deputy Commissioner in appeal filed against the order

passed by the Assistant Commissioner. The Appellate Authority also has vast powers to redeem the grievance of the petitioner. Therefore, the petitioner shall be permitted legal assistance by an Advocate before the Deputy Commissioner and the Deputy Commissioner shall bear in mind the observations made in the course of the order and the judgments rendered by the Apex Court on the issue of redemption of grievance of a senior citizen under the Act and the obligation of the children again under the Act and then pass appropriate orders as he deems fit, in the facts of the case.

17. Since the proceedings are now concluded before the Assistant Commissioner, this Court is of the opinion that the matter need not be remanded back to the Assistant Commissioner but it would be open to the Deputy Commissioner to pass appropriate orders in accordance with law.

18. For the aforesaid reasons, I pass the following:

ORDER

(i) Writ Petition is allowed.

- (ii) Section 17 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is declared as *ultra vires* of Section 30 of the Advocates' Act, 1961 and therefore, it is rendered unenforceable.
- (iii) The Endorsement dated 21-02-2023 issued by the 2nd respondent/Deputy Commissioner stands quashed.
- (iv) The petitioner is held entitled to be represented by an advocate in the proceedings before the Deputy Commissioner.
- (v) The matter is remitted back to the hands of the Deputy Commissioner to permit the petitioner to be represented by an Advocate, hear him, consider the case on its merits and pass appropriate orders, in accordance with law.
- (vi) The Deputy Commissioner while considering the appeal shall bear in mind the observations made in the course of the order.
- (vii) A copy of this order shall be forwarded to the Chief Secretary, the Government of Karnataka, for taking appropriate steps to notify the Assistant Commissioner and the Deputy Commissioners under the Act to permit

representation of Advocates to the applicants, petitioners and appellants in the proceedings before them.

**Sd/-
JUDGE**

bkp