IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE G.S. AHLUWALIA

ON THE 2nd OF AUGUST, 2024

WRIT PETITION No. 22392 of 2024

KUSHI & ASSOCIATES

Versus

THE STATE OF MADHYA PRADESH AND OTHERS

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Appearance:
Shri Sukhendra Singh – Advocate for the petitioner.
Shri Swapnil Ganguly – Deputy Advocate General for the respondents/State.

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O R D E R

This petition under Article 226 of Constitution of India has been filed seeking following relief(s):-

(I) Issue a writ in the nature of 'Certiorari', quashing the impugned order of allotment dated 24.07.2024, (Annex.P-5), passed by the respondent No.4.

(II) Issue a further writ in the nature of 'Mandamus', directing the respondent No.3 to 5, to include the name of petitioner in Select List/ Allotment List dated 24.07.2024 (Annx. P-5), passed by the respondent No.4.

(III) Issue a further writ in the nature of 'Mandamus', directing the competent authorities of the State of M.P. to peruse and enquire the entire matter from the respondent No.3 to 5, pertaining to the petitioner and take the legal action against illegality.

(IV) To call for entire records from the

respondent No.3 to 5, pertaining to petitioner and also take strict penal action against the illegality committed by them.

(V) Any other relief/order/direction/prod which this Hon'ble Court may deems fit and proper in the facts and circumstances of the case, may also kindly be granted to the petitioner.

2. It is the case of petitioner that respondents had issued an Expression of Interest & Concept Design Invitation for Development/ Renovation/ Retrofitting/ Additional construction works of 55 P.M. Excellence Colleges in the State of Madhya Pradesh. As per the expression of interest in concept design invitation, budget provision is around Rupees 336 Crores and EPCO was entrusted to select multiple Architectural Consultants/Firms and provide comprehensive architectural services for the project. As per the eligibility criteria set for the project were that the aspirant must have minimum 10 years of experience from the date of registration with the Council of Architecture, and must have designed and executed minimum 3 College building projects, must have designed and executed minimum of one renovation/ additional construction/ retrofitting projects, and also must have executed at least 3 other single projects of any kind and execution of the project more than Rs.5 Crores will be given weightage/ preference during allotment of work and accordingly, presentation of work profile of Firms, along with the Design Concept was called from the Architects during presentations. It was also mentioned that the Firms selected shall be awarded the project on consultancy fees of 2% of project cost. It is submitted by counsel for petitioner that although the petitioner was the most eligible Firm for allotment of work but when the final list of selected architectural firms was issued, no College was

allotted to petitioner firm.

3. Except by making a bald statement that architectural firms who have been allotted different Colleges are not entitled to submit their work profile, nothing has been pointed out in the Writ Petition to show that the selected architectural firms do not fulfill the eligibility criteria.

4. During the course of arguments, it was submitted by Shri Swapnil Ganguly that the petitioner has not impleaded the architectural firms who have been awarded contract of consultancy, therefore the petition suffers from non-joinder of necessary party.

5. In reply to the submission, counsel for petitioner submitted that counsel for the State is trying to twist the facts and refused to implead the successful architectural firms.

6. When this Court raised a query with regard to the scope of judicial review in contractual matters, then it was submitted by counsel for petitioner that it is not a contractual matter but it is a case of selection of architectural firm.

7. This Court was of the view that the petition has not been drafted with required pleadings, therefore this Court gave an option to the petitioner that if he so requires then the case can be taken up on 05/08/2024.

8. In reply, it was submitted by counsel for petitioner that in that case this Court must restrain the respondents from issuing allotment order to the successful architectural firms or else he should be heard. Accordingly, counsel for petitioner was directed to conclude his arguments.

9. Except by submitting that the petitioner is the most suitable architectural firm, nothing was submitted by counsel for petitioner as to

how the architectural firms which have been selected and have been allotted the Colleges are ineligible. Neither there is any pleading in that regard nor any submission was made by counsel for petitioner thereby pointing out ineligibility of the selected architectural firms.

10. Heard learned counsel for the parties.

Non-joinder of necessary party

11. It is well established principle of law that any person who is likely to be adversely affected by the order must be made a party to the Writ Petition because such a party would be a "necessary party" without whom no effective order can be passed. There is a difference between "necessary party" and "proper party". If a "necessary party" is not impleaded, the suit/ petition itself is liable to be dismissed. Whereas, a "proper party" is a person whose presence would enable the Court to completely, effectively and adequately adjudicate the matter. If a person is not found to be a "necessary party" or "proper party", then the Court cannot dismiss the suit/ Writ Petition.

12. The Supreme Court in the case of **Mumbai International Airport Private Limited Vs. Regency Convention Centre and Hotels Private Limited and Others** reported in **(2010) 7 SCC 417** has held as under:-

> "**13.** The general rule in regard to impleadment of parties is that the plaintiff in a suit, being *dominus litis*, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which

provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

> "10. (2) *Court may strike out or add parties*.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

14. The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (*a*) any person who ought to have been joined as plaintiff or defendant, but not added; or (*b*) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the

> court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.
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> **17.** The learned counsel for the first respondent on the other hand submitted that the decision in *Sumtibai* [(2007) 10 SCC 82] is not good law in view of an earlier decision of a three-Judge Bench decision of this Court in *Kasturi* v. *Iyyamperumal* [(2005) 6 SCC 733]."

13. The Supreme Court in the case of **Poonam Vs. State of Uttar Pradesh and Others** reported in **(2016) 2 SCC 779** has held as under:-

> "**20.** In this context the authority in *Sadananda Halo* v. *Momtaz Ali Sheikh* [*Sadananda Halo* v. *Momtaz Ali Sheikh*, (2008) 4 SCC 619 : (2008) 2 SCC (L&S) 9] is quite pertinent. The Division Bench referred to the decision in *All India SC & ST Employees' Assn.* v. *A. Arthur Jeen* [*All India SC & ST Employees' Assn.* v. *A. Arthur Jeen*, (2001) 6 SCC 380 : (2007) 2 SCC (L&S) 362] wherein this Court had addressed the necessity of joining the necessary candidates as parties. The Court referred to the principle of natural justice as enunciated in *Canara Bank* v. *Debasis Das* [*Canara Bank* v. *Debasis Das*, (2003) 4 SCC 557 : 2003 SCC (L&S) 507] . We may profitably reproduce the same: (*Sadananda Halo case* [*Sadananda Halo* v. *Momtaz Ali Sheikh*, (2008) 4 SCC 619 : (2008) 2 SCC (L&S) 9] , SCC pp. 647-48, para 63)

> "*63*. … 'Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.' (*Debasis Das case* [*Canara Bank* v. *Debasis Das*, (2003) 4 SCC 557 : 2003 SCC (L&S) 507] , SCC pp. 560*h*-561*a*)"

And again: (*Sadananda Halo case* [*Sadananda Halo* v. *Momtaz Ali Sheikh*, (2008) 4 SCC 619 : (2008) 2 SCC (L&S) 9] , p. 648, para 63)

> "*63*. … 'Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of

> natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. *The old distinction between a judicial act and an administrative act has withered away*. The adherence to principles of natural justice as recognised by all civilised States is of supreme importance…' (*Debasis Das case* [*Canara Bank* v. *Debasis Das*, (2003) 4 SCC 557 : 2003 SCC (L&S) 507] , SCC p. 561*e-f*)"
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> (emphasis in original)

14. The Supreme Court in the case of **Kasturi Vs. Iyyamperumal and Others** reported in **(2005) 6 SCC 733** has held as under:-

> "**7.** In our view, a bare reading of this provision, namely, second part of Order 1 Rule 10 sub-rule (2) CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead, their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are — (*1*) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (*2*) no effective decree can be passed in the absence of such party.
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> * * *

> **13.** From the aforesaid discussion, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person."

15. The Supreme Court in the case of **Moreshar S/o Yadaorao Mahajan Vs. Vyankatesh Sitaram Bhedi (dead) through LRs and others** decided on 27/09/2022 in **Civil Appeal No.5755-5756/2011** has held as under:-

> "18. It could thus be seen that a "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. It has been held that if a "necessary party" is not impleaded, the suit itself is liable to be dismissed.
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> 20. It can thus be seen that what has been held by this Court is that for being a necessary party, the twin test has to be satisfied. The first one is that there must be a right to some relief against such party in respect of the controversies involved in the proceedings. The second one is that no effective decree can be passed in the absence of such a party."

16. In the present case, certain architectural firms have been selected and Colleges have been allotted. Unless and until their selection and allotment of Colleges is set aside, petitioner cannot be granted any relief. Therefore, successful architectural firms are the "necessary party" for adjudication of the claim of the petitioner.

17. Although, the Deputy Advocate General had raised a specific objection with regard to non-joinder of "necessary party" but instead of giving any weightage to said objection, counsel for petitioner submitted that counsel for the respondents is trying to give twist to the facts.

18. This Court could not understand the arrogant attitude of counsel for petitioner specifically when the objection raised by the State counsel was a legal objection which was also otherwise relevant under the facts and circumstances of the case.

19. Be that whatever it may be.

20. Once counsel for the petitioner has refused to implead the successful architectural firms, therefore this petition is bad on account of non-joinder of necessary parties.

Scope of judicial review in contractual matters.

21. Although it is the submission of counsel for petitioner that award of allotment of College on consultancy fee @ 2% of project fee to the architectural firms is a selection and not contract, but this Court is unable to accept the said contention.

22. Counsel for petitioner was directed to elaborate his submissions but except by saying that it is a case of selection of architectural firms, no reasons were assigned for making such submission.

23. Be that whatever it may be.

24. The architectural firms were granted project on consultancy fee of 2% of the project cost. As per the Expression of Interest & Concept Design Invitation, the architectural firms were required to visit/ survey/ check structural stability of existing buildings/ do gap analysis etc for the allotted schools in any district of the Madhya Pradesh and then prepare the final Concept design, tender drawings/ working drawings,

details, BOQs detailed estimates etc i.e. complete DPR sufficient to invite tenders in 3/4 weeks time only.

25. If the contention of counsel for petitioner that it is not a contract but it is a selection is accepted, still this Court is of the view that the High Court while exercising power under Article 226 of Constitution of India cannot test the suitability of an architectural firm unless and until it is pointed out that the architectural firm which has been selected does not fulfill the eligibility criteria as mentioned in expression of interest & concept design invitation.

26. As already pointed out, except making a bald statement that the selected architectural firms are not entitled to submit their work profile as they do not have eligibility as per the norms prescribed by EPCO, nothing has been pointed out to substantiate such a bald statement.

27. The entire Writ Petition is based on the pleadings thereby praising the petitioner itself. Whether the petitioner was eligible or not is not the primary question but the question is as to whether other architectural firms were ineligible or not. If other architectural firms were also eligible, then this Court cannot substitute its opinion thereby overruling the satisfaction of the experts regarding the suitability of the architectural firms. Petitioner has not filed even a single document to show that the selected architectural firms do not fulfill the eligibility criteria.

28. The Supreme Court in the case of **Tata Motors Limited Vs. The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and Others** decided on 19/05/2023 in **Civil Appeal No.3897/2023** has held as under:-

> "48. This Court being the guardian of fundamental

rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See: Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489)

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52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at

naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in Association of Registration Plates v. Union of India and Others, reported in (2005) 1 SCC 679.

53. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd., reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

54. As observed by this Court in Jagdish Mandal v. State of Orissa and Others, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that

> evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

29. As already pointed out, except by praising itself, petitioner has not laid down any foundation to point out that any of the selected architectural firm was not eligible. So far as the suitability of eligible aspirants who otherwise fulfill all the eligibility criteria is concerned, it has to be left to the discretion of the Authorities and this Court cannot override the decision/ satisfaction recorded by the Authorities.

30. However, this was not the end of the case. When the Court observed that it would dictate the order in Chamber, as it was already 04:40 PM, then apprehending that the case might be dismissed, counsel for petitioner started insisting for adjournment.

31. After realizing that the Court may not pass a favourable order, if an attempt is made by a Lawyer to seek adjournment, then it is a glaring example of Bench hunting. Be that whatever it may be.

32. When the prayer for adjournment was refused, certain comments were passed by counsel for petitioner which were unparliamentary and were not expected from a Lawyer. However the gist of the comments was that the fee of this case is the livelihood of the Advocate and in case if it is dismissed then he would lose certain money (This is the summary assessed by the Court and not the actual words spoken by the petitioner.

The actual words are not being reproduced).

33. The Supreme Court in the case of **Bar of Indian Lawyers Through its President Jasbir Singh Malik Vs. D.K. Gandhi PS National Institute of Communicable Diseases and Anr.** Decided on 14/05/2024 in **Civil Appeal No.2646/2009** has held as under:-

> "29. It is thus well recognized in catena of decisions that the legal profession cannot be equated with any other traditional professions. It is not commercial in nature but is essentially a service oriented, noble profession. It cannot be gainsaid that the role of Advocates is indispensable in the Justice Delivery System. An evolution of jurisprudence to keep our Constitution vibrant is possible only with the positive contribution of the Advocates. The Advocates are expected to be fearless and independent for protecting the rights of citizens, for upholding the Rule of law and also for protecting the Independence of Judiciary. People repose immense faith in the Judiciary, and the Bar being an integral part of the Judicial System has been assigned a very crucial role for preserving the independence of the Judiciary, and in turn the very democratic set up of the Nation. The Advocates are perceived to be the intellectuals amongst the elites and social activists amongst the downtrodden. That is the reason they are expected to act according to the principles of uberrima fides i.e., the utmost good faith, integrity, fairness and loyalty while handling the legal proceedings of his client. Being a responsible officer of the court and an important adjunct of the administration of justice, an Advocate owes his duty not only to his client but also to the court as well as to the opposite side.
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> 30. The legal profession is different from the other professions also for the reason that what the Advocates do, affects not only an individual but the entire administration of justice, which is the foundation of the civilized society. It must be remembered that the legal profession is a solemn and

> serious profession. It has always been held in very high esteem because of the stellar role played by the stalwarts in the profession to strengthen the judicial system in the country. Their services in making the judicial system efficient, effective and credible, and in creating a strong and impartial Judiciary, which is one of the three pillars of the Democracy, could not be compared with the services rendered by other professionals. Therefore, having regard to the role, status and duties of the Advocates as the professionals, we are of the opinion that the legal profession is sui generis i.e unique in nature and cannot be compared with any other profession."

34. The Supreme Court in the case of **Chairman, M.P. Electricity Board and Ors. Vs. Shiv Narayan and Anr.** decided on 24/08/2005 in **Civil Appeal No.1065/2000** has held as under:-

> "The word "commerce" is a derivative of the word "commercial". The word "commercial" originates from the word "commerce" which has been defined in *Black's Law Dictionary*, 6th Edn. as under:
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> > "*Commerce*.—The exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles. *Anderson* v. *Humble Oil and Refining Co.* [226 Ga 252 : 174 SE 2d 415, 417] The transportation of persons and property by land, water and air. *Union Pacific R. Co.* v. *State Tax Commr.* [19 Utah 2d 236 : 429 P 2d 983, 984]
> >
> > Intercourse by way of trade and traffic between different peoples or States and the citizens or inhabitants thereof, including not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means

> and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea. *Brennan* v. *Titusville* [153 US 289 : 14 S Ct 829 : 38 L Ed 719 (1893)] ; *Railroad Co.* v. *Fuller* [84 US (17 Wall) 560 : 21 L Ed 710 (1873)] ; *Hoke* v. *United States* [227 US 308 : 33 S Ct 281 : 57 L Ed 523 (1912)]. Also interchange of ideas, sentiments, etc., as between man and man.
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> The term 'commerce' means trade, traffic, commerce, transportation or communication among the several States, or between the district of Columbia or any territory of the United States and any State or other territory, or between any foreign country and any State, territory, or the district of Columbia, or within the district of Columbia or any territory, or between points in the same State but through any other State or any territory or the district of Columbia or any foreign country. National Labor Relations Act, §2."

The word "commercial" has been defined to mean:

> "*Commercial*.—Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. *Anderson* v. *Humble Oil & Refining Co.* [226 Ga 252 : 174 SE 2d 415, 417] Generic term for most all aspects of buying and selling."

The expression "commerce" or "commercial" necessarily has a concept of a trading activity. Trading activity may involve any kind of activity, be it a transport or supply of goods. Generic term for almost all aspects is buying and selling. But in legal profession, there is no such kind of buying or selling nor any trading of any kind whatsoever.

Therefore, to compare legal profession with that of trade and business is a far from correct approach and it will totally be misplaced.

Similarly, in *Advanced Law Lexicon*, 3rd Edn. 2005, Vol. 1 at p. 878 by P. Ramanatha Aiyar, the word "commerce" has been defined as under:

> " 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of one country and the citizens or subjects of other countries, and between the citizens of different provinces in the same State or country. *Welton* v. *Missouri* [91 US 275 : 23 L Ed 347 (1875)] "
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> "Buying and selling together, exchange of merchandise especially on a large scale between different countries or districts; intercourse for the purpose of trade in any and all its forms. [Section 2(13), Income Tax Act (43 of 1961).]"

The word "profession" has been defined in *Black's Law Dictionary*, 6th Edn. as under:

> "*Profession*.—A vocation or occupation requiring special, usually advanced, education, knowledge, and skill; e.g. law or medical professions. Also refers to whole body of such profession.
>
> The labor and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.
>
> The term originally contemplated only theology, law, and medicine, but as applications of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in

> special knowledge as distinguished from mere skill.
>
> Act of professing; a public declaration respecting something. Profession of faith in a religion."

The word "profession" has also been defined in *Advanced Law Lexicon*, Vol. 3 at p. 3764 which reads as under:

> "*Profession*.—A 'profession' involves the idea of an occupation requiring either purely intellectual skill or if any manual skill, as in painting and sculpture or surgery, skill controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. *CIT* v. *Manmohan Das* [(1966) 59 ITR 699 : AIR 1966 SC 798] , ITR at p. 710. [Income Tax Act, (43 of 1961), Section 28.]"

At p. 3765 it has been further stated as follows:

> "One definition of a profession is an employment, especially an employment requiring a learned education, as those of law and physic. (*Worcest Dict.*) In the *Century Dictionary* the definition of profession is given, among others, as a vocation in which a professional knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving, their interest or welfare in the practice of an art founded on it."
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> The word implies professional attainment in special knowledge as distinguished from mere skill; a practical dealing with affairs as distinguished

from mere study or investigation; and an application of such knowledge to uses for others as a vocation as distinguished from its pursuits for its own purposes.

The term is applied to an occupation or calling which requires learned and special preparation in the acquirement of scientific knowledge and skill.

The occupation which one professes to be skilled in and to follow; any calling or occupation by which a person habitually earns his living [Section 2(36), Income Tax Act (43 of 1961) and Section 150, Indian Evidence Act (1 of 1872)]; [Section 7, North-Eastern Hill University Act (24 of 1973)].

* * *

An activity to be a profession must be one carried on by an individual by his personal skill, intelligence and dependent on individual characteristics. *Sakharam Narayan Kherdekar* v. *City of Nagpur Corpn.* [AIR 1964 Bom 200 : (1964) 1 LLJ 156] , AIR at p. 210. [Bombay Shops and Establishments Act (79 of 1948), Section 2(4).]

The multifarious functions call for the exercise of integrity; intelligence and personal skill by the chartered accountant in the service of his client and so the preamble of the Chartered Accountants Act, 1949 describes the avocation of a chartered accountant as a profession. *N.E. Merchant* v. *State* [AIR 1968 Bom 283 : 1968 Cri LJ 1041] , AIR at p. 287. [Bombay Shops and Commercial Establishments Act (76 of 1948)]

> A profession or occupation is carried on for the purpose of earning a livelihood and a profit motive does not underlie such carrying of profession or occupation. *L.M. Chitale* v. *Commr. of Labour* [AIR 1964 Mad 131 : (1963) 2 LLJ 747] , AIR at p. 133. [Constitution of India, Article 19(6)(1).]"
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> "Profession as distinguished with 'commercial' means a person who enters into a profession, it involves certain amount of skill as against commercial activity where it is more of a matter of things or business activity. In profession, it is purely use of skill activity. Therefore, two are distinct concepts in commercial activity — one works for gain or profit and as against this, in profession, one works for his livelihood." (p. 3764)

This Court in *V. Sasidharan* v. *Peter and Karunakar* [AIR 1984 SC 1700] held as under :

> ".....It does not require any strong argument to justify the conclusion that the office of a lawyer or of a firm of lawyers is not a 'shop' within the meaning of Section 2(15). Whatever may be the popular conception or misconception regarding the role of today's lawyers and the alleged narrowing of the gap between a profession on one hand and a trade or business on the other, it is trite that, traditionally, lawyers do not carry on a trade or business nor do they render services to 'customers'. The context as well as the phraseology of the definition in Section 2(15) is inapposite in the case of a lawyer's office or the office of a firm of lawyers."

In *Harendra H. Mehta* v. *Mukesh H. Mehta* [(1999) 5 SCC 108] it was noted as follows:

> "*1*. of, engaged in, or concerned with, commerce. *2*. having profit as a primary aim rather than artistic etc. value; philistine.' (*Concise Oxford Dictionary*) In the *Black's Law Dictionary*, 'commercial' is defined as:
>
> 'Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. *Anderson* v. *Humble Oil & Refining Co.* [226 Ga 252 : 174 SE 2d 415], "A broad and *not* a restricted construction should be given to the word 'commercial' appearing in Section 2 of the Foreign Awards Act. In *R.M. Investment and Trading Co. (P) Ltd.* v. *Boeing Co.*, (1994) 4 SCC 541 the terms of the agreement required the petitioner to play an active role in promoting the sale and to provide 'commercial and managerial assistance and information' which may be helpful in the respondents' sales efforts. It was held that the relationship between the appellant and the respondents was of a commercial nature. The Court said that the word 'commercial' under Section 2 of the Foreign Awards Act should be liberally construed."

In *Stroud's Judicial Dictionary* (5th Edn.) the term "commercial" is defined as "traffic, trade or merchandise in buying and selling of goods".

A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial character. Considering a similar question in the background

> of Section 2(4) of the Bombay Shops and Establishments Act, 1948 (79 of 1948), it was held by this Court in *Devendra M. Surti (Dr.)* v. *State of Gujarat*)AIR 1969 SC 63) that a doctor's establishment is not covered by the expression "commercial establishment"."

35. Thus, the profession of an Advocate is not a business or commercial activity. They are supposed to put forward the case of their client by exercising their professional skills, but they should not try to make the profession, a commercial activity. They cannot pressurize the Court to pass a favorable order, so that they can recover the fee from their client. The Courts are not supposed to be concerned about the recovery of fee of an Advocate from his client.

36. Accordingly, the aforesaid conduct of counsel for petitioner in making unparliamentary comments is hereby **condemned**.

37. Considering the totality of the facts and circumstances of the case, this Court is of considered opinion that no case is made out warranting interference.

38. Petition fails and is hereby **dismissed.**

(G.S. AHLUWALIA)
JUDGE

S.M.