
**33RD ALL INDIA UNIVERSITY
MOOT COURT COMPETITION, 2017**

**IN THE HONOURABLE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (CIVIL) No. _____ OF 2017

IN THE MATTER OF:

THE ADVOCATE PETITIONER

v.

**BAR COUNCIL OF INDIA AND
ANR..... RESPONDENT**

**UPON SUBMISSION TO THE HON'BLE CHIEF JUSTICE AND HIS COMPANION JUSTICES OF THE
SUPREME COURT OF INDIA**

~ Memorial for the Petitioner ~

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LIST OF ABBREVIATIONS

ABBREVIATION	EXPANSION
&	And
¶	Paragraph
¶¶	Paragraphs
AIHC	All India High Court Cases
AIR	All India Reporter
ALL ER	All England Reports
Anr.	Another
Art.	Article
BCI	Bar Council Of India
Cal	Calcutta
Co.	Company
COPA	Consumer Protection Act
Del	Delhi
ed.	Edition
HC	High Court
Ibid.	Ibidem
IPC	Indian Penal Code
Ltd.	Limited
NCT	National Capital Territory
NJ	Natural Justice
No.	Number

MEMORIAL ON BEHALF OF PETITIONER

Ors.	Others
Pat	Patna
Pvt.	Private
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
Sec.	Section
Supp.	Supplementary
UOI	Union of India
v.	Versus
WLR	Weekly Law Reports

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1.	Common Cause, A Registered Society and Ors. v. UOI	(2006) 9 SCC 295	¶ 8	p.....3
2.	Dalpat Rai Bhandari v. President of India	AIR 1993 SC 1	¶ 2	p.....1
3.	Dr. Rash Lal Yadav v. State of Bihar	(1994) 5 SCC 267	¶ 14	p.....5
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8.	I.R Coelho v. State of Tamil Nadu	(1998) 7 SCC 550	¶ 3	p.....1
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3.	B.C. Sharma, Fair Hearing and Access to Justice (1st ed., 2012)	¶ 14	p....5
4.	Lewin on Trusts (John Mowbray, Lyton Tucker, Nicholas Le Poidevin, Edwin Simpson, James Brightwell, 18 th ed., 2008)	¶ 3	p....2
5.	MP Jain & SN Jain's Principles of Administrative Law (7 th ed., 2011)	¶ 12	p....4
6.	D.D Basu, Commentary on the Constitution of India (9 th ed., 2014)	¶ 3	p....1
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1.	Rajeev Dhavan, The Right to Strike, The Hindu (10/01/2003)	¶ 7	p....3
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STATUTE AND CONSTITUTION

1.	The Advocates Act, 1961	¶ 13, 14	p.....5
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WEB RESOURCES

1.	www.westlaw.india.com(WEST LAW INDIA)
2.	www.manupatrafast.com(MANUPATRA)
3.	www.judis.nic.in(SUPREME COURT OF INDIA OFFICIAL)
4.	www.jstor.org(JSTOR)
5.	www.sconline.com(SCC ONLINE)
6.	www.legal.un.org. (UNITED NATIONS)

STATEMENT OF JURISDICTION

The Petitioner herein has invoked the Writ Jurisdiction of this Honourable Court under article 32 of the Constitution of India. Article 32 read as-

“32. Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution”

STATEMENT OF FACTS

BACKGROUND

1. The Bar Council of India, under its assigned powers, in 2009, inter alia, added the following provision:-

"An advocate who browbeats and / or abuses a judge or judicial officer or uses unbecoming language in the Court or refuses to attend Court as a tool of protest shall, on preliminary inquiry, be suspended from practicing for an indefinite period and the decision of the Disciplinary Committee shall be final."

VOICE OF PROTEST BY THE LAWYERS COMMUNITY

2. In the protest of the above mentioned rule, the Paschim Pradesh Bar Association called for a State-wide strike of advocates. The protest included, inter alia, demonstrations, TV interviews, preventing judges from entering the Courts, and boycott of Courts.

REACTION FROM THE BAR AND THE BENCH

3. The Bar Council of India, in exercise of its powers under the Advocates Act, 1961 and the Rules thereunder suspended, on preliminary inquiry, 50 advocates involved in the strike on the grounds of professional misconduct.
4. On a separate occasion, the Hon'ble HC in a civil case, passed an ex parte order imposing costs upon the petitioner's client and directing the half of such cost to be paid by the petitioner himself, for not appearing the case due to the strike call. The Hon'ble HC also instituted a contempt proceeding against him.

EPILOGUE

5. Being aggrieved by the said order, the Petitioner has filed the instant writ petition before the Hon'ble Supreme Court.

ISSUES RAISED

I.

WHETHER THE WRIT PETITION IS MAINTAINABLE IN THE PRESENT CASE?

II.

WHETHER THERE IS A BREACH OF CONTRACT OR BREACH OF TRUST BETWEEN THE
PETITIONER AND HIS CLIENT?

III.

WHETHER STRIKE IS A CONSTITUTIONAL RIGHT AND IN CONSONANCE WITH THE
FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION?

IV.

WHETHER RIGHT TO FREEDOM OF PROFESSION AND OCCUPATION INCLUDES
DISCONTINUING THE PROFESSION OR OCCUPATION?

V.

WHETHER THE IMPUGNED RULE IS ARBITRARY AND AGAINST THE PRINCIPLES OF
NATURAL JUSTICE?

SUMMARY OF ARGUMENTS

[1]. THE WRIT PETITION IS MAINTAINABLE IN THE INSTANT CASE.

In the present case, there have been gross violations of fundamental rights viz. Art. 14 & 21 of Constitution of India. The impugned rule is arbitrary and against the principles of natural justice. Henceforth the Hon'ble SC of India has the power to entertain proceedings for the enforcement of fundamental rights.

[2]. THERE IS NO BREACH OF CONTRACT OR BREACH OF TRUST BETWEEN THE PETITIONER AND HIS CLIENT.

In the instant case, there has been no breach of contract or trust between the petitioner and his client. There has been no legal injury caused to the client. Moreover the absence of the petitioner was on justified grounds.

[3]. STRIKE IS A CONSTITUTIONAL RIGHT AND IN CONSONANCE WITH THE FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION.

Right to strike is a facet of the rights guaranteed under Art. 19(1)(a) of the Indian Constitution. Strikes empower the disempowered to fight injustice in cases where there is no option left and serve as hard – fought weapons against oppressive and authoritative forces in democracy.

[4]. RIGHT TO FREEDOM OF PROFESSION AND OCCUPATION INCLUDES DISCONTINUING THE PROFESSION OR OCCUPATION.

It is submitted that right to freedom of profession and occupation under Art. 19(1)(g) includes the right to discontinue the profession or occupation. In the instant case their abstention is justified on the ground that it was for a legitimate cause and a justified purpose.

[5]. THE IMPUGNED RULE IS ARBITRARY AND AGAINST THE PRINCIPLES OF NATURAL JUSTICE.

It is the humble submission herein that, in an adversarial system, all the parties must be given an opportunity of being heard. In the instant case, the authorities have swung away from the principles of natural justice, since there was no opportunity of a fair and reasonable hearing given to the 50 advocates before their suspension. Further, the provision that the decision of the Disciplinary Committee shall be final, is arbitrary in nature and is against the principles of NJ.

PLEADINGS

[1]. THE WRIT PETITION IS MAINTAINABLE IN THE INSTANT CASE.

¶ 1. The Petitioner files the instant petition under Art. 32¹ in the Hon'ble Supreme Court.

[1.1] PETITIONER HAS LOCUS STANDI IN THE INSTANT CASE.

¶ 2. It is humbly submitted that maintainability of writ petition for enforcement of fundamental rights can be questioned only on the ground of laches², delays and acquiescence,³ drafting of petition in an undignified manner,⁴ malicious in nature,⁵ where disputed question of facts are involved or question of law has been raised in the abstract⁶ or enforcement of private or contractual rights are sought to be enforced⁷. In the instant case, none of the aforementioned exception exists. The petition has been filed in time, question of facts are involved and fundamental rights are sought to be enforced. The impugned rule amended by BCI⁸ comes within the purview of Article 13⁹. Therefore, the Hon'ble Supreme court is competent to decide the legality of the circular under Art. 32.

[1.2] BASIC STRUCTURE OF THE CONSTITUTION HAS BEEN VIOLATED.

¶ 3. It is submitted that Part III of the Constitution which deals with "Fundamental rights" is regarded as the basic structure of the Constitution¹⁰. The doctrine of basic structure not only applies against the amendments under the exercise of constituent power¹¹ but also against exercise of legislative¹² and executive power¹³. Therefore, the said rule is within the ambit of application of basic structure.

¹ Art. 32, the Constitution of India, 1950.

² Rabindra Nath Bose and others v. Union of India and others, AIR 1970 SC 470.

³ R. v. Dairy Produce Quota Tribunal (1990) 2 AII ER 434 : (1990) 2 WLR 1302.

⁴ M.K Mallick, *Law and Practice*, 47 (12th ed., 2012).

⁵ S.A. Kini v. Union of India, AIR 1985 SC 893 : (1985) 3 SCR 754 : 1985 Supp. SCC 122(¶ 4) ; R.V. Customs and Excise Commissioner ex parte Cooke and Stevenson, 1 AII ER 1068 (1970, Queen Bench Division, Divisional Court).

⁶ Indian legal and Economic forum v. U.O.I (1997) 10 SCC 728.

⁷ Satish Chandra v. Union of India, AIR 1953 SC 250.

⁸ Moot Problem, 33RD ALL INDIA INTER-UNIVERSITY MOOT COURT COMPETITION, 2017.

⁹ Art. 13 (3), the Constitution of India, 1950 ; Brig Guardian Singh Uban v. Union of India. 1997 AIHC 886 (DEL) ; Dalpat Rai Bhandari v. President of India, AIR 1993 SC 1 ; D.D Basu, *Commentary on the Constitution of India*, (9th ed., 2014).

¹⁰ I.R Colho v. State of Tamil Nadu, (1998) 7 SCC 550.

¹¹ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; Smt. Indira Nehru Gandhi v. Raj Narain, 1975 Supp. SCC 1.

¹² Waman Rao v. Union of India, (1981) 2 SCC 362.

[2]. THERE IS NO BREACH OF CONTRACT OR BREACH OF TRUST BETWEEN THE PETITIONER AND HIS CLIENT.

¶ 4. It is well-established fact that trust warrants to provide protection of the interests of the person who confides in Trustee¹⁴ and in the such jural relation between the trustee and the beneficiary has been accounted as ‘fiduciary relation’¹⁵. It is submitted that in the instant case no implication relating to causing injury to the interests of the client has been reported nor by the order it is implied so.

¶ 5. It is submitted that when the fiduciary relation has arisen for the breach of the same it must satisfy the ingredients. In the case of *White v. Consol. Planning, Inc.*,¹⁶ the court was of the opinion that to prove breach of a fiduciary duty it must be shown that the defendant failed to “act in good faith and with due regard to plaintiff’s interests” which in the instant case was not true since the situation was devoid of willful misconduct to abstain from the proceeding. Moreover, the strikes of advocates have been held to be sufficient for the absence of the advocate.¹⁷

¶ 6. In the case of *Green v. Freeman*¹⁸ one of the major requirements to prove breach was to show that the damages were proximately caused due to the act, wherein in the instant situation, if abstention would have been the sole cause, the imposition of the cost could have been imposed on the advocate itself. Moreover, there has been no breach of legal duty and the absence of the advocate was on justified grounds.

[3]. STRIKE IS A CONSTITUTIONAL RIGHT AND IN CONSONANCE WITH THE FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH AND EXPRESSION.

¶ 7. Article 19(1)(a) confers on all citizens the right to freedom of speech and expression.¹⁹ By the mere fact that a person enters the lawyer profession does not disentitle him to claim the freedoms guaranteed to every citizen. A majoritarian democracy becomes autocratic if it abjures discontent and tries to discipline the many forms of "free speech and expression" through ‘proper channels’.²⁰ Strikes and demonstrations are a democracy's hard-fought weapons against oppression. They cannot be wished away by this Hon’ble Supreme Court,

¹³ S.R Bommai v. Union of India, (1994) 3 SCC 2.

¹⁴ *Lewin on Trusts*, 3 (John Mowbray, Lyton Tucker, Nicholas Le Poidevin, Edwin Simpson, James Brightwell, 18th ed., 2008).

¹⁵ *Ibid* at 34.

¹⁶ 166 N.C. App. 283 (2004, North Carolina Court of Appeal).

¹⁷ C.k Takwani, *Civil procedure with Limitation Act*, 284 (7th ed., 1963).

¹⁸ 367 N.C. 136 (2013, Supreme Court of North Carolina).

¹⁹ Naveen Jindal v. Union of India, (2004) 4 SCC 510; Pratap Singh v. State of Punjab, AIR 1964 SC 72.

²⁰ Rajeev Dhavan, The Right to Strike, *The Hindu* (10/01/2003) available at <http://www.thehindu.com/2003/01/10/stories/2003011000421000.htm> , last seen on 16/03/2017.

which has hitherto supported their disciplined use. Strikes empower the disempowered to fight injustice in oppressive cases when no constructive option is left. This cannot be wiped out in this manner and henceforth, this needs urgent review by the Hon'ble SC itself.²¹

[3.1] THE SUPREME COURT'S DECISION IN THE LAWYERS' NO STRIKE CASE²² MUST BE RECONSIDERED.

¶ 8. It is humbly submitted before the Hon'ble court that in the famous case *Harish Uppal v. Union of India*²³ the court held that advocates have no right to strike. However the court also opined "in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, Courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day". The court, therefore, acknowledges that the right to strike exists and can be exercised if a rare situation demands so. The apex court has only tried to restrict the right to strike of advocates with regards to the significant role they play in the administration of justice. Restriction will not mean denial in any circumstances and moreover, restriction can only be in a relation to the existence of a right.

[4]. RIGHT TO FREEDOM OF PROFESSION AND OCCUPATION INCLUDES DISCONTINUING THE PROFESSION OR OCCUPATION.

¶ 9. It is humbly submitted that right to freedom of profession and occupation under Art. 19 (1) (g)²⁴ includes the right to discontinue the profession or occupation. In the instant case, the lawyer community had no other option other than to stop appearing in the court as the strike was being carried for a justified purpose. Moreover, in the absence of any redressal mechanism, they had no option other than to stop appearing in the courts to fight for the cause of the independence and integrity of the bar and for their own rights.

²¹ Ibid.

²² *Harish Uppal v. Union of India*, AIR 2003 SCC 45.

²³ *Harish Uppal v. Union of India*, AIR 2003 SCC 45; See *B.L Wadehra v. State(NCT of Delhi)*, AIR 2000 Del 266; *Ramon Services (P) Ltd. v. Subhash Kapoor*, AIR 2001 SC 207; *Common Cause, A Registered Society and Ors. V. UOI*, (2006) 9 SCC 295.

²⁴ Art. 19 (1) (g), the Constitution of India. 1950.

[5]. THE IMPUGNED RULE IS ARBITRARY AND AGAINST THE PRINCIPLES OF NATURAL JUSTICE.**[5.1] THE RULE IS INFECTED WITH THE VICE OF ARBITRARINESS.**

¶ 10. It is humbly submitted that the word “Browbeat” in general entails bullying, intimidation, badger etc.²⁵ In the instant case, “browbeat”, “abuse” or “unbecoming language” are all a matter of individual & subjective unraveling and decoding rather than reasonable comprehension and intelligibility. The impugned rule²⁶ here in the instant case confers subjective discretion²⁷ on the BCI to suspend an Advocate based on unmentioned and objective parameters. This leads to arbitrariness²⁸ and is in contravention of the principles of Art. 14²⁹. In addition to this, the impugned rule mentions that in case of violation of the rule, the delinquent Advocate will be suspended from practicing for an indefinite period, which is ex-facie in violation of Doctrine of Proportionality³⁰.

¶ 11. In the instant case, the impugned amended rule³¹ constitute a serious threat to the independence of the legal profession and will prevent advocates from discharging their duties without the constant fear that any emphatic and assertive argument will result in a judge terming it as browbeating” leading to their debarment.

[5.2] PRINCIPLES OF NATURAL JUSTICE HAVE BEEN VIOLATED.

¶ 12. Natural justice has been held as an inseparable ingredient of fairness and reasonableness.³² Fair hearing has the following two elements viz : the opportunity of hearing being given [1] and that such opportunity is reasonable[2].³³ Preliminary enquiry is not a substitute for full-fledged enquiry.³⁴ There is no rule regarding any discretion as ‘absolute’³⁵, vesting of power in a high authority does not ipso facto exclude natural justice.³⁶ It is necessary that the courts avoid drawing unnecessary technical and artificial distinctions just

²⁵ *Oxford Dictionary & Thesaurus*, 86 (Julia Elliott, 2007).

²⁶ Moot Problem, 33RD ALL INDIA INTER-UNIVERSITY MOOT COURT COMPETITION, 2017.

²⁷ *Liversidge v. Anderson*, 1942 AC 206 (1941, House of Lords).

²⁸ *E.P. Royappa v. State of Tamil Nadu*, AIR 1974 SC 555; *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *R.D Shetty v. The International Airport*, AIR 1979 SC 1628.

²⁹ Art. 14, the Constitution of India, 1950.

³⁰ *R v. British Broadcasting Corporation*, 2 ALL ER 977 (2003, House of Lords) ; See *Moni Shankar v Union of India*, (2008) 3 SCC 484; *State of M.P v. Hazari Lal*, (2008) 3 SCC 273; *Indian Airlines Ltd. v. Prabha D. Kanan*, (2006) 11 SCC 67.

³¹ Moot Problem, 33RD ALL INDIA INTER-UNIVERSITY MOOT COURT COMPETITION, 2017.

³² *Suresh Chandra Nanhorya v. Rajendra Rajak*, (2006) 7 SCC 800.

³³ *Indru Ramchand Bharvani v. Union of India*, (1988) 4 SCC 1; *Bal Kissen Kejriwal v. Collector of Custom*, AIR 1962 Cal 460.

³⁴ *Revision v. Employee Proceeded Against*, CRP. No. 682 of 2009. (Kerala High Court, 27/04/2017).

³⁵ *MP Jain & SN Jain’s Principles of Administrative Law*, 406 (Dr. Shakil Ahmad Khan, 7th ed., 2011).

³⁶ *Gill v. Chief election commissioner* , AIR 1978 SC 851.

to deny procedural safeguards to the people.³⁷ Non-observance of natural justice is itself prejudice to any man and proof of denial of natural justice is unnecessary.³⁸ In addition to this, where conclusions are controversial, howsoever slightly, and penalties discretionary, natural justice is a must.³⁹

[5.2.1] *No opportunity of hearing was given prior to suspension of 50 advocates.*

¶ 13. It is a settled provision of law that a pre-decisional notice forms the part of a fair hearing.⁴⁰ In the landmark case of *Russel v. Duke of Norfolk*,⁴¹ the Hon'ble Court held that the standard of natural justice is that the person concerned should have a reasonable opportunity of presenting his case. Thus, it is the humble contention that if a person is subjected to pains or penalties, it is the fundamental rule that he should be informed of the case against him and afforded a fair opportunity of answering it.⁴² In addition to this, the rule is in direct contravention with Ss. 35 and 36 (B)⁴³ of the Advocates Act.

[5.2.2] *The disciplinary proceeding is a judicial proceeding and the decision of the same being final is arbitrary.*

¶ 14. It is the humble contention that the impugned disciplinary proceeding was a judicial proceeding falling within the meaning of Ss. 193 and 228 IPC.⁴⁴ This is so because, if there is a power to decide and determine to the prejudice of a person, then duty to act judicially is implicit in such power.⁴⁵ Procedural reasonableness forms an element of the concept of natural justice,⁴⁶ therefore, where the authority decides to act hurriedly, the decision about immediacy is also justiciable.⁴⁷ It is also contended that, in a disciplinary proceeding, the presence of the person is essential⁴⁸.

³⁷ *Madan Sharma v. B.S.E Board*, AIR 1971 Pat 371.

³⁸ *Swadeshi Cotton mills v. U.O.I*, AIR 1981 SC 818.

³⁹ *Supra* 35.

⁴⁰ *I.J Rao, Asst. Collector of Customs v. Bibhuti Bhusan Bagh*, (1989) 3 SCC 202.

⁴¹ 1 All ER 109 (1949, House of Lords).

⁴² *Selvarajan v. Race Relations Board*, 1 All ER 12 (1976. House of Lords).

⁴³ Sec. 35 & Sec. 36 (B), The Advocates Act, 1961.

⁴⁴ Sec. 42 (2), The Advocates Act, 1961.

⁴⁵ *State of Orissa v. Binapani Dei*, AIR 1967 SC 1269.

⁴⁶ *Dr. Rash Lal Yadav v. State of Bihar*, (1994) 5 SCC 267.

⁴⁷ *Swadeshi Cotton Mills v. Union of India*, AIR 1981 SC 818.

⁴⁸ *B.C. Sharma, Fair Hearing and Access to Justice*, 41 (1st ed. 2012).

PRAYER

Wherefore, in light of the issues raised, arguments advanced and authorities cited, may this Hon'ble Court be pleased to declare and hold that:

1. That there is no breach of contract or breach of trust between the Petitioner and his Client.
2. That to strike is a constitutional right and in consonance with the fundamental right to freedom of speech and expression.
3. The right to freedom of profession and occupation includes the freedom to discontinue the profession or occupation.
4. The impugned amended rule by the BCI and the procedure therein is arbitrary as well as against the principles of natural justice.

AND/OR

Pass any other order it may deem fit, in the interest of Justice, Equity and Good Conscience

All of which is most humbly and respectfully submitted

Place: New Delhi

Sd/-

COUNSELS FOR THE PETITIONER