PART A – ADVOCACY

Legal Profession in India

The history of the legal profession in India can be traced back to the establishment of the First British Court in Bombay in 1672 by Governor Aungier. The admission of attorneys was placed in the hands of the Governor-in-Council and not with the Court. Prior to the establishment of the Mayor’s Courts in 1726 in Madras and Calcutta, there were no legal practitioners.

The Mayor’s Courts, established in the three presidency towns, were Crown Courts with right of appeal first to the Governor-in-Council and a right of second appeal to the Privy Council. In 1791, Judges felt the need of experience, and thus the role of an attorney to protect the rights of his client was upheld in each of the Mayor’s Courts. This was done in spite of opposition from Council members or the Governor. A second principle was also established during the period of the Mayor’s Courts. This was the right to dismiss an attorney guilty of misconduct. The first example of dismissal was recorded by the Mayor’s Court at Madras which dismissed attorney Jones.

The Supreme Court of Judicature was established by a Royal Charter in 1774. The Supreme Court was established as there was dissatisfaction with the weaknesses of the Court of the Mayor. Similar Supreme Courts were established in Madras in 1801 and Bombay in 1823. The first barristers appeared in India after the opening of the Supreme Court in Calcutta in 1774. As barristers began to come into the Courts on work as advocates, the attorneys gave up pleading and worked as solicitors. The two grades of legal practice gradually became distinct and separate as they were in England. Madras gained its first barrister in 1778 with Mr. Benjamin Sullivan.

Thus, the establishment of the Supreme Court brought recognition, wealth and prestige to the legal profession. The charters of the Court stipulated that the Chief Justice and three puisne Judges be English barristers of at least 5 years standing.

The charters empowered the Court to approve, admit and enrol advocates and attorneys to plead and act on behalf of suitors. They also gave the Court the authority to remove lawyers from the roll of the Court on reasonable cause and to prohibit practitioners not properly admitted and enrolled from practising in the Court. The Court maintained the right to admit, discipline and dismiss attorneys and barristers. Attorneys were not admitted without recommendation from a high official in England or a Judge in India. Permission to practice in Court could be refused even to a barrister.
In contrast to the Courts in the presidency towns, the legal profession in the mofussil towns was established, guided and controlled by legislation. In the Diwani Courts, legal practice was neither recognized nor controlled, and practice was carried on by vakils and agents. Vakils had even been appearing in the Courts of the Nawabs and there were no laws concerning their qualification, relationship to the Court, mode of procedure of ethics or practice. There were two kinds of agents – a. untrained relatives or servants of the parties in Court and b. professional pleaders who had training in either Hindu or Muslim law. Bengal Regulation VII of 1793 was enacted as it was felt that in order to administer justice, Courts, must have pleading of causes administered by a distinct profession Only men of character and education, well versed in the Mohammedan or Hindu law and in the Regulations passed by the British Government, would be admitted to plead in the Courts. They should be subjected to rules and restrictions in order to discharge their work diligently and faithfully by upholding the client’s trust. Establishment of the High Courts

In 1862, the High Courts started by the Crown were established at Calcutta, Bombay and Madras. The High Court Bench was designed to combine Supreme Court and Sudder Court traditions. This was done to unite the legal learning and judicial experience of the English barristers with the intimate experience of civil servants in matters of Indian customs, usages and laws possessed by the civil servants. Each of the High Courts was given the power to make rules for the qualifications of proper persons, advocates, vakils and attorneys at Bar. The admission of vakils to practice before the High Courts ended the monopoly that the barristers had enjoyed in the Supreme Courts. It greatly extended the practice and prestige of the Indian laws by giving them opportunities and privileges equal to those enjoyed for many years by the English lawyers. The learning of the best British traditions of Indian vakils began in a guru-shishya tradition: “Men like Sir V. Bashyam Ayyangar, Sir T. Muthuswamy Ayyar and Sir S. Subramania Ayyar were quick to learn and absorb the traditions of the English Bar from their English friends and colleagues in the Madras Bar and they in turn as the originators of a long line of disciples in the Bar passed on those traditions to the disciples who continued to do the good work.” Additional High Courts were established in Allahabad (1886), Patna (1916), and Lahore (1919).

There were six grades of legal practice in India after the founding of the High Courts – a) Advocates, b) Attorneys (Solicitors), c) Vakils of High Courts, d) Pleaders, e) Mukhtars, f) Revenue Agents. The Legal Practitioners Act of 1879 in fact brought all the six grades of the profession into one system under the jurisdiction of the High Courts. The Legal Practitioners Act and the Letters Patent of the High Courts formed the chief legislative governance of legal practitioners in the subordinate Courts in the country until the Advocates Act, 1961 was enacted. In order to be a vakil, the candidate had to study at a college or university, master the use of English and pass a vakil’s examination. By 1940, a vakil was required to be a graduate with an LL.B. from a university in India in addition to three other certified requirements. The certificate should be proof that a. he had passed in the examination b. read in the chamber of a qualified
lawyer and was of a good character. In fact, Sir Sunder Lal, Jogendra Nath Chaudhary, Ram Prasad and Moti Lal Nehru were all vakils who were raised to the rank of an Advocate. Original and appellate jurisdiction of the High Court.

The High Courts of the three presidency towns had an original side. The original side included major civil and criminal matters which had been earlier heard by predecessor Supreme Courts. On the original side in the High Courts, the solicitor and barrister remained distinct i.e. attorney and advocate. On the appellate side every lawyer practiced as his own attorney.

However, in Madras the vakils started practice since 1866. In 1874, the barristers challenged their right to do original side work. However, in 1916, this right was firmly established in favour of the vakils. Similarly, vakils in Bombay and Calcutta could be promoted as advocates and become qualified to work on the original side. By attending the appellate side and original side Courts each for one year, a vakil of 10 years service in the Court was permitted to sit for the advocates’ examination.

Indian Bar Councils Act, 1926.

The Indian Bar Councils Act, 1926 was passed to unify the various grades of legal practice and to provide self-government to the Bars attached to various Courts. The Act required that each High Court must constitute a Bar Council made up of the Advocate General, four men nominated by the High Court of whom two should be Judges and ten elected from among the advocates of the Bar. The duties of the Bar Council were to decide all matters concerning legal education, qualification for enrolment, discipline and control of the profession. It was favourable to the advocates as it gave them authority previously held by the judiciary to regulate the membership and discipline of their profession.

The Advocates Act, 1961 was a step to further this very initiative. As a result of the Advocates Act, admission, practice, ethics, privileges, regulations, discipline and improvement of the profession as well as law reform are now significantly in the hands of the profession itself.

Excerpts: THE SEVEN LAMPS OF ADVOCACY By EDWARD ABBOTT PARRY

There are seven lamps of advocacy: The lamp of honesty, the lamp of courage, lamp of industry, the lamp of wit, the lamp of eloquence, the lamp of judgment, and the lamp of fellowship.

I. THE LAMP OF HONESTY
The great advocate is like the great actor: he fills the stage for his span of life, succeeds, gains our applause, makes his last bow, and the curtain falls. Nothing is so elusive as the art of acting, unless indeed it be the sister art of advocacy.

The young student of acting or advocacy is eager to believe that there are no methods and no technique to learn, and no school in which to graduate. Youth is at all times prone to act on the principle that there are no principles, that there is no one from whom it can learn, and nothing to teach. Any one, it seems, can don a wig and gown, and thereby become an advocate. Yet there are principles of advocacy; and if a few generations were to forget to practise these, it would indeed be a lost art. The student of advocacy can draw inspiration and hope from the stored-up experience of his elders. He can trace in the plans and life-charts of the ancients the paths along which they strode, journeyed. They can be seen pacing the ancient halls with their clients, proud of the traditions of their great profession — advocates — advocates all.

Without a free and honourable race of advocates the world will hear little of the message of justice. Advocacy is the outward and visible appeal for the spiritual gift of justice. The advocate is the priest in the temple of justice, trained in the mysteries of the creed, active in its exercises. Advocacy connotes justice. Upon the altars of justice the advocate must keep his seven lamps clean and burning rightly. In the centre of these must ever be the lamp of honesty.

The order of advocates is, in D'Aguesseau's famous phrase, "as noble as virtue." Far back in the Capitularies of Charlemagne it was ordained of the profession of advocates "that nobody should be admitted therein but men mild, pacific, fearing God, and loving justice, upon pain of elimination." So may it continue, world without end.

From the earliest, Englishmen have understood that advocacy is necessary to justice, and honesty is essential to advocacy. Every pleader who acts in the business of another should have regard to four things: — First, that he be a person receivable in court, that he be no heretic, nor excommunicate, nor criminal, nor man of religion, nor woman, nor ordained clerk above the order of sub-deacon, nor beneficed clerk with the cure of souls, nor infant under twenty-one years of age, nor judge in the same cause, nor open leper, nor man attainted of falsification against the law of his office.

Secondly, that every pleader is bound by oath that he will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrong-doing. Thirdly, that he will never have recourse to false delays or false witnesses, and never allege, proffer, or consent to any corruption, deceit, lie, or falsified law, but loyally will maintain the right of his client, so that he may not fail through his folly or negligence, nor by default of him, nor by default of any argument that he could urge; and that he will not by blow, contumely, brawl, threat, noise, or villain conduct disturb any judge, party, serjeant, or other in court, nor impede the hearing or the course of justice. Fourthly, there is the salary, concerning which four
points must be regarded — the amount of the matter in dispute, the labour of the serjeant, his value as a pleader in respect of his (learning), eloquence, and repute, and lastly the usage of the court."

Nevertheless, although an advocate is bound by obligations of honour and probity not to overstate the truth of his client's case, and is forbidden to have recourse to any artifice or subterfuge which may beguile the judge, he is not the judge of the case, and within these limits must use all the knowledge and gifts he possesses to advance his client's claims to justice. Boswell asked Doctor Johnson whether he did not think "that the practice of the law in some degree hurt the nice feeling of honesty?" To whom the doctor replied: "Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge." Boswell: "But what do you think of supporting a cause which you know to be bad?" Johnson: "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. Lord Chief Justice Cockburn, set forth his views of an advocate's duty, concluding with these memorable words: "The arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his client per fas, and not per nefas. He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice." If an advocate knows the law to be x, it is not honest to lead the court to believe that it is y. Whether the advocate does this by directly mis-stating the law, or by deliberately omitting to state it fully within the means of his knowledge, it is equally without excuse, and dims the lamp of honesty.

For the advocate must remember that he is not only the servant of the client, but the friend of the court, and honesty is as essential to true friendship as it is to sound advocacy.

II. THE LAMP OF COURAGE

Advocacy needs the "king-becoming graces: devotion, patience, courage, for-titude." Advocacy is a form of combat where courage in danger is half the battle. Courage is as good a weapon in the forum as in the camp. The advocate, like Csesar, must stand upon his mound facing the enemy, worthy to be feared, and fearing no man. Unless a man has the spirit to encounter difficulties with firmness and pluck, he had best leave advocacy alone.

A modern advocate kindly reproving a junior for his timidity of manner wisely said: "Remember it is better to be strong and wrong than weak and right." The belief that success in advocacy can be attained by influence, apart from personal qualifications, is ill-founded.

It is very true that learning begets courage, and wise self-confidence can only be founded on knowledge. The long years of apprenticeship, the studious attention to "preperatives," are, to the
advocate, like the manly exercises of the young squire that enabled the knight of old to earn his spurs on the field of battle. In no profession is it more certain that knowledge is power," and when the opportunity arrives, knowledge, and the courage to use it effectively, proclaim the presence of the advocate.

There have been many advocates whose courage was founded on humor rather than knowledge, and who have successfully asserted their independence in the face of an impatient or overbearing Bench through the medium of wit, where mere wisdom might have failed in effect.

Independence without moderation becomes licentiousness, but true independence is an essential attribute of advocacy, and the English Bar has never wanted men endowed with this form of true courage. The sacrifice of the highest professional honors to the maintenance of principle has been a commonplace in the history of English advocates, and the names of the living could be added if need be to those who have passed away, leaving us this clean heritage as example.

The true position of the independence of the English Bar, the right and the duty of the advocate to appear in every case, however poor, degraded, or wicked the party may be, is laid down once and for all in a celebrated speech of Erskine's in his defence of Thomas Paine, who was indicted in 1792 for publishing the Rights of Man. Great public indignation was expressed against Erskine for daring to defend Paine. As he said in his speech, "In every place where business or pleasure collects the public together, day after day, my name and character have been the topics of injurious reflection. And for what? Only for not having shrunk from the discharge of a duty which no personal advantage recommended, and which a thousand difficulties repelled." He then continued, in words which the learned editor of Howell's State Trials emphasises by printing in capital letters, to enunciate one of the basic principles of English advocacy: "Little, indeed, did they know me, who thought that such alumnies would influence my conduct: I will for ever, at ALL HAZARDS, ASSERT THE DIGNITY, INDEPENDENCE, AND INTEGRITY OF THE ENGLISH Bar; without which, impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise — from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

William Henry Seward was acting in the defence of the negro Freeman in 1846, who killed a farmer and several of his family. His advocacy was of no avail to the negro, but his eloquent speech remains a noble statement of the duty of the advocate, and a fine example of devotion and courage in the exercise of that duty.
The whole speech is worthy of study, as it contains a glowing and reasoned appeal for the right of the most degraded human being in a civilised state to a real hearing of his case in a judicial court, which can only be obtained through honest and competent advocacy.

" In due time, gentlemen of the jury, when I shall have paid the debt of nature, my remains will rest here in your midst with those of my kindred and neighbours.

It is very possible they may be unhonoured, neglected, spurned! But perhaps years hence, when the passion and excitement which now agitate this community shall have passed away, some wandering stranger, some lone exile, some Indian, some negro, may erect over them an humble stone, and thereon this epitaph: 'He was faithful!' These words, as he desired, are engraved on the marble over him, and he is remembered at the American Bar as an advocate who upheld its best traditions, and feared not to hold aloft the Lamp of Courage.

III. THE LAMP OF INDUSTRY

The first task of the advocate is to learn to labour and to wait. There never was a successful advocate who did not owe some of his prowess to industry. From the biographies of our ancestors we may learn that the eminent successful ones of each generation practised at least enough industry in their day to preach its virtues to aspiring juniors. Work soon becomes a habit. It may not be altogether a good habit, but it is better to wear out than to rust out. Nothing, we are told, is impossible to industry. Certainly without industry the armoury of the advocate will lack weapons on the day of battle.

There must be years of what Charles Lamb described with graceful alliteration as "the dry drudgery of the desk's dead wood" before the young advocate can hope to dazzle juries with eloquent perorations, confound dishonest witnesses by skilful cross-examination, and lead the steps of erring judges into the paths of precedent.

All great advocates tell us that they have had either steady habits of industry or grand outbursts of work. Charles Russell had a continuous spate of energy. "Do something!"

Abraham Lincoln owed his sound knowledge of law to grim, zealous industry. In after-life to every student who came near him his advice was, "Work! work! work!"

Advocacy is indeed a life of industry. Each new success brings greater toil. Campbell, writing home from the Oxford Circuit, describes the weary round of his daily task. Some advocates suffer thus every day the court sits, whilst others sit round and suffer envy. "I ought to have got so far to-night on my way to Hereford, but we have a long day's work before us, and I shall be obliged to travel all to-morrow night. You can hardly form a notion of the life of labour, anxiety, and privation which I lead upon the circuit. I am up every morning by six. I never get out of court till
seven, eight, or nine in the evening, and, having swallowed any indifferent fare that my clerk provides for me at my lodgings, I have consultations and read briefs till I fall asleep. This arises very much from the incompetence of the judge. It is from the incompetency of judges that the chief annoyances I have in life arise. I could myself have disposed of the causes here in half the time the judge employed. He has tried two causes in four days. Poor fellow, he is completely knocked up." An advocate must study his brief in the same way that an actor studies his part. Success in advocacy is not arrived at by intuition.

You have to work hard and to think hard. I get some good help, as I tell you. My mode of work is this: One of these young men reads the brief and makes a note—a full one. I go through the note with him (smiling), 'cross-examining him, if you like. Sometimes, I admit, it may not be necessary for me to read the brief; the note may be so complete, and the man's knowledge of the case so exact, that I get everything from him. But it often is—in fact, generally is—necessary to go to the brief. You have seen me reading briefs here. I admit that I am quick in getting at the kernel of a case, and that saves me some trouble; but I must read the brief with my own eyes, or somebody else's." I said, 'Sir John Karslake went blind because he could only read his brief with his own eyes. It is a great point to be able to read your brief with somebody else's eyes!'" Russell—Well, well, well, that's so! but it is not intuition.'" I said, 'It has been said that O'Connell never read his brief when he appeared for the defendant. He made his case out of the plaintiff's case.'" Russell—'I don't think that is likely; I think O'Connell knew his case—the vital points in his case—before he went into court. There is often a great deal in a brief which is not vital, which is not even pertinent. I can read a brief quickly; I can take in a page at a glance, if you like; I can throw the rubbish over easily, and come right on the marrow of the case. But I can only do that by reading the brief, or by the help of my friends. I learn a great deal at consultations; I am not above taking hints from everybody, and I think carefully over everything that is said to me (holding his hand up with open palm); 'I shut out no view. If I have a good point, it is that I can see quickly the hinge on which the whole case turns, and I never lose sight of it. But that is not intuition, my friend; it is work.'" Industry in reading and book-learning may make a man a good jurist, but the advocate must exercise his industry in the double art of speaking and arranging his thoughts in ordered speech. He must be ready to leave his books awhile and practise the athletics of eloquence with equal industry. The silver-tongued Heneage Finch advises students "to study all the morning and talk all the afternoon."

For "bare reading without practice makes a student, but never makes him a clever lawyer." Our fathers understood this better perhaps than we do, and made provision of halls and cloisters and gardens, where students could take exercise and discuss the mysteries of their profession when the hours of reading were over.

The days of wandering in cloisters and gardens, putting cases to one's fellow-students, and listening to the wisdom of elders by the margin of the fountain are, alas! not for us. But even today a wise youngster should recognise that sitting in court to listen to the conduct of cases,
attendance at circuit mess and dining in Hall, where the law-talk of seniors may still on occasion be of value — these things are all forms of industry, for the advocate can only learn the true creed of his faith from oral tradition.

If a man is endowed with health and industry, the profession of an advocate is not “a rash and hazardous speculation.” He may even without blame give hostages to fortune, remembering that when Erskine made his first appearance at the Bar his agitation nearly overcame him, and he was just about to sit down a failure when, he says, “I thought I felt my little children tugging at my gown, and the idea roused me to an exertion of which I did not think myself capable.” He succeeded, indeed, far beyond his expectations, and he found, when he had overcome that first modest inertia which benumbs even the greatest genius, that he was fully equipped to fight the battles of his clients against all comers. And the reason of it was that he had not failed to read and learn and digest beneath the Lamp of Industry.

IV. THE LAMP OF WIT

At the back of this little word "wit" lies the idea of knowledge, understanding, sense. In its manifestation we look for a keen perception of some incongruity of the moment. The murky atmosphere of the court is illuminated by a flash of thought, quick, happy, and even amusing. Wit, wisely used, bridges over a difficulty, smooths away annoyance, or perhaps turns aside anger, dissolving embarrassment in a second's laughter.” Laughter may be derisive, unkind, even cruel, or it may be rightly used as a just weapon of ridicule wherewith to smite pretension and humbug. It may be gracious and full of kindliness, putting a timid man at his ease, or instinct with good-humour, softening wrath or mitigating tedious irrelevancy. It may be the due recognition of a witty text preaching a useful truth, that could otherwise be expressed only in a treatise :” From the earliest times wit has been a light to lighten the darkness of advocacy.

Pedants and bores resent all forms of wit, but a real humorist rejoices in nothing so much as a good story against himself.

Often the wit of an advocate will turn a judge from an unwise course where argument or rhetoric would certainly fail. Lord Mansfield paid little attention to religious holidays. He would sit on Ash- Wednesday, to the scandal of some members of the Bar, whose protests made no impression upon him. At the end of Lent he suggested that the court might sit on Good Friday. The members of the Bar were horrified. Serjeant Davy, who was in the case, bowed in acceptance of the proposition.” If your lordship pleases ; but your lordship will be the first judge that has done so since Pontius Pilate.” The court adjourned until Saturday

"Wit is often the fittest instrument with which to destroy the bubble of bombast. “
Wit may fairly be used to strip the cloak of pretension from the shoulders of impudence. Holker was cross-examining a big vulgar Jew jeweller in a money-lending case and began by looking him up and down in a sleepy dismal way and drawled out: "Well, Mr. Moselwein, and what are you?"

"Agenschelman," replied the jeweller with emphasis. "Just so, just so," ejaculated Holker with a dreary yawn, "but what were you before you were a gentleman?" Wit, skilfully used, is the kindliest and most effective method of exhibiting the futility of judicial interruptions. "Where do you draw the line, Mr. Bramwell?" asked a learned judge in the Court of Common Pleas. "I don't know, and I don't care, my lord. It is enough for me that my client is on the right side of it."

Wit and courtesy need never be divorced. They are, indeed, complementary. Wit, deftly used, refreshes the spirit of the weary judge. Lord Chief Justice Coleridge, writing from the Northern Circuit, says: "Gully was excellent. His phrase, when he asked for a stay of execution 'in order to consider more at leisure some of your lordship's observations,' tickled my fancy very much. Misdirection was never more courteously described."

Satire or irony is often in danger of being misunderstood by the simple-minded jury. Ridicule, to be effective, must be pointed, even extravagant. In combating the defence of Act of God set up by an American advocate defending a client on the charge of arson, Governor Wisher, for the prosecution, disposed of the theory of spontaneous combustion, and succeeded in satisfying the jury of its absurdity: "It is said, gentlemen, that this was Act of God. It may be, gentlemen. I believe in the Almighty's power to do it, but I never knew of His walking twice round a straw stack to find a dry place to fire it, with double-nailed boots on so exactly fitting the ones worn by the defendant."

Bowen, on the Western Circuit, was less fortunate. Prosecuting a burglar caught red-handed on the roof of a house, he left the case to the jury in the following terms: "If you consider, gentlemen, that the accused was on the roof of the house for the purpose of enjoying the midnight breeze, and, by pure accident, happened to have about him the necessary tools of a housebreaker, with no dishonest intention of employing them, you will, of course, acquit him." The simple sons of Wessex nodded complacently at counsel, and, accepting his invitation, acquitted the prisoner.

"Brevity is the soul of wit."

Good advocacy displays the highest form of wit in an instinct for brevity. The healthy appetite of judge and advocate alike is shown in a keenness to "get through the rind of the orange and reach the pulp as soon as possible."
V. **THE LAMP OF ELOQUENCE**

The eloquence of advocates of the past must largely be taken on trust. There is no evidence of it that is not hearsay. For, though we have the accounts of earwitnesses of the eloquence of Erskine, Scarlett, Choate, or Lincoln, and can ourselves read their speeches, the effect of their eloquence does not remain. We are told about it by those who experienced it, and can believe or not as we choose. It is the same with actors. It requires genius to describe acting, so that the reader captures some of the experience of the witness. The most eloquent advocacy that is reported in print is to be found not in law reports, but in fiction — in the speeches of Portia and Serjeant Buzfuz, for instance, where for all time the world continues hanging on the lips of the advocate in excited sympathy with the client. There are some who think that rhetoric at the Bar has fallen in esteem. The modern world has certainly lost its taste for sweet and honeyed sentences, and sets a truer value on fine phrases and the fopperies of the tongue; but there will always be a high place in the profession for the man who speaks good English with smooth elocution, and whose speeches fall within Pope's description: Fit words attended on his weighty sense, And mild persuasion flow'd in eloquence. The test of eloquence in advocacy is necessarily its effect upon those to whom it is addressed. The aim of eloquence is persuasion. The one absolute essential is sincerity, or, perhaps one should say, the appearance of sincerity.

It would appear from the history of advocacy that the flame of the lamp of eloquence may vary from time to time in heat and colour. One cannot say that the style of one advocate is correct and another incorrect, since the style is the attribute of the man and the generation he is trying to persuade. Yet, however different the style may be, the essential power of persuasion must be present. He must, as Hamlet says, be able to play upon his jury, knowing the stops, and sounding them from the lowest note to the top of the compass. Brougham's tribute to Erskine's eloquence is perhaps the best pen-picture of an English advocate we possess, and it is noticeable how he emphasises this power of persuasion and endeavours to solve the psychology of it. He places in the foreground the physical appearance of the man, a great factor in each style of advocacy.

"Nor let it be deemed trivial," he says, "or beneath the historian's province, to mark that noble figure, every look of whose countenance is expressive, every motion of whose form graceful, an eye that sparkles and pierces, and almost assures victory, while it speaks audience ere the tongue.' Juries have declared that they felt it impossible to remove their looks from him when he had riveted and, as it were, fascinated them by his first glance; and it used to be a common remark among men who observed his motions that they resembled those of a blood-horse, as light, as limber, as much betokening strength and speed, as free from all gross superfluity or encumbrance. Then hear his voice of surpassing sweetness, clear, flexible, strong, exquisitely fitted to strains of serious earnestness, deficient in compass indeed, and much less fitted to express indignation, or even scorn, than pathos, but wholly free from harshness or monotony. All these, however, and even his chaste, dignified, and appropriate action, were very small parts of this wonderful advocate's excellence. He had a thorough knowledge of men, of their passions, and
their feelings — he knew every avenue to the heart, and could at will make all its chords vibrate to his touch. His fancy, though never playful in public, where he had his whole faculties under the most severe control, was lively and brilliant; when he gave it vent and scope it was eminently sportive, but while representing his client it was wholly subservient to that in which his whole soul was wrapped up, and to which each faculty of body and of mind was subdued — the success of the cause."

Eloquence of manner is real eloquence, and is a gift not to be despised. There is a physical as well as a psychological side to advocacy, documentary evidence of which may be found in the old prints and portraits.

Mr. Montagu Williams has pointed out that the best English eloquence of his time was founded on what he calls a solid style of advocacy. Nearly every great advocate has found it necessary to make use of the eloquence of persuasion. Charles Russell is the one exception. He did not seek to persuade, he directed the court and jury. Whether or not he was, as Lord Coleridge said, "the biggest advocate of the century," he was undoubtedly a very great advocate. Clearness, force, and earnestness were the basic qualities of his eloquence. It was said of him that "ordinarily the judge dominates the jury, the counsel, the public, — he is the central figure of the piece. But when Russell is there the judge isn't in it. Russell dominates every one."

The moral of the lives of the advocates seems to be that in the house of eloquence there are many mansions, and any style natural to the man who uses it is his right style, and may succeed. One besetting sin of many would-be eloquent speakers is fatal, and that is bombast. And though eloquence at its highest is a gift, the art of speaking can be learned and personal difficulties overcome. De-mosthenes, with his pebbles in his mouth or running up a hill spouting an oration, has been an example to us from the school-room.

There is no golden rule of method, but there is this golden principle to remember that the message of eloquence is addressed to the heart rather than the brain." Gain the heart, or you gain nothing; the eyes and the ears are the only road to the heart. Merit and knowledge will not gain hearts, though they will secure them when gained. Pray have that truth ever in your mind. Engage the eyes by your address, air, and motions; soothe the ears by the elegance and harmony of your diction; the heart will certainly follow; and the whole man and woman will as certainly follow the heart."

VI. THE LAMP OF JUDGMENT

Judgment inspires a man to translate good sense into right action. I would not quarrel with the philosopher who describes judgment as an instinct, but I would bid him remember that even an instinct is acquired by "cunning" rather than luck. Let no one think that he can attain to sound judgment without hard work. The judgment of the advocate must be based on the maxim, "He
that judges without informing himself to the utmost that he is capable cannot acquit himself of judging amiss."

A client is entitled to the independent judgment of the advocate. Whether his judgment is right or wrong, it is the duty of the advocate to place it at the disposal of his client. In the business of advocacy judgment is the goods that the advocate is bound to deliver. Yet he is under constant temptation to please his client by giving him an inferior article. The duty of the advocate to give only his best.

The above question frequently arises, and some counsel have considered themselves bound to obey the wishes of the solicitor. There is no doubt that this is the safest course for the advocate, for, if he does otherwise and the result is adverse, he is likely to be much blamed, and the solicitor also is exposed to disagreeable comments; but I hold, and have always acted upon the opinion, that the client retains counsel's judgment, which he has no right to yield to the wishes or opinions of any one else. He is bound, if required, to return his brief, but if he acts against his own convictions he sacrifices, I think, his duty as an advocate."

An advocate of judgment has the power of gathering up the scattered threads of facts and weaving them into a pattern surrounding and emphasising the central point of the case. In every case there is one commanding theory, to the proof of which all the facts must be skilfully marshalled. An advocate with one point has infinitely greater chances than an advocate with twenty points. Rufus Choate was an advocate of great judgment, and not only was he enthusiastic and diligent in searching for the central theory, or 44 hub of his case, as he called it, but having made up his mind what it was, he rightly put it forward without delay, believing that it was the "first strike" that conquered the jury. Parker, his biographer, tells us that 44 he often said to me that the first moments were the great moments for the advocate. Then, said he, the attention is all on the alert, the ears are quicker, the mind receptive. People think they ought to go on gently, till, somewhere about the middle of their talk, they will put forth all their power. But this is a sad mistake. At the beginning the jury are all eager to know what you are going to say, what the strength of your case is. They don't go into details and follow you critically all along; they try to get hold of your leading notion, and lump it all up. At the outset, then, you want to strike into their minds what they want — a good, solid, general view of your case; and let them think over that for a good while. 4 If, said he emphatically, 4 you haven't got hold of them, got their convictions at least open, in your first half-hour or hour, you will never get at them at all."

Abraham Lincoln had a genius for seeing the real point of his case and putting it straight to the Court. A contemporary who was asked in later life what was Lincoln's trick with the jury replied, "He saw the kernel of every case at the outset, never lost sight of it, and never let it escape the jury. That was the only trick I ever saw him play."
In nothing does the advocate more openly exhibit want of judgment than in prolixity. Modern courts of justice are blamed by the public, not wholly without cause, for the length and consequent expense of trials. To poor people this may mean a denial of justice. No one desires that the judge should constantly interfere with counsel in the discharge of their duties, but it seems to be his duty on occasion to blow his whistle and point out to the combatants that they are offside.

If every one connected with the trial of an action were to train and use his judgment and co-operate with the judgments of his fellow-workers in a policy of anti-waste, a great reproach would be lifted from our courts of justice. Prolixity is no new disease.

"In his lordship's conduct of trials he was very careful of three matters: 1. To adjust what was properly the question, and to hold the counsel to that; for he that has the worst end of the staff, is very apt to fling off from the point and go out of the right way of the cause. 2. To keep the counsel in order; for in trials they have their parts and their times. His lordship used frequently to inculcate to counsel the decorum of evidencing practice. 3. To keep down repetition, to which the counsel, one after another, are very propense;

The judgment of an advocate may be called upon at any moment for a sudden decision that may mean the victory or defeat of his client. For this reason it is necessary that he should be always alert. The contents of his brief must be already in his mind, and his attention must be fixed on what is happening in court, which has rarely been foreseen in the best-prepared brief ever delivered to counsel. "Watch the case!" It is a golden rule.

An advocate who is always fumbling with his brief when he is examining a witness cannot follow the game that is on the table before him. Sound judgment is essential to the examination of witness.

Two golden rules handed down from the eighteenth century, and maybe from beyond, are still unlearned lessons to each succeeding generation of advocates: 1. Never ask a question without having a good reason to assign for asking it. 2. Never hazard a critical question without having good ground to believe that the answer will be in your favour.

Most re-examination intending to rehabilitate the character of a witness is apt to make matters worse. These stories of actual happenings, trivial in themselves, teach us the necessity of judgment in advocacy. And I pray the young advocate not to rejoice too merrily over the errors of judgment of his seniors or lament too grievously about his own. Bear in mind that by acknowledged error we may learn wisdom, and that the only illuminant for the lamp of judgment is the oil of experience.

VII. THE LAMP OF FELLOWSHIP
An advocate lacking in fellowship, careless of the sacred traditions of brotherhood which have kept the lamp of fellowship burning brightly for the English Bar through many centuries, a man who joins the Bar merely as a trade or business, and does not understand that it is also a professional community with public ideals, misses the heart of the thing, and he and his clients will suffer accordingly.

Fitzjames Stephen wisely said of the English Bar that it is "exactly like a great public school, the boys of which have grown older, and have exchanged boyish for manly objects. There is just the same rough familiarity, the general ardour of character, the same kind of unwritten code of morals and manners, the same kind of public opinion expressed in exactly the same blunt, unmistakable manner."

It was for this reason that the judges always addressed a serjeant as "Brother." It seems a pity that this fraternal greeting, this courteous link of fellowship between Bench and Bar, necessarily disappeared with the abolition of Serjeant's Inn. Yet, though the talisman is no longer spoken, the spirit of brotherhood will always be with us.

In the old days education in the law was undertaken very seriously, but in a fraternal spirit. The reader would propound a case, the utter barristers would declare their opinion, the reader would confute the objections laid against him, and the students would eagerly note the learned points of the seniors. These readings took four or five hours daily, and were held in the halls. The moots and the boltings took place after supper, and at other times among the students under the leadership of a barrister. But the whole term was not taken up with the dry study of the law. There were feastings, grand nights.

For though some of this ancientry is better honoured in the breach than the observance, yet even the buffoonery, as Stephen called it, of Grand Court has its value as a link with the past. It is an excellent thing for the profession that in the same way as the lessons of advocacy in the past were learned by the young students from their elders, who sat at meat with them and shared their lives in intimate and homely fashion, so to-day we enter a common Inn, dine at a common table, join a common mess upon circuit, all of which is evidence of the continuance of that right spirit of fellowship which, to my mind, is an essential of advocacy. The fellowship of the Temple springs from its long traditions of brotherhood among the Templars. To turn out of the Strand into its quiet courts brings over your brooding spirit something of that sacred melancholy pleasure which one feels on entering the old school or dining once again in the college hall. But you are no longer actor, art and part, in the school and college life. Here in the Temple, though others are judges and benchers and fashionable leaders, you can still wander in shabby honesty in the gardens, pull down some of the old volumes in the library, and dine below the salt with your fellow-ancients.

The Temple is full of ghosts — honest ghosts with whom it is a privilege to claim fellowship. There are some who speak of the Bar sneeringly as a Trade Union — which it certainly is, and to
my thinking one of the oldest and best unions. And if advocacy could be honestly described as a trade, then the phrase trade union might be accepted without demurrer. For the basic quality of a trade union, that which has made these institutions thrive against opposition, is the spirit of fellowship and unselfishness which is the ideal of its members.

We have seen how of old the senior members of the Bar trained up the juniors in the mystery of their craft, and throughout the practice of the profession it has always been a point of honour for the elders to assist the beginners in those difficult days of apprenticeship. What could be more delightful and encouraging to a youngster than to be received by his genial, handsome leader in the presence of an admiring attorney.

No man ever attains a position at the Bar in which he can afford to despise the opinion of his fellow-men. The eulogies of public journals, even the praise and patronage of attorneys, are of no worth compared with the respect of the Bar.

Charles Russell, during the course of a trial, cross-examined a lady with great severity, and afterwards received an anonymous letter of a very abusive character, in which he was charged with having been guilty of conduct in his cross-examination "which no gentleman should pursue towards any woman." He thereupon sat down and wrote a letter to the counsel on the other side, in which he said, "I should be sorry to think this was true, but I am not the best judge of my own conduct,"

Russell's learned friend cleverly evaded responsibility by telling him that the character of a gentleman was one "we all know you eminently possess," with which certificate of character the great man was soothed and satisfied. With the decay of circuits and the passing of old customs and the silence of ancient convivialities, some of the spirit of fellowship may be lost. But we must remember that even the good old days were not without evidence of professional malice and uncharitableness. As far back as the reign of Francois I. it was a rule of the French Bar that "advocates must not use contentious words or exclamations the one toward the other; or talk several at the same time, or interrupt each other." These words might still be engraved in letters of gold on the walls of our own law-courts, for on occasion the lamp of fellowship burns so low that such things occur. Still, at the English Bar we may claim that we set a good example to other bodies of learned men by our real attachment to the precepts and practice of fellowship, and may, without hypocrisy, commend the rest of mankind to follow in our footsteps, And do as adversaries do in law, Strive mightily, but eat and drink as friends.
Contempt of Court: Meaning

Maninderjit Singh Bitta vs Union Of India & Ors
(2011) 11 SCALE 634

Bench: S.H. Kapadia, K.S. Radhakrishnan, Swatanter Kumar

1. Government of India, on 28th March, 2001, issued a notification under the provisions of Section 41(6) of the Motor Vehicles Act, 1988 (for short, 'the Act') read with Rule 50 of the Motor Vehicles Rules, 1989 (for short, 'the Rules') for implementation of the provisions of the Act. This notification sought to introduce a new scheme regulating issuance and fixation of High Security Number Plates. In terms of sub-section (3) of Section 109 of the Act, the Central Government issued an order dated 22nd August, 2001 which dealt with various facets of manufacture, supply and fixation of new High Security Registration Plates (HSRP). The Central Government also issued a notification dated 16th October, 2001 for further implementation of the said order and the HSRP Scheme. Various States had invited tenders in order to implement this Scheme.

2. A writ petition being Writ Petition (C) No.41 of 2003 was filed in this Court challenging the Central Government's power to issue such notification as well as the terms and conditions of the tender process. In addition to the above writ petition before this Court, various other writ petitions were filed in different High Courts raising the same challenge. These writ petitions came to be transferred to this Court. All the transferred cases along with Writ Petition (C) No. 41 of 2003 were referred to a larger Bench of three Judges of this Court by order of reference dated 26th May, 2005 in the case of Association of Registration Plates v. Union of India [(2004) 5 SCC 364], as there was a difference of opinion between the learned Members of the Bench dealing with the case. The three Judge Bench finally disposed of the writ petitions vide its order dated 30th November, 2004 reported in Association of Registration Plates v. Union of India Association of Registration Plates v. Union of India [(2005) 1 SCC 679]. While dismissing the writ petition and the connected matters, the Bench rejected the challenge made to the provisions of the Rules, statutory order issued by the Central Government and the tender conditions and also issued certain directions for appropriate implementation of the Scheme.

8. Now, we would examine certain principles of law which would normally guide the exercise of judicial discretion in the realm of contempt jurisdiction. 'Contempt' is an extraordinary jurisdiction of the Courts. Normally, the courts are reluctant to initiate contempt proceedings under the provisions of the 1971 Act. This jurisdiction, at least suomoto, is invoked by the courts sparingly and in compelling circumstances, as it is one of the foremost duty of the courts to ensure compliance of its orders. The law relating to contempt is primarily dissected into two main
heads of jurisdiction under the Indian Law: (a) Criminal Contempt, and (b) Civil Contempt. It is now well settled and explained principle under the Indian contempt jurisdiction that features, ingredients, procedure, attendant circumstances of the case and the quantum of punishment are the relevant and deciphering factors.

Section 12 of the 1971 Act deals with the contempt of court and its punishment while Section 15 deals with cognizance of criminal contempt. Civil contempt would be wilful breach of an undertaking given to the court or wilful disobedience of any judgment or order of the court, while criminal contempt would deal with the cases where by words, spoken or written, signs or any matter or doing of any act which scandalises, prejudices or interferes, obstructs or even tends to obstruct the due course of any judicial proceedings, any court and the administration of justice in any other manner. Under the English Law, the distinction between criminal and civil contempt is stated to be very little and that too of academic significance. However, under both the English and Indian Law these are proceedings sui generis. While referring to Justice J.D. Kapoor's Law of Contempt of Court, Second Edition, 2010 which mentioned the Phillimore Committee Report - Report of the Committee on Contempt of Court, of which importantly the following passage can be noticed:

"4. In England and Wales most forms of contempt have been regarded as of criminal character, and as such, are called "criminal contempts". In Scotland contempt of court is not a crime nor is a distinction between "criminal" and "civil" contempts recognised. Scots law regards contempt of court as a chapter of a law sui generis. This difference of approach is of little more than academic significance in modern practice, but the Scottish explain certain peculiar elements in its operation and procedure. What is of particular importance is that it is branch of the law in which breaches are investigated by a special and summary procedure and where, once established, they may be severely punished."

9. Under the Indian Law the conduct of the parties, the act of disobedience and the attendant circumstances are relevant to consider whether a case would fall under civil contempt or a criminal contempt. For example, disobedience of an order of a court simplicitor would be civil contempt but when it is coupled with conduct of the parties which is contemptuous, prejudicial and is in flagrant violation of the law of the land, it may be treated as a criminal contempt. Even under the English Law, the courts have the power to enforce its judgment and orders against the recalcitrant parties.

10. In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the orders of the court, even to constitute a civil contempt. Every party to lis before the court, and even otherwise, is expected to obey the orders of the court in its true spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. The Government Departments are no exception to it. The departments or instrumentalities of the State must act expeditiously as per orders of the court and if such orders postulate any schedule, then it must be
adhered to. Whenever there are obstructions or difficulties in compliance with the orders of the court, least that is expected of the Government Department or its functionaries is to approach the court for extension of time or clarifications, if called for. But, where the party neither obeys the orders of the court nor approaches the court making appropriate prayers for extension of time or variation of order, the only possible inference in law is that such party disobeys the orders of the court. In other words, it is intentionally not carrying out the orders of the court. Flagrant violation of the court's orders would reflect the attitude of the concerned party to undermine the authority of the courts, its dignity and the administration of justice. In the case of Re: Vinay Chandra Mishra [(1995) 2 SCC 584], this Court held that 'judiciary has a special and additional duty to perform, viz., to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. Dignity and authority of the Courts have to be respected and protected at all costs'.

11. Another very important aspect even of the Civil Contempt is, 'what is the attribution of the contemnor?' There may be cases of disobedience where the respondent commits acts and deeds leading to actual disobedience of the orders of the court. Such contemnor may flout the orders of the court openly, intentionally and with no respect for the rule of law. While in some other cases of civil contempt, disobedience is the consequence or inference of a dormant or passive behaviour on the part of the contemnor. Such would be the cases where the contemnor does not take steps and just remains unmoved by the directions of the court. As such, even in cases where no positive/active role is directly attributable to a person, still, his passive and dormant attitude of inaction may result in violation of the orders of the court and may render him liable for an action of contempt.

12. It is not the offence of contempt which gets altered by a passive/negative or an active/positive behaviour of a contemnor but at best, it can be a relevant consideration for imposition of punishment, wherever the contemnor is found guilty of contempt of court. With reference to Government officers, this Court in the case of E.T. Sunup v. Canss Employees Assoc.. [(2004) 8 SCC 683] took the view that it has become a tendency with the Government officers to somehow or the other circumvent the orders of the Court by taking recourse to one justification or the other even if ex-facie they are unsustainable. The tendency of undermining the court orders cannot be countenanced. Deprecating practice of undue delay in compliance with the orders of the court, this Court again in the case of M.C. Mehta v. Union of India and Ors. [(2001) 5 SCC 309] observed:

".....clear lapse on the part of NCT and Municipal Corporation. Even if there was not deliberate or wilful disregard for the court orders, there has clearly been a lackadaisical attitude and approach towards them. Though no further action in this matter need be taken for now, but such lethargic attitude if continues may soon become contumacious."
13. It is also of some relevancy to note that disobedience of court orders by positive or active contribution or non-obedience by a passive and dormant conduct leads to the same result. Disobedience of orders of the court strikes at the very root of rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. If the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs (refer T.N. GodavarmanThirumulpad's case [(2006) 5 SCC 1]. The proceedings before the highest court of the land in a public interest litigation, attain even more significance. These are the cases which come up for hearing before the court on a grievance raised by the public at large or public spirited persons. The State itself places matters before the Court for determination which would fall, statutorily or otherwise, in the domain of the executive authority. It is where the State and its instrumentalities have failed to discharge its statutory functions or have acted adversely to the larger public interest that the courts are called upon to interfere in exercise of their extraordinary jurisdiction, to ensure maintenance of the rule of law. These are the cases which have impact in rem or on larger section of the society and not in personam simplicitor. Courts are called upon to exercise jurisdiction with twin objects in mind. Firstly, to punish the persons who have disobeyed or not carried out orders of the court i.e. for their past conduct. Secondly, to pass such orders, including imprisonment and use the contempt jurisdiction as a tool for compliance of its orders in future. This principle has been applied in the United States and Australia as well. For execution of the orders of the court even committal for an indefinite term has been accepted under Australian law [Australasian Meat Industry Employees Union v. Mudginberri Station Pty. Ltd. (1986) 161 CLR 98 (Australian High Court)] and American law, though this is no longer permissible under English Law. While referring to detention of a person for a long period to ensure execution of the orders in Re Nevitt [117 F. 448, 461 (1902)] Judge Sanborn observed that the person subjected to such a term ‗carries the keys of his prison in his own pocket.‘ Lethargy, ignorance, official delays and absence of motivation can hardly be offered as any defence in an action for contempt. Inordinate delay in complying with the orders of the courts has also received judicial criticism. It is inappropriate for the parties concerned to keep the execution of the court's orders in abeyance for an inordinate period. Inaction or even dormant behaviour by the officers in highest echelons in the hierarchy of the Government in complying with the directions/orders of this Court certainly amounts to disobedience. Inordinate delay of years in complying with the orders of the court or in complying with the directed stipulations within the prescribed time, has been viewed by this Court seriously and held to be the contempt of court, as it undermines the dignity of the court. Reference in this regard can be made to ManiyeriMadhavan v. Inspector of Police, Cannanore [AIR 1993 SC 356] and Anil RatanSarkar and Ors. v. HirakGhosh and Ors. [(2002) 4 SCC 21].

Even a lackadaisical attitude, which itself may not be deliberate or wilful, have not been held to be a sufficient ground of defence in a contempt proceeding. Obviously, the purpose is to ensure compliance of the orders of the court at the earliest and within stipulated period.
14. Reverting back to the facts of the present case, it is undisputed that for years together the State of Haryana has failed to comply with the directions of this Court and implement the scheme. It has not only caused prejudice to the public at large but has even undermined the dignity of this Court. The attitude of the State of Haryana and the respective officers has been lackadaisical and of willful disregard. Despite repeated orders they have failed to take effective steps and whatever steps were taken the same are not in conformity with law. The repeated Orders of this Court have failed to bring any results from the recalcitrant State. The repeated opportunities and extension of time did not help in expeditious progress in the matter. On the contrary, there is apparent disobedience of the Orders of this Court and no compliance with the Orders of this court, by their completely passive and dormant behaviour. This behaviour, besides causing serious problems in the effective implementation of statutory scheme, has even undermined the dignity of this Court and impinged upon the basic rule of law. At the cost of repetition, we may notice that there is not even a word of explanation as to why no steps were taken by the State of Haryana for a long period of seven years and why tender has not been awarded till date. The vague averments made in the affidavit are nothing but a lame excuse to somehow avoid the present proceedings. The State of Haryana and the concerned officers, namely, the Secretary, Transport and the Commissioner, State Transport Authority have violated the Orders of this Court and are liable for the consequences of such disobedience.

15. It was expected of the officers in-charge and particularly the Secretary, Transport and Commissioner, State Transport Authority of the State of Haryana to at least carefully read the orders of this Court and ensure their implementation in their correct perspective. We would have expected such high officers of the State to act fairly, expeditiously and in accordance with the orders of this Court. If the concerned State would have taken timely and appropriate steps in accordance with the law and the orders of this Court, it would have not only saved the time of the Court, which it had spent on repeated hearings, but would have also saved the public money that it had spent so far.

16. We have no hesitation in coming to the conclusion that the Secretary, Transport and the Commissioner, State Transport Authority of the State of Haryana is guilty of willful disobedience/non-compliance of the orders of this Court, particularly the orders dated 30th November 2004, 7th April 2011 and 30th August 2011. Having found them guilty under the provisions of the 1971 Act and under Article 129 of the Constitution of India, we punish the Secretary, Transport and Commissioner, State Road Transport Authority of the State of Haryana as under:
   i) They are punished to pay a fine of Rs.2,000/- each and in default, they shall be liable to undergo simple imprisonment for a period of fifteen days;
   ii) We impose exemplary cost of Rs.50,000/- on the State of Haryana, which amount, at the first instance, shall be paid by the State but would be recovered from the salaries of the erring officers/officials of the State in accordance with law and such recovery proceedings be concluded within six months. The costs would be payable to the Supreme Court Legal Services Committee.
iii) In view of the principle that the courts also invoke contempt jurisdiction as a tool for compliance of its orders in future, we hereby direct the State Government and the respondent/contemner herein now to positively comply with the orders and implement the scheme within eight weeks from today. Copy of this order be circulated to the Chief Secretary/Competent Authority of all the States/U.T.s. It is ordered accordingly.
R.K. Anand v. Registrar, Delhi High Court
(2009) 8 SCC 106

AFTAB ALAM, J. 1. The present is a fall out from a criminal trial arising from a hit and run accident on a cold winter morning in Delhi in which a car travelling at reckless speed crashed through a police check post and crushed to death six people, including three policemen. Facing the trial, as the main accused, was a young person called Sanjeev Nanda coming from a very wealthy business family. According to the prosecution, the accident was caused by Sanjeev Nanda who, in an inebriated state, was driving a black BMW car at very high speed. The trial, commonly called as the BMW case, was meandering endlessly even after eight years of the accident and in the year 2007, it was not proceeding very satisfactorily at all from the point of view of the prosecution. The status of the main accused coupled with the flip flop of the prosecution witnesses evoked considerable media attention and public interest. To the people who watch TV and read newspapers it was yet another case that was destined to end up in a fiasco. It was in this background that a well known English language news channel called New Delhi Television (NDTV) telecast a programme on May 30, 2007 in which one Sunil Kulkarni was shown meeting with IU Khan, the Special Public Prosecutor and RK Anand, the Senior Defence Counsel (and two others) and negotiating for his sell out in favour of the defence for a very high price. Kulkarni was at one time considered the most valuable witness for the prosecution but afterwards, at an early stage in the trial, he was dropped by the prosecution as one of its witnesses. Nearly eight years later, the trial court had summoned him to appear and give his testimony as a court witness. The telecast came a few weeks after the court order and even as his evidence in the trial was going on. According to NDTV, the programme was based on a clandestine operation carried out by means of a concealed camera with Kulkarni acting as the mole. What appeared in the telecast was outrageous and tended to confirm the cynical but widely held belief that in this country the rich and the mighty enjoyed some kind of corrupt and extra-constitutional immunity that put them beyond the reach of the criminal justice system. Shocked by the programme the Delhi High Court suo moto initiated a proceeding (Writ Petition (Criminal) No. 796 of 2007). It called for from the news channel all the materials on which the telecast was based and after examining those materials issued show cause notices to RK Anand, IU Khan and Bhagwan Sharma, an associate advocate with RK Anand why they should not be convicted and punished for committing criminal contempt of court as defined under Section 2(c) of the Contempt of Courts Act. (In the sting operations there was another person called Lovely who was apparently sent to meet Kulkarni as an emissary of RK Anand. But he died in a freak accident even before the stage of issuance of notice in the proceeding before the High Court). On considering their show cause and after hearing the parties the High Court expressed its displeasure over the role of Bhagwan Sharma but acquitted him of the charge of contempt of court. As regards RK Anand and IU Khan, however, the High Court found and held that their acts squarely fell within the definition of contempt under clauses (ii) & (iii) of Section 2(c) of the Contempt of Courts Act. It, accordingly, held them guilty of committing contempt of Court vide
judgment and order dated August 21, 2008 and in exercise of power under Article 215 of the Constitution of India prohibited them, by way of punishment, from appearing in the Delhi High Court and the courts subordinate to it for a period of four months from the date of the judgment. It, however, left them free to carry on their other professional work, e.g., ‘consultations, advises, conferences, opinion etc’. It also held that RK Anand and IU Khan had forfeited their right to be designated as Senior Advocates and recommended to the Full Court to divest them of the honour. In addition to this the High Court also sentenced them to fine of rupees two thousand each.

2. These two appeals by RK Anand and IU Khan respectively are filed under Section 19(1) of the Contempt of Courts Act against the judgment and order passed by the Delhi High Court.

THE CONTEXT

3. Before proceeding to examine the different issues arising in the case it is necessary to first know the context in which the whole sordid episode took place. It will be, therefore, useful to put together the basic facts and circumstances of the case at one place. The occurrence in which six people lost their lives was reconstructed by the prosecution on the basis of police investigation as follows:

The crime, the Police investigation & proceedings before the Trial court

4. On January 10, 1999 at about half past four in the morning a speeding vehicle crashed through a police check-post on one of the Delhi roads and drove away leaving behind six people dead or dying. As the speeding car hit the group of persons standing on the road some were thrown away but two or three persons landed on the car's bonnet and rolled down to the ground under it. The car, however, did not stop. It moved on dragging along the persons who were caught in its underside. It halted only after the driver lost control and going down a distance of 200-300 feet hit the road divider. At this point the occupants came down from the car to inspect the scene. They looked at the front and the rear of the car and would not have failed to notice the persons caught under the car who were still crying for help and who perhaps might have been saved if they were taken out even at that stage. But the anxiety of the car's occupants to leave the accident site without delay seemed to override all other considerations. They got back into the car, reversed it and drove on. The car went on dragging the unfortunate victims trapped under it to certain and ghastly death and left behind at the accident site dismembered limbs and dead bodies of men.

5. The police investigation brought to light that the accident was caused by a black BMW car which was being driven by Sanjeev Nanda. He was returning from a late night party, under the influence of liquor, along with some friend(s).

6. Five days after the accident, on January 15, 1999 one Sunil Kulkarni contacted the Joint Commissioner of Police, Delhi, and claimed to be an eye witness to the occurrence. According to his story, at the time of the accident he was passing through the spot, on foot, on his way to the Nizamuddin Railway Station for catching a train for Bhopal. He described the accident in considerable detail and stated that at the sight of so many people being mowed down by the car
he got completely unnerved. He proceeded for the railway station and on reaching there tried to ring up the police or the emergency number 100 but was unable to get through. He finally went to Bhopal and on coming back to Delhi, being bitten by conscience, he contacted the police. What was of significance in Kulkarni's statement is that the accident was caused by a car and when it stopped after hitting the people a man alighted from the driving seat and examined the front and rear of the car. Then, another person got down from the passenger seat called the other, “Sanjeev”, and urged that they should go. On the same day his statement was recorded by the police under Section 161 of the Code of Criminal Procedure (CrPC). The following day he was shown Nanda's BMW car at Lodhi Colony Police Station and he identified it as the one that had caused the accident. On January 21, 1999 Kulkarni's statement was recorded before a magistrate under Section 164 of CrPC. Before the magistrate, in regard to the accident, he substantially reiterated the statement made before the police, lacing it up with details about his stay in Delhi from January 7 and his movements on the evening before the accident. In the statement before the magistrate the manner of identification of Sanjeev Nanda was also the same with the addition that after the accident when the car moved again the person on the driving seat was trying to look for the way by craning out his head out of the broken glass window and thus he was able to see him from a distance of no more than three and a half feet when the car passed by his side. The police wanted to settle the question of the driver's identification by having Kulkarni identify Sanjeev Nanda in a test identification parade but Sanjeev Nanda refused to take part in any identification parade. Then, on March 31, 1999 when Sanjeev Nanda was produced in court Kulkarni also happened to be there. He identified him to the investigating officer as the driver of the car causing accident.

7. Kulkarni's arrival on the scene as an eye witness of the tragic accident got wide publicity and he was generally acclaimed as a champion of the public cause. He must have appeared to the police too as godsend but soon there were reasons for the police to look at him completely differently. He had given as his address a place in Mumbai. A summons issued by the trial court on the Mumbai address given by him returned unserved. The report dated August 30, 1999 on the summons disclosed that he had given a wrong address and his actual address was not known to anyone. It also stated that he was a petty fraudster who had defrauded several people in different ways. The report concluded by saying that he seemed to be a person of shady character.

8. At the same time Kulkarni also turned around. On August 31, 1999 a Habeas Corpus petition (Writ Petition (Crl) No. 846/99) was filed in the Delhi High Court making the allegation that he was being held by the Delhi Police in wrongful confinement. On the following day (September 1, 1999) when the writ petition was taken up the allegations were denied on behalf of the police. Moreover, Kulkarni was personally present in Court. The Court, therefore, dismissed the writ petition without any directions. Next, Kulkarni filed a petition (through a lawyer) before the trial court on September 13, 1999. In this petition, he stated that on the date of occurrence, that is, January 10, 1999 itself he had told the police that the accident was caused by a truck. But the police was adamant not to change the version of the FIR that was already registered and on
the basis of which five persons were arrested. The police forced him to support its story, and his earlier statements were made under police coercion.

9. On September 23, 1999 a clash took place between some policemen and some members of the bar in the Patiala House court premises for the ‘custody’ of Kulkarni. A complaint about the alleged high handed actions of the police was formally lodged before the court and a notice was issued to the Jt. Commissioner. In response to the notice the Jt. Commissioner submitted a long and detailed report to the court on September 27, 1999. In the report, apart from defending the action of the policemen the Jt. Commissioner had a lot of things to say about Kulkarni’s conduct since he became a witness for the prosecution in the BMW case. He noted that he would never give his address or any contact number to any police official. His life style had completely changed. He lived in expensive hotels and moved around in big cars. The Jt. Commissioner enclosed with his report a copy of the print-out of the cell phone of Kulkarni (the number of which he had given to one of the police officers) that showed that as early as on July 17, 1999 he was in touch with the counsel for the defence RK Anand (one of the appellants) and his junior Mr. Jai Bhagwan, Advocate and even with Suresh Nanda, father of Sanjeev Nanda. He cited several other instances to show Kulkarni’s duplicity. The long and short of the report was that Kulkarni was bought off by the defence. He was in collusion with the defence and was receiving fat sums of money from the family of the accused. He was trying to play the two ends against the middle and he was completely unreliable.

10. On September 30, the date fixed for his examination, Kulkarni was duly present in court. He was, however, represented by his own lawyer and not by the prosecuting counsel. He was quite eager to depose. But the prosecution no longer wanted to examine him. IU Khan, the Special Prosecutor filed a petition stating that on the instructions of the State he gave up Kulkarni as one of the prosecution witness on the ground that he was won over by the accused. He also submitted before the court the report of the Joint Commissioner dated September 27. The allegation that he was won over was of course, denied both by Kulkarni and the accused. The court, however, discharged him leaving the question open as to what inference would it draw as a result of his non-examination by the prosecution.

11. Earlier to Kulkarni’s exit from the case, the prosecution had lost two other key witnesses. To begin with there were three crucial witnesses for the prosecution. One was Hari Shankar Yadav, an attendant on a petrol pump near the site of the tragedy; the other was one Manoj Malik who was the lone survivor among the victims of the accident and the third of course was Kulkarni. Hari Shankar Yadav was examined before the court on August 18, 1999 and he resiled from his earlier statement made before the police. Manoj Malik was scheduled to be examined on August 30, 1999 but he seemed to have disappeared and the police was unable to trace him out either in Delhi or at his home address in Orissa. On the date fixed in the case, however, he appeared in court, not with the prosecution team but with two other lawyers. He was examined as a witness notwithstanding the strong protest by the prosecution who asked for an adjournment.
Not surprisingly, he too turned hostile. Lastly, Kulkarni too had to be dropped as one of the prosecution witness in the circumstances as noted above.

12. The trial proceeded in this manner and over a period of the next four years the prosecution examined around sixty witnesses on the forensic and other circumstantial aspects of the case. The prosecution finally closed its evidence on August 22, 2003. Thereafter, the accused were examined under Section 313 of CrPC and a list of defence witnesses was furnished on their behalf. While the case was fixed for defence evidence two applications came to be filed before the trial court, one was at the instance of the prosecution seeking a direction to the accused Sanjeev Nanda to give his blood sample for analysis and comparison with the blood stains found in the car and on his clothes, and the other by the defence under Section 311 of CrPC for recalling nine prosecution witnesses for their further cross-examination. By order dated March 19, 2007 the trial court rejected both the applications. It severely criticised the police for trying to seek its direction for something for which the law gave it ample power and authority. It also rejected the petition by the defence for recall of witnesses observing that the power under Section 311 of CrPC was available to the court and not to the accused. At the end of the order the court observed that the only witness in the case whose statement was recorded under Section 164 of CrPC was Kulkarni and even though he was given up by the prosecution, the court felt his examination essential for the case. It, accordingly, summoned Kulkarni to appear before the court on May 14, 2007. Kulkarni thus bounced back on the stage with greater vigour than before.

MEDIA INTERVENTION

13. In the trial court the matter was in this state when another chapter was opened up by a TV channel with which we are primarily concerned in this case. On April 19, 2007 one Vikas Arora, Advocate, an assistant of IU Khan sent a complaint in writing to the Chief Editor, NDTV with copies to the Commissioner of Police and some other authorities. In the complaint it was alleged that one Ms Poonam Agarwal, a reporter of the TV Channel was demanding copies of statements of witnesses and the Police Case-diary of the BMW case and was also seeking an interview with IU Khan or the complainant, his junior. On their refusal to meet the demands she had threatened to expose them through some unknown person and to let the people know that the police and the public prosecutor had been influenced and bribed by the accused party. He requested the authorities to take appropriate action against Poonam Agarwal.

14. On April 20, 2007 NDTV telecast a half hour special programme on how the BMW case was floundering endlessly even after more than seven years of the occurrence. Apparently, the telecast on April 20, 2007 brought Poonam Agarwal and Kulkarni together. According to Poonam Agarwal, on April 22, 2007 she received a phone call from Kulkarni who said that he was deeply impressed by the programme telecast by her channel and requested for a meeting with her. (The version of Kulkarni is of course quite different). She met him on April 22 and 23. He told her that in the BMW case the prosecution was hand in glove with the defence; he wanted to expose the nexus between the prosecution and the defence and needed her help in that regard. Poonam
Agarwal obtained the approval of her superiors and the idea to carry out the sting operation using Kulkarni as the decoy was thus conceived.

15. Even while the planning for the sting operation was going on, NDTV on April 26 gave reply to the notice by Vikas Arora. In their reply it was admitted that Poonam Agarwal had sought an interview with Arora's senior which was denied for reasons best known to him. All other allegations in Arora's notice were totally denied and it was loftily added that the people at NDTV were conscious of their responsibilities and obligations and would make continuous efforts to unravel the truth as a responsible news channel.

16. On April 28, 2007 Kulkarni along with one Deepak Verma of NDTV went to meet IU Khan in the Patiala House court premises. For the mission Poonam Agarwal ‘wired' Kulkarni, that is to say, she equipped him with a concealed camera and a small electronic device that comprised of a tiny black button-shaped lens attached to his shirt front connected through a wire to a small recorder with a microchip hidden at his backside. Before sending off Kulkarni she switched on the camera and waited outside the court premises in a vehicle. Deepak Verma from the TV channel was sent along to ensure that everything went according to plan. He was carrying another concealed camera and the recording device in his handbag. Kulkarni and Deepak Verma were able to meet IU Khan while he was sitting in the chamber of another lawyer. Kulkarni entered into a conversation with IU Khan inside the crowded chamber (the details of the conversation we will examine later on at its proper place in the judgment). The conversation between the two that took place inside the chamber was recorded on the microchips of both the devices, one worn by Kulkarni and the other carried by Deepak Verma in his bag. After a while, on Kulkarni’s request, both IU Khan and Kulkarni came out of the chamber and some conversation between the two took place outside the chamber. The recording on the microchip of Kulkarni’s camera was copied onto magnetic tapes and from there to compact discs (CDs). The microchip in Kulkarni’s camera used on April 28, 2007 was later reformatted for other uses. Thus, admittedly that part of the conversation between Kulkarni and IU Khan that took place on April 28, 2007 outside the chamber is available only on CD and the microchip on which the original recording was made is no longer available. The second operation was carried out on May 6, 2007 when Kulkarni met RK Anand in the VIP lounge at the domestic terminal of IGI Airport. The recording of the meeting was made on the microchip of the concealed camera carried by Kulkarni.

17. On May 8, 2007 the third sting operation was carried out when Kulkarni got into the back seat of RK Anand's car that was standing outside the Delhi High Court premises. RK Anand was sitting on the back seat of the car from before. The recording shows Kulkarni and RK Anand in conversation as they travelled together in the car from Delhi High Court to South Extension.

18. In the evening of the same day the fourth and final sting operation was carried out in South Extension Part II market where Kulkarni met one Bhagwan Sharma, Advocate and another person called Lovely. Bhagwan Sharma is one of the juniors working with RK Anand and Lovely appears to be his handyman who was sent to negotiate with Kulkarni on behalf of RK Anand.
19. According to Poonam Agarwal, in all these operations she was only at a little distance from the scene and was keeping Kulkarni, as far as possible, within her sight.

20. According to NDTV, in all these operations a total of five microchips were used. Four out of those five chips are available with them in completely untouched and unaltered condition. One microchip that was used in the camera of Kulkarni on April 28, 2007, as noted above, was reformatted after its contents were transferred onto a CD.

21. On May 13, 2007 NDTV recorded an interview by Kulkarni in its studio in which Kulkarni is shown saying that after watching the NDTV programme (on the BMW case) he got in touch with the people from the channel and told them that the prosecution and the defence in the case were in league and he knew how witnesses in the case were bought over by the accused and their lawyers. He also told NDTV that he could expose them through a sting operation. He further said that he carried out the sting operation with the help of NDTV. He first met IU Khan who referred him to RK Anand. He then met some people sent by RK Anand, including someone whose name was 'Lovely or something like that'. As to his objective he said quite righteously that he did the sting operation 'in the interest of the judiciary'. In answer to one of the questions by the interviewer he replied rather grandly that he would ask the court to provide him security by the NSG and he would try to go and depose as soon as security was provided to him. In the second part of the interview the interviewer asked him about the accident and in that regard he said briefly and in substance what he had earlier stated before the police and the magistrate.

Back to the Court

22. It is noted above that by order dated March 19, 2007 the trial court had summoned Kulkarni to appear before it as a court witness on May 14, 2007. The defence took the matter to the Delhi High Court (in Crl. M.C. No. 1035/2007 with Crl. M. 3562/2007) assailing the trial court order rejecting their prayer to recall some prosecution witnesses for further cross-examination and suo moto summoning Kulkarni under Section 311 of CrPC, to be examined as a court witness. The matter was heard in the High Court on several dates. In the meanwhile Kulkarni was to appear before the trial court on May 14, 2007. Hence, the High Court gave interim directions allowing Kulkarni to be examined by the court but not to put him to any cross-examinations till the disposal of the petition being argued before it. The petition was finally disposed of by a detailed order dated May 29, 2007. The High Court set aside the trial court order rejecting the defence petition for recall of certain prosecution witnesses and asked the trial court to reconsider the matter. It also held that the trial court's criticism of the police was unwarranted and accordingly, expunged those passages from its order. However, insofar as summoning of Kulkarni was concerned the High Court held that there was no infirmity in the trial court order and left it undisturbed.

23. On May 14, 2007 Kulkarni appeared before the trial court but on that date, despite much persuasion, the court was not able to get any statement from him. From the beginning he asked for an adjournment on the plea that he was not well. In the end the court adjourned the
proceedings to May 17 with the direction to provide him police protection. On May 17, the examination of Kulkarni commenced and he described the accident more or less in the same way as in his statements before the police and the magistrate. He said that the accident was caused by a black car (and not by a truck) but added that the car was coming from his front and its light was so strong that he could not see much. He said about his identification of the car at the Lodhi Colony police station. But on the question of identification of the driver there was a significant shift from his earlier statements. He told the court that what he had heard was one of the occupants urging the other to go calling him "Sanch or Sanz". He had also heard another name "Sidh" being mentioned among the car's occupants. In reply to the court's question he said that in his statement before the magistrate under Section 164 of CrPC he had stated the name "Sanjeev", and not the nick names that he actually heard, under pressure from some police officials. He said that he was also put under pressure not to take the name of Sidharth Gupta and some police official told him that he was not in the car at the time of the accident. He said that apart from the name that he heard being uttered by the occupant(s) of the car and the number of persons he saw getting down from the car the rest of his statement under Section 164 was correct. He said that actually three, and not two, persons had got down from the car. The court then asked him to identify the persons who came out of the offending car. Kulkarni identified Sanjeev Nanda who was present in court. He further said that the third occupant of the car was a hefty boy whom he did not see in the court. At this point IU Khan explained that he might be referring to Sidharth Gupta who was discharged by the order of the High Court. Kulkarni added that he was unable to identify the second occupant of the car and went on to declare, even without being asked, he could not say who came out of the driver's side. He was shown Manik Kapoor, another accused in the case, as one the occupants of the car but he said that after lapse of nine years he was not in a position to identify him.

24. On May 29 Kulkarni was cross examined on behalf of the Prosecution by IU Khan. The prosecutor confronted him with his earlier statements recorded under Sections 161 and 164 of CrPC and he took it as opportunity to move more and more away from the prosecution case. He admitted that Sanjeev Nanda was one of the occupants of the car but positively denied that he came out from the driving seat of the offending car. He elaborated that the one to come out from the driving seat of the car was a fat, hefty boy who was not present on that date. (It does not take much imagination to see that he was trying to put Sidharth Gupta on the driving seat of the car who had been discharged from the case by the order of the Delhi High Court and was thus in no imminent danger from his deposition!). He denied that he disowned or changed some portions from his earlier statements under the influence of the accused persons. On May 29 Kulkarni's cross-examination by IU Khan was incomplete and it was deferred to May 31. But before that NDTV telecast the sting programme that badly jolted not only everyone connected with the BMW trial but the judicial system as well.

THE TELECAST
25. Based on the sting operations NDTV telecast a programme called India 60 Minutes (BMW Special) on May 30, 2007 at 8.00 p.m. It was followed at 9.00 pm, normally reserved for news, as 'BMW Special'. From a purely journalistic point of view it was a brilliant programme designed to have the greatest impact on the viewers. The programmes commenced with the anchors (Ms. Sonia Singh in the first and Ms. Barkha Dutt in the second telecast) making some crisp and hard hitting introductory remarks on the way the BMW case was proceeding which, according to the two anchors, was typical of the country's legal system. The introductory remarks were followed by some clips from the sting recordings and comments by the anchors, interspersed with comments on what was shown in the programme by a host of well known legal experts.

26. It is highly significant for our purpose that both the telecasts also showed live interviews with RK Anand. According to the channel's reporter, who was posted at RK Anand's residence with a mobile unit, he initially declined to come on the camera or to make any comments on the programme saying that he would speak only the following day in the court at the hearing of the case. According to the reporter, in course of the telecast Sanjeev Nanda also arrived at the residence of RK Anand and joined him in his office. He too refused to make any comments on the on-going telecast. But later on RK Anand came twice on the TV and spoke with the two anchors giving his comments on what was being shown in the telecasts. We shall presently examine whether the programmes aired to the viewers were truly and faithfully based on the sting operations or whether in the process of editing for preparing the programmes any slant was given, prejudicial to the two appellants. This is of course subject to the premise that the Court has no reason to suspect the original materials on which the programme was based and it is fully satisfied in regard to the integrity and authenticity of the recordings made in the sting operations. That is to say, the recordings of the sting operations were true and pure and those were not fake, fabricated, doctored or morphed.

27. In regard to the telecast it needs to be noted that though the sting operations were complete on May 8, 2007 and all the materials on which the telecast would be based were available with the TV channel, the programme came on air much later on May 30. The reason for withholding the telecast was touched upon by the anchors who said in their introductory remarks that after the sting operations were complete and just before his testimony began in court Kulkarni withdrew his consent for telecasting the programmes. Nevertheless, after taking legal opinion on the matter NDTV was going ahead with the airing of programme in larger public interest. Towards the end of the nine o'clock programme the anchor had a live discussion with Poonam Agarwal in which she elaborated upon the reason for withholding the telecast for about three weeks. Concerning Kulkarni, Poonam Agarwal said that he was the main person behind the stings and the sting operation was planned at his initiative. He had approached her and said to her that he wished to bring out into the open the nexus between the prosecution and the defence in the BMW case. He had also said to her that in connection with the case he was under tremendous pressure from both sides. But after the stings were complete he changed his stand and would not
agree to the telecast of the programme based on the stings. In the discussion between the anchor and Poonam Agarwal it also came to light that initially NDTV had seen Kulkarni as one of the victims of the system but later on he appeared in highly dubious light. The anchor said that they had no means to know if he had received any money from any side. Poonam Agarwal who had the occasion to closely see him in course of the sting operations gave instances to say that he appeared to her duplicitous, shifty and completely unreliable.

28. NDTV took the interview of RK Anand even as the first telecasts were on and thus what he had to say on what was being shown on the TV was fully integrated in the eight o'clock and nine o'clock programmes on May 30. IU Khan was interviewed on the following morning when a reporter from the TV channel met him at his residence with a mobile transmission unit. The interview was live telecast from around eight to twenty three past eight on the morning of May 31. But that was the only time his interview was telecast in full. In the programmes telecast later on, one or two sentences from his interview were used by the anchor to make her comments.

29. In his interview IU Khan basically maintained that from the clandestine recording of his conversation with Kulkarni, pieces, were used out of context and selectively for making the programme and what he spoke to Kulkarni was deliberately misinterpreted to derive completely wrong inferences. He further maintained that in his meeting with Kulkarni he had said nothing wrong much less anything to interfere with the court's proceeding in the pending BMW case. Impact of the telecast:

30. On the same day IU Khan withdrew from the BMW case as Special Public Prosecutor. Before his withdrawal, however, he produced before the trial court a letter that finds mention in the trial court order passed on that date, written in the hand of Kulkarni stating that he collected the summons issued to him by the court from SHO, Lodhi Colony Police Station on the advice of IU Khan.

31. The trial court viewed the telecast by NDTV very seriously and issued notice to its Managing Director directing to produce `the entire unedited original record of the sting operation as well as the names of the employees/reporters of NDTV who were part of the said sting operation' by the following day.

32. The further cross-examination of Kulkarni was deferred to another date on the request of the counsel replacing IU Khan as Special Public Prosecutor.

33. On June 1, 2007, RK Anand had a legal notice sent to NDTV, its Chairman, Directors and a host of other staff asking them to stop any further telecasts of their BMW programme and to tender an unconditional apology to him failing which he would take legal action against them inter alia for damages amounting to rupees fifty crores. NDTV gave its reply to the legal notice on July 20, 2007. No further action was taken by RK Anand in pursuance of the notice.

HIGH COURT TAKES NOTICE
34. On the same day (May 31, 2007) a Bench of the Delhi High Court presided over by the Chief Justice took cognisance of the programme telecast by NDTV the previous evening and felt compelled to examine all the facts. The Court, accordingly, directed the Registrar General `to collect all materials that may be available in respect of the telecast including copies of CDs/Video and transcript and submit the same for consideration within 10 days'. The court further directed NDTV `to preserve the original material including the CDs/Video pertaining to the aforesaid sting operation.'

36. On June 2, 2007, Ms. Poonam Agarwal of NDTV submitted before the High Court six CDs; one of the CDs (marked `1') was stated to be edited and the remaining five (marked `2'-'6') unedited. In a written statement given on the same day she declared that NDTV News Channel did not have any other material in connection with the sting operation. She also stated that in accordance with the direction of the Court, NDTV was preserving the original CDs/ Videos relating to the sting operation. On June 6, 2007, Poonam Agarwal submitted true transcripts of the CDs duly signed by her on each page. She also gave a written statement on that date stating that the CDs submitted by her earlier were duplicated from a tape-recording prepared from four spy camera chips which were recorded on different occasions. (As we shall see later on, the total number of microchips used in all the four stings was actually five and not four). She also gave the undertaking, on behalf of NDTV that those original chips would be duly preserved.

39. In Poonam Agarwal's affidavit NDTV took the stand that the stings were conceived and executed by Kulkarni. Its own role was only that of the facilitator. Kulkarni would choose the date and time and venue of the meetings where he would like to do the sting. He would fix up the meetings not in consultation with Poonam Agarwal but on his own. He would simply tell her about the meetings and she would provide him with the wherewithal to do the sting. She would not ask him when and how and for what purpose the meeting was fixed even though it may take place at such strange places as the VIP lounge of the airport or a car travelling from outside the Delhi High Court to South Extension. She would not ask him even about any future meetings or his further plans. Proceeding resumes:

42. On August 7, 2007, the Court on a consideration of all the materials coming before it came to the view that prima facie the actions of RK Anand, IU Khan, Bhagwan Sharma and Lovely (who was dead by then) were aimed at influencing the testimony of a witness in a manner so as to interfere with the due legal process. Their actions thus clearly amounted to criminal contempt of court as defined under Clause (ii) & (iii) of Section 2(c) of the Contempt of Courts Act. The Court accordingly passed the following order:

From your aforesaid acts and conduct as discerned from the CDs and their transcripts, the affidavit 23rd July, 2007 of Ms. Poonam Agarwal along with its annexures, we are, prima facie, satisfied that you Mr. R.K. Anand, Senior Advocate, Mr. I. U. Khan, Senior Advocate, Mr. Sri Bhagwan, Advocate and Mr. Lovely have wilfully and deliberately tried to interfere with the due course of judicial proceedings and administration of justice by the courts. Prima facie your acts
and conduct as aforesaid was intended to subvert the administration of justice in the pending trial and in particular influence the outcome of the pending judicial proceedings.

Accordingly, in exercise of the powers under Article 215 of the Constitution of India, we do hereby direct initiation of proceedings for contempt and issuance of notice to you, Mr. RK Anand, Senior Advocate, Mr. IU Khan, Senior Advocate, Mr. Shri Bhagwan, Advocate and Mr. Lovely to show cause as to why you should not be proceeded and punished for contempt of court as defined under Section 2(c) of the Contempt of Courts Act and under Article 215 of the Constitution of India.

You are, therefore, required to file your reply showing cause, if any, against the action as proposed within four weeks.

43. In response to the notice RK Anand, instead of filing a show cause, first filed a petition (on September 5, 2007) asking one of the judges on the Bench, namely, Manmohan Sarin J. to recuse himself from the hearing of the matter. The recusal petition and the review petition arising from it were rejected by the High Court by orders dated October 4 and November 29, 2007. We will be required to consider the unpleasant business of the recusal petition in greater detail at its proper place later in the judgment.

46. On October 1, IU Khan filed his affidavit in reply to the notice issued by the High Court and RK Anand and Bhagwan Sharma filed their affidavits on October 3, 2007.

YET ANOTHER TELECAST

47. In the evening of December 3, 2007 NDTV telecast yet another programme from which it appeared that RK Anand and Kulkarni were by no means strangers to each other and the association between the two went back several years in the past. Kulkarni, under the assumed name of Nishikant, had stayed in RK Anand's villa in Shimla for some time. There he also had a brush with the law and was arrested by the police in Una (HP). He had spent about forty five days in jail. From the HP police record it appeared that after coming on the scene in the BMW case he spent some time in hotels in Rajasthan and Gurgaon with the Nanda's paying the bills.

48. This time RK Anand did not give any legal notice to NDTV seeking apology or claiming damages etc. but on the following day (December 4) he made a complaint about the telecast before the Court. The Court directed NDTV to produce all the original materials concerning the telecast and its transcript. The Court further directed NDTV to file an affidavit giving details in regard to the collection of the materials and the making of the programme.

49. In response to the High Court's direction one Deepak Bajpai, Principal Correspondent with NDTV filed an affidavit on its behalf on December 11, 2007. In the affidavit it was stated that following a reference to HP in the conversation between RK Anand and Kulkarni in the second sting that took place in the car he went to Shimla and other places in Himachal Pradesh and made extensive investigations there. Kulkarni was easily identified by the people there through his photograph. On making enquiries he came to learn that in the year 2000 Kulkarni
lived in RK Anand's villa called 'Schilthorn' in Shimla for about a year under the assumed name of Nishikant. While staying there he corresponded with an insurance company on behalf of RK Anand, using his letter-head, in connection with some insurance claim. Interestingly, there he also obtained a driving licence describing himself as Nishikant Anand son of RK Anand. In Shimla and in other places in Himachal he also duped a number of traders and businessmen. In Una he was arrested by Police on suspicion and he had to spend about 45 days in jail.

PROCEEDINGS BEFORE THE HIGH COURT

51. After putting the recusal petition and the review application out of its way, the Court took up the hearing of the main matter that was held on many dates spread over a period of four months from December 4, 2007 to May 2, 2008. RK Anand appeared in person while IU Khan was represented through lawyers. Neither RK Anand nor IU Khan (nor for that matter Bhagwan Sharma) tendered apology or expressed regret or contrition for their acts. IU Khan simply denied the charge of trying to interfere with the due course of judicial proceedings and administration of justice by the Courts. He took the stand that the expressions and words he is shown to have uttered in his meeting with Kulkarni were misinterpreted and a completely different meaning was given to them to suit the story fabricated by the TV channel for its programme.

53. The contemnors then raised the issues of the nature of contempt jurisdiction and the onus and the standard of proof in a proceeding for criminal contempt. They further questioned the admissibility of the sting recordings and contended that those recordings were even otherwise unreliable. In course of hearing RK Anand tried to assail the integrity of the CDs furnished to him that were the reproductions from the original of the sting recordings. According to him, there were several anomalies and discrepancies in those recordings and (on January 29, 2008) he submitted before the Court that from the CDs furnished to him he had got another CD of eight minutes duration prepared in order to highlight the tampering in the original recording. He sought the Court's permission to play his eight minute CD before it. On RK Anand's request the Court viewed the eight minute CD submitted by him on February 5, 2008. On February 27, 2008 the Court directed NDTV to file an affidavit giving its response to the CD prepared by RK Anand. As directed, NDTV filed the affidavit, sworn by one Dinesh Singh, on March 7, 2008. The affidavit explained all the objections raised by RK Anand in his eight minute CD. RK Anand then filed a petition (Crl. M. 4012/2008) on March 31, 2008 for sending the original CDs for examination by the Central Forensic Science Laboratory.

58. In the end the Court held that the circumstances and the manner in which the meetings took place between the proceedees and Kulkarni and the exchanges that took place in those meetings as evidenced from the sting recordings fully established that both IU Khan and RK Anand were guilty of the charges framed against them. It accordingly convicted them for criminal contempt of Court and sentenced them as noticed above.

SOME OF THE ISSUES ARISING IN THE CASE
59. These are broadly all the facts of the case. We have set out the relevant facts in considerable detail since we do not see this case as simply a matter of culpability, or otherwise, of two individuals. Inherent in the facts of the case are a number of issues, some of which go to the very root of the administration of justice in the country and need to be addressed by this Court.

The two appeals give rise to the following questions:

1. Whether the conviction of the two appellants for committing criminal contempt of court is justified and sustainable?

2. Whether the procedure adopted by the High Court in the contempt proceedings was fair and reasonable, causing no prejudice to the two appellants?

3. Whether it was open to the High Court to prohibit the appellants from appearing before the High Court and the courts subordinate to it for a specified period as one of the punishments for criminal contempt of court?

4. Whether in the facts and circumstances of the case the punishments awarded to the appellants can be said to be adequate and commensurate to their misdeeds? Apart from the above, some other important issues arise from the facts of the case that need to be addressed by us. These are:

5. The role of NDTV in carrying out sting operations and telecasting the programme based on the sting materials in regard to a criminal trial that was going on before the court.

6. The declining professional standards among lawyers, and

7. The root-cause behind the whole affair; the way the BMW trial was allowed to go directionless

60. On these issues we were addressed at length by Mr. Altaf Ahmed, learned Senior Advocate appearing for RK Anand and Mr. P. P. Rao, learned Senior Advocate appearing on behalf of IU Khan. We also heard Mr. Harish Salve, learned Senior Advocate representing NDTV, which though not a party in the appeals was, nevertheless issued notice by us. We also received valuable assistance from Mr. Gopal Subramanium, Senior Advocate and Mr. Nageshwar Rao, Senior advocate, the amici appointed by us having regard to the important issues involved in the case. We spent a full day viewing all the sting recordings, the recording of the programmes telecast by NDTV on May 30, 2007 and the eight minute CD prepared by RK Anand. Present at the viewing were all the counsel and one of the appellants, namely RK Anand.

RK ANAND’S APPEAL

61. Before adverting to anything else we must deal with the appeals proper. In order to judge the charge of criminal contempt against the appellants it needs to be seen what actually transpired between Kulkarni and the two appellants in the stings to which they were subjected. And for that we shall have to examine the raw sting recordings.
Mr. Altaf Ahmed, learned senior counsel appearing for RK Anand, submitted that the High Court founded the appellant's conviction under the Contempt of Courts Act on facts that were electronically recorded, even without having the authenticity of the recording properly proved. The High Court simply assumed the sting recordings to be correct and proceeded to pronounce the appellant guilty of criminal contempt on that basis. Hence, the genuineness and accuracy of what appeared in the sting recordings always remained questionable. Mr. Ahmed submitted that the judgment and order coming under appeal was quite untenable for the simple reason that the integrity of its factual foundation was never free from doubt. Learned Counsel further submitted that the procedure followed by the High Court was not fair and the appellant was denied a fair trial. He also submitted that the High Court arrived at its conclusions without taking into consideration the appellant's defence and that was yet another reason for setting aside the impugned judgment and order.

Nature of Contempt Proceedings:

Mr. Ahmed submitted that under the Contempt of Courts Act the High Court exercised extra-ordinary jurisdiction. A proceeding under the Act was quasi criminal in nature and it demanded the same standard of proof as required in a criminal trial to hold a person guilty of criminal contempt. In support of the proposition he cited two decisions of this Court, one in *Mritunjoy Das v. Sayed Hasibur Rahman* [2001] 2 SCR 471 and the other in *Chotu Ram v. Urvashi Gulati* [2001Cri LJ 4204]. In both the decisions the Court observed that the common English phrase, “he who asserts must prove” was equally applicable to contempt proceedings. In both the decisions the Court cited a passage from a decision by Lord Denning in *Re Bramblevale Ltd.* [All ER 1063H and 1064B] on the nature and standard of evidence required in a proceeding of contempt.

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.

Seeking to buttress the point learned Counsel also referred to some more decisions of this Court in: (i) *Anil Rattan Sarkar v. Hirak Ghosh* [2002 Cri LJ 1814] (ii) *Bijay Kumar Mahanty v. Jadu @ Ram Chandra Sahoo* [2003 Cri LJ 841] (iii) *J. R. Parashar, Advocate v. Prashant Bhushan, Advocate* [2001 Cri LJ 4207] and (iv) *S. Abdul Karim v. NK Prakash* [1976 Cri LJ 641].

There cannot be any disagreement with the proposition advanced by Mr. Ahmed but as noted above if the sting recordings are true and correct no more evidence is required to see that RK Anand was trying to suborn a witness, that is, a particularly vile way of interfering with due course of a judicial proceeding especially if indulged in by a lawyer of long standing. Admissibility of electronically recorded & stored materials in evidence:
69. This leads us to consider the main thrust of Mr. Ahmed's submissions in regard to the integrity, authenticity, and reliability of the electronic materials on the basis of which the appellants were held guilty of committing contempt of Court. Learned Counsel submitted that the way the High Court proceeded in the matter it was impossible to say with any certainty that the microchips that finally came before it for viewing were the same microchips that were used in the spy cameras for the stings or those were not in any way manipulated or interfered with before production in court. He further submitted that the admissibility in evidence of electronic recordings or Electronically Stored Information (ESI) was subject to stringent conditions but the High Court completely disregarded those conditions and freely used the sting recordings as the basis for the appellants' conviction.

70. In support of the submissions Mr. Ahmed submitted a voluminous compilation of decisions (of this Court and of some foreign courts) and some technical literature and articles on ESI. We propose to take note of only those decisions/articles that Mr. Ahmed specifically referred to us and that have some relevance to the case in hand.

71. Two of the decisions of this Court referred by Mr. Ahmed, one in *S A Khan v. Bhajan Lal* [(1993) 3 SCC 151](#) and the other in *Quamarul Islam v. S. K. Kanta* [1973 Cri LJ 228] relate to newspaper reports. In these two decisions it was held that newspaper report is hearsay secondary evidence which cannot be relied on unless proved by evidence aliunde. Even absence of denial of statement appearing in newspaper by its maker would not absolve the obligation of the applicant of proving the statement. These two decisions have evidently no relevance to the case before us.

72. In regard to the admissibility in evidence of tape recorded statements Mr. Ahmed cited a number of decisions of this Court in (i) *N. Shri Rama Reddy v. V. Giri* [1971] 1 SCR 399 (ii) *R.M. Malkani v. State of Maharashtra* 1973Cri LJ 228 (iii) *Mahabir Prasad Verma v. Dr. Surinder Kaur* [1982] 3 SCR 607 and (iv) *Ram Singh v. Col. Ram Singh* AIR 1986 SC 3. He also referred to two foreign decisions on the point, one in (i) *R v. Stevenson* 1971 (1) All ER 678, and the other of the Supreme Court, Appellate Division of the State of New York in *The People of State of New York v. Francis Bell* (taken down from the internet). We need here refer to the last among the decisions of this Court and the English decisions in *R v. Stevenson*. In *Ram Singh*, a case arising from an election trial the Court examined the question of admissibility of tape recorded conversations under the relevant provisions of the Indian Evidence Act. The Court lay down that a tape recorded statement would be admissible in evidence subject to the following conditions. Thus, so far as this Court is concerned the conditions for admissibility of a tape-recorded statement may be stated as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or by other who recognise his voice. In other words, it manifestly follows as a logical corollary that in the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.
(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence-direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in a safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

73. In *R v. Stevenson* too the Court was dealing with a tape recorded conversation in a criminal case. In regard to the admissibility of the tape recorded conversation the court observed as follows:

Just as in the case of photographs in a criminal trial the original un-retouched negatives have to be retained in strict custody so in my views should original tape recordings. However one looks at it, whether, as counsel for the Crown argues, all the prosecution have to do on this issue is to establish a prima facie case, or whether, as counsel for the defendant Stevenson in particular, and counsel for the defendant Hulse joining with him, argues for the defence, the burden of establishing an original document is a criminal burden of proof beyond reasonable doubt, in the circumstances of this case it seems to me that the prosecution have failed to establish this particular type of evidence. Once the original is impugned and sufficient details as to certain peculiarities in the proffered evidence have been examined in court, and once the situation is reached that it is likely that the proffered evidence is not the original-is not the primary and the best evidence -that seems to me to create a situation in which, whether on reasonable doubt or whether on a prima facie basis, the judge is left with no alternative but to reject the evidence. In this case on the facts as I have heard them such doubt does arise. That means that no one can hear this evidence and it is inadmissible.

74. Mr. Ahmed also referred to another decision by a US Court on the admissibility of video tapes. This is by the Court of Appeal of the State of North Carolina in *State of North Carolina v. Michael Odell Sibley*. In this decision there is a reference to an earlier decision of the same court in *State v. Cannon*. [92 N C App. 246] etc. in which the conditions for admissibility of video tape in evidence were laid down as under:

The prerequisite that the offer or lay a proper foundation for the videotape can be met by:

1. testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purpose);
2. “proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape...”; (3) testimony that “the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing,” (substantive purposes); or (4) "testimony that the videotape had not been
edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.

75. On the different issues germane to the admissibility of ESI Mr. Ahmed also referred to a decision of the District Court of Maryland, United State in Civil Action No. PWG-06-1893, *Jack R. Lorraine and Beverly Mack v. Markel American Insurance Company*. Mr. Ahmed also cited before us an article captioned ‘The Sedona Conference. Commentary on ESI Evidence & Admissibility: A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WGI). published in Sedona Conference Journal, Fall 2008. The article deals extensively with the different questions relating to admissibility in evidence of ESI and one of its basic premises is that the mere fact that the information was created and stored within a computer system would not make that information reliable and authentic.

76. He also invited our attention to an article appearing in The Indian Police Journal, July-September 2004 issue under the caption “Detection Technique of Video Tape Alteration on the Basis of Sound Track Analysis”. From this article Mr. Ahmed read out the following passages:

The acceptance of recorded evidence in the court of law depends solely on the establishment of its integrity. In other words, the recorded evidence should be free from intentional alteration. Generally, examination of recorded evidence for establishing the integrity/authenticity is performed to find out whether it is a one-time recording or an edited version or copy of the original.

And further:

Alteration on an audio recording can be of Addition, Deletion, Obscuration, Transformation and Synthesis. In video recordings the alteration may be with the intention to change either on the audio track or on the video track. In both the ways there is always disturbance on both the track. Alterations in a video track are usually made by adding or removing some frames, by rearranging few frames, by distorting certain frames and lastly by introducing artificially generated frames. Alteration on a video recording

77. In light of the decisions and articles cited above Mr Ahmed contended that the High Court freely used the copies of the sting recordings and the transcripts of those recordings made and supplied by NDTV without caring to first establish the authenticity of the sting recordings. Learned Counsel submitted that the use of the CDs of the sting recordings and their transcripts by the High Court was in complete violation of the conditions laid down by this Court in Ram Singh.

78. Learned Counsel pointed out that at the threshold of the proceeding, started suo moto, the High Court, instead of taking the microchips used for the sting operations in its custody directed NDTV ‘to preserve the original material including the CDs/Video’ pertaining to the sting operations and to submit to the Court copies and transcripts made from those chips. Thus the microchips remained all along with NDTV, allowing it all the time and opportunity to make any alterations and changes in the sting recordings (even assuming there were such recording in the first place!) to suit its purpose. The petition filed by RK Anand for directing NDTV to submit the
original microchips before the Court and to give him copies made in Court directly from those chips remained lying on the record unattended till it was rejected by the final judgment and order passed in the case. Another petition requesting to send the microchips for forensic examination also met with the same fate.

79. Mr. Ahmed further submitted that the procedure followed by the High Court was so flawed that even the number of chips used for the different sting operations remained indeterminate. The trial court order dated June 1, 2007 referred to three chips produced on behalf of NDTV. The written statement of Poonam Agarwal made before the High Court on June 6, 2007 mentioned four chips and finally their number became five in her affidavit dated October 1, 2007.

80. He further submitted that the audio and the video recording on the basis of which the NDTV telecast was based and that was produced before the High Court was done by Kulkarni and it was he who was the maker of those materials. The Court never got Kulkarni brought before it either for the formal proof of the electronic materials or for cross-examination by the contemnors. The finding of the High Court was thus based on materials of which neither the authenticity was proved nor the veracity of which was tested by cross-examination. He further submitted that the affidavit of the NDTV reporter (Poonam Agarwal) doesn't cure this basic flaw in the proceedings. The recordings were not done by the TV channel's reporter: her participation in the process was only to the extent that she ‘wired’ Kulkarni and received from him the recorded materials. What she received from Kulkarni was also not identified, much less formally proved before the High Court. According to Mr. Ahmed, therefore, the finding of the High Court was wholly untenable and fit to be set aside.

SUBMISSIONS CONSIDERED

81. The legal principles advanced by Mr. Ahmed are unexceptionable but the way he tried to apply those principles to the present case appear to us to be completely misplaced.

82. Here, we must make it clear that we are dealing with a proceeding under the Contempt of Courts Act. Now, it is one thing to say that the standard of proof in a contempt proceeding is no less rigorous than a criminal trial but it is something entirely different to insist that the manner of proof for the two proceedings must also be the same. It is now well settled and so also the High Court has held that the proceeding of contempt of court is sui generis. In other words, it is not strictly controlled by the provisions of the CrPC and the Indian Evidence Act. What, however, applies to a proceeding of contempt of court are the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the Court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him/her the fullest opportunity to defend himself/herself. [See In Re Vinay Mishra, 1995 Cri LJ 3994; Daroga Singh v. B.K. Pandey 2004 Cri LJ 2084].

CORRECTNESS OF STING RECORDINGS NEVER DISPUTED OR DOUBTED:
83. Keeping this in mind when we turn to the facts of this case we find that the correctness of the sting recordings was never in doubt or dispute. RK Anand never said that on the given dates and time he never met Kulkarni at the airport lounge or in the car and what was shown in the sting recordings was fabricated and false. He did not say that though he met Kulkarni on the two occasions, they were talking about the weather or the stock market or the latest film hits and the utterances put in their mouth were fabricated and doctored. Where then is the question of proof of authenticity and integrity of the recordings? It may be recalled that both in the eight o'clock and nine o'clock programmes, RK Anand was interviewed by the programme anchors and the live exchange was integrated into the programmes. Let us see what his first response to the telecast was when the anchor of the eight o'clock programme brought him on the show.

[Following are the extracts from the exchange between the anchor and RK Anand]

85. We have gone through the transcripts of the exchange between the two anchors and RK Anand a number of times and we have also viewed the programme recorded on CDs. To us, RK Anand, in his interactions with the programme anchors, appeared to be quite stunned at being caught on the camera in the wrong act, rather than outraged at any false accusations.

90. Further, interestingly, though calling the sting recordings fabricated, manufactured, and distorted, he also relies on the very same sting recordings to make out some point or the other in his defence.

93. We also see no substance in the anomalies and alleged inter correlation in the sting recordings as pointed out on behalf of RK Anand on the basis of the eight minute CD which he got prepared from the materials supplied to him by the Court. Along with the other materials we also viewed eight minute CD produced by RK Anand. In the CD an attempt is made to show that the frames in the sting recordings some times jumped out of the sequence number and such other technical flaws. The objections raised by RK Anand were fully explained by the affidavit filed by Dinesh Singh on behalf of NDTV.

95. On a careful consideration of the materials on record we don't have the slightest doubt that the authenticity and integrity of the sting recordings was never disputed or doubted by RK Anand. As noted above he kept on changing his stand in regard to the sting recordings. In the facts and circumstances of the case, therefore, there was no requirement of any formal proof of the sting recordings. Further, so far as RK Anand is concerned there was no violation of the principles of natural justice inasmuch as he was given copies of all the sting recordings along with their transcripts. He was fully made aware of the charge against him. He was given fullest opportunity to defend himself and to explain his conduct as appearing from the sting recordings. The High Court viewed the microchips used in the spy camera and the programme telecast by TV channel in his presence and gave him further opportunity of hearing thereafter. The sting recordings were rightly made the basis of conviction and the irresistible conclusion is that the conviction of RK Anand for contempt of court is proper legal and valid calling for no interference.
IU KHAN'S APPEAL

96. The sting on IU Khan was done on April 28, 2007 in one of the lawyers' chambers at the Patiala House court premises. The video CD begins by showing Poonam Agarwal fixing the recording device and the button camera on Kulkarni's person sitting inside the car. Then Kulkarni and Deepak Verma together enter the Patiala House. They move around in the court premises for a long time till just before the lunch recess they are able to find IU Khan sitting in someone else's chamber. The chamber seems to be quite crowded with people all the time coming and going away. The first exchange of greetings between IU khan and Kulkarni as he, accompanied with Deepak Verma, enters into the chamber is not audible. But then IU Khan is heard describing Kulkarni, in a general sort of introduction to those present there, as 'the prime witness in the BMW case,' "star witness" 'a very public spirited and devoted man' etc. Kulkarni starts chatting with him about the summons issued to him by the court in the BMW case. In the meanwhile someone else comes into the chamber. IU Khan greets him loudly and starts talking to him. After a while, on Kulkarni's request, both IU Khan and Kulkarni come out of the chamber and some conversation between the two takes place outside the chamber. After the meeting is over Kulkarni and Deepak Verma together return back. As the recording devices carried by them are still on the conversation that takes place between the two is naturally recorded. Kulkarni does not allow Deepak Verma to go directly to the TV Channel's vehicle parked outside the Court premises where Poonam Agarwal would be waiting for their return, saying that they are bound to be followed. Instead, they take an auto-rickshaw and go to Pargati Maidan at a short distance from the court. From there they contact Poonam Agarwal on mobile phone, who goes there and joins them and de-wires Kulkarni. Only partial transcript of the sting recording submitted to Court:

100. What follows from the affidavit may be summarised as follows; (I) the conduct of NDTV before the High Court in a vary serious proceeding was quite cavalier and causal. (II) At the time the High Court issued show cause notices to the three proceedees it did not have before it the recording on one of the five microchips used in the sting operations. (III) The materials given to the proceedees along with show cause notice were not exactly the same as submitted before the High Court. (IV) The explanation in the form of Poonam Agarwal's affidavit came on October 1, 2007 on the same day when IU Khan filed his reply affidavit in response to the show cause notice.

101. In those circumstances it was not wrong for IU Khan to state in paragraphs 14 and 15 of his memorandum of appeal as under:

14. ...This finding is again against the material on record as the original chip of the button camera carried by Mr. Kulkarni was formatted by the NDTV in violation of the direction issued by the Hon'ble Court. This part of the conversation is not available in the transcript of the bag camera.

15. Because the CD of the button camera firstly cannot be relied upon as it was filed after the reply was filed by the appellant on 1.10.2007...
**Submissions on behalf of IU Khan**

114. Mr. P. P. Rao, learned Senior Advocate appearing for IU Khan mainly submitted that even if the sting recording is accepted as true, on the basis of the exchange that took place between his client and Kulkarni it cannot be said that he acted in a way or colluded in any action aimed at interfering or tending to interfere with the prosecution of the accused in the BMW case or interfering or tending to interfere with or obstructing or tending to obstruct the administration of justice in any other manner. He further submitted that the findings of the High Court were based on assumptions that were not only completely unfounded but in respect of which the appellant was given no opportunity to defend himself. The High Court held the appellant guilty of committing criminal contempt of court referring to and relying upon certain alleged facts and circumstances that did not form part of the notice and in regard to which he was given no opportunity to defend himself. Mr. Rao submitted that along with the notice issued by the High Court the appellant was not given all the materials concerning his case and he was thus handicapped in submitting his show cause. He further submitted that the High Court erroneously placed the case of his client at par with RK Anand and convicted him because RK Anand was found guilty even though the two cases were completely different. Mr. Rao was also highly critical of the TV channel. He questioned the propriety of the sting operation and the telecast of the sting programme concerning a pending trial and involving a court witness without any information to, much less permission by the trial court or even the High Court or its Chief Justice. Mr. Rao submitted that when Kulkarni first approached Poonam Agarwal she thought it imperative to first obtain the approval of her superiors before embarking upon the project, but it did not occur to anyone, including her superiors in the TV channel to obtain the permission or to even inform at least the Chief Justice of the Delhi High Court before taking up the operation fraught with highly sinister implications. Mr. Rao also assailed the judgment coming under appeal on a number of other grounds.

**SUBMISSIONS CONSIDERED**

115. We have carefully gone through all the materials concerning IU Khan. We have perused the transcript of the exchange between Kulkarni and IU Khan and have also viewed the full recording of the sting several times since the full transcript of the recording is not available on the record. IU Khan's conduct quite improper:

116. We have not the slightest doubt that the exchange between Kulkarni and IU Khan far crossed the limits of proper professional conduct of a prosecutor (especially engaged to conduct a sensational trial) and a designated Senior Advocate of long standing. We are not prepared to accept for a moment that on seeing Kulkarni suddenly after several years in the company of a ‘burly stranger’ (Deepak Verma) IU Khan became apprehensive about his personal safety since in the past some violent incidents had taken place in the court premises and some lawyers had lost their lives and consequently he was simply play-acting and pampering Kulkarni in order to mollify him. The plea is not borne out from the transcript and much less from the video recording. In the video recording there is no trace of any fear or apprehension on his face or in his
gestures. He appears perfectly normal and natural sitting among his colleagues (and may be one or two clients) and at no point the situation appears to be out of his control. As a matter of fact, we feel constrained to say that the plea is not quite worthy of a lawyer of IU Khan's standing and we should have much appreciated had he simply taken the plea of an error of discretion on his part.

117. Coming back to the exchange between IU Khan and Kulkarni, we accept that the transcript of the exchange does not present the accurate picture; listening to the live voices of the two (and others present in the chamber) on the CD gives a more realistic idea of the meeting. We grant everything that can be said in favour of IU Khan. The meeting took place without any prior appointment from him. Kulkarni was able to reach him, unlike RK Anand, without his permission or consent. IU Khan did not seem to be overly enthused at the appearance of Kulkarni. Accosted by Kulkarni, he spoke to him out of civility and mostly responded only to his questions and comments. There were others present in the chamber with whom he was equally engaged in conversation. He also greeted someone else who came into the chamber far more cheerfully than Kulkarni. But the undeniable fact remains that he was talking to him all the time about the BMW trial and the related proceedings. Instead of simply telling him to receive the summons and appear before the court as directed, IU Khan gave reassurances to Kulkarni telling him about the revision filed in the High Court against the trial court's order. He advised him to relax saying that since he had dropped him (as a prosecution witness) the court was no one to ask for his statement. The part of the exchange that took place outside the chamber was worse. Inside the chamber, at one stage, IU Khan seemed even dismissive of Kulkarni but on coming out he appeared quite anxious to fix up another meeting with him at his residence giving promising good Scotch whisky as inducement. IU Khan would be the first person to deny any friendship or even a long acquaintanceship with Kulkarni. The only common factor between them was the BMW case in which one was the prosecutor and the other was a prosecution witness, later dropped from the list of witnesses. A lawyer, howsoever, affable and sociable by disposition, if he has the slightest respect for professional ethics, would not allow himself such degree of familiarity with the witness of a criminal trial that he might be prosecuting and would not indulge with him into the kind of exchange as admittedly took place between IU Khan and Kulkarni. We are also not prepared to believe that in his conversation with Kulkarni, IU Khan did not mean what he was saying and he was simply trying to somehow get rid of Kulkarni. The video of the sting recordings leaves no room for doubt that IU Khan was freely discussing the proceeding of BMW case with Kulkarni and was not at all averse to another meeting with him rather he was looking forward to it. We, therefore, fully endorse the High Court finding that the conduct of IU Khan was inappropriate for a lawyer in general and a prosecutor in particular.

CRIMINAL CONTEMPT ???

118. But there is a wide gap between professional misconduct and criminal contempt of court and we now proceed to examine whether on the basis of materials on record the charge of criminal contempt of court can be sustained against IU Khan.
119. The High Court held that there was an extraordinary degree of familiarity between IU Khan, Kulkarni and RK Anand and each of them knew that the other two were equally familiar with each other. So far as BMW trial is concerned Kulkarni was a link between IU Khan and RK Anand. IU Khan, by reason of his familiarity both with RK Anand and Kulkarni would also know about the game that was afoot for the subversion of the trial. He failed to inform the prosecution and the court about it and his omission to do so was likely to have a very serious impact on the trial. He was, therefore, guilty of actually interfering with due course of judicial proceeding, in the BMW case.

120. In the two sting recordings concerning RK Anand there are ample references to IU Khan to suggest a high degree of familiarity between the three. But in the sting on IU Khan the only words used by him that might connect him to RK Anand through Kulkarni are `Bade Saheb'. If `Bade Saheb' referred to RK Anand, the involvement of IU Khan needs no further proof. The question, however, is whether that finding can be safely arrived at.

121. Now, what are the materials that might suggest that while asking Kulkarni whether he had met Bade Saheb, IU Khan meant RK Anand. Apart from the piece of conversation between Deepak Verma and Kulkarni when they were returning after meeting with IU Khan, relied upon by the High Court, there is another material, for whatever its worth, that doesn't find any mention in the High Court judgment. It is Kulkarni's statement in his interview recorded at the NDTV studio. He said as follows;

He (IU Khan) directed me to Mr RK Anand is in that video you can find `Bade Saheb'. He meant that Mr. RK Anand.

122. We mention it only because it is one of the materials lying on the record. Not that we rely on it in the least. Having known the conduct of Kulkarni throughout this episode as discussed in detail in the earlier part of the judgment it is impossible to rely on this statement and we don't even fault the High Court for not taking any note of it.

123. The only other positive material in this regard is the one referred to by the High Court. The High Court observed that towards the end of the recording by the button camera, "Mr. Deepak Verma asked Mr. Kulkarni about the identity of Bade Saheb and Mr. Kulkarni responded by saying that it is Mr. Anand." But the reference by the High Court to that particular piece of conversation between Deepak Verma and Kulkarni is neither complete nor accurate. We have noted earlier that the transcript submitted to the High Court by NDTV was incomplete and it covered only the exchange between Kulkarni and IU Khan. If the High Court had before it the full transcript of the entire recording it might have taken a different view. We have viewed the CD labelled as "Button Spy cam Recording done by Sunil Kulkarni. IU Khan Sting Operation" a number of times and we find that on the way back after meeting IU Khan, Kulkarni was being quite voluble. He spoke to Deepak Verma and gave him some instructions. A part of their conversation, relevant for our purpose is as follows:
126. The High Court rejected IU Khan's explanation that what he meant by 'Bade Saheb' was some senior officer in the police headquarter.

127. Mr. P.P. Rao submitted that the approach of the High Court was quite unfair. The proceeding before the High Court was not in the nature of a suit or a criminal trial. In response to the notice issued by the Court the appellant had made a positive statement in his reply affidavit. The statement was not formally traversed by anyone. There was, therefore, no reason for the appellant to assume that he would be required to produce evidence in support of the statement. In case the High Court felt the need for some evidence in support of the averment it should have at least made it known to the appellant. But the High Court without giving any inkling to the appellant rejected the plea in the final judgment. The appellant was thus clearly denied a proper opportunity to defend himself. We find that the submission is not without substance. The proceeding before the High Court was under the Contempt of Courts Act and the High Court was not following any well known and well established format. In that situation it was only fair to give notice to the proceeedees to substantiate the pleas taken in the reply affidavit by leading proper evidence. It must, therefore be held that the High Court rejected a material plea raised on behalf of the IU Khan without giving him any opportunity to substantiate it.

130. Mr. P.P. Rao submitted that the High Court convicted the appellant for something in regard to which he was never given an opportunity to defend himself. From the notice issued by the High Court it was impossible to discern that the charge of criminal contempt would be eventually fastened on him for his failure to inform the court and the prosecution about the way Kulkarni's was being manipulated by the defence. Mr. Rao further submitted that the reason assigned by the Court to hold the appellant guilty was based purely on assumption. The appellant was given no opportunity to show that, as a matter of fact, after Kulkarni met him at the Patiala House on April 28, 2007 he had informed the concerned authorities that after being summoned by the court Kulkarni was back to his old tricks. He further submitted that the appellant, given the opportunity, could also show that the decision to not examine him as one of the prosecution witnesses was taken by the concerned authorities in consultation with him. We find substance in Mr. Rao's submission.

131. In our considered view, on the basis of materials on record the charge of criminal contempt cannot be held to be satisfactorily established against IU Khan. In our opinion he is entitled to the benefit of doubt.

PROCEDURE FOLLOWED BY THE HIGH COURT

132. A lot has been argued about the procedure followed by the High Court in dealing with the matter. On behalf of RK Anand it was strongly contended that by only asking for the copies of the original sting recordings and allowing the original microchips and the magnetic tapes to be retained in the custody of NDTV the High Court committed a serious and fatal lapse. Mr. Gopal Subramanium also took the view that though the final judgment passed by the High Court was faultless, it was nevertheless an error on its part to leave the original sting recordings in the safe...
custody of the TV channel. On principle and as a matter of proper procedure, the Court, at the first instance, ought to have taken in its custody all the original electronic materials concerning the stings.

133. At first the direction of the High Court leaving the microchips containing the original sting recordings and the magnetic tapes with the TV channel indeed appears to be somewhat strange and uncommon but a moment's thought would show the rationale behind it. If the recordings on the microchips were fake from the start or if the microchips were morphed before notice was issued to the TV channel, those would come to the court in that condition and in that case the question whether the microchips were genuine or fake/morphed would be another issue. But once the High Court obtained their copies there was no possibility of any tampering with the microchips from that stage. Moreover, the High Court might have felt that the TV channel with its well equipped studio/laboratory would be a much better place for the handling and conservation of such electronic articles than the High Court Registry. On the facts of the case, therefore, there was no lapse on the part of the High Court in leaving the microchips in the safe custody of the TV channel and in any event it does not have any bearing on the final decision of the case.

134. However, what we find completely inexplicable is why, at least at the beginning of the proceeding, the High Court did not put NDTV, along with the two appellants, in the array of contemnors. Looking back at the matter (now that we have on the record before us the appellants' affidavits in reply to the notice issued by the High Court as well as their first response to the telecast in the form of their live interviews), we are in the position to say that since the contents of the sting recordings were admitted there was no need for the proof of integrity and correctness of the electronic materials. But at the time the High Court issued notices to the two appellants (and two others) the position was completely different. At that stage the issue of integrity, authenticity and reliability of the sting recordings was wide open. The appellants might have taken the stand that not only the sting recordings but their respective responses shown by the TV channel were fake and doctored. In such an event the TV channel would have been required to be subjected to the strictest proof of the electronic materials on which its programmes were based and, in case it failed to establish their genuineness and correctness, it would have been equally guilty, if not more, of serious contempt of court and other criminal offences. By all reckoning, at the time of initiation of the proceeding, the place of NDTV was along with the appellants facing the charge of contempt. Such a course would have put the proceeding on a more even keel and given it a more balanced appearance. Then perhaps there would have been no scope for the grievance that the High Court put the TV channel on the complainant's seat. And then perhaps the TV Channel too would have conducted itself in a more careful manner and the lapses as indicated above in the case of IU Khan might not have occurred.

THE PUNISHMENT: PROHIBITION AGAINST APPEARING IN COURTS

135. We were also addressed on the validity of the High Court's direction prohibiting the two appellants from appearing before the High Court and the courts subordinate to it for a period of
four months. Though by the time the appeals were taken up for hearing the period of four months was over, Mr. Altaf Ahmed contended that the High Court's direction was beyond its competence and authority. In a proceeding of contempt punishment could only be awarded as provided under the Contempt of Courts Act, though in a given case the High Court could debar the contemnor from appearing in court till he purged himself of the contempt. He further submitted that professional misconduct is a subject specifically dealt with under the Advocates Act and the authority to take action against a lawyer for any professional misconduct vests exclusively in the State Bar Council, where he may be enrolled, and the Bar Council of India. The Counsel further submitted that a High Court could frame rules under Section 34 of the Advocates Act laying down the conditions subject to which an advocate would be permitted to practise in the High Court and the courts subordinate to it and such rules may contain a provision that an advocate convicted of contempt of court would be barred from appearing before it or before the subordinate courts for a specified period. But so far the Delhi High Court has not framed any rules under Section 34 of the Act. According to him, therefore, the punishment awarded to the appellant by the High Court had no legal sanction.

136. Mr. Nageshwar Rao learned Senior Advocate assisting the Court as amicus shared the same view. Mr. Rao submitted that the direction given by the High Court was beyond its jurisdiction. In a proceeding of contempt the High Court could only impose a punishment as provided under Section 12 of the Contempt of Courts Act, 1971. The High Court was bound by the provisions of the Contempt of Courts Act and it was not open to it to innovate any new kind of punishment in exercise of its powers under Article 215 of the Constitution or its inherent powers. Mr. Rao submitted that a person who is a law graduate becomes entitled to practise the profession of law on the basis of his enrolment with any of the State Bar Councils established under the Advocates Act, 1961. Appearance in Court is the dominant, if not the sole content of a lawyer's practice. Since, the authority to grant licence to a law graduate to practise as an advocate vests exclusively in a State Bar Council, the power to revoke the licence or to suspend it for a specified term also vests in the same body. Further, the revocation or suspension of licence of an advocate has not only civil but also penal consequences; hence, the relevant statutory provisions in regard to imposition of punishment must be strictly followed. Punishment by way of suspension of the licence of an advocate can only be imposed by the Bar Council, the competent statutory body, after the charge is established against the advocate concerned in the manner prescribed by the Act and the Rules framed thereunder. The High Court can, of course, prohibit an advocate convicted of contempt from appearing before it or any court subordinate to it till the contemnor purged himself of the contempt. But it cannot assume the authority and the power statutorily vested in the Bar Council.

137. Mr. Gopal Subramanium the other amicus, however, approached the issue in a slightly different manner and took the middle ground. Mr. Subramanium submitted that the power to suspend the licence of a lawyer for a reason that may constitute contempt of court and at the same time may also amount to professional misconduct is a power to be exercised by the disciplinary
authority i.e. the Disciplinary Committee of the State Bar Council where the concerned advocate is registered or the Bar Council of India. The Supreme Court has held that even it, in exercise of its powers under Article 142, cannot override statutory provisions and, assuming the position of the Disciplinary Committee, suspend the licence of a lawyer. Such a course cannot be followed even by taking recourse to the appellate powers of the Supreme Court under Section 38 of the Advocates Act while dealing with a case of contempt of court (and not an appeal relating to professional misconduct as such). But approaching the matter from a different angle Mr. Subramaniam submitted, it is, however, open to the High Court to make rules regulating the appearance of advocates in courts. He further submitted that although the Delhi High Court has not framed any specific rules regulating the appearance of advocates, it is settled law that power vested in an authority would not cease to exist merely because rules prescribing the manner of exercise of power have not been framed.

138. The contention that the direction debarring a lawyer from appearing before it or in courts subordinate to it is beyond the jurisdiction of the High Court is based on the premise that the bar is akin to revocation/suspension of the lawyer's licence which is a punishment for professional misconduct that can only be inflicted by the Bar Council after following the procedure prescribed under the Advocates Act. The contention finds support from the Constitution Bench decision of this Court in Supreme Court Bar Association v. Union of India MANU/SC/0291/1998 : [1998]2SCR795. In paragraph 37 of the decision the Court observed and held as under:

37. The nature and types of punishment which a court of record can impose in a case of established contempt under the common law have now been specifically incorporated in the Contempt of Courts Act, 1971 insofar as the High Courts are concerned and therefore to the extent the Contempt of Courts Act, 1971 identifies the nature or types of punishments which can be awarded in the case of established contempt, it does not impinge upon the inherent powers of the High Court under Article 215 either. No new type of punishment can be created or assumed.

In Paragraph 57 it observed:

57. In a given case, an advocate found guilty of committing contempt of court may also be guilty of committing “professional misconduct”, depending upon the gravity or nature of his contumacious conduct, but the two jurisdictions are separate and distinct and exercisable by different forums by following separate and distinct procedures. The power to punish an advocate by suspending his licence or by removal of his name from the roll of the State Bar Council for proven professional misconduct vests exclusively in the statutory authorities created under the Advocates Act, 1961, while the jurisdiction to punish him for committing contempt of court vests exclusively in the courts. Again in paragraph 80 it observed:

80. In a given case it may be possible for this Court or the High Court, to prevent the contemnor advocate to appear before it till he purges himself of the contempt but that is much
different from suspending or revoking his licence or debarring him to practise as an advocate. In a case of contumacious, unbecoming or blameworthy conduct of an Advocate, this Court possesses jurisdiction, under the Supreme Court Rules, itself, to withdraw his privilege to practice as an Advocate because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practice as an advocate in other courts or tribunals.

139. The matter, however, did not stop at Supreme Court Bar Association. In *Pravin C Shah v. K.A. Mohd. Ali* [AIR 2001 SC 3041], this Court considered the case of a lawyer who was found guilty of contempt of court and as a consequence was sought to be debarred from appearing in courts till he purged himself of contempt. Kerala High Court has framed Rules under Section 34 of the Advocates Act and Rule 11 reads thus:

No advocate who has been found guilty of contempt of court shall be permitted to appear, act or plead in any court unless he has purged himself of the contempt.

141. More importantly, another Constitution Bench of this Court in *Ex. Capt. Harish Uppal v. Union of India* [(2002) SUPP 5 SCR 186], examined the question whether lawyers have a right to strike and/or give a call for boycott of Court(s). In paragraph 34 of the decision the Court made highly illuminating observations in regard to lawyers’ right to appear before the Court and sounded the note of caution for the lawyers.

142. In both *Pravin C. Shah* and *Ex. Capt. Harish Uppal* the earlier Constitution Bench decision was extensively considered. The decision in *Ex. Capt. Harish Uppal* was later followed in a three judge Bench decision in *Bar Council of India v. The High Court of Kerala* [AIR 2004 SC 2227].

143. In *Supreme Court Bar Association*, the direction prohibiting an advocate from appearing in court for a specified period was viewed as a total and complete denial of his right to practise law and the bar was considered as a punishment inflicted on him. In *Ex. Capt. Harish Uppal* it was seen not as punishment for professional misconduct but as a measure necessary to regulate the court’s proceedings and to maintain the dignity and orderly functioning of the courts. We may respectfully add that in a given case a direction disallowing an advocate who is convicted of criminal contempt from appearing in court may not only be a measure to maintain the dignity and Though in Paragraph 80 of the decision, as seen earlier there is an observation that in a given case it might be possible for this Court or the High Court to prevent the contemnor advocate to appear before it till he purge himself of the contempt. orderly functioning of the courts but may become necessary for the self protection of the court and for preservation of the purity of court proceedings. Let us, for example, take the case where an advocate is shown to have accepted money in the name of a judge or on the pretext of influencing him; or where an advocate is found tampering with the court's record; or where an advocate is found actively taking part in faking court orders (fake bail orders are not unknown in several High Courts!); or where
an advocate has made it into a practice to browbeat and abuse judges and on that basis has earned the reputation to get a case transferred from an `inconvenient' court; or where an advocate is found to be in the habit of sending unfounded and unsubstantiated allegation petitions against judicial officers and judges to the superior courts. Unfortunately these examples are not from imagination. These things are happening more frequently than we care to acknowledge. We may also add that these illustrations are not exhaustive but there may be other ways in which a malefactor's conduct and actions may pose a real and imminent threat to the purity of court proceedings, cardinal to any court's functioning, apart from constituting a substantive offence and contempt of court and professional misconduct. In such a situation the court does not only have the right but it also has the obligation cast upon it to protect itself and save the purity of its proceedings from being polluted in any way and to that end bar the malefactor from appearing before the courts for an appropriate period of time. It is already explained in Ex. Captain Harish Uppal that a direction of this kind by the Court cannot be equated with punishment for professional misconduct. Further, the prohibition against appearance in courts does not affect the right of the concerned lawyer to carry on his legal practice in other ways as indicated in the decision.

144. We respectfully submit that the decision in Ex-Capt. Harish Uppal v. Union of India places the issue in correct perspective and must be followed to answer the question at issue before us.

145. Lest we are misunderstood it needs to be made clear that the occasion to take recourse to the extreme step of debarring an advocate from appearing in court should arise very rarely and only as a measure of last resort in cases where the wrong doer advocate does not at all appear to be genuinely contrite and remorseful for his act/conduct, but on the contrary shows a tendency to repeat or perpetuate the wrong act(s).

146. Ideally every High Court should have rules framed under Section 34 of the Advocates Act in order to meet with such eventualities but even in the absence of the Rule the High Court cannot be held to be helpless against such threats. In a matter as fundamental and grave as preserving the purity of judicial proceedings, the High Court would be free to exercise the powers vested in it under Section 34 of the Advocates Act notwithstanding the fact that Rules prescribing the manner of exercise of power have not been framed. But in the absence of statutory Rules providing for such a course an advocate facing the charge of contempt would normally think of only the punishments specified under Section 12 of the Contempt of Courts Act. He may not even imagine that at the end of the proceeding he might end up being debarred from appearing before the court. The rules of natural justice, therefore, demand that before passing an order debarring an advocate from appearing in courts he must be clearly told that his alleged conduct or actions are such that if found guilty he might be debarred from appearing in courts for a specific period. The warning may be given in the initial notice of contempt issued under Section 14 or Section 17 (as the case may be) of the Contempt of Courts Act. Or such a notice may be given after the proceedee is held guilty of criminal contempt before dealing with the question of punishment.
147. In order to avoid any such controversies in future all the High Courts that have so far not framed rules under Section 34 of the Advocates Act are directed to frame the rules without any further delay. It is earnestly hoped that all the High Courts shall frame the rules within four months from today. The High Courts may also consider framing rules for having Advocates on Record on the pattern of the Supreme Court of India. Suborning a witness in a criminal trial is an act striking at the root of the judicial proceeding and it surely deserves the treatment meted out to the appellant. But the appellants were not given any notice by the High Court that if found guilty they might be prohibited from appearing in the High Court, and the courts subordinate to it, for a certain period. To that extent the direction given by the High Court was not in conformity with the principles of natural justice.

THE QUESTION OF SENTENCE

148. Having regard to the misdeeds of which RK Anand has been found guilty, the punishment given to him by the High Court can only be regarded as nominal. We feel that the leniency shown by the High Court in meting out the punishment was quite misplaced. And the view is greatly reinforced if one looks at the contemnor's conduct before the High Court. As we shall see presently, before the High Court the contemnor took a defiant stand and constantly tried to obstruct the proceedings.

THE DIVERSIONARY & INTIMIDATORY TACTICS IN THE PROCEEDING

149. Even as contempt notices were issued by the High Court, or even before it, some diversionary and even intimidatory tactics were employed to stonewall the proceeding initiated by it.

REQUEST FOR RECUSAL

156. Of all the obstructive measures adopted before the High Court the most unfortunate and undesirable came from RK Anand in the form of a petition 'requesting' Manmohan Sarin J., the presiding judge on the bench dealing with the matter, to recuse him from the proceeding. This petition, an ill concealed attempt at intimidation, was, as a matter of fact, RK Anand's first response to the notice issued to him by the Court. He stated in this petition that he had the feeling that he was not likely to get justice at the hands of Manmohan Sarin J. He further stated alluding to some past events, that he had tried his best to forget the past and bury the hatchet but the way and the manner in which the matter was being dealt with had caused the greatest damage to his reputation. He made the prayer that the recusal application should be heard in camera and the main matter be transferred to another bench of which Sarin J. was not a member. Along with the petition he filed a sealed cover containing a note and the materials giving rise to the belief that he was not likely to get justice at the hands of Sarin J.

164. Both Mr. Salve and Mr. Subramanium strongly submitted that the appellant had plainly no respect for the court or the court proceedings. Mr. Salve submitted that the recusal application was a brazen attempt to browbeat the High Court and in that attempt the appellant succeeded to a large extent since the prohibition to appear before the courts for a period of only four months
could only be considered as a token punishment having regard to the gravity of his conduct. Mr. Subramaniam also felt strongly about the recusal application but before taking up the issue he fairly tried to give another opportunity to the appellant stating that perhaps even now the appellant might wish to withdraw the grounds in the SLP challenging the order passed by the High Court on the recusal application. The appellant was given ample time to consider the suggestion but later on enquiry Mr. Altaf Ahmed stated that he had not pressed those grounds in course of his submissions exercising his discretion as the Counsel but he had no instructions to get those grounds deleted from the SLP.

165. The action of the appellant in trying to suborn the court witness in a criminal trial was reprehensible enough but his conduct before the High Court aggravates the matter manifold. He does not show any remorse for his gross misdemeanour and instead tries to take on the High Court by defying its authority. We are in agreement with Mr. Salve and Mr. Subramaniam that punishment given to him by the High Court was wholly inadequate and incommensurate to the seriousness of his actions and conduct. We, accordingly, propose to issue a notice to him for enhancement of punishment. We also hold that by his actions and conduct the appellant has established himself as a person who needs to be kept away from the portals of the court for a longer time. The notice would therefore require him to show-cause why the punishment awarded to him should not be enhanced as provided under Section 12 of the Contempt of Courts Act. He would additionally show-cause why he should not be debarred from appearing in courts for a longer period. The second part of the notice would also cure the defect in the High Court order in debarring the appellant from appearing in courts without giving any specific notice in that regard as held in the earlier part of the judgment.

166. We have so far been considering the two appeals proper. We now proceed to examine some other important issues arising from the case.

THE ROLE OF NDTV

167. NDTV came under heavy attack from practically all sides for carrying out the stings and airing the programme based on it. On behalf of RK Anand the sting programme was called malicious and motivated, aimed at defaming him personally. Mr. P P Rao appearing for IU Khan questioned the propriety of the stings and the repeated telecast of the sting programme concerning a pending trial and involving a court witness. Mr. Rao submitted that before taking up the sting operations, fraught with highly sinister implications, the TV channel should have informed the trial court and obtained its permission. If for any reason it was not possible to inform the trial judge then permission for the stings should have been taken from the Chief Justice of the Delhi High Court. Also, it was the duty of that TV channel to place the sting materials before the court before telecasting any programme on that basis.

172. We have already dealt with the allegations made on behalf of RK Anand while considering his appeal earlier in this judgment and we find no substance in those allegations. Reporting of pending trial:
173. We are also unable to agree with the submission made by Mr. P. P. Rao that the TV channel should have carried out the stings only after obtaining the permission of the trial court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media. It would be a sad day for the court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to pre-censorship of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution. This is, however, not to say that media is free to publish any kind of report concerning a sub-judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub-judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment.

Sting programme whether trial by media??

174. The submissions of Mr. N. Rao are based on two premises: one, the sting programme telecast by NDTV was of the genre, `trial by media' and two, the programme interfered or tended to interfere with or obstructed or tended to obstruct the proceedings of the BMW trial that was going on at the time of the telecast. If the two premises are correct then the rest of the submissions would logically follow. But are the two premises correct? What is trial by media? The expression `trial by media' is defined to mean:

the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny.

175. In light of the above it can hardly be said that the sting programme telecast by NDTV was a media trial. Leaving aside some stray remarks or comments by the anchors or the interviewees, the programme showed some people trying to subvert the BMW trial and the state of the criminal administration of justice in the country (as perceived by the TV channel and the interviewees). There was nothing in the programme to suggest that the accused in the BMW case were guilty or innocent. The programme was not about the accused but it was mainly about two lawyers representing the two sides and one of the witnesses in the case. It indeed made serious
allegations against the two lawyers. The allegations, insofar as RK Anand is concerned, stand established after strict scrutiny by the High Court and this Court. Insofar as IU Khan is concerned, though this Court held that his conduct did not constitute criminal contempt of court, nonetheless allegations against him too are established to the extent that his conduct has been found to be inappropriate for a Special Prosecutor. In regard to the witness the comments and remarks made in the telecast were never subject to a judicial scrutiny but those too are broadly in conformity with the materials on the court's record. We are thus clearly of the view that the sting programme telecast by NDTV cannot be described as a piece of trial by media. Stings & telecast of sting programmes not constituting criminal contempt:

176. Coming now to Section 3 of the Contempt of Courts Act we are unable to appreciate Mr. Rao's submission that NDTV did not have the immunity under Sub-section (3) of Section 3 as the telecast was hit by proviso (ii) Explanation (B) to that sub section. Section 3 of the Act insofar as relevant is as under:

3. Innocent publication and distribution of matter not contempt.- (1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) x x x

(3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in Sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid: Provided that this Sub-section shall not apply in respect of the distribution of-

(i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in Section 3 of the Press and Registration of Books Act, 1867 (25 of 1867);

(ii) any publication which is a newspaper published otherwise than in conformity with the rules contained in Section 5 of the said Act.

Explanation.- For the purposes of this section, a judicial proceeding-

(a) is said to be pending-

(A) x x x

(B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), or any other law-
(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused, and

(ii) in any other case, when the court takes cognizance of the matter to which the proceeding relates, and xxx

(b) x x x

177. Section 5 provides that a fair criticism of a judicial act concerning any case which has been heard and finally decided would not constitute contempt.

178. Sub-section (1) of Section 3 provides immunity to a publisher of any matter which interferes or tends to interfere with, or obstructs or tends to obstruct the course of justice in any civil or criminal proceeding if he reasonably believed that there was no proceeding pending. A Sub-section (3) deal with distribution of the publication as mentioned in Sub-section (1) and provides immunity to the distributor if he reasonably believed that the publication did not contain any matter which interfered or tended to interfere with, or obstructed or tended to obstruct the course of justice in any civil or criminal proceeding. The immunity provided under Sub-section (3) is subject to the exceptions as stated in the proviso and explanations to the Sub-section. We fail to see any application of Section 3(3) of the Contempt of Courts Act in the facts of this case. In this case there is no distribution of any publication made under Sub-section (1). Hence, neither Sub-section (3) nor its proviso or explanation is attracted. NDTV did the sting, prepared a programme on the basis of the sting materials and telecast it at a time when it fully knew that the BMW trial was going on. Hence, if the programme is held to be a matter which interfered or tended to interfere with, or obstructed or tended to obstruct the due course of the BMW case then the immunity under Sub-section (1) will not be available to it and the telecast would clearly constitute criminal contempt within the meaning of Section 2(c)(ii) & (iii) of the Act. But can the programme be accused of interfering or tending to interfere with, or obstructing or tending to obstruct the due course of the BMW case. Whichever way we look at the programme we are not able to come to that conclusion. The programme may have any other faults or weaknesses but it certainly did not interfere with or obstruct the due course of the BMW trial. The programme telecast by NDTV showed to the people (the courts not excluded) that a conspiracy was afoot to undermine the BMW trial. What was shown was proved to be substantially true and accurate. The programme was thus clearly intended to prevent the attempt to interfere with or obstruct the due course of the BMW trial.

STINGS & TELECAST OF STING PROGRAMMES SERVED IMPORTANT PUBLIC CAUSE

179. Looking at the matter from a slightly different angle we ask the simple question, what would have been in greater public interest; to allow the attempt to suborn a witness, with the
object to undermine a criminal trial, lie quietly behind the veil of secrecy or to bring out the mischief in full public gaze? To our mind the answer is obvious. The sting telecast by NDTV was indeed in larger public interest and it served an important public cause.

180. We have held that the sting programme telecast by NDTV in no way interfered with or obstructed the due course of any judicial proceeding, rather it was intended to prevent the attempt to interfere with or obstruct the due course of law in the BMW trial. We have also held that the sting programme telecast by NDTV served an important public cause. In view of the twin findings we need not go into the larger question canvassed by Mr Salve that even if the programme marginally tended to influence the proceedings in the BMW trial the larger public interest served by it was so important that the little risk should not be allowed to stand in its way.

Excesses in the telecast:

181. We have unequivocally upheld the basic legitimacy of the stings and the sting programmes telecast by NDTV. But at the same time we must also point out the deficiencies (or rather the excesses) in the telecast. Mr. Subramanium spoke about the ‘slant' in the telecast as ‘regrettable overreach'. But we find many instances in the programme that cannot be simply described as ‘slants'. There are a number of statements and remarks which are actually incorrect and misleading. In the first sting programme telecast on May 30, 2007 at 8.00 pm the anchor made the opening remarks as under:

Good Evening,...an NDTV expose, on how the legal system may have been subverted in the high profile BMW case. In 1999 six people were run over allegedly by a BMW driven by Sanjeev Nanda a young, rich industrialist but 8 years later every witness except one has turned hostile. Tonight NDTV investigates did the prosecution, the defence and the only witness not turned hostile Sunil Kulkarni collude...

182. The anchor's remarks were apparently from a prepared text since the same remarks were repeated word by word by another anchor as introduction to the second telecast on the same day at 9:00 pm.

183. Further, in the 9 o'clock telecast after some brief introductory remarks, clips from the sting recordings are shown for several minutes and a commentator from the background (probably Poonam Agarwal) introduces the main characters in the BMW case. Kulkarni is introduced by the commentator in the following words:

Sunil Kulkarni, a passerby, who allegedly saw the accident but inexplicably dropped as witness by prosecution. They claim he had been bought by the Nandas. This despite the fact that he is the only witness who still says the accident was caused by a ‘black car’ with two men in it one of them called Sanjeev.

184. [This statement does not find place in the manuscript of the telecast furnished to the court and can be found only by carefully watching the CD of the telecast submitted before the court. We are again left with the feeling that NDTV did not submit full and complete materials before the court and we are surprised that the High Court did not find it amiss]
185. In the first statement Kulkarni is twice described as the only witness in the BMW case who after eight years had not turned hostile. The statement is fallacious and misleading. Kulkarni was not being examined in the court as prosecution witness and, therefore, there was no question of his being declared ‘hostile’ by the prosecution. He was being examined as a Court witnesses. Nevertheless, the prosecution was cross-examining him in detail in course of which he was trying to sabotage the prosecution case.

186. The second statement is equally, if not more, fallacious. In the second statement it is said that Kulkarni was ‘inexplicably' dropped as a prosecution witness. We have seen earlier that Kulkarni was dropped as a prosecution witness for good reasons summed up in the Joint Commissioner's report to the trial court and there was nothing ‘inexplicable' about it. In the second statement it is further suggested that the prosecution's claim that Kulkarni was bought over by the accused was untrue because he was the only witness who still said that the accident was caused by a black car with two men in it, one of them being called Sanjeev. It is true that in his deposition before the court Kulkarni said that the accident was caused by a black car but he resiled from his earlier statements made before the police and the magistrate in a more subtle and clever way than the other two prosecution witnesses, namely, Hari Shankar Yadav and Manoj Malik. Departing from his earlier statements he said in the court that he heard one of the two occupants of the car addressing the other as ‘Sanch or sanz’ (and not as Sanjeev). Further, though admitting that Sanjeev Nanda was one of the occupants of the car, he positively denied that he got down from the driving seat of the car and placed someone else on the driving seat of the car causing the accident. Thus the damage to the prosecution case that he tried to cause was far more serious than any other prosecution witness. It is not that NDTV did not know these facts. NDTV was covering the BMW trial very closely since its beginning and was aware of all the developments taking place in the case. Then why did it introduce the programme in this way, running down the prosecution and presenting Kulkarni as the only person standing upright while everyone else had fallen down? The answer is not far to seek. One can not start a highly sensational programme by saying that it was prepared with the active help of someone whose own credibility is extremely suspect. The opening remarks were thus designed to catch the viewer and to hold his/her attention, but truth, for the moment at least was relegated to the sidelines. It is indeed true that later on in the programme facts concerning Kulkarni were stated correctly and he was presented in a more balanced way and Mr. Subramanium wanted to give NDTV credit points for that. But the impact and value of the opening remarks in a TV programme is quite different from what comes later on. The later corrections were for the sake of the record while the introductory remarks had their own value.

187. Further, on the basis of the sting recordings NDTV might have justifiably said that IU Khan, the Special Prosecutor appeared to be colluding with the defence (though this Court found that there was no conclusive evidence to come to such a finding). But there was no material before NDTV to make such allegation against the prosecution as a whole and thus to run down the other agencies and people connected with the prosecution. There are other instances also of
wrong and inappropriate choice of words and expressions but we need not go any further in the matter.

188. Another sad feature is its stridency. It is understandable that the programme should have started on a highly sensational note because what was about to be shown was really quite shocking. But the programme never regained poise and it became more and more shrill. All the interviewees, highly eminent people, expressed their shock and dismay over the state of the legal system in the country and the way the BMW trial was proceeding. But as the interview progressed, they somewhat tended to lose their self restraint and did not pause to ponder that they were speaking about a sub-judice matter and a trial in which the testimony of a court witness was not even over. We are left with the feeling that some of the speakers allowed their passions, roused by witnessing the shocking scenes on the TV screen, to get better of their judgment and made certain very general and broad remarks about the country's legal system that they might not have made if speaking in a more dispassionate and objective circumstances. Unfortunately, not a single constructive suggestion came from anyone as to how to revamp the administration of criminal justice. The programme began on negative note and remained so till the very end.

Conduct of NDTV in proceeding before High Court:

189. In the earlier part of the judgment some of the glaring lapses committed by NDTV in the proceeding before the High Court are already recounted. Apart from those one or two other issues need to be mentioned here that failed to catch the attention of the High Court. It seems that at the time the sting operations were carried out people were actually apprehensive of something of that kind. Vikas Arora, Advocate had stated in his complaint (dated April 19, 2007) about receiving such a threat from Poonam Agarwal. NDTV in its reply dated April 26, 2007 had denied the allegations in the complaint, at the same time, declaring its resolve to make continuous efforts to unravel the truth. At the same time Poonam Agarwal was planning the stings in her meetings with Kulkarni. As a matter of fact, the first sting was carried out on IU Khan just two days after giving reply to Arora's complaint. Further, from the transcript of the first sting carried out on RK Anand on May 6, 2007 it appears that he too had expressed some apprehension of this kind to which Kulkarni responded by saying that he did not have money enough to eat how could he do any recording of anyone. (It is difficult to miss the irony that the exchange took place while RK Anand was actually being subjected to the sting). It thus appears that at that time, for some reason, the smell of sting was in the air. In those circumstances we find it strange that in the affidavits filed on behalf of NDTV there should be absolutely no reference to Vikas Arora's complaint. In the earlier part of the judgment we have examined the affidavits filed by Poonam Agarwal and found that she states about all the aspects of the sting operations in great detail. But surprisingly those affidavits do not even refer to, much less deal with the complaint of Vikas Arora despite the striking similarity between the threat that was allegedly given to him and his senior IU Khan and the way the sting operation was actually carried out on IU Khan.

190. There is another loose end in the whole matter. Kulkarni's sting meeting with IU Khan had ended with fixing up another meeting for the following Sunday at the latter's residence. (It
was the setting up of this meeting that is primarily the basis for holding him guilty of misconduct as the Special Public Prosecutor). One should have thought that this meeting would surely take place because it provided a far better opportunity for the sting. With `good Scotch whisky' flowing it was likely that the planners of the stings would get more substantial evidences of what they suspected. But we are not told anything about this meeting: whether it took place or not? If it took place what transpired in it and whether any sting recording was done? If it did not take place what was the reason for not keeping the appointment and giving up such a good opportunity. Here it may be noted that Kulkarni also in his affidavit filed before the High Court on August 6, 2007 stated that as arranged between them he again met IU Khan in the evening but the sting recording of that meeting was withheld by NDTV because that falsified their story. Kulkarni, as was his wont, might be telling lies but that was an additional reason for NDTV to clarify the issue regarding the second meeting between the two.

191. The next meeting between Kulkarni and IU Khan that was fixed up in the sting meeting on April 28, 2007 might or might not have taken place but there can be little doubt that they met again between April 28, 2007 and May 31, 2007 (the day following the first sting telecast) when Kulkarni gave IU Khan the `certificate' that he had accepted the summons on his advice (which was submitted by IU Khan before the trial court when he withdrew from the case).

192. The affidavits filed on behalf of NDTV are completely silent on these aspects.

193. These omissions (and some similar others) on the part of NDTV leave one with the feeling that it was not sharing all the facts within its knowledge with the court. The disclosures before the Court do not appear to be completely open, full and frank. It would tell the court only so much as was necessary to secure the conviction of the proceeedees-wrong doers. There were some things that it would rather hold back from the court. We would have appreciated the TV channel to make a fuller disclosure before the High Court of all the facts within its knowledge.

194. Having said all this we would say, in the end, that for all its faults the stings and the telecast of the sting programme by NDTV rendered valuable service to the important public cause to protect and salvage the purity of the course of justice. We appreciate the professional initiative and courage shown by the young reporter Poonam Agarwal and we are impressed by the painstaking investigation undertaken by NDTV to uncover the Shimla connection between Kulkarni and RK Anand.

195. We have recounted above the acts of omission and commission by NDTV before the High Court and in the telecast of the sting programme in the hope that the observations will help NDTV and other TV channels in their future operations and programmes. We are conscious that the privately run TV channels in this country are very young, no more than eighteen or twenty years old. We also find that like almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad.

196. The better news channels in the country (NDTV being one of them) are second to none in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the
audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they some times do not tend to trivialise highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In quest of excellence they have still a long way to go.

197. A private TV channel which is also a vast business venture has the inherent dilemma to reconcile its business interests with the higher standards of professionalism/demands of profession. The two may not always converge and then the TV channel would find its professional options getting limited as a result of conflict of priorities. The media trips mostly on TRPs (television rating points), when commercial considerations assume dominance over higher standards of professionalism.

198. It is not our intent here to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is likely to cause more harm than good. The norms to regulate the media and to raise its professional standards must come from inside.

ROLE OF THE LAWYER

199. The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Prosecutor), both of them lawyers of long standing, and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct. We have viewed with disbelief Senior Advocates freely taking part in TV debates or giving interviews to a TV reporter/anchor of the show on issues that are directly the subject matter of cases pending before the court and in which they are appearing for one of the sides or taking up the brief of one of the sides soon after the TV show. Such conduct reminds us of the fictional barrister Rumpole, `the Old Hack of Bailey', who self depreciatingly described himself as an `old taxi plying for hire'. He at least was not bereft of professional values. When a young and enthusiastic journalist invited him to a drink of Dom Perignon, vastly superior and far more expensive than his usual `plonk', `Chateau Fleet Street', he joined him with alacrity but when in the course of the drink the journalist offered him a large sum of money for giving him a story on the case; `why he was defending the most hated woman in England', Rumpole ended the meeting simply saying "In the circumstance I think it is best if I pay for the Dom Perignon"

200. We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and
reversed, it will have very deleterious consequences for administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a bar that enjoys the unqualified trust and confidence of the people, that share the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

201. We are glad to note that Mr. Gopal Subramanium, the amicus fully shared our concern and realised the gravity of the issue. In course of his submissions he eloquently addressed us on the elevated position enjoyed by a lawyer in our system of justice and the responsibilities cast upon him in consequence. His Written Submissions begin with this issue and he quotes extensively form the address of Shri M C Setalvad at the Diamond Jubilee Celebrations of the Bangalore Bar Association, 1961, and from the decisions of this Court in Pritam Pal v. High court of Madhya Pradesh MANU/SC/0169/1992 : 1992CriLJ1269 (observations of Ratnavel Pandian J.) and Sanjeev Datta, In Re, MANU/SC/0697/1995 : 1995CriLJ2910 (observations of Sawant J. at pp 634-635, para 20).

202. We respectfully endorse the views and sentiments expressed by Mr. M.C. Setalvad, Pandian J. and Sawant J.

203. Here we must also observe that the Bar Council of India and the Bar Councils of the different states cannot escape their responsibility in this regard. Indeed the Bar council(s) have very positively taken up a number of important issues concerning the administration of justice in the country. It has consistently fought to safeguard the interests of lawyers and it has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society. This takes us to the last leg of this matter.

THE LARGER ISSUE : BMW TRIAL GETTING OUT OF HAND

204. Before laying down the records of the case we must also advert to another issue of great importance that causes grave concern to this Court. At the root of this odious affair is the way the BMW trial was allowed to be constantly interfered with till it almost became directionless. We have noted Kulkarni's conduct in course of investigation and at the commencement of the trial; the fight that broke out in the court premises between some policemen and a section of lawyers over his control and custody; the manner in which Hari Shankar Yadav, a key prosecution witness turned hostile in court; the curious way in which Manoj Malik, another key witness for the prosecution appeared before the court and overriding the prosecution's protest, was allowed to depose only to resile from his earlier statement. All this and several other similar developments calculated to derail the trial would not have escaped the notice of the Chief Justice or the judges
of the Court. But there is nothing to show that the High Court, as an institution, as a body took any step to thwart the nefarious activities aimed at undermining the trial and to ensure that it proceeded on the proper course. As a result, everyone seemed to feel free to try to subvert the trial in any way they pleased.

205. We must add here that this indifferent and passive attitude is not confined to the BMW trial or to the Delhi High Court alone. It is shared in greater or lesser degrees by many other High Courts. From experience in Bihar, the author of these lines can say that every now and then one would come across reports of investigation deliberately botched up or of the trial being hijacked by some powerful and influential accused, either by buying over or intimidating witnesses or by creating insurmountable impediments for the trial court and not allowing the trial to proceed. But unfortunately the reports would seldom, if ever, be taken note of by the collective consciousness of the Court. The High Court would continue to carry on its business as if everything under it was proceeding normally and smoothly. The trial would fail because it was not protected from external interferences. Every trial that fails due to external interference is a tragedy for the victim(s) of the crime. More importantly, every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognisable and it then loses the trust and confidence of the people. Every failed trial is also, in a manner of speaking, a negative comment on the State's High Court that is entrusted with the responsibility of superintendence, supervision and control of the lower courts. It is, therefore, high time for the High Courts to assume a more pro-active role in such matters. A step in time by the High Court can save a criminal case from going astray. An enquiry from the High Court Registry to the concerned quarters would send the message that the High Court is watching; it means business and it will not tolerate any nonsense. Even this much would help a great deal in insulating a criminal case from outside interferences. In very few cases where more positive intervention is called for, if the matter is at the stage of investigation the High Court may call for status report and progress reports from police headquarter or the concerned Superintendent of Police. That alone would provide sufficient stimulation and pressure for a fair investigation of the case. In rare cases if the High Court is not satisfied by the status/progress reports it may even consider taking up the matter on the judicial side. Once the case reaches the stage of trial the High Court obviously has far wider powers. It can assign the trial to some judicial officer who has made a reputation for independence and integrity. It may fix the venue of the trial at a proper place where the scope for any external interference may be eliminated or minimized. It can give effective directions for protection of witnesses and victims and their families. It can ensure a speedy conclusion of the trial by directing the trial court to take up the matter on a day-to-day basis. The High Court has got ample powers for all this both on the judicial and administrative sides. Article 227 of the Constitution of India that gives the High Court the authority of superintendence over the subordinate courts has great dynamism and now is the time to add to it another dimension for monitoring and protection of criminal trials. Similarly Article 235 of the Constitution that vests the High Court with the power of control over subordinate courts should also include a positive element. It should not be confined only to
posting, transfer and promotion of the officers of the subordinate judiciary. The power of control should also be exercised to protect them from external interference that may sometime appear overpowering to them and to support them to discharge their duties fearlessly.

206. In light of the discussions made above we pass the following orders and directions.

1. The appeal filed by IU Khan is allowed and his conviction for criminal contempt is set aside. The period of four month's prohibition from appearing in Delhi High Court and the courts subordinate to it is already over. The punishment of fine given to him by the High Court is set aside. The Full Court of the Delhi High Court may still consider whether or not to continue the honour of Senior Advocate conferred on him in light of the findings recorded in this judgment.

2. The appeal of RK Anand is dismissed subject to the notice of enhancement of punishment issued to him as indicated in paragraph 165 of the judgment. He is allowed eight weeks time from the date of service of notice for filing his show-cause.

3. Those of the High Courts which have so far not framed any rules under Section 34 of the Advocates Act, shall frame appropriate rules without any further delay as directed in paragraph 147 of the judgment.

4. Put up the appeal of RK Anand after the show-cause is filed.

* * * * *
In Re: Arundhati Roy vs Unknown, AIR 2002 SC 1375
Bench: G Pattanaik, R Sethi

JUDGMENT Sethi, J.

5. The facts of the case, which are not seriously disputed, are that an organisation, namely, Narmada Bachao Andolan filed a petition under Article 32 of the Constitution of India being Writ Petition No. 319 of 1994 in this Court. The petitioner was a movement or andolan, whose leaders and members were concerned about the alleged adverse environmental impact of the construction of the sardar Sarovar Reservoir Dam in Gujarat and the far-reaching and tragic consequences of the displacement of hundreds of thousands of people from their ancestral homes that would result from the submerging of vast extents of land, to make up the reservoir. During the pendency of the writ petition this Court passed various order. By one of the order, the Court permitted to increase the height of the dam to RL 85 meters which was resented to and protested by the writ petitioners and others including the respondent herein. The respondent Arundhati Roy, who is not a party to the writ proceedings, published an article entitled "The Greater Common Good" which was published in Outlook Magazine and in some portion of a book written by her. Two judges of this Court, forming the three-judge Bench felt that the comments made by her were, prima facie, a misrepresentation of the proceedings of the court. It was observed that judicial process and institution cannot be permitted to be scandalised or subjected to contumacious violation in such a blatant manner, it had been done by her. The action of the respondent had caused the court much anguish and when the court expressed its displeasure on the action of the respondent in making distorted writing or manner in which leaders of the petitioner Ms. Medha Patkar and one Dharmadikhari despite giving assurance to the court acted in breach of the injunction, the Court observed:

"We are unhappy at the way the leaders of NBA and Ms. Arundhati Roy have attempted to undermine the dignity of the Court. We expected better behavior from them."

6. Showing its magnanimity, the Court declared:

"After giving this matter our thoughtful consideration and keeping in view the importance of the issue of resettlement and rehabilitation of the PAFs, which we have been monitoring for the last five years, we are not inclined to initiate proceedings against the petitioner, its leaders or Ms. Arundhati Roy. We are of the opinion, in the largest interest of the issues pending before us, that we need not pursue the matter any further. We, however, hope that what we have said above would serve the purpose and the petitioner and its leaders would hereafter desist from acting in a
manner which has the tendency to interfere with the due administration of justice or which violates the injunctions issued by this Court from time to time.”

7. The third learned Judge also recorded his disapproval of the statement made by the respondent herein and others and felt that as the court's shoulders are broad enough to shrug off their comments and because the focus should not shift from the resettlement and rehabilitation of the oustees, no action in contempt be taken against them.

8. However, after the judgment was pronounced in IA No. 14 of 1999 on 15th October, 1999, an incident is stated to have taken place on 30th December, 2000 regarding which Contempt Petition No. 2 of 2001 was filed by J.R. Parashar, Advocate and others. According to the appellations made in that petition, the respondents named therein, led a huge crowd and held a Dharna in front of this Court and shouted abusive slogans against the court including slogans ascribing lack of integrity and dishonesty to his institution.

All the three respondents therein admitted that there was a Dharna outside the gates of this Court on 30th December, 2000 which was organised by Narmada Bachao Andolan and the gathered crowd were persons who lived in the Narmada Valley and were aggrieved by the majority judgment of this Court relating to the building of the dam on the Narmada River.

9. The assertions in the aforesaid contempt petition attributed that the contemnors shouted abusive slogans against the court including slogans ascribing lack of integrity and dishonesty to the institution undoubtedly made the action of the contemnor gross contemptuous and as such the court had initiated the contempt proceedings by issuing notice. But in view of the denial of the alleged contemnors to the effect that they had never shouted such slogans and used such abusive words as stated in the contempt petition, instead of holding an inquiry and permitting the parties to lead evidence in respect of here respective stand, to find out which version is correct, the court though it fit not to adopt that course and decided to drop the proceedings. But in the very show cause that had been filed by the respondent No. 3, Smt. Arundhati Roy, apart from denying that she had not used any such words as ascribed to her.

However, the Court felt that respondent No. 3 therein (Arundhati Roy) was found to have, prima facie, committed contempt as she had imputed motives to specific courts for entertaining litigation and passing orders against her. She had accused courts of harassing her as if the judiciary were carrying out a personal vendetta against her. She had brought in matters which were not only not pertinent to the issues to be decided but has drawn uninformed comparisons to make statements about this Court which do not appear to be protected by law relating to fair criticism. It was stated by her in the court that she stood by the comments made by her even if the same are contumacious. For the reason recorded therein, the Court issued notice int he prescribed form to the respondent herein asking her to show cause as to why she should not be proceeded
against for contempt for the statements in the offending three paragraphs of her affidavit, reproduced hereinearlier.

10. In her reply affidavit, the respondent has again reiterated what she had stated in her earlier affidavit. It is contended that as a consequence of the Supreme Court judgment the people in the Narmada Valley are likely to lose their homes, their livelihood and their histories and when they came calling on the Supreme Court, they were accused of lowering the dignity of the court which, according to her is a suggestion that the dignity of the court and the dignity of the Indian citizens are incompatible, oppositional, adversarial things. She stated:

"I believe that the people of the Narmada valley have the constitutional right to peacefully against what they consider an unjust and unfair judgment. As for myself, I have every right to participate in any peaceful protest meeting that I choose to. Even outside the gates of the Supreme Court. As a writer I am fully entitled to put forward my views, my reasons and arguments for why I believe that the judgment in the Sardar Sarovar case is flawed and unjust and violates the human rights of Indian citizens. I have the right to use all my skills and abilities such as they are, and all the facts and figures at my disposal, to persuade people to my point of view."

11. She also stated that she has written and published several essays and articles on Narmada issue and the Supreme Court judgment. None of them was intended to show contempt to the court. She justified her right to disagree with the court's view on the subject and to express her disagreement in any publication or forum. In her belief the big dams are economically unviable, ecologically destructive and deeply undemocratic. In her affidavit she has further stated:

"But whoever they are, and whatever their motives, for the petitioners to attempt to misuse the Contempt of Court Act and the good offices of the Supreme Court to stifle criticism and stamp out dissent, strikes at the very roots of the notion of democracy.In recent months this Court has issued judgments on several major public issues. For instance, the closure of polluting industries in Delhi, the conversion of public transport buses from diesel to CNG, and the judgment permitting the construction of the Sardar Sarovar Dam to proceed. All of these have had far-reaching and often unanticipated impacts. They have materially affected, for better or for worse, the lives and livelihoods of millions of Indian citizens. Whatever the justice or injustice of these judgments whatever their finer legal points, for the court to become intolerant of criticism or expressions of dissent would mark the beginning of the end of democracy.

In conclusion, I wish to reaffirm that as a writer I have right to state my opinions and beliefs. As a free citizen of India I have the right to be part of any peaceful dharna, demonstration or protest march. I have the right to criticize any judgment of any court that I believe to be unjust. I have the
right to make common cause with those I agree with. I hope that each time I exercise these rights I will not dragged to court on false charges and forced to explain my actions."

17. The High Court in its judgment had concluded that the allegations made against the judicial officers come within the category of contempt which is committed by "scandalizing the court". The learned judges observed on the authority of the pronouncement of Lord Russel in Reg. v. Gray [(1900) 2 G.B. 36] that this class of contempt is subject to one important qualification. In the opinion of the judges of the High Court, the complaint lodged by the contemners exceeded the bounds of fair and legitimate criticism. This Court referred to various judgments of English Courts and concluded:

"The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libeler in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law."

19. Similarly reliance of Shri Shanti Bhushan, Senior Advocate on Shri Baradakanta Mishra v. The Registrar of Orissa High Court and Anr. [1974 (1) 374] is of no great help to his client. After referring to the definition of criminal contempt in Section 2(c) of the Act, the court found that the terminology used in the definition is borrowed from the English Law of contempt and embodies certain concepts which are familiar to that law which, by and large, was applied in India. The expressions "scandalized", "lowering the authority of the court," "interference", "obstruction" and "administration of justice" have all gone into the legal currency of our sub-continent and have to be understood in the sense in which they have been so far understood by our courts with the aid of English Law, where necessary. Sub-clause (i) of the definition was held to embody the concept of canalization, as discussed by Halsbury's Laws of England, 3rd Edition in Volume 8, page 7 at para 9. Action of scandalizing the authority of the court has been regarded as an "obstruction" of public justice whereby the authority of the court is undermined. All the three clauses of the definition were held to justify the contempt in terms of obstruction of or interference with the administration of justice. It was declared that the Act accepts what was laid down by the Privy Council and other English authorities that proceedings in contempt are always

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with reference to the administration of justice. The canalization within the meaning of Sub-section (i) must be in respect of the court or the judge with reference to administration of justice. This Court concluded that the courts of justice are, by their constitution, entrusted with functions directly connected with the administration of justice, and it is the expectation and confidence of all those who have or likely to have business therein that the court perform all their functions on a high level of rectitude without fear or favour, affection or ill-will. It is this traditional confidence in courts of justice that the justice will be administered to the people which is sought to be protected by proceedings in contempt. The object obviously is not to vindicate the judge personally but to protect the public against any undermining of their accustomed confidence in the institution of the judiciary. canalization of the court was held to be a species of contempt which may take several forms. Krishna Iyer, J. while concurring with the main judgment authored by Palekar, J. observed that the dilemma of the law of contempt arises because of the constitutional need to balance two great but occasionally conflicting principles - freedom of expression and fair and fearless justice. After referring to the judgments of English, American and Canadian Courts, he observed: "Before stating the principles of law bearing on the facts of contempt of court raised in this case we would like to underscore the need to draw the lines clear enough to create confidence in the people that this ancient and inherent power, intended to preserve the faith of the public in public justice, will not be so used as to provoke public hostility as overtook the Star Chamber. A vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor, a law which makes it a crime to public regardless of truth and public good and permits a process of brevi manu conviction, may unwittingly trench upon civil liberties and so the special jurisdiction and jurisprudence bearing on contempt power must be delineated with deliberation and operated with serious circumspection by the higher judicial echelons. So it is that as the palladium of our freedoms, the Supreme Court and the High Courts, must vigilantly protect free speech even against judicial umbrage - a delicate but sacred duty whose discharge demands tolerance and detachment of a high order."

20. According to him the considerations, as noticed in the judgment, led to the enactment of the Contempt of Courts Act, 1971 which makes some restrictive departures from the traditional law and implies some wholesome principles which serve as unspoken guidelines in this branch of law. **Section 2(c)** emphasizes to the interference with the courts of justice or obstruction of the administration of justice or scandalizing or lowering the authority of the court - not the judge. According to him, "The unique power to punish for contempt of itself inheres in a court qua court, in its essential role of dispenser of public justice. After referring to host of judicial pronouncements, Krishna Iyer, J., concluded:

"We may now sum up. Judges and Courts have diverse duties. But functionally, historically and jurisprudentially, the value which is dear to the community and the function which deserves to be cordoned off from public molestation, is judicial. Vicious criticism of personal and administrative act of Judges may indirectly mar their image and weaken the confidence of the public in the
judiciary but the countervailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally over-zealous, criticism cannot be overlooked. Justices is so cloistered virtue."

22. In In Re: S. Mulgaokar Beg, CJ observed that the judiciary is not immune from criticism but when that criticism is based on obvious distortion or gross mis-statement and made in a manner which is designed to lower the respect of the judiciary and destroy public confidence in it, it cannot be ignored. He further declared"

Krishna Iyer, J. while concurring observed:

"The contempt power, though jurisdictionally large, is discretionary in its unsheathed exercise. Every commission of contempt need not erupt in indignant committal or demand punishment, because Judges are judicious, their valour non-violent and their wisdom goes into action when played upon by a volley of values, the least of which is personal protection - for a wide discretion, range of circumspection and rainbow of public considerations benignantly guide that power. Justice if not hubris; power is not petulance and prudence is not pusillanimity, especially when Judges are themselves prospectors and mercy is a mark of strength, not whimper of weakness. Christ and Gandhi shall not be lost on the Judges at a critical time when courts are on trial and the people ("We, the People of India") pronounce the final verdict on all national institutions. Such was the sublime perspective, not plural little factors, that prompted me to nip in the bud the proceeding started for serving a larger cause of public justice than punitive action against a publisher, even assuming) he was guilty. The preliminary proceeding has been buried publicly; let it lie in peace. Many values like free press, fair trial, judicial fearlessness and community confidence must generously enter the verdict, the benefit of doubt, without absolutist insistence, being extended to the defendants. Such are the dynamics of power in this special jurisdiction. These diverse indicators, carefully considered, have persuaded me to go no further, by a unilateral decision of the Bench. This closure has two consequences. It puts the lid on the proceedings without pronouncing on the guilt or otherwise of the opposite parties. In a quasi-criminal action, a presumption of innocence operates. Secondly, whatever belated reasons we may give for our action, we must not proceed to substantiate the accusation, if any. To condemn unheard is not fair play. Bodyline bowling, perhaps, is not cricket. So may reason do not reflect on the merits of the charge."

24. He further observed that contempt power is a wise economy to use by the Court of this branch of its jurisdiction. The court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the Judges, where the attack is calculated to obstruct or destroy the judicial process. The court should harmonise the constitutional values of free criticism and the need for a fearless curial process and its presiding functionary, the Judge.
25. In Dr. D.C. Saxena v. Hon'ble the Chief Justice of India this Court held that if maintenance of democracy is the foundation of free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. Nobody has a right to denigrate others right of person and reputation. Bonafide criticism of any system or institution including the judiciary cannot be objected to as healthy and constructive criticism are fools to augment forensic tools for improving its function.

26. Relying upon some judgments of foreign courts and the cherished wishes expressed or observations made by the Judges of this country it cannot be held as law that in view of the constitutional protection of freedom of speech and expression no-one can be proceeded with for the contempt of court on the allegation of scandalizing or intending to scandalise the authority of any Court. The Act is for more comprehensive legislation which lays down the law in respect of several matters which hitherto had been the subject of judicial exposition. The legislature appears to have kept in mind to bring the law on the subject into line with modern trends of thinking in other countries without ignoring the ground realities and prevalent socio-economic system in India, the vast majority of whose people are poor, ignorant, uneducated, easily liable to be misled. But who acknowledge have the tremendous faith in the Dispensers of Justice. The Act, which was enacted in the year 1971, much after the adoption of the Constitution by the People of India, defined criminal contempt under Section 2(c) to mean:

"Criminal contempt" means the publication (whether by words, spoken or written or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which

i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court, or

ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."

27. This Court has occasion to deal with the constitutional validity of the Act and came to the conclusion that the same was intra vires. If the constitutional validity of criminal contempt withstood the test on the touchstone of constitutionality in the light of the fundamental rights, it is too late to argue at this stage that no contempt proceeding can be initiated against a person on the ground of scandalizing the authority of the court.
28. Dealing with the meaning of the word "scandalizing", this Court in D.C. Saxena's case (supra) held that it is an expression of scurrilous attack on the majesty of justice which is calculated to undermine the authority of the courts and public confidence in the administration of justice.

Dealing with Section 2(c) of the Act and defining the limits of scandalizing the court, it was held:

"scandalizing the court, therefore, would mean hostile criticism of judges as judges or judiciary. Any personal attack upon a judge in connection with the officer he holds is dealt with under law of libel or slander. Yet defamatory publication concerning the judge as a judge calculated to lower the dignity of the court would destroy, undermine or tend to undermine public confidence in the administration of justice or the majesty of justice. It would, therefore, be scandalizing the judge as a judge, in other words, imputing partiality, corruption, bias improper motives to a judge is canalization of the court and would be contempt of the court. Even imputation of lack of impartiality or fairness to a judge in the discharge of his official duties amounts to contempt. The gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice. When the contemnor challenges the authority of the court, he interferes with the performance of duties of judge's office or judicial process or administration of justice or generation or production of tendency bringing the judge or judiciary into contempt. Section 2(c) of the Act, therefore, defines criminal contempt in wider articulation that any publication, whether by words, spoken or written, or by signs, or by visible representations, or otherwise of any matter or the doing of any other act whatsoever which scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or prejudices, or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner, is a criminal contempt. Therefore, a tendency to scandalise the court or tendency to lower the authority of the court or tendency to interfere with or tendency to obstruct the administration of justice in any manner or tendency to challenge the authority or majesty of justice, would be a criminal contempt. The offending act apart, any tendency if it may lead to or tends to lower the authority of the court is a criminal contempt. Any conduct of the contemnor which has the tendency or produces a tendency to bring the judge or court into contempt or tends to lower the authority of the court would also be contempt of the court."

"The appellant has contended before us that the law of contempt should be so applied that the freedom of speech and expression are not whittled down. This is true. The spirit underlying Article 19(1)(a) must have due play but we cannot overlook the provisions of the second clause of the article. While it is intended that there should be freedom of speech and expression, it is also intended that in the exercise of the right, contempt of court shall not be committed. The words of the second clause are:
'Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law or prevent the State from making any law, in so far as such law imposes reasonable restriction on the exercise of the right conferred by the sub-clause... in relation to contempt of court, defamation or incitement to an offence.' These provisions are to be read with Articles 129 and 215 which specially confer on this Court and the High Courts the power to punish for contempt of themselves. Article 19(1)(a) guarantees complete freedom of speech and expression but it also makes an exception in respect of contempt of court. The guaranteed right on which the functioning of our democracy rests, is intended to give protection to expression of free opinions to change political and social conditions and to advance human knowledge. While the right is essential to a free society, the Constitution has itself imposed restrictions, in relation to contempt of court and it cannot therefore be said that the right abolishes the law of contempt or that attacks upon judges and courts will be condoned."

30. In Sheela Barse v. Union of India & Ors, the Court acknowledged that the broader right of a citizen to criticise the systemic inadequacies in the larger public interest. It is the privileged right of the Indian citizen to believe what he considers to be true and to speak out his mind, though not, perhaps, always with the best of tastes; and speak perhaps, with greater courage than care for exactitude. Judiciary is not exempt from such criticism. Judicial institutions are, and should be made, of stronger stuff intended to endure the thrive even in such hardy climate. But we find no justification to the resort to this freedom and privilege to criticise the proceedings during their pendency by persons who are parties and participants therein.

31. The law of contempt itself envisages various exceptions as incorporated in Section 3, 4, 5, 6and 7. Besides the aforesaid defences envisaged under the Act, the court can, in appropriate cases, consider any other defence put forth by the respondent which is not incompatible with the dignity of the court and the law of contempt.

36. As already held, fair criticism of the conduct of a judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself. Litigant losing in the Court would be the first to impute motives to the judges and the institution in the name of fair criticism which cannot be allowed for preserving the public faith in an important pillar of democratic set up, i.e., judiciary. In Dr. D.C. Saxena's case (supra) this Court dealt with the case of P. Shiv Shankar by observing:
"In P.N. Duda v. P. Shiv Shankar this Court had held that administration of justice and judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by the conscience and oath to their office, i.e., to defend and uphold the Constitution and the laws without fear and favour. Thus the judges must do, in the light given to them to determine, what is right. Any criticism about the judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of the judges and brings administration of justice to ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgments can be criticised. Motives to the judges need not be attributed. It brings the administration of justice into disrepute. Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. In the free market-place of ideas criticism about the judicial system or judges should be welcome so long as such criticism does not impair or hamper the administration of justice. This is how the courts should exercise the powers vested in them and judges to punish a person for an alleged contempt by taking notice of the contempt suo motu or at the behest of the litigant or a lawyer. In that case the speech of the Law Minister in a Seminar organised by the Bar Council and the offending portion therein were held not contemptuous and punishable under the Act. In a democracy judges and courts alike are, therefore, subject to criticism and if reasonable argument or criticism in respectful language and tempered with moderation is offered against any judicial act as contrary to law or public good, no court would treat criticism as a contempt of court."

38. The Constitution of India has guaranteed freedom of speech and expression to every citizen as a fundamental right. While guaranteeing such freedom, it has also provided under Article 129 that the Supreme Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself. Similar power has been conferred on the High Courts of the States under Article 215. Under the Constitution, there is no separate guarantee of the freedom of the press and it is the same freedom of expression, which is conferred on all citizens under Article 19(1). Any expression of opinion would, therefore, be not immune from the liability for exceeding the limits, either under the law of defamation or contempt of Court or the other constitutional limitations under Article 19(2). If a citizen, therefore, in the grab of exercising right of free expression under Article 19(1), tries to scandalise the court or undermines the dignity of the court, then the court would be entitled to exercise power under Article 129 or Article 215, as the case may be. In relation to a pending proceeding before the Court, while showing cause to the notice issued, when it is stated the court displays a disturbing willingness to issue notice on an absurd despicable, entirely unsubstantiated petition, it amounts to a destructive attack on the reputation and the credibility of the institution and it undermines the public confidence in the judiciary as a whole and by no stretch of imagination, can be held to be a fair criticism of the Court's proceeding. When a scurrilous attack is made in relation to a pending proceeding and the noticed states that the issuance of notice to show cause was intended to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it, is a direct attack on the institution itself, rather than the conduct of an individual Judge.
The meaning of the expressions used cannot come within the extended concept of fair criticism or expression of opinion particularly to the case of the contemner in the present case, who on her own right is an acclaimed writer in English. At one point of time, we had seriously considered the speech of Lord Atkin, where the learned Judge has stated:

"The path of criticism is public way: the wrongheaded are permitted to err therein... Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." [Andre Paul v. Attorney General (1936), AC 322].

and to find out whether there can be a balancing between the two public interests, the freedom of expression and the dignity of the court. We also took note of observations of Bharucha, J. in the earlier contempt case against the present contemner, who after recording his disapproval of the statement, observed that the Court's shoulders are broad enough to shrug off the comments. But in view of the utterances made by the contemnor in her show causes filed and not a word of remorse, till the conclusion of the hearing, it is difficult for us either to shrug off or to hold the accusations made as comments of outspoken ordinary man and permit the wrongheaded to err therein, as observed by Lord Atkin.

40. In the offending portion of her affidavit, the respondent has accused the court of proceeding with absurd, despicable and entirely unsubstantiated petition which, according to her, amounted to the court displaying a disturbing willingness to issue notice. She has further attributed motives to the court of silencing criticism and muzzling dissent by harassing and intimidating those who disagree with it. Her contempt for the court is evident from the assertion "by entertaining a petition based on an FIR that even a local police station does not see fit to act upon, the Supreme Court is doing its own reputation and credibility consideration harm". In the affidavit filed in these proceedings, the respondent has reiterated what she has stated in her earlier affidavit and has not shown any repentance. She wanted to become a champion to the cause of the writers by asserting that persons like her can allege anything they desire and accuse any person or institution without any circumspection, limitation or restraint. Such an attitude shows her persistent and consistent attempt to malign the institution of the judiciary found to be most important pillar in the Indian democratic set up. This is no defence to say that as no actual damage has been done to the judiciary, the proceedings be dropped. The well-known proposition of law is that it punishes the archer as soon as the arrow is shot no matter if it misses to hit the target. The respondent is proved to have shot the arrow, intended to damage the institution of the judiciary and thereby weaken the faith of the public in general and if such an attempt is not prevented, disastrous consequences are likely to follow resulting in the destruction of rule of law, the expected norm of any civilised society.
41. On the basis of the record, the position of law our findings on various pleas raised and the conduct of the respondent, we have no doubt in our mind that the respondent has committed the criminal contempt of this Court by scandalizing its authority with malafide intentions. The respondent is, therefore, held guilty for the contempt of court punishable under Section 12 of the Contempt of Courts Act.

42. As the respondent has not shown any repentance or regret or remorse, no lenient view should be taken in the matter. However, showing the magnanimity of law by keeping in mind that the respondent is a woman, and hoping that better sense and wisdom shall dawn upon the respondent in the future to serve the cause of art and literature by her creative skill and imagination, we feel that the ends of justice would be met if she is sentenced to symbolic imprisonment besides paying a fine of Rs. 2000/-.  

43. While convicting the respondent for the contempt of the Court, we sentence her to simple imprisonment for one day and to pay a fine of Rs. 2,000/-. In case of default in the payment of fine, the respondent shall undergo simple imprisonment for three months.
Mrityunjoy Das & Anr vs Sayed Hasibur Rahaman & Ors

AIR 2001 SC 1293

Bench: Umesh C. Banerjee, S.N. Phukan

BANERJEE, J.

The introduction of the Contempt of Courts Act, 1971 in the statute book has been for purposes of securing a feeling of confidence of the people in general for due and proper administration of justice in the country. It is a powerful weapon in the hands of the law courts by reason wherefor it must thus be exercised with due care and caution and for larger interest.

Incidentally, a special leave petition (1416/1997) was filed before this Court by PaschimBangaRajyaBhumijibiSangh against the judgment of the Calcutta High Court pertaining to the question of constitutionality of certain provisions of West Bengal Land Reforms Amendment Acts 1981 and 1986. The said Sangha filed an Interlocutory Application being I.A.No.3 OF 1999 for issuance of certain directions which inter alia reads as below:

(a) direct the State of West Bengal and its Revenue Authorities not to initiate any proceedings for vesting of the land against the members of the Petitioner Sangha and if any vesting proceeding has been already initiated against the members of the Petitioner Sangha in that event not to pass any order and maintain status-quo in respect of the land in question in all respect till the disposal of the Special Leave Petition (Civil) No.1416 of 1997 pending before this Honble Court or in alternative clarify that the order dated 20.3.1998 as quoted in paragraph 19-20 will apply only to the parties thereto and not to the members of the Petitioner No.1 Sangha.

The Interlocutory Application was heard on 29th October, 1999 and this Court was pleased to pass an order therein to the following effect: At the request of Learned counsel for the Applicants four weeks time is granted to enable him to put on record appropriate information regarding members of the Sangha for whom the application is moved and the nature of the stay required.

In the meantime Learned Counsel for the Respondent will also take appropriate instructions in connection with this I.A. Subsequently on 16th December, 1999, this Court in I.A.No.3 passed an interim order to the effect as below: Having heard Learned counsel for the parties, by way of an interim order, it is directed that status-quo regarding possession on spot shall be maintained by both the sides in connection with the members of the Petitioner-Sangha who were before the High Court in the Writ Petition out of which the present proceedings arise.
In the meantime, learned senior counsel for the respondent-State of West Bengal will verify the list of these members, which is furnished to him by Learned Counsel for the Petitioner and subject to that verification further orders will be passed after three months.

To be placed after three months.

In the application (I.A.No.3) a further order was passed on 17th April, 2000 which reads as below: We have heard learned senior counsel for the Petitioners, Mr. Shanti Bhushan and Learned Senior Counsel for respondent-State of West Bengal, Mr. Ray, Learned Senior Counsel for respondent-State of West Bengal is right when he says that some more time is required as 13,000 persons are listed and they have to ascertain about their existence on the spot. We grant time up to the end of July, 2000. I.A. will be placed in the second week of August, 2000. In the meantime, at the request of Learned Counsel for the Petitioners, Mr. Shanti Bhusan we grant additional interim relief in continuation of our earlier order dated 16.12.1999 to the effect that if in the meantime, any vesting orders have been passed in respect of the lands of members of Petitioner Sangha who were before the High Court in the matter out of which the present proceedings arise, then those vesting orders shall not be implemented until further orders."

It is this order which is said to have been violated and thus bringing the orders of this Court into ridicule. The factum of violation is said to have been deliberate since in spite of the order as above and even after the service of the order dated 17th April, 2000 to the authorities of Land Reforms Department, Government of West Bengal for its compliance, the Petitioner No.1 being a resident of village Amriti, District, Malda, West Bengal and a life member of the PaschimBangaRajyaBhumijibisangha was served with a notice dated 5.4.2000 under Section 57 of the West Bengal Land Reforms Act together with Section 14-T (3) of the said Act read with Rule 4 of the Rules framed thereunder by the Revenue Officer Cell, Malda asking to submit details of land held by him and his family members since 7.8.1969 and particulars of land transferred by him after that date. The records depict that a reply to the said notice was furnished as early as 30th April, 2000 alongwith the certification of membership of the Sangha and copy of the order dated 16th December, 1999 passed by this Court. It further appears that a hearing did take place and the Revenue Officer passed an order of vesting on 17th April, 2000. Subsequently, on the factual matrix, it appears that by the notice dated 26th April, 2000 issued by the Revenue Officer, possession of 37.47½ acres of land was directed to be made over to the Land Revenue Authority on 27.4.2000. It has been the definite case of the petitioners that in spite of receipt of both the orders dated 16th December, 1999 and 17th April, 2000, the Block Land & Land Reforms Officer, English Bazar, Malda came on the site and took possession of the said land. Similar is the situation as regards the land belonging to petitioner No.2 and possession 20.76 acres of land was also obtained by the Block Land & Land Reforms Officer, English Bazar,
Malda. This act of obtaining possession from the applicants herein is stated to be a deliberate violation of this Court's order and thus cannot but be ascribed to be contemptuous in nature.

The purpose of contempt jurisdiction is to uphold the majesty and dignity of the Courts of law since the image of such a majesty in the minds of the people cannot be led to be distorted. The respect and authority commanded by Courts of Law are the greatest guarantee to an ordinary citizen and the entire democratic fabric of the society will crumble down if the respect for the judiciary is undermined. It is true that the judiciary will be judged by the people for what the judiciary does, but in the event of any indulgence which even can remotely be termed to affect the majesty of law, the society is bound to lose confidence and faith in the judiciary and the law courts thus, would forfeit the trust and confidence of the people in general.

The other aspect of the matter ought also to be noticed at this juncture viz., the burden and standard of proof. The common English phrase he who asserts must prove has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the standard of proof, be it noted that a proceeding under the extra-ordinary jurisdiction of the Court in terms of the provisions of the Contempt of Court Act is quasi criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond reasonable doubt. The observations of Lord Denning in Re Bramblevale (1969 3 All ER 1062) lend support to the aforesaid. Lord Denning in Re Bramblevale stated:

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt.

In this context, the observations of the Calcutta High Court in Archana Guha v. Ranjit Guha Neogi (1989 (II) CHN252) in which one of us was a party (Banerjee, J.) seem to be rather apposite and we do lend credence to the same and thus record our concurrence therewith.

In The Aligarh Municipal Board and Others v. Ekka Tonga Mazdoor Union and Others (1970 (III) SCC 98), this Court in no uncertain term stated that in order to bring home a charge of contempt of court for disobeying orders of Courts, those who assert that the alleged contemners had knowledge of the order must prove this fact beyond reasonable doubt. This Court went on to observe that in case of doubt, the benefit ought to go to the person charged.
In a similar vein in V.G. Nigam and others v. KedarNath Gupta and another (1992 (4) SCC 697), this Court stated that it would be rather hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities.

Having discussed the law on the subject, let us thus at this juncture analyse as to whether in fact, the contempt alleged to have been committed by the alleged contemners, can said to have been established firmly without there being any element of doubt involved in the matter and that the Court would not be acting on mere probabilities having however, due regard to the nature of jurisdiction being quasi criminal conferred on to the law courts. Admittedly, this Court directed maintenance of status quo with the following words the members of the petitioner Sangha who were before the High Court in the writ petition out of which the present proceedings arise. And it is on this score the applicant contended categorically that the intent of the Court to include all the members presenting the Petition before this Court whereas for the Respondent Mr. Ray contended that the same is restricted to the members who filed the writ petition before the High Court which culminated in the initiation of proceeding before this Court. The Counter affidavit filed by the Respondents also record the same. The issue thus arises as to whether the order stands categorical to lend credence to the answers of the respondent or the same supports the contention as raised by the applicants herein Incidentally, since the appeal is pending in this Court for adjudication, and since the matter under consideration have no bearing on such adjudication so far as the merits of the dispute are concerned, we are not expressing any opinion in the matter neither we are required to express opinion thereon, excepting however, recording that probabilities of the situation may also warrant a finding, in favour of the interpretation of the applicant. The doubt persists and as such in any event the respondents being the alleged contemners are entitled to have the benefit or advantage of such a doubt having regard to the nature of the proceeding as noticed herein before more fully.

In view of the observations as above, we are not also inclined to go into the question of apology. On the wake of the aforesaid, this Contempt Petition fails and is dismissed without however, any order as to costs.
DEFENCES

CRIMINAL APPEAL No. 463 of 2006
HET RAM BENIWAL & ORS. v. RAGHUVEER SINGH & ORS.

CRIMINAL APPEAL No. 464 of 2006
BHURAMAL SWAMI v. RAGHUVEER SINGH & ORS.
Delivered on 21st October 2016

L. NAGESWARA RAO, J.

1. The Appellants were found guilty of committing contempt by the High Court of Judicature for Rajasthan at Jodhpur. Simple imprisonment of two months and fine of Rs. 2,000/- each was imposed. Aggrieved by the said judgment, the Appellants have filed these Criminal Appeals.

2. The Appellants along with Sheopat Singh belong to the Marxist Communist Party. Sheopat Singh died during the pendency of these proceedings. It is relevant to mention that Appellants Nos. 2 and 3 are advocates. A prominent trade union activist of Sri Ganganagar District Shri Darshan Koda was murdered on 18.12.2000. Some of the accused were granted anticipatory bail in February, 2001 by the High Court of Rajasthan. The Appellants addressed a huge gathering of their party workers in front of the Collectorate at Sri Ganganagar on 23.02.2001. While addressing the gathering, the Appellants made scandalous statements against the High Court which were published in Lok Sammat newspaper on 24.02.2001. The offending statements made by the Appellants (from the translated version) are summarized as under:

“Appellant No. 1 - “Ex MLA Het Ram Beniwal said that, there are two types of justice in the courts. A thief of Rs.100/- cannot get bail, if the lathi and gandasi is hit then the courts ask for the statements of the witnesses and diary, but Miglani and Gurdoyal Singh committed the murder, even then anticipatory bail had been taken on the application without diary.”

“Appellant No. 2 - “Navrang Chaudhary, Advocate, District President, CITU said that the general public has lost confidence in the law and justice.”

“Appellant No. 3 - “MCP Leader Bhuramal Swami naming the judge of the High Court said in attacking way that all around there is rule of rich people whether it is bureaucracy or judiciary.”

“Appellant No. 4 - “Sarpanch Hardeep Singh told that there was influence of money behind the anticipatory bail of the accused.”
The Advocate General gave his consent to Respondent No.1 for initiation of contempt proceedings on 16.01.2002. Thereafter, Respondent No.1 filed a Contempt Petition in the High Court. It was stated by Respondent No. 1 in the contempt petition that baseless allegations of bias and corruption were made by the Appellants against the judiciary. He also alleged that the Appellants were guilty of a systematic campaign to destroy the public confidence in the judiciary.

3. The Appellants filed a common counter denying the allegations made against them. The appointment of the Special Public Prosecutor in the case of the murder of Shri Darshan Koda was in dispute and the Appellants contended that they were agitating for appointment of another competent lawyer as Special Public Prosecutor. They accused Respondent No.1 of initiating contempt proceedings only to harass and victimize them as they were agitating for a change of the Special Public Prosecutor. They denied making any defamatory statements against the judiciary. A compact disc (CD) was produced on 15.07.2003 which was a video recording, of the press conference held on 15.05.2002 at Sri Ganganagar by the third Appellant and Sheopat Singh. The said press conference was also telecast on ETV (Rajasthan). The High Court viewed the CD after taking consent from both sides in the presence of the third Appellant and Sheopat Singh. The High Court directed a transcript of the video to be prepared and be kept on record.

4. The High Court framed three questions for consideration which are as follows:

   Whether statement published in “LokSammat” dtd. 24.2.2001 published from Sri Ganganagar amounts to criminal contempt?
   Whether editor’s liability for whatever is published in the newspaper is absolute or he is not liable for faithful reproduction of the statement made by somebody else in the news reporting?
   Whether it is proved beyond reasonable doubt on the basis of material on record that respondents No.2 to 6 did make the statements attributed to them respectively so as to hold them liable for contempt?”

5. In view of the disparaging remarks made by the Appellants against the judges of the Rajasthan High Court, the High Court held that the statement published in Lok Sammat on 24.02.2001 amounts to criminal contempt. The scathing remarks made by the Appellants have a tendency of creating a doubt in the minds of the public about the impartiality, integrity and fairness of the High Court in administering justice. According to the High Court, the scurrilous attack made by the Appellants against the judiciary lowers the authority of the Court.

6. In view of the unconditional apology tendered at the earliest point of time by Respondent No. 1, the Editor of Lok Sammat, the High Court discharged the notices against him in the contempt petition. The High Court answered the third point against the Appellants and held them guilty of contempt as the case was proved against them beyond reasonable doubt. The entire evidence on record was scrutinized carefully by the High Court to reach this conclusion. The press conference held by the
third Appellant was highlighted by the High Court to conclude that the highly objectionable statements were, in fact, made by the Appellants on 23.02.2001. As the Appellants denied having made any statements against the judiciary in their reply to the contempt petition, the journalists demanded an explanation. The third Appellant stated that they stood by what was said on 23.02.2001. The High Court held the Appellants guilty of committing criminal contempt and sentenced them to simple imprisonment of two months and fine of Rs. 2000/- each.

7. We have heard Mr. Prashant Bhushan, Advocate for the Appellants. As Respondent No. 1 who was the petitioner in the contempt petition was unrepresented, we requested Ms. Aishwarya Bhati, Advocate to assist the Court to which she readily agreed. Apart from making oral submissions Ms. Bhati also gave a written note. Mr. Bhushan submitted that statements attributed to the Appellants only represent fair criticism which would not amount to contempt. According to him, the Appellants were in an agitated mood due to the murder of one of their leaders and the mishandling of the criminal case connected to that murder. Criticism of class bias and improper administration of justice cannot be considered to be contempt. He referred to a statement attributed to the fourth Appellant who alleged influence of money in the grant of anticipatory bail to the accused and explained that statement as having been made in a different context altogether. He stated that the influence of money was against the authorities and police force and not attributed to the judiciary. He also stated that the statement made by the third Appellant who named the judge who granted anticipatory bail and accused the judiciary of being partial to rich people does not tantamount to contempt. Strong reliance was placed on Indirect Tax Practitioners Association v. R. K. Jain, reported in (2010) 8 SCC 281 by Mr. Bhushan to contend that the Courts should not be sensitive to fair criticism. He also stated that the power of punishing for contempt has to be exercised sparingly.

8. Ms. Aishwarya Bhati, the learned Amicus Curiae, submitted that the judgment of the High Court does not warrant any interference as the entire evidence was dealt with in detail. She submitted that all the relevant factors were taken into account by the High Court including the statements made by the Appellants which ex facie demonstrated contempt, the stand of the editor of the newspaper that they have scrupulously and correctly reported the statements in the newspaper and non denial of the Appellants addressing the public meeting at the Collectorate of Sri Ganganagar. She also submitted that the High Court took note of the press conference of the third Appellant and Sheopat Singh on 15.05.2002 and the affidavits of 5 journalists and one deed writer who were witness to the meeting on 23.02.2001. She placed reliance on a judgment of this Court reported in Bal Kishan Giri v. State of Uttar Pradesh, reported in (2014) 7 SCC 280 to contend that vituperative comments undermining the judiciary would amount to contempt. She also relied upon Vijay Kumar Singh v. Union of India, reported in (2014) 16 SCC 460 to contend that the apology was made only for the purpose of avoiding punishment and was not bona fide. To avoid prolixity, we are not referring to other judgments cited by the learned Amicus Curiae. She referred to the affidavits filed by the Appellants in this Court apologizing for the statements and even they do not demonstrate any genuine contrition. She submitted that an apology by the contemnors should be tendered at the earliest opportunity and it should be unconditional.

9. Section 2 (c) of the Contempt of Courts Act, 1971 (hereinafter referred to as ‘the Act’) defines
criminal contempt as follows:

“2. Definitions. In this Act, unless the context otherwise requires,
(1) “criminal contempt” means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which –
(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;”

10. Section 5 of the Act is as under:

“5. Fair criticism of judicial act not contempt.

“A person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided.”

(1) Section 12 of the Act is as under:

“12. Punishment for contempt of court (1)

Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both.

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation.-An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is
a company, every person who, at the time the contempt was committed, was in charge of, and was
responsible to, the company for the conduct of the business of the company, as well as the company,
shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of
the court, by the detention in civil prison of each such person:

Provided that nothing contained in this sub-section shall render any such person liable to such
punishment if he proves that the contempt was committed without his knowledge or that he
exercised all due diligence to prevent its commission.

6. Notwithstanding anything contained in sub-section (4), where the contempt of court referred to
therein has been committed by a company and it is proved that the contempt has been committed
with the consent or Connivance of, or is attributable to any neglect on the part of, any director,
manager, secretary or other officer of the company, such director, manager, secretary or other
officer shall also be deemed to be guilty of the contempt and the punishment may be enforced with
the leave of the court, by the detention in civil prison of such director, manager, secretary or other
officer.

Explanation.-For the purpose of sub-sections (4) and (5),

(a) “company” means anybody corporate and includes a firm or other association of individuals ; and
(b) “director”, in relation to a firm, means a partner in the firm.

(2) We are, in the present case, concerned with Section 2(c)(i) of the Act which deals with scandalizing
or lowering the authority of the Court. It has been held by this Court that judges need not be
protected and that they can take care of themselves. It is the right and interest of the public in the
due administration of justice that have to be protected. See Asharam M. Jain v. A. T. Gupta, reported in (1983) 4 SCC 125, “Vilification of judges would lead to the destruction of the system of
administration of justice. The statements made by the Appellants are not only derogatory but also
have the propensity to lower the authority of the Court. Accusing judges of corruption results in
denigration of the institution which has an effect of lowering the confidence of the public in the
system of administration of justice. A perusal of the allegations made by the Appellants cannot be
termed as fair criticism on the merits of the case. The Appellants indulged in an assault on the
integrity of the judges of the High Court by making baseless and unsubstantiated allegations. They
are not entitled to seek shelter under Section 5 of the Act. The oft-quoted passage from Ambard v. Attorney-General for Trinidad and Tobago, [1936] A.C. is that “Justice is not a
cloistered virtue; she must beallowed to suffer the scrutiny and respectful even though outspoken
comments of ordinary men.” The Privy Council “The path ofin the same judgment held as follows:
criticism is a public way: the wrong headed are permitted to err therein: provided that members of
the public abstain from imputing improper motives to those taking part in the administration of
justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to
impair the administration of justice, they are immune.” [Emphasis ours]

In Indirect Tax Practitioners Association v. R. K. Jain (supra) this Court held in paragraph 23 as follows:

"Ordinarily, the Court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19 (1) (a) of the Constitution. Only when the criticism of judicial institution transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the court would use this power."

(3) Every citizen has a fundamental right to speech, guaranteed under Article 19 of the Constitution of India. Contempt of Court is one of the restrictions on such right. We are conscious that the power under the Act has to be exercised sparingly and not in a routine manner. If there is a calculated effort to undermine the judiciary, the Courts will exercise their jurisdiction to punish the offender for committing contempt. We approve the findings recorded by the High Court that the Appellants have transgressed all decency by making serious allegations of corruption and bias against the High Court. The caustic comments made by the Appellants cannot, by any stretch of imagination, be termed as fair criticism. The statements made by the Appellants, accusing the judiciary of corruption lower the authority of the Court. The Explanation to sub-section 12 (1) of the Act provides that an apology should not be rejected merely on the ground that it is qualified or tendered at a belated stage, if the accused makes it bona fide. The stand taken by the Appellants in the contempt petition and the affidavit filed in this Court does not inspire any confidence that the apology is made bona fide. After a detailed consideration of the submissions made by both sides and the evidence on record, we are in agreement with the judgment of the High Court that the Appellants are guilty of committing contempt of Court. After considering the peculiar facts and circumstances of the case including the fact that the contemptuous statements were made in 2001, we modify the sentence to only payment of fine of Rs. 2,000/- each.

(4) The Appeal is dismissed with the said modification.

15. Criminal Appeal No. 464 of 2006, which concerns the same facts as reported in another newspaper, stands disposed of in terms of Criminal Appeal No.463 of 2006.

16. We record our appreciation for the assistance rendered by Ms. Aishwarya Bhati, Advocate as Amicus Curiae.

[ANIL R. DAVE]

[L. NAGESWARA RAO]
Perspective Publications (P) Ltd vs State Of Maharashtra,
1971 AIR 221, 1969 SCR (2) 779

Bench: Grover, A.N.

JUDGMENT:

This is an appeal from the judgment of the Bombay High Court passed in exercise of ordinary original civil jurisdiction by which the appellants were found guilty of having committed contempt of Mr. Justice Tarkunde in his judicial capacity and of the court. Appellant No. 2 D.R. Goel, who is the Editor, Printer and Publisher of Perspective Publications (P) Ltd.--appellant No. 1, was sentenced to simple imprisonment for one month together with fine amounting to Rs. 1,000/-, in default of payment of fine he was to undergo further simple imprisonment for the same period. The appellants were also directed to pay the costs incurred by the State. On behalf of the first appellant it has been stated at the bar that the appeal is not being pressed.

The background in which the impugned article was published on April 24, 1965, in a weekly periodical called "Mainstream" which is a publication brought out by the first appellant may be set out. In the year 1960 a suit was filed by one Krishnaraj Thackersey against the weekly newspaper "Blitz" and its Editor and others claiming Rs. 3 lacs as damages for libel. The hearing in that suit commenced on the original side of the Bombay High Court on June 24, 1964. The delivery of the judgment commenced on January 19, 1965 and continued till February 12, 1965. After June 24, 1964, that suit was heard from day to day by Mr. Justice Tarkunde. The suit was decreed in the sum of Rs. 3 lacs. An appeal is pending before a division bench of the High Court against that judgment.

The impugned article is stated to have been contributed by a person under the name of "Scribbler" but appellant No. 2 has taken full responsibility for its publication. Its heading was "STORY OF A LOAN and Blitz Thackersey Libel Case". It is unnecessary to reproduce the whole article which appears verbatim in the judgment of the High Court. The article has been ingeniously and cleverly worded. The salient matters mentioned in the article are these: After paying a tribute to the Indian judiciary the writesays that according to the report in "Prajatantra" a Gujarati paper architects Khare-Tarkunde Private Limited of Nagpur, hereinafter called "Khare-Tarkunde" (which is described a Firm in the article) got a loan facility of Rs. 10 lacs from the Bank of India on December 7, 1964. The partners of Khare-Tarkunde included the father, two brothers and some other relations of Justice Tarkunde who awarded a decree for Rs. 3 lacs as damages against Blitz and in favour of Thackersey. It is pointed out that the date on which Rs. 10 lacs loan facility was granted by the Bank of India was about five and a half months after the Thackersey-Blitz libel suit had begun and just over six weeks before Justice Tarkunde began delivering his "marathon judgment" on January 19, 1965. It is then said that for Rs. 10 lacs loan facility granted
to Khare-Tarkunde, the New India Assurance Co. stood guarantee and that the two Directors of the Bank of India who voted in favour of the credit of Rs. 10 lacs being granted to Khare-Tarkunde were Thackersey and Jaisinh Vithaldas (believed to be a relative of Thackersey). Next it is stated that one of the Directors of the New India Assurance that stood guarantee for the loan facility was N.K. Petigara, who was also a senior partner of M/s. Mulla & Mulla Craigie Blunt & Caroe, Solicitors of Thackersey in the Blitz-Thackersey Libel Case before Justice Tarkunde 4 Sup. CI/69--17 Emphasis is laid on the fact that Khare-Tarkunde had a capital of Rs. 5 lacs only and the balance sheet of the firm of June 1964 revealed indebtedness to various financiers to the tune of Rs. 14 lacs. Thus Khare-Tarkunde is stated to be "lucky to get against all this a handsome loan of Rs. 10 lacs from the Bank of India". The writer refers to the Code among college teachers and university professors of not examining papers when their own children and near relatives sit for examination and adds that Justice Tarkunde himself will recognize the rightness of such a Code. Referring to the unimpeachable integrity and reputation of judges of the Bombay High Court, the writer proceeds to say "there must not be allowed to be raised even the faintest whisper of any misgiving on that score." Paragraph 24 deserves to be reproduced :-

"If Sri Krishna Thackersey did not lay it bare at the time of the suit that he was one of the sponsors of a contract of which the judge's relations were the beneficiaries, it is up to the Chief Justice of the Supreme Court and the Bombay High Court including Justice Tarkunde as also the ever vigilant members of the Bar to consider all the implications of these disclosures which have distressed a common citizen like me, so that the finest traditions of our judiciary may be preserved intact."

A petition was filed before the Bombay High Court by the State of Maharashtra pointing out that the aforesaid article contained scandalous allegations and was calculated to obstruct the administration of justice and constituted gross contempt of court. The article purported to state certain facts relating to the transaction between Khare-Tarkunde and the Bank which were false and there were several mis-statements and suppression of facts some of which were:

(a) The article wrongly stated that the father of Mr. Justice Tarkunde was a partner in Khare Tarkunde; and
(b) The article falsely described the transaction as a 'loan' by the Bank to Khare- Tarkunde. In fact the said transaction was only a guarantee given by the Bank which undertook to pay to the Govt. any amount not exceeding Rs. 10 lacs in the event of Khare- Tarkunde being unable to perform its obligations. The Bank was secured by a further guarantee given by the New India Assurance Co. Ltd. undertaking to secure the Bank in the event of the Bank having to pay the said amount or any part thereof.
Appellant No. 2 who also happens to be a Director and Principal Officer of the first appellant, filed a reply raising some objections of a legal and technical nature, and took up the position that the impugned article was based on a report published in "Prajatantra" from which all the facts stated in the article were incorporated. It was asserted that certain 'major facts' had been verified by the appellant and found to be true. It was admitted that upon reading the petition for taking contempt proceedings it was found by appellant No. 2 that there were certain incorrect statements in the article. It was claimed that the article had been published in a bona fide belief that whatever was stated in the article in "Prajatantra" was true. The intention was to convey to the public at large that it was incumbent on the plaintiff Thackersey and Pettigara, one of the partners of Mulla & Mulla etc., his attorneys to inform Justice Tarkunde that the plaintiff had voted for a resolution of the Board of Directors of the Bank of India which, without reasonable doubt, would help Khare-Tarkunde in which Tarkunde happened to be a brother of the Judge. The High Court analysed the implications of the facts stated in each paragraph of the impugned article in great detail and observed:

"............... reading the article as a whole, taking care not to read into it anything more than its plain language implies and making every allowance for literary style and rhetorical flourish expressions which were often used in the arguments for the respondents it is impossible to avoid the conclusions that this article exceeds the bounds of fair and reasonable criticism. In so far as it suggests that there is some sort of casual connection between the granting of the loan to M/s. Khare-Tarkunde Pvt. Ltd., and the judgment of Mr. Justice Tarkunde in the Blitz-Thackersey case, it clearly attempts to lower the learned judge in his judicial capacity not to mention the fact that it would also tend to shake the confidence of the lay public in the High Court and impair the due administration of justice in that Court. In so far as there is a suggestion made be it ever so faint that Mr. Justice Tarkunde knew or must have known of the loan to his brother's firm before he delivered the judgment in the case, the article is malicious and 'not in good faith.'"

The High Court also examined the misstatements and inaccuracies in the impugned article and held that there was no foundation for the suggestion that Khare-Tarkunde was an impecunious concern and therefore was "lucky" to get the handsome loan nor for the suggestion that either Thackersey and his co-Directors in the Bank of India or Thackersey's solicitor and his co-Directors in the New India Assurance Co. went out of their way to grant accommodation to Khare-Tarkunde. The High Court found no basis for the insinuation that there was any connection between the loan and the judgment in the Blitz-Thackersey case or that Justice Tarkunde knew or might have Known about any loan having been granted to his brother's firm. No attempt was made to justify these suggestions in the return or in the argument before the High Court and all that was urged was that the words used by contestable did not give rise to the said
imputations or innuendos and that the contemnor was only trying to communicate to the public at large what has been stated before. It is needless to refer to the other points raised before and decided by the High Court because none of them has been argued before us.

In this appeal, counsel for appellant no. 2 has made some attempt to establish that no aspersion was cast on the integrity of Justice Tarkunde in the article nor was any imputation of dishonesty made. His second contention is that proceedings for contempt for scandalising a Judge have become obsolete and the proper remedy in such a situation is for the Judge to institute action for libel. Thirdly, it is said that there was no evidence before the High Court that Justice Tarkunde did not know about the transaction or the dealings between the firm in which his brother was a partner and the bank of which Thackersey was a director. If, it is submitted, the allegations made in the article were truthful or had been made bona fide in the belief that they were truthful the High Court ought not to have found appellant no. 2 guilty of contempt. At any rate, according to counsel, the statements contained in the article only made out a charge of bias against the Judge and if such a charge is made it cannot be regarded as contempt. On the first point our attention has been invited to the paragraphs in the article containing expression of high opinion held by the writer of the judiciary in India. It is suggested that his attempt was only to make a fair and legitimate criticism of the proceedings in the Thackersey suit against the "Blitz" weekly. It has been emphasised in the article that the damages which were awarded to the tune of Rs. 3 lakhs were almost punitive and that it was a rare phenomenon that the plaintiff (Thackersey) did not step into the witness box and also a permanent injunction had been granted preventing Blitz from printing anything based on the subject matter of litigation. The law involving freedom of press fully warranted such criticism of a judgment or of the proceedings in a suit in a court of law.

It is true that the writer of the article could exercise his right of fair and reasonable criticism and the matters which have been mentioned in some of the paragraphs may not justify any proceedings being taken for contempt but the article read as a whole leaves no doubt that the conclusions of the High Court were unexceptionable. It was a skillful attempt on the part of the writer to impute dishonesty and lack of integrity to Justice Tarkunde in the matter of Thackersey-Blitz suit, the imputation being indirect and mostly by innuendo that it was on account of the transaction and the dealings mentioned in the article that the suit of Thackersey was decreed in the sum of Rs. 3 lakhs which was the full amount of damages claimed by Thackersey. It may be that the article also suggests that Thackersey and his attorneys were to blame inasmuch as they did not inform the Judge about the transactions of Khare Tarkunde with the Bank of India with which Thackersey was associated in his capacity as a director but that cannot detract from the obvious implications and insinuations made in various paragraphs of the article which immediately create a strong prejudicial impact on the mind of the reader about the lack of honesty, integrity and impartiality on the part of Justice Tarkunde in deciding the Thackersey-Blitz suit. On the second point counsel for appellant no. 2 has relied a great deal on certain decisions of the Privy Council- and the Australian and American courts. In the matter of a Special
Reference from the Bahama Islands(1) a letter was published in a colonial newspaper containing sarcastic allusions to a refusal by the Chief Justice to accept 'a gift of pineapples. No judgment was given by the Privy Council but their lordships made a report to Her Majesty that the impugned letter though it might have been made subject of proceedings for libel was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of law and, therefore, did not constitute contempt of court. In that case there was no question of scandalising the court nor had any imputation been made against the Chief Justice in respect of any judicial proceedings pending before him or disposed of in his court. It is the next decision of the Privy Council in McLeod v. St. Aubyn(2) on which a great deal of argument has been built up before us that the courts, at least in England, have stopped committing anyone for contempt for publication of scandalising matter respecting the court after adjudication as well as pending a case before it. That case came by way of an appeal from an order of the Acting Chief Justice St. Aubyn of the Supreme Court of St. Vincent committing one McLeod to prison for 14 days for alleged contempt of court. It was said inter alia in the impugned publication that in Mr. Trifford the public had no confidence and his locus tenens, Mr. St. Aubyn was reducing the judicial character to the level of a clown. There were several other sarcastic and libelous remarks made about the Acting Chief Justice. While recognizing publication of scandalous matter of the court itself as a head of contempt of court as laid down by Lord Hardwicke in Re: Read and Huggonson(1), Lord Morris proceeded to make the oft-quoted observation "committals for contempt of Court 'by itself have become obsolete in this country even though in small colonies consisting principally of coloured population committals might be necessary in proper cases". Only a year later Lord Russel of Killowen C.J., in The Queen v. Gray(2) reaffirmed that any act done or writing published calculated to bring a court or a judge of the court in contempt, or to lower his authority, was a contempt of court. The learned Chief Justice made it clear that judges and courts were alike open to criticism and if reasonable argument or expostulation was offered against any judicial act as contrary to law or the public good no court could or would treat that as contempt of court but it was to be remembered that the liberty of the press was not greater and no less than the liberty of every subject. In that case it was held that there was personal scurrilous abuse of a judge and it constituted contempt. All the three cases which have been discussed above were noticed by the Privy Council in Debi Prasad Sharma & Ors. v. The King Emperor(3) where contempt proceedings had been taken in respect of editorial comments published in a newspaper based or a news item that the Chief Justice of Allahabad High Court in his administrative capacity had issued a circular to judicial officers enjoining on them to raise contributions to the war fund and it was suggested that he had done a thing which would lower the prestige of the court in the eyes of the public. This is what was said at page 224 :-

(2) [1899] A.C. 549.
"In In re a Special Reference from the Bahama Islands [1893] A.C. 138, the test applied by the very strong Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due, administration of the law. In Reg. v. Gray [1900] 2Q.B. 36 it was shown that the offence of scandalising the court itself was not obsolete in this country.

A very scandalous attack had been made on a judge for his judicial utterances while sitting in a criminal case on circuit, and it was with the foregoing opinions on record that Lord Russel of Killowen C.J. adopting the expression of Wilmot C.J. in his opinion in Rex v. Almon (1765) Wilmot's Notes of Opinions 243, which is the source of much of the present law on the subject, spoke of the article complained of as calculated to lower the authority of the judge."

It is significant that their lordships made a distinction between a case where there had been criticism of the administrative act of (1) 2 Ark. 471.

(2) [1900] 2 Q.B.D. 36.

(3) 70 I.A. 216.

a Chief Justice and an imputation on him for having done or omitted to have done something in the administration of justice. It is further noteworthy that the law laid down in McLeod v. St. Aubyn(1) was not followed and it was emphasised that Reg. v. Gray(2) showed that the offence of scandalising the court itself was not obsolete in England. In Rex v. Editor of the New Statesman(3) an article had been published in the New Statesman regarding the verdict by Mr. Justice Savory given in a libel action brought by the Editor of the "Morning Post" against Dr. Marie Sidences (the well known advocate of birth control) in which it was said, inter alia, "the serious point in this case, however, is that an individual owning to such views as those of Dr. Marie Stores cannot apparently hope for a fair hearing in a Court presided over by Mr. Justice Avory--and there are so many Avorys". On behalf of the contemnor McLeod v. St. Aubyn(1) was sought to be pressed into service. The Lord Chief Justice in delivering the judgment of the Court said that the principle applicable to such cases was the one stated in Reg. v. Gray(2) and relied on the observations of Lord Russel at p. 40. It was observed that the article imputed unfairness and lack of impartiality to a judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial functions. Again in Ambard v. Attorney General for Trinidad and Tobago(4) the law enunciated in Reg. v. Gray(2) by Lord Russel of Killowen was applied and it was said at page 335:

"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the
ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice, or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though spoken, comments of ordinary men."

It was, however, held that there was no evidence upon which the court could find that the alleged contemnor had exceeded fair and temperate criticism and that he had acted with untruth or malice (1) [1899] A.C. 549.

(2) [1900] 2 Q.B.D. 36.

(3) [1928] 44 T.L.R. 301.

(4) [1936] A.C. 322.

and with the direct object of bringing the administration of justice into disrepute.

Lord Denning M.R. in Reg v. Commissioner of Police of the Metropolis, Ex parte Blackburn (No.2)(1) made some pertinent observations about the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair and even outspoken comment on matters of public interest. In the words of the Master of Rolls, "those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication." In that case Mr. Quintin Hogg had written an article in "Punch" in which he had been critical of the Court of Appeal and had even made some erroneous statements. But reading of the article the salient passage of which is set out in the judgment of the Master of the Rolls makes it quite clear that there was no attempt to scandalise the Court and impute any dishonourable or dishonest motives or to suggest any lack of integrity in any particular Judge. Oswald in his book on the Contempt of Court has expressed the view that it would be going a great deal too far to say that commitments for contempt of court by scandalising the Court itself have become obsolete, and that there does not seem to be any good reason for ignoring the principles which govern the numerous early cases on the subject.
The American and the Australian cases viz., John D. Pennekamp and The Miami Herald Publishing Co. v. State of Florida(2) and Bell v. Stewart(a) to which reference has been made on be- half of appellant No. 2 can hardly be of much assistance because in this country principles have become crystallized by the decisions of the High Courts and of this Court in which the principles followed by English Courts have been mostly adopted.

We would now advert to the decisions of this Court. It was held in Bathina Ramakrishna Reddy v. The State of Madras(4) that the fact that the defamation of a Judge of a subordinate court constitutes an offence under s. 499 of the Indian Penal Code did not oust the jurisdiction of the High Court to take cognizance of the act as a contempt of court. In that case in an article in a Telugu weekly it was alleged that the Stationary Sub-Magistrate of Kovvur was known to the people of the locality for harassing (1) [1968]2 W.L.R. 1206.

(2) 328 U.S. 331.

(3) 28 Com. L.R. 419.


litigants in various ways etc. Mukherjea, J., (as he then was) who delivered the judgment described the article as a scurrilous attack on the integrity and honesty of a judicial officer. It was observed that if the allegations were false, they could not undermine the confidence of the public in the administration of justice and bring the judiciary into disrepute. The appellant there had taken the sole responsibility regarding the publication of the article and was not in a position to substantiate by evidence any of the allegations made therein. It was held that he could not be said to have acted bona fide, "even if good faith can be held to be a defence at all in a proceeding for contempt". The decision in Re: The Editor, Printer and Publisher of "The Times of India" and In re Aswini Kumar Ghose and Anr. v. Arabinda Bose & Anr.(1) is very apposite and may be next referred to. In a leading article in "The Times of India" on the judgment of this Court in Aswini Kumar Ghose v. Arabinda Bose & Anr.(2) the burden was that if in a singularly oblique and infelicitous manner the Supreme Court had by a majority decision tolled the knell of the much maligned dual system prevailing in the Calcutta and Bombay High Courts by holding that the right to practise in any High Court conferred on advocates of the Supreme Court had made the rules in force in those High Courts requiring advocates appearing on the original side to be instructed by attorneys inapplicable to them. This is what was said by Mahajan, J., (as he then was) speaking for the Court:

"No objection could have been taken to the article had it merely preached to the courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges,
it not only transgressed the limits of fair and bona fide criticism but had a clear tendency 'to affect the dignity and prestige of this Court. The article in question was thus a gross contempt of court. It is obvious that if an impression is created in the minds of the public that the judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined."

The Editor, Printer and Publisher of the newspaper tendered an apology which was accepted; but this Court concurred in the expression of views in *Ambard v. Attorney General of Trinidad* (3), a passage from which has already been extracted. The guiding principles to be followed by courts in contempt proceedings were enunciated in *Brahma Prakash Sharma & Ors. v. The State* of (1) [1953] S.C.R. 215.


(3) [1936] A.C. 322.

Uttar Pradesh(1). The judgment again was delivered by Mukherjea, J., (as he then was) and the English decisions including those of the Privy Council were discussed. It is necessary to refer only to the principles laid down for cases of the present kind i.e. scandalising the court. It has been observed that there are two primary considerations which should weigh with the court when it is called upon to exercise summary power in cases of contempt committed by "scandalising" the court itself. In the first place, the reflection on the conduct or character of a Judge in reference to the discharge of his judicial duties would not be contempt, if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. Secondly, when attacks or comments are made on a Judge or Judges disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on a judge and what really amounts to contempt of court. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. "it will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends is ,any way, to interfere with the proper administration of law." In that case it was held that the contempt was of a technical nature. This was based apparently on the reason that the Members of the Bar who had passed a resolution
attributing incompetency, lack of courtesy etc. and had referred to complaints against two officers, one a Judicial Magistrate and the other a Revenue Officer and had sent those complaints to the District Magistrate, Commissioner and the Chief Secretary in the State and secondly because very little publicity had been given to the statement.

In Re: Hira Lal Dixit & two Ors.(2) the above principles were applied and reaffirmed. In that case words which had been used in a poster which was published had the necessary implication that the judges who decided in favour of the Government were rewarded by the Government with appointments to this Court. Although this case was not one of scandalizing of the court but the question that was posed was whether the offending passage was of such character and import or made in such circumstances as would tend to hinder or obstruct or interfere with the due course of administration of justice by this Court and it was answered in the affirmative and the contemnor was held guilty of Contempt of Court. In State of Madhya Pradesh v. Revashankar(1) an application was made under s. 528 of the Code of Criminal Procedure in certain criminal proceedings containing serious aspersions against a Magistrate, Mr. N.K. Acharya. Reliance was once again placed on Brahm Prakash Sharma’s(2) case and the principles laid therein. It was held that the aspersions which had been made amounted to something more than a mere intentional personal insult to the Magistrate; they scandalised the court itself and impaired the administration of justice and that proceedings under the contempt of court could be taken against the contemnor.

There can be no manner of doubt that in this country the principles which should govern cases of the present kind are now fully settled by the previous decisions of this Court. we may restate the result of the discussion of the above cases on this head of contempt which is by no means exhaustive.

(1) It will not be right to say that committals for contempt for scandalizing the court have become obsolete.

(2) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".
(4) A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the court.

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as Contempt.


(2) [1953] S.C.R. 1169.

(5) Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Mukherjea, J. (as he then was) (Brahma Prakash Sharma's case)(1) the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

As regards the third contention no attempt was made before the High Court to substantiate that the facts stated in the article were true or were rounded on correct data. It may be that truthfulness or factual correctness is a good defence in an action for libel, but in the law of contempt there are hardly any English or Indian cases in which such defence has been recognized. It is true that in the case of Bathina Ramakrishna Reddy(2) there was some discussion about the bona fides of the person responsible for the publication but that was apparently done to dispose of the contention which had been raised on the point. It is quite clear that the submission made was considered on the assumption that good faith can be held to be a defence in a proceeding for contempt. The words "even if good faith can be held to be a defence at all in a proceeding for contempt" show that this Court did not lay down affirmatively that good faith can be set up as a defence in contempt proceedings. At any rate, this point is merely of academic interest because no attempt was made before the High Court to establish the truthfulness of the facts stated in the article. On the other hand, it was established that some of the material allegations were altogether wrong and incorrect.

Lastly the submission that the statements contained in the article made out only a charge of bias against the judge and this cannot constitute contempt has to be stated to be rejected. It is a new point and was never raised before the High Court. Moreover the suggestion that the charge in the article was of legal bias which meant that Justice Tarkunde had some sort of pecuniary interest in
Khare-Tarkunde which had the transactions with the bank of which Thackersey was a Director is wholly baseless. Counsel had to agree that Justice Tarkunde was neither a shareholder nor was there anything to show that he had any other interest in Khare-Tarkunde. The mere fact that his brother happens (1) [1953] S.C.R. 1169.

(2) [1952] S.C.R. 425., to have a holding in it cannot per se establish that Justice Tarkunde would also have some financial or pecuniary interest therein. It is not possible to accept nor has such extreme position been taken by the counsel for appellant no. 2 that there is any bar to a brother or 'a near relation of a judge from carrying on any business, profession or avocation. The entire argument on this point is wholly without substance.

The appellant No. 2 showed no contrition in the matter of publication of the impugned article. He never even tendered an unqualified apology. The High Court, in these circumstances, was fully justified in punishing him for contempt of court and in awarding the sentence which was imposed. In the impugned article there was a clear imputation of impropriety, lack of integrity and oblique motives to Justice Tarkunde in the matter of deciding the Thackersey-Blitz suit which, on the principles already stated, undoubtedly constituted contempt of court. The appeal fails and is hereby dismissed.

V.P.S.                        Appeal dismissed.
JUDGMENT:

DR. A.S, ANAND, C.J. This petition has been filed by the State of Gujarat bringing to the notice of the Court how the petitioner-Narmada Bachao Andolan-had been reacting to the interim order of this Court permitting the increase of the height of the dam to RL 85 meters and about the threats of protests, public meetings and of undertaking Satyagrahas etc., on account of that order. Reference is made particularly to the interview of Ms. Medha Patkar which appeared in the Hindustan Times of 27.6.1999 and some other newspaper reports and press releases issued by the petitioner. Our attention has also been drawn to an article which appeared in the Weekly News Magazine `Outlook` and to some portions of a Book titled "The Greater Common Good" by Ms. Arundhati Roy.

On 22nd July, 1999, we made the following order :

At the outset, our attention has been drawn to certain statements, press releases, interviews, etc., given by the petitioners themselves or by some others under the aegis of the petitioner-Narmada Bachao Andolan. Copies of some of those statements, etc., have been filed along with I.A. No. 14 by the State of Gujarat.

Our attention has also been drawn to an article in the weekly news magazine "Outlook" dated May 24, 1999 under the title "The Greater Common Good" by Ms. Arundhati Roy. A book under the same title, i.e., "The Greater Common Good" by Arundhati Roy, which appears to have been dedicated to "The Narmada, and all the life she sustains and Shripad, Nandini, Sylvie, Alok, Medha, Baba Amte and their colleagues in the NBA", has also been brought to our notice.

We have gone through the statements, the press releases, the article and certain portions of the book referred to above. Prima facie it appears to us that there is a deliberate attempt to undermine the dignity of the Court and to influence the course of justice. These writings, which present a rather one sided and distorted picture have appeared in spite of our earlier directions restraining the parties from going to the press, etc., during the pendency of the proceedings in this Court.

However, before we decide to proceed any further, we consider it proper to appoint an amicus to advise the Court about the action, if any, which is required to be taken in this respect as also in respect of the writ petition itself.
We request Mr. K.K. Venugopal, Senior Advocate, President of the Supreme Court Bar Association, to act as amicus and advise the court.

After hearing learned amicus as well as other learned counsel appearing in the case, who all rose above the case of their clients to assist the Court, we are of the opinion that the petitioner-NBA and its leader Ms. Medha Patkar have knowingly made comments on pending proceedings and have prima facie disobeyed the interim injunctions issued by this Court on 11.4.1997 and 5.11.1998. Prima facie the threats held out by the petitioners and its leaders also appear to be an attempt to prejudice or interfere with the due course of judicial proceedings. Litigants must realise that Courts cannot be forced by pressure tactics to decide pending cases in the manner in which the concerned party desires. It will be a negation of the Rule of Law if the Courts were to act under such pressure.

Some of the objectionable passages in the Book, "The Greater Common Good" by Ms. Arundhati Roy are as follows:

I stood on a hill and laughed out loud.

I had crossed the Narmada by boat from Jalsindhi and climbed the headland on the opposite bank from where I could see, ranged across the crowns of law, bald hills, the tribal hamlets of Sikka, Surung, Neemgavan and Domkhedi. I could see their airy, fragile homes. I could see their fields and the forests behind them. I could see little children with littler goats scuttling across the landscape like motorised peanuts, I knew I was looking at a civilisation older than Hinduism, slated-sanctioned (by the highest court in the land) – to be drowned this monsoon when the waters of the Sardar Sarovar reservoir will rise to submerge it."

"Why did I laugh?

Because I suddenly remembered the tender concern with which the Supreme Court Judges in Delhi (before vacating the legal stay on further construction of the Sardar Sarovar dam) had enquired whether tribal children in the resettlement colonies would have children's park to play in. The lawyers representing the Government had hastened to assure them that indeed they would, and what's more, mat there were seesaws and slides and swings in every park. I looked up at the endless sky and down at the river rushing past and for a brief, brief moment the absurdity of it all reversed my rage and I laughed. I meant no disrespect."

"Who owns this land? Who owns its rivers? Its forests?Its fish? These are huge questions. They are being taken hugely seriously by the State. They are being answered in one voice by every
"According to the Land Acquisition Act of 1894 (amended in 1984) the Government is not legally bound to provide a displaced person anything but a cash compensation. Imagine that. A cash compensation, to be paid by an Indian government official to an illiterate tribal man (the women get nothing) in a land where even the postman demands a tip for a delivery! Most tribal people have no formal title to their land and therefore cannot claim compensation anyway. Most tribal people—or let's say most small farmers—have as much use for money as a Supreme Court Judge has for a bag of fertiliser.

Ms. Arundhati Roy is not a party to the proceedings pending in this Court. She has, however, made comments on matters connected with the case being fully alive to the pendency of the proceedings in this Court. The comments made by her are prima facie a misrepresentation of the proceedings in this Court. Judicial process and institution cannot be permitted to be scandalised or subjected to contumacious violation in such a blatant manner in which it has been done by her.

While hypersensitivity and peevishness have no place in judicial proceedings—vicious stultification and vulgar debunking cannot be permitted to pollute the stream of justice. Indeed under our Constitution there are positive values like right to life, freedom of speech and expression, but freedom of speech and expression does not include freedom to distort orders of the Court and present an incomplete and one-sided picture deliberately, which has the tendency to scandalise the Court. Whatever may be the motive of Ms. Arundhati Roy, it is quite obvious that she decided to use her literally fame by misinforming the public and projecting in a totally incorrect manner, how the proceedings relating to Resettlement and Rehabilitation had shaped in this Court and distorting various directions given by the Court during the last about 5 years. The writings referred to above have the tendency to create prejudice against this Court. She seems to be wholly ignorant of the task of the Court. The manner in which she has given twist to the proceedings and orders of the Court is in bad taste and not expected from any citizen, to say the least.

We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into disrepute or ridicule. The right of criticising, in good faith in private or public, a judgment of the Court cannot be exercised, with malice or by attempting to impair the administration of justice. Indeed, freedom of speech and expression is "life blood of democracy" but his freedom is subject to certain qualifications. An offence of scandalising the Court is one such qualification, since that offence exists to protect the administration of justice and is
reasonably justified and necessary in a democratic society. It is not only an offence under the
contempt of Courts act but is sui generis. Courts are not unduly sensitive to fair comment or even
outspoken comments being made regarding their judgments and orders made objectively, fairly
and without any malice, but no one can be permitted to distort orders of the Court and
deliberately give a slant to its proceedings, which have the tendency to scandalise the Court or
bring it to ridicule, in the larger interest of protecting administration of justice.

The action of the petitioner and its leaders Ms. Medha Patkar as well as writings of Ms.
Arundhati Roy have caused us much anguish and when we express our displeasure of the action
of Ms. Arundhati Roy in making distorted writings or the manner in which the leaders of the
petitioner Ms. Medha Patkar and Mr. Dharmadhikari have, after giving assurances to this Court,
acted in breach of the injunctions, we do so out of anguish and not out of anger. May be the
parties were over-zealous in projecting their point of view on a matter involving a large segment
of tribal population, but they should not have given to themselves the liberty of acting in the
objectionable manner as already noticed. We are unhappy at the way the leaders of NBA and Ms.
Arundhati Roy have attempted to undermine the dignity of the Court. We expected better
behaviour from them.

After giving this matter our thoughtful consideration and keeping in view the importance of the
issue of Resettlement and Rehabilitation of the PAFs, which we have been monitoring for the last
five years, we are not inclined to initiate contempt proceedings against the petitioner, its leaders
or Ms. Arundhati Roy. We are of the opinion, in the larger interest of the issues pending before
us, that we need not pursue the matter any further. We, however, hope that what we have said
above would serve the purpose, and the petitioner and its leaders would hereafter desist from
acting in a manner which has the tendency to interfere with the due administration of justice or
which violates the injunctions issued by this Court from time to time.

After 22nd of July, 1999 when learned amicus was appointed, nothing has come to our notice
which may show that Ms. Arundhati Roy has continued with her objectionable writings insofar as
the judiciary is concerned. She may have by now realised her mistake. We, therefore, consider it
appropriate to now let the matter rest here and not to pursue it any further. The application (LA.
14) is accordingly disposed of.

Before parting with this order we wish to place on record our deep appreciation for the assistance
rendered to us by the amicus, Shri K.K. Venugopal, Senior Advocate and all other learned
counsel appearing in the case.

Let the main Writ Petition be now placed for directions on 4th Nov. 1999 at 2 P.M.
While I record my disapproval of the statements that are complained of, I am not inclined to take action in contempt against Medha Patkar, Shripad Dharmadhikari and Arundhati Roy because the Court's shoulders are broad enough to shrug off their comments and because the focus should not shift from the resettlement and rehabilitation of the oustees, I acknowledge with gratitude the assistance rendered to the Court by the learned amicus curiae and by learned counsel for the parties.

The L.A. (no. 14) is, accordingly, disposed of.
Punishment for Contempt  
Supreme Court Bar Association vs Union Of India & Anr  
AIR 1998 SC 1895  

J U D G M E N T DR. ANAND. J.

In Re: Vinay Chandra Mishra, (1995) 2 SCC 584, this Court found the Contemner, an advocate, guilty of committing criminal contempt of Court for having interfered with and "obstructing the course of justice by trying to threaten, overawe and overbear the court by using insulting, disrespectful and threatening language". While awarding punishment, keeping in view the gravity of the contumacious conduct of the contemner, the Court said:

"The facts and circumstances of the Present Case justify our invoking the power under Article 129 read with Article 142 of the Constitution to award to the contemner a suspended sentence of imprisonment together with suspension of his practice as and advocate in the manner directed herein. We accordingly sentence the contemner for his conviction for the offence of the criminal contempt as under:

(a) The contemner Vinay Chandra Mishra is hereby sentenced to undergo simple imprisonment for a period of six weeks. However, in the circumstances of the case, the sentence will remain suspended for a period of four years and may be activated in case the contemner is convicted for any other offence of contempt of court within the said period; and

(b) The contemner shall stand suspended from practising as an advocate for a period of three years from today with the consequence that all held by him in his capacity as an advocate, shall stand vacated by him forthwith.

Aggrieved by the direction that the "Contemner shall stand suspended from practising as an Advocate for a period of three years" issued by this Court by invoking powers under Articles 129 and 142 of the Constitution, the Supreme Court Bar Association, through its Honorary Secretary, has filed this petition under Article 32 of the Constitution of India, seeking the following relief:

"Issue and appropriate writ, direction, or declaration, declaring that the disciplinary committees of the Bar Councils set up under the Advocates Act, 1961, alone have exclusive jurisdiction to inquire into and suspend or debar an advocate from practising law for professional or other misconduct, arising out of punishment imposed for contempt of court or otherwise and further declare that the Supreme Court of India or any High Court in exercise of its inherent jurisdiction has no such original jurisdiction, power or authority in that regard notwithstanding the contrary view held by this Hon'ble Court in Contempt Petition (Crl.) No. 3 of 1994 dated 10.3.1995."
"The question which arises is whether the Supreme Court of India can while dealing with Contempt Proceedings exercise power under Article 129 of the Constitution or under Article 129 read with Article 142 of the Constitution or under Article 142 of the Constitution can debar a practicing lawyer from carrying on his profession as a lawyer for any period whatsoever. We direct notice to issue on the Attorney General of India and on the respondents herein. Notice will also issue on the application for interim stay. Having regard to the importance of the aforesaid question we further direct that this petition be placed before a Constitution Bench of this Court.”

That is how this Writ petition has been placed before this Constitution Bench.

The only question which we are called upon to decide in this petition is whether the punishment for established contempt of Court committed by an Advocate can include punishment to debar the concerned advocate from practice by suspending his licence (sanad) for a specified period, in exercise of its powers under Article 129 read with Article 142 of the Constitution of India.

Dealing with this issue, the three judge Bench in vinay Chandra Mishra's case (Supra), opined:

"The question now is what punishment should be meted out to the contemner. We have already discussed the contempt jurisdiction of this Court under Article 129 of the Constitution. That jurisdiction is independent of the statutory law of contempt enacted by Parliament under Entry 77 of List I of Seventh Schedule of the Constitution. The jurisdiction of this Court, under Article 129 is sui generis. The jurisdiction to take cognizance of the contempt as well as to award punishment for it being constitutional, it cannot be controlled by any statute. Neither, therefore, the Contempt of Courts Act, 1971 nor the Advocates Act, 1981 can be pressed into service to restrict the said jurisdiction.

What is further, the jurisdiction and powers of this Court under Article 142 which are supplementary in nature and are provided to do complete justice in any matter, are independent of the jurisdiction and powers of this Court under Article 129 which cannot be trammeled in any way by any statutory provision including the provisions of the Advocates Act or the contempt jurisdiction of the court including of this Court and the contempt of Courts Act, 1971 being a statute cannot denude, restrict or limit the powers of this Court to take action for contempt under Article 129.

Mr. Kapil Sibal, learned senior counsel appearing for the Supreme Court Bar Association, and Dr. Rajiv Dhawan, senior advocate appearing for the Bar Council of U.P. and Bar Council of India assailed the correctness of the above findings and submitted that powers conferred on this Court by Article 142, though very wide in their aptitude, can be exercised only to "do complete justice in any case or cause pending before it " and since the issue of 'professional misconduct' is not the
subject matter of "any cause" pending before this court while dealing with a case of contempt of court, it could not make any order either under Article 142 or 129 to suspend the licence of an advocate contemner, for which punishment, statutory provisions otherwise exist. According to the learned counsel, a court of record under Article 129 of the Constitution does not have any power to suspend the licence of a lawyer to practice because that is not a punishment which can be imposed under its jurisdiction to punish for contempt of Court and that Article 142 of the Constitution cannot also be pressed into aid to make an order which has the effect of assuming "jurisdiction which expressly vests in another statutory body constituted under the Advocates Act, 1961. The learned Solicitor General submitted that under Article 129 read with Article 142 of the Constitution, this Court can neither create a "jurisdiction" nor created a "punishment" not otherwise permitted by law and that since the power to punish an advocate (for "professional misconduct") by suspending his licence vests exclusively in a statutory body constituted under the Advocates Act, this Court cannot assume that jurisdiction under Article 142 or 129 or even under Section 38 of the Advocates Act, 1961.

To appreciate the submissions raised at the bar, let us first notice Article 129 of the Constitution, it reads:

"129. Supreme Court to be a court of record. -
The Supreme Court shall be a court of record and shall have all the power of such a court including the power of punish for contempt of itself."

The Article on its plain language vests this Court with all the powers of a court of record including the power to punish for contempt of itself.

"The contempt jurisdiction of courts of record forms part of their inherent jurisdiction. The power that courts of record enjoy to punish contempts is part of their inherent jurisdiction. The juridical basis of the inherent jurisdiction has been well described by Master Jacob as being:
'the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.' Such a power is not derived from statute nor truly from the common law but instead flows from the very concept of a court of law."

Article 142 of the Constitution reads:-

"142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc. - (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before, it, and any decree
so passed or order so made shall to enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court Shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

It is, thus, seen that the power of this court in respect of investigation or punishment of any contempt including contempt of itself, is expressly made 'subject to the provisions of any law made in this behalf by the parliament' by Article 142(2). However, the power to punish for contempt being inherent in a court of record, it follows that no act of parliament can take away that inherent jurisdiction of the Court of Record to punish for contempt and the Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts, though such a legislation may serve as a guide for the determination of the nature of punishment which this court may impose in the case of established contempt. Parliament has not enacted any law dealing with the powers of the Supreme Court with regard to investigation and punishment of contempt of itself. (We shall refer to Section 15 of the Contempt of Courts Act, 1971, later on) and this Court, therefore exercises the power to investigate and punish for contempt of itself by virtue of the powers vested in it under Articles 129 and 142(2) of the Constitution of India.

After the submission of the Sanyal Committee Reports, the contempt of Courts Act, 1952 was repealed and replaced by the contempt of Courts Act, 1971 which Act was enacted to "define and limit the powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto". It would be proper to notice some of the relevant provisions of the 1971 Act at this stage.

Section 2 (a), (b) and (c) of the Contempt of Courts Act, 1971 define contempt of court as follows:-

"2. Definitions. - In this Act, unless the context otherwise requires,-

(a) 'contempt of court' means

   (i) civil contempt or criminal contempt;

(b) 'Civil contempt' means

   willful disobedience to an
judgment, decree, direction, order, writ or other process of a court or willful breach of an under
taking given to a court;

(c) 'criminal contempt' means the publication whether by words, spoken or written, or by signs, or
by visible representations, or otherwise) of any matter or the doing of any other act whatsoever
which-

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court, or
(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings;
or
(iii) interferes or tends to interfere with or obstructs or tends to obstruct, the administration of
justice in any other manner."

Section 10 provides :-

" Sec. 10. Power of High Court to punish contempts of subordinate courts. - Every High Court
shall have and exercise the same jurisdiction, powers ad authority, in accordance jurisdiction,
powers and authority, in accordance with the same procedure and practice, in respect of
contempts of courts subordinate to it as it has and exercises in respect of contempts of itself:

Provided that no High Court shall take cognizance of a contempt alleged to have been committed
in respect of a court subordinate to it where such contempt is an offence punishable under the
Indian Penal Code, 1860 (45 of 1860)." The punishment for committing contempt of court is
provided in Section 12 of the 1971 Act which reads:-

"12. Punishment for contempt of court.- (1) Save as otherwise expressly provided in this Act or in
any other law, a contempt of court may be punished with simple imprisonment for a term which
may extend to six months, or with fine which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may be remitted on
apology being made to the satisfaction of the court.

Explanation.- An apology shall not be rejected merely on the ground that it is qualified or
conditional if the accused makes it bona fide.

(2) Notwithstanding any thing contained in any law for the time being in force, no court shall
impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect
of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil
contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence
of imprisonment is necessary, shall, instead of sentencing him to simple imprisonment, direct that
he be detained in a civil prison for such period not exceeding six months as it may think fit.
A careful reading of sub-section (2) of Section 12 reveals that the Act places an embargo on the court not to impose a sentence in excess of the sentence prescribed under sub-section (1). A close scrutiny of sub-section (3) of Section 12 demonstrates that the legislature intended that in the case of civil contempt a sentence of fine alone should be imposed except where the court considers that the ends of justice make it necessary to pass a sentence of imprisonment also. Dealing with imposition of punishment under Section 12(3) of the Act, in the case of Smt. Pushpaben and another vs. Narandas V. Badiani and another. (1979) 2 SCC 394, this Court opined:

"A close and careful interpretation of the extracted section (Section 12(3)) leaves no room for doubt that the legislature intended that a sentence of fine alone should be imposed in normal circumstances. The statute, however, confers special power on the Court to pass a sentence of imprisonment if it thinks that ends of justice so require. Thus before a Court passes the extreme sentence of imprisonment, it must give special reasons after a proper application of its mind that a sentence of imprisonment along is called for in a particular situation. Thus, the sentence of imprisonment is an exception while sentence of fine is the rule."

Section 10 of the 1971 Act like Section 2 of the 1926 Act and Section 4 of the 1952 Act recognises the power which a High Court already possesses as a Court of Record for punishing for contempt of itself, which jurisdiction has now the sanction of the Constitution also by virtue of Article 215. The Act, however, does not deal with the powers of the Supreme Court to try or punish a contemner for committing contempt of the Supreme Court or the courts subordinate to it and the constitutional provision contained in Articles 142(2) and 129 of the Constitution alone deal with the subject.

In S.K. Sarkar, Member, Board of Revenue vs. Vinay chandra Misra, (1981) 1 SCC 436, this Court opined:

"Articles 129 and 215 preserve all the powers of the Supreme Court and the High Court, respectively, as a Court of Record which include the power to punish the contempt of itself. As pointed out by this Court in Mohd. Ikram Hussain v. State of U.P. (AIR 1964 SC 1625), there are no curbs on the power of the High Court to punish for contempt of itself except those contained in the Contempt of courts Act. Articles 129 and 215 do not define as to what constitutes contempt of court. Parliament has, by virtue of the aforesaid entries in List I and List III of the Seventh Schedule, Power to define and limit the powers of the Courts in punishing contempt of court and to regulate their procedure in relation thereto. Indeed, this is what is stated in the preamble of the Act of 1971".

(Emphasis supplied) In Sukhdev Singh v. Hon'ble C.J.S. Teja Singh & Ors.
AIR 1954 SCR 454, while recognising that the power of the High Court to institute proceedings for contempt and punish the contemner when found necessary is a special jurisdiction which is inherent in all courts of Record, the Bench opined that "the maximum punishment is now limited to six month's simple imprisonment or a fine of Rs. 2,000/- or both" because of the provision of Contempt of Courts Act.

The nature and types of punishment which a court of record can impose, in a case of established contempt, under the common law have now been specifically incorporated in the contempt of Courts Act. 1971 in so far as the High Courts are concerned and therefore to the extent the contempt of Courts Act 1971 identifies the nature of types of punishments which can be awarded in the case of established contempt, it does not impinge upon the inherent powers of the High Court under Article 215 either. No new type of punishment can be created or assumed. As already noticed, the parliament by virtue of Entry 77, List I is competent to enact a law relating to the powers of the Supreme Court with regard to contempt of itself and such a law may prescribe the nature of punishment which may be imposed on a contemner by virtue of the provisions of Article 129 read with Article 142(2). Since, no such law has been enacted by the parliament, the nature of punishment prescribed, under the Contempt of Courts Act, 1971, may act as a guide for the Supreme Court but the extent of punishment as prescribed under that Act can apply only to the High Courts, because the 1971 Act ipso facto does not deal with the contempt jurisdiction of the Supreme Court, except that Section 15 of the Act prescribes procedural mode for taking cognizance of criminal contempt by the supreme Court also. Section 15, however, is not a substantive provision conferring contempt jurisdiction. The judgment in Sukhdev Singh's case (supra) as regards the extent of "maximum punishment" which can be imposed upon a contemner must, therefore, be construed as dealing with the powers of the High Courts only and not of this Court in that behalf. We are, therefore, doubtful of the validity of the argument of the learned solicitor General that the extent of punishment which the supreme Court can impose in exercise of its inherent powers to punish for contempt of itself and/or of subordinate courts can also be only to the extent prescribed under the contempt of Courts Act, 1971. We, however, do not express any final opinion on that question since that issue strictly speaking, does not arise for our decision in this case. The question regarding the restriction or limitation on the extent of punishment, which this Court may award while exercising its contempt jurisdiction may be decided in a proper case, when so raised.

The suspension of an Advocate from practice and his removal from the State roll of advocates are both punishments specifically provided for under the Advocates Act, 1961, for proven "professional misconduct" of an advocate. While exercising its contempt jurisdiction under Article 129, the only cause or matter before this Court is regarding commission of contempt of court. There is no cause of professional misconduct, properly so called, pending before the Court. This Court, therefore, in exercise of its jurisdiction under Article 129 cannot take over the jurisdiction of the disciplinary committee of the Bar Council of the State or the Bar Council of India to punish
an advocate by suspending his licence, which punishment can only be imposed after a finding of 'professional misconduct' is recorded in the manner prescribed under the Advocates Act and the Rules framed thereunder.

The contempt of court is a special jurisdiction to be exercised sparingly and with caution, whenever an act adversely affects the administration of justice or which tends to impede its course or tends to shake public confidence in the judicial institutions. This jurisdiction may also be exercised when the act complained of adversely affects the Majesty of Law or dignity of the courts. The purpose of contempt jurisdiction is to uphold the majesty and dignity of the Courts of law. It is an unusual type of jurisdiction combining "the jury, the judge and the hangman" and it is so because the court is not adjudicating upon any claim between litigating parties. This jurisdiction is not exercised to protect the dignity of an individual judge but to protect the administration of justice from being maligned. In the general interest of the community it is imperative that the authority of courts should not be imperiled and there should be no unjustifiable interference in the administration of justice. It is a matter between the court and the contemner and third parties cannot intervene. it is exercised in a summary manner in aid of the administration of justice, the majesty of law and the dignity of the courts. No such act can be permitted which may have the tendency to shake the public confidence in the fairness and impartiality of the administration of justice.

The power of the Supreme Court to punish for contempt of court, though quite wide, is yet limited and cannot be expanded to include the power to determine whether an advocate is also guilty of "Professional misconduct" in a summary manner, giving a go bye to the procedure prescribed under the Advocates Act. The power to do complete justice under Article 142 is in a way, corrective power, which gives preference to equity over law but it cannot be used to deprive a professional lawyer of the due process contained in the Advocates Act 1961 by suspending his licence to practice in a summary manner, while dealing with a case of contempt of court.

The plenary powers of this court under Article 142 of the Constitution are inherent in the court and are complementary to those powers which are specifically conferred on the court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers also exists independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power, exists as a separate and independent basis of jurisdiction, apart from the statutes. It stands upon the foundation, and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties. This plenary
jurisdiction is, thus, the residual source of power which this court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the court by Article 142 being curative in nature cannot be construed as powers which authorise the court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purpose of the Article viz. to do complete justice between the parties. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

Indeed, these constitutional powers can not, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject.

In Delhi Judicial Service Association Tis Hazari vs. State of Gujarat & Ors. etc. etc. (1991 (3) SCR 936) the following questions fell for determination.

"(a) whether the Supreme Court has inherent jurisdiction or power to punish for contempt of subordinate or inferior courts under Article 129 of the Constitution, (b) whether the inherent jurisdiction and power of the Supreme Court is restricted by the Contempt of Courts Act, 1971, (c) whether the incident interfered with the due administration of justice and constituted contempt of court, and (d) what punishment should be awarded to the contemners found guilty of contempt."

The Court observed:

"Article 142(1) of the constitution provides that Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any 'cause' or 'matter' pending before it. The expression 'cause' or 'matter' would include any proceeding
pending in court and it would cover almost every kind of proceeding in court including civil or criminal. The inherent power of this Court under Article 142 coupled with the plenary and residuary powers under Articles 32 and 136 embraces power to quash criminal proceedings pending before any court to do complete justice in the matter before this Court."

Mr. Nariman urged that Article 142(1) does not contemplate any order contrary to statutory provisions. He placed reliance on the Courts observations in Prem Chand Garg Vs. Excise Commissioner, U.P. Allahabad 91963 Supp. 1 SCR 885 at 889) and A.R. Anthulay Vs. R.S. Nayak and Anr. (1988 (2) SCC 602) where the Court observed that though the powers conferred on this Court under Article 142(1) are very wide, but in exercise of that power the court cannot make any order plainly inconsistent with the express statutory provisions of substantive law. It may be noticed that in prem Chand Garg's and Antulay's case (supra) observations with regard to the extent of this Court's power under Article 142(1) were made in the context of fundamental rights. Those observations have no bearing on the question in issue as there is no provision in any substantive law restricting this Court's power to quash proceedings pending before subordinate court. This Court's power under Article 142(1) to do "complete justice" is entirely of different level and of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court has selling of a cause or matter before it, it has power to issue any order or direction to do "complete justice" in the matter. This constitutional power of the Apex Court cannot be limited or restricted by provisions contained in statutory law." The Bench went on to say:

"No enactment made by Central or State Legislature can limit or restrict the power of this Court under Article 142 of the constitution, the court must take into consideration the statutory provisions regulating the matter in dispute. What would be the need of "complete justice" in a cause or matter would depend upon the facts and circumstances of each case and while exercising that power the court would take into consideration the express provisions of a substantive statute. Once this Court has taken seisin of a case, cause or matter, it has power to pass any order or issue direction as may be necessary to do complete justice in the matter. This has been the consistent view of this Court as would appear from the decisions of this court in State of U.P. Vs. Poosu & Anr. (1976 (3) SCR 1005; Ganga Bishan & Ors.Vs. Jai Narain (1986 (1) SCC 75; Navnit R. Kamani & Ors.Vs. Jai Narain (1988 (4) SCC 387); B.N. Nagarajan &Ors.vs. State of Mysore & Ors. (1986 (3) SCR 682): Special Reference No. 1 of 1964, (supra), and Harbans Singh vs. State of U.P. Ors. (supra)."

In a given case, an advocate found guilty of committing contempt of court may also be guilty of committing "professional misconduct" depending upon the gravity or nature of his contumacious conduct, but the two jurisdictions are separate and distinct and exercisable by different forums by following separate and distinct procedures. The power to punish an Advocate, by suspending his licence or by removal of his name from the roll of the State bar Council, for proven professional
misconduct, vests exclusively in the statutory authorities created under the Advocates Act, 1961, while the jurisdiction to punish him for committing contempt of court vests exclusively in the courts.

After the coming into force of the Advocates Act, 1961, exclusive power for punishing an advocate for "professional misconduct" has been conferred on the concerned state Bar Council and the Bar Council of India. That Act contains a detailed and complete mechanism for suspending or revoking the licence of an advocate for his "professional misconduct". Since, the suspension or revocation of licence of an advocate has not only civil consequence but also penal consequence, the punishment being in the nature of penalty, the provisions have to be strictly construed. Punishment by way of suspending the licence of an advocate can only be imposed by the competent statutory body after the charge is established against the Advocate in a manner prescribed by the Act and the Rules framed thereunder.

Let us now have a quick look at some of the relevant provisions of the Advocates Act, 1961.

The Act, besides laying down the essential functions of the Bar Council of India provides for the enrollment of advocates and setting up of disciplinary authorities to chastise and, if necessary, punish members of the profession for professional misconduct. The punishment may include suspension from practice for a specified period or reprimand or removal of the name from the roll of the advocates. Various provisions of the Act deal with functions of the State Bar Councils and the Bar Council of India. We need not, however, refer to all those provisions in this judgment except to the extent their reference is necessary.

According to Section 30, every advocate whose name is entered in the Stat roll of advocates shall be entitled, as of right, to practice, throughout the territories to which the Act extends, in all courts including the Supreme Court of India. Section 33 provides that no person shall, on or after the appointed day, be entitled to practice in any court or before any authority or person unless he is enrolled as an advocate under the Act.

Chapter V of the Act deals with the 'conduct of Advocate'. After a complaint is received alleging professional misconduct by an advocate by the Bar Council, the Bar Council entrusts the inquiry into the case of misconduct to the Disciplinary Committee constituted under Section 9 of the Act. Section 35 lays down that if on receipt of a complaint or otherwise, a state Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. Section 36, provides that where on receipt of a complaint or otherwise, the Bar Council of India has reason to believe that any advocate whose name is entered on any State roll is guilty of professional or other misconduct, it shall refer the case to the disciplinary Committee. Section 37 provides for an appeal to the Bar
Council of India against an order made by the disciplinary committee of a state Bar Council. Any person aggrieved by an order made by the disciplinary committee of the Bar Council of India may prefer an appeal to the Supreme Court of India under Section 38 of the Act.

Section 42(1) of the Act confers on the Disciplinary Committee of the Bar Council, powers of a civil court under the code of Civil procedure and section 4292 (hereinafter referred to as the Rules) enacts that its proceedings shall be "deemed" to be judicial proceeding for the purpose mentioned therein.

Section 49 of the Act lays down that the Bar Council of India may make rules for discharging its functions under the Act and in particular such Rules may prescribe inter-alia the standards of professional conduct to be observed by the advocates and the procedure to be followed by the Disciplinary Committees of the Bar Council while dealing with a case of professional misconduct of an advocate. The Bar Council of India has framed rules called 'The Bar Council of India Rules' (hereinafter referred to as the Rules) in exercise of its rule making power under the Advocate Act 1951.

Part VII of the Rules deals with disciplinary proceedings against the advocates. In chapter I of the part VII provisions have been made to deal with complaints of professional misconduct received against advocates as well as for the procedure to be followed by the Disciplinary committees of the State Bar Council and the Bar Council of India to deal with such complaints received under Sections 35 and 36 of the Act. Rule 1 of Chapter I of part VII of the Rules provides that a complaint against an advocate shall be in the form of a petition duly signed and verified as required under the code of Civil procedure, and shall be accompanied by the fees as prescribed by the Rules. On the complaint being found to be in order the same shall be registered and placed before the Bar Council for such order as it may deem it to pass. Sub-rule (2) provides that before referring a complaint made under Section 35(1) of the Act, to one of its disciplinary committees the Bar Council may require the complainant to furnish better particulars and the Bar Council "may also call for the comments from the advocate complained against ."

Rules 3 and 4 of Chapter I and VII provide for the procedure to be followed in dealing with such complaints. These rules read:

" 3.(1) After a complaint has been referred to a Disciplinary Committee by the Bar Council, the registrar shall expeditiously send a notice to the Advocate concerned requiring him to show cause within a specified date on the complaint made against him and to submit the statement of defence, documents and affidavits in support of such defence, and further informing him that in case of his non-appearance on the date of hearing fixed, the matter shall be heard and determined in his absence. Explanation: Appearance includes, unless otherwise directed, appearance by an Advocate or through duly authorised representative.
(2) If the Disciplinary Committee requires or terms, a complainant may file a replication within such time as may be fixed by the committee.

(3) The Chairman of the Disciplinary Committee Hall fix the date, hour and place of the enquiry which shall not ordinarily be later than thirty days from the receipt of the reference. The Registrar shall give notice of such date, hour and piece to the complainant or other person aggrieved. The advocate concerned and the Attorney General or He Additional Solicitor General of India or the Advocate General as the case may be, and shall also serve on them copies of the complaint and such other documents mentioned in Rule 24 of this Chapter as the Chairman of the Committee may direct at least ten days before the date fixed for the enquiry.

Rules 5, 6 and 7 deal with the manner of service of notice, summoning of witnesses and appearance of the parties before the disciplinary committee. At any stage of the proceedings, the disciplinary committee may appoint an advocate to appear as amicus curiae and in case either of the parties absent themselves, the committee may; proceed ex parte against the absenting party and decide the case.

Sub-rule (1) of Rule 8 provides:

"This Disciplinary Committee shall hear the Attorney General or the Additional Solicitor General of India or the Advocate General, as the Case may be or their Advocate, and parties or their Advocates, if they desire to be heard, and determine the matter on documents and affidavits unless it is of the opinion that it should be in the interest of justice to permit cross examination of the deponents or to take oral evidence, in which case the procedure for the trial of civil suits shall as far as possible be followed."

Rules 9 and 10 deal with the manner of recording evidence during the enquiry into a complaint of professional misconduct and the maintenance of record by the committee.

Rule 14(1) lays down as follows:

"The finding of the majority of the numbers of the Disciplinary Committee shall be the finding of the Committee. The reason given in support of the finding may be given in the form of a judgement, and in the case of a difference of opinion, any member dissenting shall be entitled to record his dissent giving his own reason. It shall be competent for the Disciplinary Committee to award such costs as it thinks fit."

Rule 16 provides:
"16(1). The Secretary of a State Bar Council shall send to the Secretary of the Bar Council India quarterly sentiments complaints received and the stage of the proceedings before the state Bar Council and Disciplinary Committees in such manner as may be specified from time to time.

(2) The Secretary of the Bar Council of India may however call for such further statements and particulars as he considers necessary."

An appeal from the final order of the disciplinary committee of the Bar Council of a State is provided to the Bar Council of India under Section 37 of the Act and the procedure for filing such an appeal is detailed in Rules 19(2) to 31.

The object of referring to the various provisions of the Advocates Act, 1961 and the Rules framed thereunder is to demonstrate that an elaborate and detailed procedure, almost akin to that of a regular trial of a case by a court, has been prescribed to deal with a complaint of professional misconduct against an advocate before he can be punished by the Bar Council by revoking or suspending his licence or even for reprimanding him.

The Bar Councils therefore entertain cases of misconduct against advocates. The Bar Councils are to safeguard the rights, privilege and interests of advocates. The Bar Councils is a body corporate. The disciplinary committees are constituted by the Bar Council. The Bar Council is not the same body as its disciplinary committee. One of the principal functions of the Bar Council in regard to standards of professional conduct and etiquette of advocates is to receive complaints against advocates and if the Bar Council has reason to believe that any advocate has been guilty of professional or other misconduct it shall refer the case for disposal to its disciplinary committee. A most significant feature is that no litigant and no member of the public can straightway commence disciplinary proceedings against an advocate. It is the Bar Council of a State which initiates the disciplinary proceedings.

Thus, after the coming into force of the Advocates Act, 1961 with effect from 19th May 1961, matters connected with the enrollment of advocates as also their punishment for professional misconduct is governed by the provisions of that Act only. Since, the jurisdiction to grant licence to a law graduate to practice as an advocate vests exclusively in the Bar Councils of the concerned State, the jurisdiction to suspend his licence for a specified term or to revoke it also vests in the same body.

Keeping in view the elaborate procedure prescribed under the Advocates Act 1961 and the Rules framed thereunder it follows that a complaint of professional misconduct is required to be tried by the disciplinary committee of the Bar Council, like the trial of a criminal case by a court of law and an advocate may be punished on the basis of evidence led before the disciplinary committee.
of the Bar Council after being afforded an opportunity of hearing. The delinquent advocate may be suspended from the rolls of the advocates or imposed any other punishment as provided under the Act.

It is therefore, not permissible for this court to punish an advocate for "professional misconduct" in exercise of the appellate jurisdiction by convening itself as the statutory body exercising "original jurisdiction". Indeed, if in a given case the concerned Bar Council on being apprised of the contumacious and blame worthy conduct of the advocate by the High Court or this Court does not take any action against the said advocate, this court may well have the jurisdiction in exercise of its appellate powers under Section 38 of the Act read with Article 142 of the Constitution to proceed suo moto and send for the records from the Bar Council and pass appropriate orders against the concerned advocate. In an appropriate case, this Court may consider the exercise of appellate jurisdiction even suo moto provided there is some cause pending before the concerned Bar Council, and the Bar Council does "not act" or fails to act, by sending for the record of that cause and pass appropriate orders.

Thus, to conclude we are of the opinion that this court cannot in exercise of its jurisdiction under Article 142 read with Article 129 of the Constitution, while punishing a contemner for committing contempt of court, also impose a punishment of suspending his licence to practice, where the contemner happens to be an Advocate. Such a punishment cannot even be imposed by taking recourse to the appellate powers under Section 38 of the Act while dealing with a case of contempt of court (and not an appeal relating to professional misconduct as such). To that extent, the law laid down in Re: Vinay Chandra Mishra, (1995) 2 S.C.C. 584 is not good law and we overrule it.

An Advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that Advocate by either debarring him from practice or suspending his licence, as may be warranted, in the facts and circumstances of each case.

In V.C. Mishra's case, the Bench, relied upon its inherent powers under Article 142, to punish him by suspending his licence, without the Bar Council having been given any opportunity to deal with his case under the Act. We cannot persuade ourselves to agree with that approach. It must be remembered that wider the amplitude of its power under Article 142, the greater is the need of care for this Court to see that the power is used with restraint without pushing back the limits of the constitution so as to function within the bounds of its own jurisdiction. To the extent, this Court makes the statutory authorities and other organs of the State perform their duties in accordance with law, its role is unexceptionable but it is not permissible or the Court to "take over" the role of the statutory bodies or other organs of the State and "perform" their functions.
Upon the basis of what we have said above, we answer the question posed in the earlier part of this order, in the negative. The writ petition succeeds and is ordered accordingly.
Pushpaben & Anr vs Narandas V. Badiani & Anr,
1979 AIR 1536

J. Fazalali, Syed Murtaza

JUDGMENT:

The Judgment of the Court was delivered by FAZAL ALI, J.-This is an appeal under S. 19 of the Contempt of Courts Act (hereinafter called the Act) against an order of the High Court of Bombay convicting the appellants for a Civil Contempt and sentencing them to one month's simple imprisonment. The facts of the case have been fully detailed by the High Court and it is not necessary for us to repeat the same all over again. It appears that Respondent No. 1 had given a loan of Rs. 50,000/- to the appellants on certain conditions. Somehow or other, the loan could not be paid by the appellants as a result of which Respondent No. 1 filed a complaint under S. 420 I.P.C. against the appellants. While the complaint was pending before the Court of the Magistrate, the parties entered into a compromise on 22-7-1971 under which the appellants undertook to pay the loan of Rs. 50,000/- with simple interest @ 12% per annum on or before 21-7-1972. An application was filed before the Court for allowing the parties to compound the case and acquit the accused. The Court after hearing the parties, passed the following order:

"The accused given an undertaking to the court that he shall repay the sum of Rs. 50,000/- to the complainant on or before 21-7-1972 with interest as mentioned on the reverse. In view of the undertaking, I permit the compromise and acquit the accused".

It is obvious, therefore, that the Court permitted the parties to compound the case only because of the undertaking given by the appellants.

Thereafter, it appears, that the undertaking was violated and the amount of loan was not paid to the Respondent No. 1 at all. The respondent, therefore, moved the High Court for taking action for contempt of Court against the appellants as a result of which the present proceedings were taken against them. The High Court came to the conclusion that the appellants had committed a wilful disobedience of the undertaking given to the Court and were, therefore, guilty of civil contempt as defined in S. 2(b) of the Act. Hence, this appeal before us.

Mr. V. S. Desai appearing in support of the appeal has raised two short points before us. He has submitted that there is no doubt that the appellants had violated the undertaking but in the circumstances it cannot be said that the appellants had committed a wilful disobedience of the orders of the Court. So far as this point is concerned, we fully agree with the High Court. In the circumstances, the appellants undoubtedly committed wilful disobedience of the order of the court by committing a serious breach of the undertaking given to the Court on the basis of which
alone, the appellants had been acquitted. For these reasons, the first contention put forward by Mr. Desai, is overruled.

It is, then, contended that under S. 12(3), normally the sentence that should be given to an offender who is found guilty of civil contempt, is fine and not imprisonment, which should be given only where the Court is satisfied that ends of justice require the imposition of such a sentence. In our opinion, this contention of learned counsel for the appellants is well-founded and must prevail. Sub-section 3 of S. 12 reads thus:-

"Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the Court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit".

A close and careful interpretation of the extracted section leaves no room for doubt that the Legislature intended that a sentence of fine alone should be imposed in normal circumstances. The statute, however, confers special power on the Court to pass a sentence of imprisonment if it think that ends of justice so require. Thus before a Court passes the extreme sentence of imprisonment, it must give special reasons after a proper application of its mind that a sentence of imprisonment alone is called for in a particular situation Thus, the sentence of imprisonment is an exception while sentence of fine is the rule.

Having regard to the peculiar facts and circumstances of this case, we do not find any special reason why the appellants should be sent to jail by sentencing them to imprisonment. Furthermore, respondent No. 1 before us despite service, has not appeared to support the sentence given by the High Court. Having regard to these circumstances, therefore, we are satisfied that the present case, squarely falls in the first part of S. 12(3) and a sentence of fine alone should have been given by the High Court. We, therefore, allow this appeal to this extent that the sentence of imprisonment passed by the High Court is set aside and instead the appellants are sentenced to pay a fine of Rs. 1000/- each. In case of default, 15 days simple imprisonment. Four weeks time to pay the fine.

P.B.R.  
Appeal allowed in part.
Daroga Singh & Ors vs B.K. Pandey
(2004) 5 SCC 26

Bench: R.C. Lahoti, Bhan.

JUDGMENT:

The instant criminal appeals arising from a common judgment relating to the same incident, depict a rare, unfortunate and condemnable act of the police officials who contrary to the duty enjoined upon them to protect and maintain law and order, indulged in the act of attacking in a pre-planned and calculated manner Shri D.N. Barai, Ist Additional District and Sessions Judge, in his court room and Chambers on 18th November, 1997 at Bhagalpur in the State of Bihar.

In Sessions trial No. 592 of 1992, the Investigating Officer (Jokhu Singh) was examined as a witness on 7th May, 1997 in the Court of Shri D.N. Barai, Ist Additional District and Sessions Judge, Bhagalpur. As the cross-examination could not be concluded the case was adjourned to 26th May, 1997. Thereafter the case was adjourned to several dates but this witness did not appear for the cross-examination. A show cause notice was issued against Jokhu Singh through Superintendent of Police, Madhepura, requiring him to appear on 11th June, 1997. In spite of that Jokhu Singh did not appear. On 14th July, 1997, a wireless message was sent to him through Superintendent of Police to appear in the court on 5th August, 1997. Once again the witness did not turn up. The Court, therefore, having no other option issued a notice to Jokhu Singh to show cause why proceedings under the Contempt of Courts Act (hereinafter referred to as 'the Act') be not initiated against him. Ultimately, on 27th August, 1997 the case was adjourned to 20th September, 1997 and to procure his presence, non-bailable warrant was issued. On this date also the witness did not turn up. He did not file reply to the show cause notice either. On 17th November, 1997, Jokhu Singh appeared in the court in the afternoon. Having regard to the previous order of non-bailable warrant of arrest, he was remanded to judicial custody. A petition for bail was filed on his behalf after the court hours. It was directed that the same be placed for hearing on the next date.

Shri K.D. Choudhary, one of the appellants who was an office bearer of the Policemen's Association at District Level and was posted as SHO of the Police Station in the evening of the same day went to the Chambers of Shri Barai for release of Shri Jokhu Singh on execution of a personal bond. Shri Barai did not agree. Thereafter he approached the District Magistrate and on the basis of his advice he met the District Judge and renewed his demand for release of Jokhu Singh, which was declined.
On 18th November, 1997, when the bail petition of Jokhu Singh was taken up, the learned counsel appearing on his behalf made a prayer seeking withdrawal of the bail application. Accordingly, the bail application was dismissed as withdrawn. Soon thereafter, a large number of police officers (without uniform), armed with lathis and other weapons and shouting slogans against Shri Barai, barged into his court room. The court peon Shri Bishundeo Sharma who tried to shut the door was brutally assaulted. Shri Barai apprehending danger to his life, rushed to his Chambers and managed to bolt the door. Unruly mob forcibly broke open the door, overpowered the bodyguard and assaulted Shri Barai. They reiterated their demand for unconditional release of Jokhu Singh. Due to the manhandling Shri Barai felt dizziness and became unconscious. It was due to timely arrival of a team of doctors that his life was saved.

On the next day, on return from Banka, District & Sessions Judge also enquired into the matter and submitted a detailed report before the High Court.

On 19th November, 1997, on the basis of the report sent by the 5th Additional District and Sessions Judge, Bhagalpur dated 18th November, 1997, Original Criminal Miscellaneous Case No. 24 of 1997 was registered and placed before a Bench of the High Court for admission. After hearing, the Court arrived at the conclusion that a prima facie case of criminal contempt was made out against the contemners. Accordingly proceedings under the Contempt of Courts Act were initiated and a direction was issued to the Registry to issue notices to the above referred persons along with a copy of the report, containing allegations against the concerned persons, calling upon them to show cause as to why suitable action be not taken against them for the alleged misconduct.

On 25th November, 1997, all the contemners appeared through their respective advocates.

Besides the departmental proceedings, different criminal cases were also lodged against them.

On behalf of some of the contemners a request was made to keep the contempt matter in abeyance until the conclusion of the proceedings initiated under various provisions of the Indian Penal Code, the departmental proceedings and the report of the Commission constituted under the Commission of Inquiry Act. The request was declined by the High Court. It was held that the pendency of a criminal case or judicial inquiry could not constitute a bar to the continuation of the contempt proceedings. But before adjourning the proceedings to the next date and having noticed that all the contemners and their advocates were present and every body was condemning the occurrence, the Court expressed the desire that some of the responsible officers like Superintendent of Police, Deputy Superintendent of Police, Inspector of Police Kotwali Shri K.D. Choudhary and Sub-Inspector of Police Ms. Shashi Lata Singh and Sergeant Major of Police Line Ranjit Pandey should disclose details of the occurrence which had taken place in the court
premises on 18th November, 1997 and if possible, identify more names of such persons, who, according to them, had taken part at the time of occurrence.

On 10th December, 1997, all the contemners appeared and filed additional or supplementary replies to show cause notice. The Superintendent of Police in his supplementary reply disclosed names of 14 more police officials and constables, who, as per his inquiry, had also taken part along with the main persons named earlier.

Appellants who were convicted under the Contempt of Courts Act and visited with the punishment of simple imprisonment have filed five different appeals.

Learned counsels appearing for the appellants in different appeals, apart from the merits in individual appeals, which we shall deal with later, have raised some common points challenging the correctness of the impugned judgment. The same are:

(i) the alleged contempt is that of a court subordinate to the High Court and the allegations made constitute an offence under Section 228 IPC, and therefore the jurisdiction of the High Court to take cognizance of such a case is expressly barred under proviso to Section 10 of the Act;

(ii) that the High Court cannot take suo motu notice of the contempt of a court subordinate to it. The procedure given in the High Court Rules and Orders for initiation of proceedings for contempt of subordinate court having not been followed the entire proceedings are vitiated and liable to be quashed;

(iii) the standard of proof required in the criminal contempt is the same as in a criminal charge and therefore the charge of criminal contempt has to be proved by holding a trial as in a criminal case. The appellants could not be convicted on the basis of evidence by way of affidavits only. The witnesses should have been examined in Court and in any case the appellants should have been given an opportunity to cross-examine the persons who had deposed against them on affidavits to verify the version of the incident as according to them there were conflicting versions of the incident;

(iv) reasonable and adequate opportunity was not afforded to the appellants either to defend themselves or put forward their case; and

(v) affidavits of independent witnesses which were on record have not been dealt with by the High Court.
Answer to the first point would depend upon the interpretation to be put on Section 10 of the Act. Section 10 which deals with the power of the High Court to punish for the contempt of subordinate courts.

According to the learned counsels appearing for the appellants the proviso to Section 10 means that if the act by which a party is alleged to have committed contempt of a subordinate court constitutes offence of any description whatsoever punishable under the Indian Penal Code, the High Court is precluded from taking cognizance of it. According to them in the present case the allegations made amounts to an offence under Section 228 of the Indian Penal Code and consequently the jurisdiction of the High Court is barred.

We do not find any force in this submission. The point raised is concluded against the appellants by a judgment of the Constitution Bench of this Court in Bathina Ramakrishna Reddy Vs. The State of Madras, 1952 SCR 425 wherein it was held that sub-section (3) excluded the jurisdiction of the High Court to take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it only in cases where the acts alleged to constitute contempt are punishable as contempt under specific provisions of the Indian Penal Code, but not where these acts merely amount to offences of other description for which punishment has been provided in the Indian Penal Code.

On an examination of the decisions of several High Courts in India it was laid down that the High Court had the right to protect subordinate courts against contempt but subject to this restriction, that cases of contempt which have already been provided for in the Indian Penal Code should not be taken cognizance of by the High Court. This, it was stated, was the principle underlying section 2(3) of the Contempt of Courts Act, 1926. This Court then observed that it was not necessary to determine exhaustively what were the cases of contempt which had been already provided for in the Indian Penal Code; it was pointed out, however, that some light was thrown on the matter by the provision of section 480 of the Code of Criminal Procedure which empowers any civil, criminal or revenue court to punish summarily a person who is found guilty of committing any offence under sections 175, 178, 179, 180 or section 228 of the Indian Penal Code in the view or presence of the court. The later decision of Brahma Prakash Sharma ([1953] S.C.R. 1169) explained the true object of contempt proceedings.

Mukherjea J. who delivered the judgment of the Court said (at page 1176):

"It would be only repeating what has been said so often by various Judges that the object of contempt proceedings is not to afford protection to Judges personally from imputations to which
they may be exposed as individuals; it is intended to be a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened."

It was also pointed out that there were innumerable ways by which attempts could be made to hinder or obstruct the due administration of justice in courts and one type of such interference was found in cases where there was an act which amounted to "scandalising the court itself": this scandalising might manifest itself in various ways but in substance it was an attack on individual Judges or the court as a whole with or without reference to particular cases, causing unwarranted and defamatory aspersions upon the character and ability of the Judges. Such conduct is punished as contempt for the reason that it tends to create distrust in the popular mind and impair the confidence of the people in the courts which are of prime importance to the litigants in the protection of their rights and liberties."

These two judgments have been followed recently in Arun Paswan, S.I. vs. State of Bihar & Others[2003 (10) SCALE 658]. We respectfully agree with the reasoning and the conclusions arrived at in these cases.

"Criminal contempt" is defined in Section 2 (c) of the Act.

Section 228 of the Indian Penal Code provides for Intentional insult or interruption to public servant sitting in judicial proceeding.

What is made publishable under Section 228, IPC is the offence of intentional insult to a Judge or interruption of court proceedings but not as a contempt of Court. The definition of criminal contempt is wide enough to include any act by a person which would either scandalize the court or which would tend to interfere with the administration of justice. It would also include any act which lowers the authority of the Court or prejudices or interferes with the due course of any judicial proceedings. It is not limited to the offering of intentional insult to the Judge or interruption of the judicial proceedings. This Court observed in Delhi Judicial Service Association Vs. State of Gujarat & Ors., 1991 (4) SCC 406:

"...The public have a vital stake in effective and orderly administration of justice. The Court has the duty of protecting the interest of the community in the due administration of justice and, so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the Court against insult or injury, but, to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with. The power to punish for contempt is thus for the protection of public justice, whose interest requires that
decency and decorum is preserved in Courts of Justice. Those who have to discharge duty in a Court of Justice are protected by the law, and shielded in the discharge of their duties. Any deliberate interference with the discharge of such duties either in court or outside the court by attacking the presiding officers of the court, would amount to criminal contempt and the courts must take serious cognizance of such conduct."

In the present case, a judicial officer of the rank of District Judge was attacked in a pre-planned and calculated manner in his court room and when he tried to protect himself from physical harm by retiring to his chambers, by chasing him there and causing injuries to him. The raising of slogans and demanding unconditional bail for Jokhu Singh further compounded the offence. The Courts cannot be compelled to give "command orders". The act committed amounts to deliberate interference with the discharge of duty of a judicial officer by intimidation apart from scandalizing and lowering the dignity of the Court and interference with the administration of justice. The effect of such an act is not confined to a particular court or a district, or the State, it has the tendency to effect the entire judiciary in the country. It is a dangerous trend. Such a trend has to be curbed. If for passing judicial orders to the annoyance of the police the presiding officers of the Courts are to be assaulted and humiliated the judicial system in the country would collapse.

The second contention raised on behalf of the appellants is that the High Court cannot on its own motion take action of a criminal contempt of a subordinate court. According to the learned counsels the High Court can take cognizance of a criminal contempt under Section 15 (2) of the Act of a subordinate court only on a reference made to it by the subordinate court or on a motion made by the Advocate General. Since the procedure as laid down in the High Court Rules and Orders had not been followed the very initiation of proceedings for contempt was vitiated and therefore liable to be quashed. We do not find any force in this submission as well. This point also stands concluded against the appellants by a decision of this Court in S.K. Sarkar, Member, Board of Revenue, U.P. Lucknow, Vs. Vinay Chandra Misra, [1981 (1) SCC 436]. In this case an advocate filed a petition before the High Court under the Contempt of Courts Act alleging that the appellant therein as a Member of Revenue Board made certain contemptuous remarks, viz., nalayak gadhe saale ko jail bhijwa dunga; kis idiot ne advocate bana diya hai and acted in a manner which amounted to criminal contempt of the Court of Revenue Board, in which he (the advocate) was the counsel for one of the parties. The advocate requested the High Court to take suo motu action under the Contempt of Court Act against the member of the Revenue Board or pass such orders as it deemed fit. The question for determination was whether the High Court was competent to take cognizance of contempt of a subordinate court when it was moved by a private petitioner and not in accordance with either of the two motions mentioned in Section 15(2). Analyzing Section 15 (2) of the Act and in reading it in harmony with Section 10 of the Act it was held:
18. A comparison between the two sub-sections would show that whereas in sub-section (1) one of the three alternative modes for taking cognizance, mentioned is "on its own motion", no such mode is expressly provided in sub-section (2). The only two modes of taking cognizance by the High Court mentioned in sub-section (2) are: (i) on a reference made to it by a subordinate court; or (ii) on a motion made by the Advocate General, or in relation to a union territory by the notified Law Officer. Does the omission in Section 15(2) of the mode of taking suo motu cognizance indicate a legislative intention to debar the High Court from taking cognizance in that mode of any criminal contempt of a subordinate court? If this question is answered in the affirmative, then, such a construction of sub-section (2) will be inconsistent with Section 10 which makes the powers of the High court to punish for contempt of a subordinate court, coextensive and congruent with its power to punish for its own contempt not only in regard to quantum or prerequisites for punishment, but also in the matter of procedure and practice. Such a construction which will bring Section 15(2) in conflict with Section 10, has to be avoided, and the other interpretation which will be in harmony with Section 10 is to be accepted. Harmoniously construed, sub-section (2) of Section 15 does not deprive the High Court of the power of taking cognizance of criminal contempt of a subordinate court, on its own motion, also. If the intention of the legislature was to take away the power of the High Court to take suo motu cognizance of such contempt, there was no difficulty in saying so in unequivocal language, or by wording the sub-section in a negative form. We have, therefore, no hesitation in holding in agreement with the High Court, that sub-section (2) of Section 15, properly construed, does not restrict the power of the High Court to take cognizance of and punish contempt of a subordinate court, on its own motion."

We respectfully agree with the view taken in this judgment and hold that the High Court could initiate proceedings on its own motion under the Contempt of Courts Act against the appellants.

The third contention raised by the learned counsel for the appellants is that the standard of proof required in the criminal contempt is the same as in a criminal charge and therefore the charge of criminal contempt has to be proved beyond reasonable doubt. That the appellants could not be convicted on the basis of the affidavits filed. That the witnesses should have been examined in Court and in any case the appellants should have been given an opportunity to cross-examine the persons who had deposed against them on affidavits to verify the version of the incident as according to them there were conflicting versions of the incident. It was emphasized that justice must not only be done, but must be seen to be done by all concerned to establish confidence that the contemners will receive a fair, just and impartial trial. We do not find any substance in this submission as well. High Court in its order has noted that the learned counsels appearing for both the parties have taken a stand that all possible fair and proper opportunities were extended to them. In view of the statements made by the counsels for the parties it will not be open to the counsels for the parties at this stage to take the stand that in the absence of cross-examination of the concerned persons, reliance could not be placed on the statements which were made on oath.
Learned counsel who had appeared for the contemners before the High Court did not claim the right of cross-examination. Only at the stage of arguments a submission was made that opportunity to cross-examine the concerned persons was not given which vitiated the trial. High Court rejected this contention by holding that such a stand could not be taken at that stage of the proceedings. It has been held in Arun Paswan case (supra) that a party which fails to avail of the opportunity to cross-examine at the appropriate stage is precluded from taking the plea of non-observance of principles of natural justice at a later stage. Such a plea would not be tenable.

It has repeatedly been held by this Court (Ref: 1995 (2) SCC 584) that the procedure prescribed either under the Code of Criminal Procedure or under the Evidence Act is not attracted to the proceedings initiated under Section 15 of the Contempt of Courts Act. The High Court can deal with such matters summarily and adopt its own procedure. The only caution that has to be observed by the Court in exercising this inherent power of summary procedure is that the procedure followed must be fair and the contemners are made aware of the charges levelled against them and given a fair and reasonable opportunity. Having regard to the fact that contempt proceedings are to be decided expeditiously in a summary manner the convictions have been recorded without extending the opportunity to the contemners to cross examine those who had deposed against them on affidavits. Though the procedure adopted in this case was summary but adequate safeguards were taken to protect the contemners’ interest. The contemners were issued notices apprising them of the specific allegations made against them. They were given an opportunity to counter the allegations by filing their counter affidavits and additional counter/supplementary affidavits as per their request. They were also given opportunity to file affidavits of any other persons which they did. They were given opportunities to produce any other material in their defence which they did not do. Most of the contemners had taken the plea that at the relevant time they were on duty in their respective Police Stations though in the same town. They also attached copies of station diaries and duty chart in support of their alibi. The High Court did not accept the plea of alibi as all these papers had been prepared by the contemners themselves and none of the superior officer had supported such a plea. The evidence produced by the respondents was rejected in the face of the reports made by the Additional District and Sessions Judge, Director General of Police coupled with affidavits of Mr. Barasi, the Additional District and Sessions Judge, two court’s officials and affidavits of some of the lawyers who had witnessed the occurrence.

The contempt proceedings have to be decided in a summary manner. The Judge has to remain in full control of the hearing of the case and immediate action is required to be taken to make it effective and deterrent. Immediate steps are required to be taken to restore order as early and quickly as possible. Dragging the proceedings unnecessarily would impede the speed and efficiency with which justice has to be administered. This Court while considering all these aspects held in In re: Vinay Chandra Mishra (the alleged contemner), 1995 (2) SCC 584, that the criminal contempt no doubt amounts to an offence but it is an offence sui generis and hence for
such offence, the procedure adopted both under the common law and the statute law in the
country has always been summary. It was observed that the need was for taking speedy action
and to put the Judge in full control of the hearing. It was emphasised that immediate steps were
required to be taken to restore order in the court proceedings as quickly as possible. To quote
from the above-referred to case "However, the fact that the process is summary does not mean
that the procedural requirement, viz., that an opportunity of meeting the charge, is denied to the
contemner. The degree of precision with which the charge may be stated depends upon the
circumstances. So long as the gist of the specific allegations is made clear or otherwise the
contemner is aware of the specific allegation, it is not always necessary to formulate the charge in
a specific allegation. The consensus of opinion among the judiciary and the jurists alike is that
despite the objection that the Judge deals with the contempt himself and the contemner has little
opportunity to defend himself, there is a residue of cases where not only it is justifiable to punish
on the spot but it is the only realistic way of dealing with certain offenders. This procedure does
not offend against the principle of natural justice, viz., nemo judex in sua causa since the
prosecution is not aimed at protecting the Judge personally but protecting the administration of
justice. The threat of immediate punishment is the most effective deterrent against misconduct.
The Judge has to remain in full control of the hearing of the case and he must be able to take steps
to restore order as early and quickly as possible. The time factor is crucial. Dragging out the
contempt proceedings means a lengthy interruption to the main proceedings which paralyses the
court for a time and indirectly impedes the speed and efficiency with which justice is
administered. Instant justice can never be completely satisfactory yet it does provide the simplest,
most effective and least unsatisfactory method of dealing with disruptive conduct in court. So
long as the contemner's interests are adequately safeguarded by giving him an opportunity of
being heard in his defence, even summary procedure in the case of contempt in the face of the
court is commended and not faulted."

In the present case the High Court had decided to proceed with the contempt proceedings in a
summary manner. Due opportunity was afforded to all the contemners and after verifying and
cross checking the material available before it, coming from different reliable sources the High
Court convicted only nine persons out of twenty six persons arrayed as contemners before it. The
High Court took due care to ascertain the identity of the contemners by cross-checking with the
affidavits filed by the different persons. It is also based on the independent reports submitted by
the Director General of Police and Superintendent of Police. We do not find any fault in the
procedure adopted by the High Court in conducting the proceedings in the present case. For the
survival of the rule of law the orders of the courts have to be obeyed and continue to be obeyed
unless overturned, modified or stayed by the appellate or revisional courts. The court does not
have any agency of its own to enforce its orders. The executive authority of the State has to come
to the aid of the party seeking implementation of the court orders. The might of the State must
stand behind the Court orders for the survival of the rule of the court in the country. Incidents
which undermine the dignity of the courts should be condemned and dealt with swiftly. When a
judge is attacked and assaulted in his court room and chambers by persons on whose shoulders lay the obligation of maintaining law and order and protecting the citizen against any unlawful act needs to be condemned in the severest of terms. If judiciary has to perform its duties and functions in a fair and free manner, the dignity and the authority of the courts has to be respected and maintained at all stages and by all concerned failing which the very constitutional scheme and public faith in the judiciary runs the risk of being lost.

It was urged with some vehemence that principles of natural justice were not observed in as much as opportunity to cross examine the witnesses who had deposed on affidavits is concerned it may be stated that no such opportunity was asked for in the High Court at trial stage. It was for them to ask for such an opportunity to cross examine the parties who had deposed against them on affidavit. Since the contemners did not avail of the opportunity at the trial stage the plea of non-observations of principles of natural justice is not tenable. Appellants were made aware of the procedure which was adopted by the High Court. They were given full opportunity to put forth their point of view. Each of them filed detailed affidavits along with evidence in support thereof. They had attached their duty charts showing that they could not have been present at the place of occurrence as they were on duty somewhere else. High Court has considered and discussed the entire evidence present on the record before recording the conviction. The contention that the affidavits of independent witnesses were not considered cannot be accepted. Only those were convicted against whom corroboration of the fact of their presence and participation in the incident was confirmed from more than one source.

Plea that reasonable and adequate opportunity was not afforded to the appellants is equally untenable. We find from the record that all the material (affidavits, show cause notice etc.) which were brought on record was properly served on the learned advocates appearing for the contemners.

It is unfortunate that neither the criminal proceedings nor the disciplinary proceedings or the inquiry under the Commission of Inquiry Act have been concluded. No doubt the appellants had been suspended initially but in due course they have been reinstated. Some of them have retired as well. Inaction on the part of the authorities resulted in emboldening others to commit similar acts. In Arun Paswan (supra), proceedings for criminal contempt were initiated against the appellant therein pursuant to the complaint lodged by the District & Sessions Judge, Sasaram addressed to the Registrar General of the High Court of Patna. What is being emphasised is that had timely action been taken by the authorities and the criminal proceedings concluded in time, incident, as referred to above, where slogans were raised "District Judge Murdabad, Bhagalpur Dohrana Hai" could have been avoided.
The incident with which we are dealing with took place on 18th November 1997. The incident which has been dealt with in the case of Arun Paswan, S.I. (supra) is dated 20th January, 2002. Both the incidents have taken place in the State of Bihar, one in Bhagalpur and the other in Sasaram. The manner in which the police personnel belonging to middle level of police administration and entrusted with such responsibilities as require theirs coming into contact with public day to day persuades us to make observation that there is something basically wrong with the police in Bihar. Misconduct amounting to gross violation of discipline committed not by a single individual but by so many collectively and that too by those who have formed an association consisting of members of a disciplined force in uniform was not promptly and sternly dealt with by the State or its senior officials so as to take care to see that such incident, even if happened, remains solitary incident. Faced with the initiation of contempt proceedings, the persons proceeded against did not have the courtesy of admitting their guilt and tendering an apology which if done could have been dealt with mercy. They decided to contest, of course the justice administration system allows them the liberty of doing so and they had every right of doing so but at the end it has been found that their pleas were false and their denial of charges was aimed at prolonging the hearing as much as they could. We are shocked to learn that the criminal courts seized of trial of the accused persons on substantive charges for offences under the penal law of the land are awaiting the decision of this appeal? Why for? Neither the High Court nor this Court has ever directed the proceedings before the criminal Courts to remain stayed. The criminal Court shall have to decide on the charges framed against the accused persons on the basis of the evidence adduced in those cases and not on the basis of this judgment.

Though we have found no merit in any of the pleas raised on behalf of the appellants and we have formed an opinion without hesitation that the appeals are to be dismissed, this is a case the facts whereof persuade us to place on record certain observations of ours.

In the constitutional scheme the judiciary is entrusted with the task of upholding the Constitution and the laws. Apart from interpreting the Constitution and the laws, the judiciary discharges the function of securing maintenance of law and order by deciding the disputes in a manner acceptable to civilised and peace loving society. In order to maintain the faith of the society in the rule of law the role of the judiciary cannot be undermined. In a number of cases this Court has observed that foundation of the judiciary is the trust and confidence of the people of the nation and when such foundation or trust is rudely shaken by means of any disrespect by the very persons who are required to enforce the orders of the court and maintain law and order the people's perception of efficacy of the systems gets eroded.

The Judges are as a jurist calls 'paper tigers'. They do not have any machinery of their own for implementing their orders. People, while approaching the Court of law which they regard as temple of justice, feel safe and secure whilst they are in the Court. The police personnel is deployed in the Court campus for the purpose of maintaining order and to see that not only the
Judges can work fearlessly in a calm, cool and serene atmosphere but also to see that anyone coming to the Court too feels safe and secure thereat. Every participant in court proceedings is either a seeker of justice or one who comes to assist in administration of justice. So is the expectation of the members of the Bar who are treated as officers of the Court. We shudder to feel what would happen if the police personnel itself, and that too in an organised manner, is found to be responsible for disturbing the peace and order in the Court campus, for causing assault on the Judges and thus sullying the temple of justice apart from bringing a bad name to an indispensable organ of the executive wing of the State.

The police force is considered by the society as an organised force of civil officers under the command of the State engaged in the preservation of law and order in the society and maintaining peace by enforcement of laws and prevention and detection of crime. One who is entrusted with the task of maintaining discipline in the society must first itself be disciplined. Police is an agency to which social control belongs and therefore the police has to come up to the expectations of the society.

After all, what the learned Addl. Sessions Judge had done Jokhu Singh had appeared as a witness. His cross-examination was not concluded without which his testimony was liable to be excluded from being read in evidence. The learned Judge had exhausted practically all means for securing the presence of the witness. He would neither attend nor make any communication to the Court. Even the threat of initiation of proceedings under the Contempt of Courts Act did not deter him from abstaining. To secure his presence a non-bailable warrant had to be issued. He avoided the service of non-bailable warrant of arrest and appeared in the Court in the late hours. He was not apologetic and felt that he was above the process of the Court. It cannot be said that the higher authorities of police were not aware of the behaviour of Jokhu Singh. Either they knew about it or they should have known about it. Instead of offering the bail, Jokhu Singh was busy managing for the Judge being approached or influenced by extra legal methods. Jokhu Singh and his confederate decided to take the law in their own hands and assault the Judge and anyone who came in their way. We do not think that any of the appellants deserve any sympathy or mercy.

We trust and hope that this case would set in motion the thinking process of the persons occupying higher echelons in police administration specially in Bihar and take care to ensure that such incidents do not recur in future.

We direct the disciplinary authorities before whom the disciplinary proceedings are pending and the criminal Courts before whom the prosecutions are pending against the appellants to conclude the proceedings and the trial at the earliest. The Commission holding the enquiry under the Commissions of Enquiry Act, 1952 would also do well to conclude its proceedings at the earliest. We request Hon’ble the Chief Justice of the High Court of Patna to watch and if
necessary monitor the proceedings of the Commission of Inquiry and issue directions to the criminal courts to expeditiously conclude the pending criminal cases.

The appeals are dismissed. The appellants who are on bail shall forthwith surrender to their bail bonds and taken into custody to serve out the sentences as passed by the High Court of Patna. The Director General of Police, Bihar is directed to ensure compliance with this order by securing presence of all the appellants to serve out the sentences passed on them by the High Court.
Vinay Chandra Mishra, In re

(1995) 2 SCC 584

P.B. SAWANT, J. - On 10-3-1994, Justice S.K. Keshote of the Allahabad High Court addressed a letter to the Acting Chief Justice of that Court as follows:

“No. SKK/ALL/8/94 10-3-1994

Dear Brother Actg. Chief Justice,

Though on 9-3-1994 itself I orally narrated about the misbehaviour of Shri V.C. Mishra with me in the Court but I thought it advisable to give you the same in writing also.

On 9-3-1994 I was sitting with Justice Anshuman Singh in Court No. 38. In the list of fresh cases of 9-3-1994 at Sr. No. 5 FAFO Record No. 22793 M/s Bansal Forgings Ltd. v. U.P. Financial Corp. filed by Smt S.V. Misra was listed. Shri V.C. Mishra appeared in this case when the case was called.

**Brief facts of that case**

M/s Bansal Forgings Ltd. took loan from U.P. Financial Corporation and it made default in payment of instalment of the same. The Corporation proceeded against the Company under Section 29 of the U.P. Financial Corporation Act. The Company filed a civil suit against the Corporation and it has also filed an application for grant of temporary injunction. Counsel for the Corporation suo motu put appearance in the matter before trial court and prayed for time for filing of reply. The learned trial court passed an order on the said date that the Corporation will not seize the factory of the Company. The Company shall pay the amount of instalment and it will furnish also security for the disputed amount. The court directed to furnish security on 31-1-1994 and case was fixed on 15-3-1994.

Against said order of the trial court this appeal has been filed and arguments have been advanced that that Court has no jurisdiction to pass the order for payment of instalment of loan and further no security could have been ordered.

I put a question to Shri Mishra under which provision this order has been passed. On putting of question he started to shout and said that no question could have been put to him. He will get me transferred or see that impeachment motion is brought against me in Parliament. He further said that he has turned up many Judges. He created a good scene in the Court. He asked me to follow the practice of this Court. In sum and substance it is a matter where except to abuse me of mother and sister he insulted me like anything. What he wanted to convey to me was that admission is as a course and no arguments are heard, at this stage. It is not the question of insulting of a Judge of this institution but it is a matter of institution as a
whole. In case dignity of Judiciary is not being maintained then where this institution will stand. In case a Senior Advocate, President of Bar and Chairman of Bar Council of India behaves in Court in such manner what will happen to other advocates.

Since the day I have come here I am deciding the cases on merits. In case a case has merits it is admitted but not as a matter of course. In this Court probably advocates do not like the consideration of cases on their merits at the stage of admission. In case dignity of Judiciary is not restored then it is very difficult for the Judges to discharge their judicial function without fear and favour.

I am submitting this matter to you in writing to bring this mishappening in the Court with the hope that you will do something for restoration of dignity of Judiciary.

Thanking you,

Yours sincerely,

Sd/- (Jus. S.K. Keshote)"

2. The Acting Chief Justice, Shri V.K. Khanna forwarded the said letter to the then Chief Justice of India by his letter of 5-4-1994. The learned Chief Justice of India constituted this Bench to hear the matter on 15-4-1994.

3. On 15-4-1994, this Court took the view that there was a prima facie case of criminal contempt of court committed by Shri Vinay Chandra Mishra (the ‘contemner’) and issued a notice against him to show cause why contempt proceedings be not initiated against him. By the same order, Shri D.P. Gupta, the learned Solicitor General of India was requested to assist the Court in the matter. Pursuant to the notice, the contemner filed his reply by affidavit dated 10-5-1994 and also an application seeking discharge of show-cause notice, and in the alternative for an inquiry to be held into the incident referred to by Justice Keshote in his letter which had given rise to the contempt proceedings. It is necessary at this stage to refer to the material portions of both the affidavit and the application filed by the contemner. After referring to his status as a Senior Advocate of the Allahabad High Court and his connections with the various law organisations in different capacities to impress upon the Court that he had a deep involvement in the purity, integrity and solemnity of judicial process, he has submitted in the affidavit that but for his deep commitments to the norms of judicial processes as evidenced by his said status and connections, he would have adopted the usual expedient of submitting his unconditional regrets. But the facts and circumstances of this case were such which induced him to “state the facts and seek the verdict of the Court” whether he had committed the alleged contempt or whether it could be “a judge committing contempt of his own court”. He has then stated the facts which according to him form the ‘genesis’ of the present controversy. They are as follows:
“A. A Private Ltd. Co. had taken an instalment loan from U.P. Financial Corporation, which provides under its constituent Act (Section 29) for some sort of self-help in case of default of instalments.

B. A controversy arose between the said Financial Corporation and the borrower as a result of which, the borrower had to file a civil suit seeking an injunction against the Corporation for not opting for the non-judicial sale of their assets.

C. The civil court granted the injunction against putting the assets to sale, but at the same time directed furnishing security for the amount due.

D. Being aggrieved by the condition of furnishing security, which in law would be tantamount to directing a mortgagor to furnish security for payment of mortgage loan, even when he satisfies the Court that a stay is called for - the property mortgaged being a pre-existing security for its payment.

E. The Company filed an FAFO being No. 229793 of 1994 against the portion of the order directing furnishing of security.

F. The said FAFO came for preliminary hearing before Hon’ble Justice Anshuman Singh and the Applicant of this petition on 9-3-1994, in which I argued for the debtor-Company.

G. When the matter was called on Board, the Applicant took charge of the court proceedings and virtually foreclosed attempts made by the Senior Judge to intervene. The Applicant Judge inquired from me as to under what law the impugned order was passed to which I replied that it was under various rules of Order 39 CPC. That Applicant therefore conveyed to me that he was going to set aside the entire order, against a portion of which I had come in appeal, because in his view the Lower Court was not competent to pass such an order as Order 39 did not apply to the facts.

H. I politely brought to the notice of the Applicant Judge that being the appellant I had the dominion over the case and it could not be made worse, just because I had come to High Court.

I. The Applicant Judge apparently lost his temper and told me in no unconcealed term that he would set aside the order in toto, disregarding what I had said.

J. Being upset over, what I felt was an arbitrary approach to judicial process I got emotionally perturbed and my professional and institutional sensitivity got deeply wounded and I told the Applicant Judge that it was not the practice in this Court to dismiss cases without hearing or to upset judgments or portions of judgments, which have not been appealed against. Unfortunately the Applicant Judge took it unsportingly and apparently lost
his temper and directed the stenographer to take down the order for setting aside of the whole order.

K. At this juncture, the Hon’ble Senior Judge intervened, whispered something to the Applicant Judge and directed the case to be listed before some other Bench. It was duly done and by an order of the other Court dated 18-3-1994 Hon’ble Justices B.M. Lal and S.K. Verma, the points raised by me before the Applicant Judge were accepted. A copy of the said order is reproduced as Annexure I to this affidavit.

L. I find it necessary to mention that the exchange that took place between me and the Applicant Judge got a little heated up. In the moment of heat the Applicant Judge made the following observations:

‘I am from the Bar and if need be I can take to goondaism.’

Adding in English -

‘I never opted for Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief Justice of India disregarded my options and transferred me to this place, which I never liked.’

Provoked by this I asked him whether he was creating a scene to create conditions for getting himself transferred as also talked earlier.”

After narrating the above incident, the contemner has gone on to deny that he had referred to any impeachment, though according to him he did mention that “a judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence”.

4. The contemner has further denied the allegations made by Justice Keshote that as soon as the case was called out, he (i.e. Justice Keshote) asked him the provision under which the impugned order was passed and that he had replied that the Court had no jurisdiction to ask the same and should admit and grant the stay order. According to him, such a reply could only be attributed to one who is ‘mad’ and that considering his practice of thirty-five years at the Bar and his responsible status as a member of the Bar, it is unbelievable that he would reply in such a “foolish manner”. The contemner has further denied that he had abused the learned Judge since according to him he had never indulged in abusing anybody. With regard to the said allegations against him, the contemner has stated that the same are vague and, therefore, “nothing definite is warranted to reply”.

5. He has further contended in his affidavit that if the learned Judge was to be believed that he had committed the contempt, the Senior Judge who was to direct the court proceedings would have initiated proceedings under “Article 129 of the Constitution” for committing contempt in facie curiae. He has also stated that the learned Judge himself did not direct such proceedings
against him which he could have. He has found fault that instead of doing so, the learned Judge had “deferred the matter for the next day and adopted a devious way of writing to the Acting Chief Justice for doing something about it”. He has then expressed his ‘uncomprehension’ with (sic why) the learned Judge should have come to the Supreme Court when he had ample and sufficient legal and constitutional powers to arraign him at the Bar for what was attributed to him.

6. The contemner has then gone on to complain that the “language used” by the learned Judge “in the Court extending a threat to resort to goondaism is acting in a way which is professionally perverse and approximating to creating an unfavourable public opinion about the awesomeness of judicial process, lowering or tending to lower the authority of any Court” which amounted to contempt by a Judge punishable under Section 16 of the Contempt of Courts Act, 1971. He has then gone on to submit “under compulsion of” his “institutional and professional conscience” and for “upholding professional standards expected of both the Bench and the Bar of this Court” that this Court may order a thorough investigation into the incident in question to find out whether a contempt has been committed by him punishable under “Article 215” of the Constitution or by the Judge under Section 16 of the Contempt of Courts Act.

7. He has further stated that the entire Bar at Allahabad knows that he was unjustly ‘roughed’ by the Judge and was being punished for taking a “fearless and non-servile stand” and that he is being prosecuted for asserting the right of audience and using “the liberty to express his views” when a Judge takes a course “which in the opinion of the Bar is irregular”. He has also contended that any punishment meted out to the “outspoken lawyer” will completely emasculate the freedom of the profession and make the Bar “a subservient, tail-wagging appendage to the judicial branch, which is an anathema to a healthy democratic judicial system”.

8. He has made a complaint that he was feeling handicapped in not being provided with the copy of the letter/report of the Acting Chief Justice of the Allahabad High Court and he has also been unable to gauge the “rationale of the applicant in not having initiated proceedings” against him either immediately or a day following, when he chose to address a letter to the Acting Chief Justice. He has then contended that he wanted to make it clear that he was seeking a formal inquiry not for any vindication of any personal hurt but to make things safe for the profession which in a small way by a quirk of destiny come to his keeping also. He has also stated that he would be untrue and faithless to his office if he subordinated the larger interests of the profession and dignity of the judicial process for a small thing of seeking his little safety. The contemner goes on to state that he did not opt for filing a contempt against the learned Judge as in normal course of arguments, sometimes altercations take place between a Judge and the arguing advocate, which may technically be contempt on either side but there being no intention, provisions of contempt are not attracted. In support of his said case, he has reproduced an extract from Oswald’s *Contempt of Court*, 3rd Edn., by Robertson. The said extract is as follows:

“An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the
advocate thinks irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client’s case. It is said that a Scotch advocate was arguing before a Court in Scotland, when one of the Judges, not liking his manner, said to him, ‘It seems to me, Mr Blank, that you are endeavouring in every way to show your contempt for the Court.’ ‘No’, was the quick rejoinder, ‘I am endeavouring in every way to conceal it’.

9. In the end, he has stated that he had utmost respect and regard for the courts and he never intended nor intends not to pay due respect to the courts which under the law they are entitled to and it is for this reason that instead of defending himself through an advocate, he had left to the mercy of this Court to judge and decide the right and wrong. He has also stated that it is for this reason that he had not relied upon the provisions of the Constitution under Articles 129 and 215 and Section 16 of the Contempt of Courts Act and to save himself on the technicality and jurisdictional competence.

10. Lastly, he has reiterated that he had always paid due regard to the courts and he was paying the same and will continue to pay the same and he “neither intended nor intends to commit contempt of any court”.

11. Along with the aforesaid affidavit was forwarded by the contemner, a petition stating therein that he had not gone beyond the legitimate limits of fearless, honest and independent obligations of an advocate and it was Justice Keshote himself who had lost his temper and extended threats to him which were such as would be punishable under Section 16 of the Contempt of Courts Act, 1971 (hereinafter referred to as the ‘Act’). He has prayed that the notice issued to him be discharged and if in any case, this Court does not feel inclined to discharge the notice, he “seeks his right to inquiry and production of evidence directly or by affidavits” as this Court may direct. He has further stated in that petition that he is moving an independent application for contempt proceedings to be drawn against the learned Judge and it would be in the interests of justice and fair play if the two are heard together. It has to be noted that the contemner has throughout this affidavit as well as the petition referred to Justice Keshote as ‘applicant’, although he knew very well that contempt proceedings had been initiated suo motu by this Court on the basis of the letter written by Justice Keshote to the Acting Chief Justice of the High Court. His manner of reference to the learned Judge also reveals the respect in which he holds the learned Judge.

12. The contemner has also filed another petition on the same day as stated in the aforesaid petition wherein he has prayed that on the facts stated in the reply affidavit to the show-cause notice for contempt proceedings against him, this Court be pleased to draw proceedings under Section 16 of the Act against the learned Judge for committing contempt of his own court and hold an inquiry. In this petition, he has stated that in his reply to the contempt notice, he has
brought the whole truth before this Court which according to him was witnessed by the Senior Judge of the Bench, Justice Anshuman Singh and a large number of advocates. Once again referring to Justice Keshote as the applicant, he has stated that the learned Judge in open court conveyed to him (i.e. the contemner) that he can take to goondaism if need arises, that he also talked disparagingly against the Chief Justice of India for not transferring him to the place for which he had opted and talked to the contemner scurrilously and in a manner unworthy of a Judge and also attempted to gag the contemner from discharging his duties as an advocate. The contemner has further contended that as a common law principle relating to contempt of courts, a Judge is liable for contempt of his own court as much as any other person associated with judicial proceedings and outside, and that the aforesaid principle has been given statutory recognition under Section 16 of the Act. He has further contended that the behaviour of the learned Judge was so unworthy that the senior colleague on the Bench apart from “disregarding with the desire of the applicant to dismiss the entire order” against a part of which an appeal had been filed, released the case from the board and did not think of taking recourse to the obvious and well-known procedure of initiating contempt proceedings against him for the alleged contempt committed in the face of the Court. He has further contended that “the adoption of devious ways of reaching the Acting Chief Justice by letter and reportedly coming to Delhi for meeting meaningful people” is “itself seeking (sic) about the infirmity of the case” of the Judge. He has in the end reiterated his prayer for an inquiry into the behaviour of the learned Judge if the notice of contempt was not discharged against him in view of the denial by him of the conduct alleged against him.

14. On 30-6-1994 the contemner filed his supplementary/additional counter-affidavit. In this affidavit, he raised objections to the maintainability “of initiating contempt proceedings” against him. His first objection was to the assumption of jurisdiction by this Court to punish for an act of contempt committed in respect of another court of record which is invested with identical and independent power for punishing for contempt of itself. According to him, this Court can take cognizance only of contempt committed in respect of itself. He has also demanded that in view of the point of law raised by him, the matter be placed before the Constitution Bench and that notice be issued to the Attorney General of India and all the Advocates General of the States. He has then gone on to deny the statements made by the learned Judge in the letter written to the Acting Chief Justice of the High Court and in view of the said denial by him, he has asked for the presence of the learned Judge in the Court for being cross-examined by him, i.e., the contemner. He has further stated that if the contempt proceedings are taken against him, the statement of Justice Anshuman Singh who was the Senior Judge on the Bench before which the incident took place, would also be necessary. He has also taken exception to Justice Keshote’s speaking in the Court except through the Senior Judge on the Bench which, according to him had been the practice in the Allahabad High Court, and has alleged that the learned Judge did not follow the said convention. In the end, he has reiterated that he has utmost respect and regard for the courts and he has never intended nor intends not to pay due regard to the courts.
15. On 15-7-1994 this Court passed an order wherein it is recorded that on 15-4-1994 the court had issued a notice to the contemner to show cause as to why criminal contempt proceedings be not initiated against him and notice was issued on its own motion. The Court heard the contemner in person as well as his learned counsel. The Court perused the counter-affidavit and the additional affidavit of the contemner and was of the view that it was a fit case where criminal contempt proceedings be initiated against the contemner. Accordingly, the Court directed that the proceedings be initiated against him. The contemner was given an opportunity to file any material in reply or in defence within another eight weeks. He was also allowed to file the affidavit of any other person apart from himself in support of his defence. Shri Gupta, learned Solicitor General was appointed as the prosecutor to conduct the proceedings. The affidavits filed by the contemner were directed to be sent to Justice Keshote making it clear that he might offer his comments regarding the factual averments in the said affidavits.

16. In view of the said order, the Court dismissed the contemner’s Application No. 2560 of 1994 praying for discharge of the notice. The contemner thereafter desired to withdraw his Application No. 2561 of 1994 seeking initiation of proceedings against the learned Judge for contempt of his own court, by stating that he was doing so “at this stage reserving his right to file a similar application at a later stage”. The Court without any comment on the statement made by the contemner, dismissed the said application as withdrawn.

17. Justice Keshote by a letter of 20-8-1994 forwarded his comments on the counter-affidavit and the supplementary/additional counter-affidavit filed by the contemner. The learned Judge denied that he took charge of the court proceedings and virtually foreclosed the attempts made by the Senior Judge to intervene, as was alleged by the contemner. He stated that being a member of the Bench, he put a question to the contemner as to under which provision, the order under appeal had been passed by the trial court, and upon that the contemner started shouting and said that he would get him transferred or see to it that impeachment motion was brought against him in Parliament. According to the learned Judge, the contemner said many more things as already mentioned by him in his letter dated 10-3-1994. He further stated that the contemner created a scene which made it difficult to continue the court proceedings and ultimately when it became difficult to hear all the slogans, insulting words and threats, he requested his learned brother on the Bench to list that case before another Bench and to retire to the chamber. Accordingly, the order was made by the other learned member of the Bench and both of them retired to their chambers.

18. The learned Judge also stated that the contemner has made wrong statement when he states “that applicant, therefore, conveyed to me that he was going to set aside the entire order, against portion of which I had come in appeal because in his view, the lower court was not competent to pass such order as Order 39 did not apply to the facts”. The learned Judge stated that he neither made any such statement nor conveyed to the contemner, as suggested by him. He reiterates that except one sentence, viz., “that under which provision this order had been made by the trial court” nothing was said by him. According to the learned Judge, it was a case where the
The learned Judge alleges that the counter-affidavit manufactures a defence. He has denied the contents of para 6(H) and (I) of the counter-affidavit by stating that nothing of the kind as alleged therein had happened. According to the learned Judge, it was a case where the contemner lost his temper on the question being put to him by him, i.e., the learned Judge. He has stated that instead of losing his temper and creating a scene and threatening and terrorising him, the contemner should have argued the matter and encouraged the new junior Judge. The learned Judge has further denied the following averment, viz., “unfortunately, the applicant Judge took it unsportingly and apparently lost his temper and directed the stenographer to take down the order for setting aside of the whole order” made in para 6(J) of the counter-affidavit, as wrong. He has pointed out that in the Division Bench, it is the senior member who dictates order/judgments. He has also denied the statements attributed to him in other paragraphs of the affidavit and in particular, has stated that he did not make the following observations: “I am from the Bar and if need be I can take to goondaism” and has alleged that the said allegations are absolutely wrong. He has also denied that he ever made the statements as follows: “I never opted for Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief Justice of India disregarded my options and transferred me to this place which I never liked.” According to him, the said allegations are manufactured with a view to create a defence. He has denied the allegations made against him in the additional/supplementary affidavits as wrong and has stated that what actually happened in the Court was stated in his letter of 10-3-1994.

19. On 7-10-1994, the contemner filed his unconditional written apology in the following words:

 1. In deep and regretful realization of the fact that a situation like the one which has given rise to the present proceedings, and which in an ideal condition should never have arisen, subjects me to deep anguish and remorse and a feeling of moral guilt. The feeling has been compounded by the fact of my modest association with the profession as the Senior Advocate for some time and also being the President of the High Court Bar Association for multiple terms (from which I have resigned a week or ten days back), and also being the Chairman of the Bar Council of India for the third five-year term. The latter two being elective posts convey with its holding an element of trust by my professional fraternity which expectations of setting up an example of an ideal advocate, which includes generating an intra-professional culture between the Bar and the Bench, under which the first looks upon the second with respect and resignation, the second upon the first with courtesy and consideration. It also calls for cultivation of a professional attitude amongst the lawyers to learn to be good and sporting losers.

 2. Guilty realizing my failure at approximating these standards resulting in the present proceedings, nolo contendere I submit my humble and unconditional apologies
for the happenings in the Court of Justice S.K. Keshote at Allahabad High Court on 9-3-1994, and submit myself at the Hon. Court’s sweet will.

3. I hereby withdraw from record all my applications, petitions, counter-affidavits, and prayers made to the court earlier to the presented (sic) of this statement. I, also, withdraw all submissions made at the Bar earlier and rest my matter with the present statement alone, and any submissions that may be made in support of or in connection with statement.”

20. On that day, the matter was adjourned to 24-11-1994 to enable the learned counsel for the parties to make further submissions on the apology and to argue the case on all points, since the Court stated that it may not be inclined to accept the apology as tendered. The learned counsel for all the parties including the contemner, Bar Council of India and the State Bar Council of U.P. (who were allowed to intervene) were heard and the matter was reserved for judgment.

21. Thereafter, the State Bar Council of U.P. also submitted its written submissions on 26-11-1994 along with an application for intervention. We have perused the said submissions.

22. We may first deal with the preliminary objection raised by the contemner and the State Bar Council, viz., that this Court cannot take cognizance of the contempt of the High Courts. The contention is based on two grounds. The first is that Article 129 vests this Court with the power to punish only for the contempt of itself and not of the High Courts. Secondly, the High Court is also another court of record vested with identical and independent power of punishing for contempt of itself.

23. The contention ignores that the Supreme Court is not only the highest court of record, but under various provisions of the Constitution, is also charged with the duties and responsibilities of correcting the lower courts and tribunals and of protecting them from those whose misconduct tends to prevent the due performance of their duties. The latter functions and powers of this Court are independent of Article 129 of the Constitution. When, therefore, Article 129 vests this Court with the powers of the court of record including the power to punish for contempt of itself, it vests such powers in this Court in its capacity as the highest court of record and also as a court charged with the appellate and superintending powers over the lower courts and tribunals as detailed in the Constitution. To discharge its obligations as the custodian of the administration of justice in the country and as the highest court imbued with supervisory and appellate jurisdiction over all the lower courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour and for that purpose all the courts and tribunals are protected while discharging their legitimate duties. To discharge this obligation, this Court has to take cognizance of the deviation from the path of justice in the tribunals of the land, and also of attempts to cause such deviations and obstruct the course of justice. To hold otherwise would mean that although this Court is charged with the duties and
responsibilities enumerated in the Constitution, it is not equipped with the power to discharge
them.

24. This subject has been dealt with elaborately by this Court in *Delhi Judicial Service Assn. v. State of Gujarat* [(1991) 4 SCC 406]. We may do no better than quote from the said decision the relevant extracts:

“18. There is therefore no room for any doubt that this Court has wide power to interfere and correct the judgment and orders passed by any court or tribunal in the country. In addition to the appellate power, the Court has special residuary power to entertain appeal against any order of any court in the country. The plenary jurisdiction of this Court to grant leave and hear appeals against any order of a court or tribunal, confers power of judicial superintendence over all the courts and tribunals in the territory of India including subordinate courts of Magistrate and District Judge. This Court has, therefore, supervisory jurisdiction over all courts in India.

19. Article 129 provides that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Article 215 contains similar provision in respect of High Court. Both the Supreme Court as well as High Courts are courts of record having powers to punish for contempt including the power to punish for contempt of itself. The Constitution does not define ‘Court of Record’. This expression is well recognised in juridical world. In *Jowitt’s Dictionary of English Law*, ‘Court of Record’ is defined as:

‘A court whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, and which has power to fine and imprison for contempt of its authority.’

In *Wharton’s Law Lexicon*, Court of Record is defined as:

‘Courts are either of record where their acts and judicial proceedings are enrolled for a perpetual memorial and testimony and they have power to fine and imprison; or not of record being courts of inferior dignity, and in a less proper sense the King’s Courts - and these are not entrusted by law with any power to fine or imprison the subject of the realm, unless by the express provision of some Act of Parliament. These proceedings are not enrolled or recorded.’

In *Words and Phrases* (Permanent Edn., Vol. 10, p. 429) ‘Court of Record’ is defined as under:

‘Court of Record is a court where acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the ‘record’ of the court, and are of such high and supereminent authority that their truth is not to be questioned.’

Another manner of division is into courts of record and courts not of record. Certain courts are expressly declared by statute to be courts of record. In the case of courts not expressly declared to be courts of record, the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences; if it has such power, it seems that it is a court of record. The proceedings of a court of record preserved in its archives are called records, and are conclusive evidence of that which is recorded therein.

23. The question whether in the absence of any express provision a Court of Record has inherent power in respect of contempt of subordinate or inferior courts, has been considered by English and Indian courts. These authorities show that in England the power of the High Court to deal with the contempt of inferior court was based not so much on its historical foundation but on the High Court’s inherent jurisdiction being a court of record having jurisdiction to correct the orders of those courts.

24. In India prior to the enactment of the Contempt of Courts Act, 1926, High Court’s jurisdiction in respect of contempt of subordinate and inferior courts was regulated by the principles of Common Law of England. The High Courts in the absence of statutory provision exercised power of contempt to protect the subordinate courts on the premise of inherent power of a Court of Record.

26. The English and the Indian authorities are based on the basic foundation of inherent power of a Court of Record, having jurisdiction to correct the judicial orders of subordinate courts. The King’s Bench in England and High Courts in India being superior Courts of Record and having judicial power to correct orders of subordinate courts enjoyed the inherent power of contempt to protect the subordinate courts. The Supreme Court being a Court of Record under Article 129 and having wide power of judicial supervision over all the courts in the country, must possess and exercise similar jurisdiction and power as the High Courts had prior to Contempt Legislation in 1926. Inherent powers of a superior Court of Record have remained unaffected even after codification of Contempt Law.

28. The Parliament’s power to legislate in relation to law of contempt relating to Supreme Court is limited, therefore the Act does not impinge upon this Court’s power with regard to the contempt of subordinate courts under Article 129 of the Constitution.

29. Article 129 declares the Supreme Court a court of record and it further provides that the Supreme Court shall have all the powers of such a court including the power to punish for contempt of itself. The expression used in Article 129 is not restrictive instead it is extensive in nature. If the Framers of the Constitution intended that the Supreme Court
Court shall have power to punish for contempt of itself only, there was no necessity of inserting the expression ‘including the power to punish for contempt of itself’. The article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression ‘including’. The expression ‘including’ has been interpreted by courts, to extend and widen the scope of power. The plain language of Article 129 clearly indicates that this Court as a court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a court of record.

In interpreting the Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The courts ought not to accept any such construction. While construing Article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since the Supreme Court is designed by the Constitution as a court of record and as the Founding Fathers were aware that a superior court of record has inherent power to indict a person for the contempt of itself as well as of courts inferior to it, the expression ‘including’ was deliberately inserted in the article. Article 129 recognised the existing inherent power of a court of record in its full plenitude including the power to punish for the contempt of inferior courts. If Article 129 is susceptible to two interpretations, we would prefer to accept the interpretation which would preserve the inherent jurisdiction of this Court being the superior court of record, to safeguard and protect the subordinate judiciary, which forms the very backbone of administration of justice. The subordinate courts administer justice at the grassroot level, their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level.

31. We have already discussed a number of decisions holding that the High Court being a court of record has inherent power in respect of contempt of itself as well as of its subordinate courts even in the absence of any express provision in any Act. A fortiori the Supreme Court being the Apex Court of the country and superior court of record should possess the same inherent jurisdiction and power for taking action for contempt of itself as well as for the contempt of subordinate and inferior courts. It was contended that since High Court has power of superintendence over the subordinate courts under Article 227 of the Constitution, therefore, High Court has power to punish for the contempt of subordinate courts. Since the Supreme Court has no supervisory jurisdiction over the High Courts or other subordinate courts, it does not possess powers which High Courts have under Article 215. This submission is misconceived. Article 227 confers supervisory jurisdiction on the High Court and in exercise of that power High Court may correct judicial orders of subordinate courts, in addition to that, the High Court has administrative control over the subordinate courts. Supreme Court’s power to correct judicial orders of the subordinate courts under Article 136 is much wider and more
effective than that contained under Article 227. Absence of administrative power of superintendence over the High Courts and subordinate courts does not affect this Court’s wide power of judicial superintendence of all courts in India. Once there is power of judicial superintendence, all the courts whose orders are amenable to correction by this Court would be subordinate courts and therefore this Court also possesses similar inherent power as the High Court has under Article 215 with regard to the contempt of subordinate courts. The jurisdiction and power of a superior Court of Record to punish contempt of subordinate courts was not founded on the Court’s administrative power of superintendence, instead the inherent jurisdiction was conceded to superior Court of Record on the premise of its judicial power to correct the errors of subordinate courts.

36. Advent of freedom, and promulgation of Constitution have made drastic changes in the administration of justice necessitating new judicial approach. The Constitution has assigned a new role to the Constitutional Courts to ensure rule of law in the country. These changes have brought new perceptions. In interpreting the Constitution, we must have regard to the social, economic and political changes, need of the community and the independence of judiciary. The court cannot be a helpless spectator, bound by precedents of colonial days which have lost relevance. Time has come to have a fresh look at the old precedents and to lay down law with the changed perceptions keeping in view the provisions of the Constitution. ‘Law’, to use the words of Lord Coleridge, ‘grows; and though the principles of law remain unchanged, yet their application is to be changed with the changing circumstances of the time’. The considerations which weighed with the Federal Court in rendering its decision in Gauba [K. L. Gauba v. Hon’ble the Chief Justice and Judges of the High Court of Judicature at Lahore AIR 1942 FC 1] and Jaitly case [Purshottam Lal Jaitly v. King-Emperor, 1944 FCR 364] are no more relevant in the context of the constitutional provisions.

37. Since this Court has power of judicial superintendence and control over all the courts and tribunals functioning in the entire territory of the country, it has a corresponding duty to protect and safeguard the interest of inferior courts to ensure the flow of the stream of justice in the courts without any interference or attack from any quarter. The subordinate and inferior courts do not have adequate power under the law to protect themselves, therefore, it is necessary that this Court should protect them. Under the constitutional scheme this Court has a special role, in the administration of justice and the powers conferred on it under Articles 32, 136, 141 and 142 form part of the basic structure of the Constitution. The amplitude of the power of this Court under these articles of the Constitution cannot be curtailed by law made by Central or State legislature. If the contention raised on behalf of the contemners is accepted, the courts all over India will have no protection from this Court. No doubt High Courts have power to persist for the contempt of subordinate courts but that does not affect or abridge the inherent power of this Court under Article 129.
The Supreme Court and the High Courts both exercise concurrent jurisdiction under the constitutional scheme in matters relating to fundamental rights under Articles 32 and 226 of the Constitution, therefore this Court’s jurisdiction and power to take action for contempt of subordinate courts would not be inconsistent to any constitutional scheme. There may be occasions when attack on Judges and Magistrates of subordinate courts may have wide repercussions throughout the country, in that situation it may not be possible for a High Court to contain the same, as a result of which the administration of justice in the country may be paralysed, in that situation the Apex Court must intervene to ensure smooth functioning of courts. The Apex Court is duty bound to take effective steps within the constitutional provisions to ensure a free and fair administration of justice throughout the country, for that purpose it must wield the requisite power to take action for contempt of subordinate courts. Ordinarily, the High Court would protect the subordinate court from any onslaught on their independence, but in exceptional cases, extraordinary situation may prevail affecting the administration of public justice or where the entire judiciary is affected, this Court may directly take cognizance of contempt of subordinate courts. We would like to strike a note of caution that this Court will sparingly exercise its inherent power in taking cognizance of the contempt of subordinate courts, as ordinarily matters relating to contempt of subordinate courts must be dealt with by the High Courts. The instant case is of exceptional nature, as the incident created a situation where functioning of the subordinate courts all over the country was adversely affected, and the administration of justice was paralysed, therefore, this Court took cognizance of the matter.

38. It is true that courts constituted under a law enacted by Parliament or the State legislature have limited jurisdiction and they cannot assume jurisdiction in a matter, not expressly assigned to them, but that is not so in the case of a superior court of record constituted by the Constitution. Such a court does not have a limited jurisdiction instead it has power to determine its own jurisdiction. No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to be so, under the provisions of the Constitution. In the absence of any express provision in the Constitution, the Apex Court being a court of record has jurisdiction in every matter and if there be any doubt, the Court has power to determine its jurisdiction. If such determination is made by High Court, the same would be subject to appeal to this Court, but if the jurisdiction is determined by this Court it would be final.

We therefore hold that this Court being the Apex Court and a superior court of record has power to determine its jurisdiction under Article 129 of the Constitution, and as discussed earlier it has jurisdiction to initiate or entertain proceedings for contempt of subordinate courts. This view does not run counter to any provision of the Constitution.”
27. In the present case, although the contempt is in the face of the court, the procedure adopted is not only summary but has adequately safeguarded the contemner’s interests. The contemner was issued a notice intimating him the specific allegations against him. He was given an opportunity to counter the allegations by filing his counter-affidavit and additional counter/supplementary affidavit as per his request, and he has filed the same. He was also given an opportunity to file an affidavit of any other person that he chose or to produce any other material in his defence, which he has not done. However, in the affidavit which he has filed, he has requested for an examination of the learned Judge. We have at length dealt with the nature of *in facie curiae* contempt and the justification for adopting summary procedure and punishing the offender on the spot. In such procedure, there is no scope for examining the Judge or Judges of the court before whom the contempt is committed. To give such a right to the contemner is to destroy not only the raison d’être for taking action for contempt committed in the face of the court but also to destroy the very jurisdiction of the court to adopt proceedings for such conduct. It is for these reasons that neither the common law nor the statute law countenances the claim of the offender for examination of the Judge or Judges before whom the contempt is committed. Section 14 of our Act, i.e. the Contempt of Courts Act, 1971 deals with the procedure when the action is taken for the contempt in the face of the Supreme Court and the High Court. Sub-section (3) of the said section deals with a situation where *in facie curiae* contempt is tried by a Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed. The provision in specific terms and for obvious reasons, states that in such cases it shall not be necessary for the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, to appear as a witness and the statement placed before the Chief Justice shall be treated as the evidence in the case. The statement of the learned Judge has already been furnished to the contemner and he has replied to the same. We have, therefore, to proceed by treating the statement of the learned Judge and the affidavits filed by the contemner and the reply given by the learned Judge to the said affidavits, as evidence in the case.

28. We may now refer to the matters in dispute to examine whether the contemner is guilty of the contempt of court. Under the common law definition, “contempt of court” is defined as an act or omission calculated to interfere with the due administration of justice. This covers criminal contempt (that is, acts which so threaten the administration of justice that they require punishment) and civil contempt (disobedience of an order made in a civil cause). Section 2(a), (b) and (c) of the Act defines the contempt of court as follows:

   “2. Definitions. - In this Act, unless the context otherwise requires,-

   (a) ‘contempt of court’ means civil contempt or criminal contempt;

   (b) ‘civil contempt’ means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;
(c) ‘criminal contempt’ means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which -

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;”

29. From the facts which have been narrated above, it is clear that the allegations against the contemner, if true, would amount to criminal contempt as defined under Section 2(c) of the Act. It is in the light of this definition of the “criminal contempt” that we have to examine the facts on record.

30. The essence of the contents of Justice Keshote’s letter is that when he put a question to the contemner as to under which provision the order was passed by the lower court, the contemner “started to shout and said that no question could have been put to him”. The contemner further said that he would get the learned Judge transferred or see that impeachment motion was brought against him in Parliament. He also said that he had “turned up many judges”. He also created a scene in the Court. The learned Judge has further stated in his letter that in sum and substance it was a matter where “except to abuse him of mother and sister”, he insulted him “like anything”. The contemner, according to the learned Judge, wanted to convey to him that admission was a matter of course and no arguments were to be heard at that stage. The learned Judge has given his reaction to the entire episode by pointing out that this is not a question of insulting a Judge but the institution as a whole. In case the dignity of the judiciary was not maintained then he “did not know where the institution would stand, particularly when contemner who is a Senior Advocate, President of the Bar and Chairman of the Bar Council of India behaved in the court in such manner which will have its effect on other advocates as well”. He has further stated that in case the dignity of the judiciary is not restored, it would be very difficult for the Judges to discharge the judicial function without fear or favour. At the end of his letter, he has appealed to the learned Acting Chief Justice for “restoration of dignity of the judiciary”.

31. The contemner, as pointed out above, by filing an affidavit has denied the version of the episode given by the learned Judge and has stated that when the matter was called on, the learned Judge (he has referred to him as the ‘applicant’) took charge of the court proceedings and virtually foreclosed the attempts made by the Senior Judge to intervene. The learned Judge enquired from the contemner as to under which law the impugned order was passed to which the latter replied that it was under various rules of Order 39 CPC. The learned Judge then conveyed to the contemner that he was going to set aside the entire order although against a portion of it
only he had come in appeal. According to the contemner, he then politely brought to the notice of
the learned Judge that being the appellant, he had the dominion over the case and it could not be
made worse just because he had come to High Court. According to the contemner, the learned
Judge then apparently lost his temper and told him that he would set aside the order in toto
disregarding what he had said. The contemner has then proceeded to state that “being upset over
what” he felt was an arbitrary approach to judicial process he “got emotionally perturbed” and
“his professional and institutional sensitivity got deeply wounded” and he told the applicant-
Judge that “it was not the practice” of that Court to dismiss a case without hearing or to upset
judgments or portions of judgments which have not been appealed against. According to the
contemner, “unfortunately the applicant-Judge took it un sportingly and apparently lost his temper
and directed the stenographer to take down the order for setting aside of the whole order”. The
contemner has then stated that he “found it necessary to mention that the exchange that took place
between him and the applicant-Judge got a little heated up”. In the moment of heat the applicant-
Judge made the following observations:

“I am from the Bar and if need be I can take to goondais. I never opted for
Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief
Justice of India disregarded my options and transferred me to this place, which I never
liked.”

According to the contemner, he was “provoked by this” and asked the learned Judge
“whether he was creating a scene to create conditions for getting himself transferred as also
talked earlier”. The contemner has denied that he had referred to any impeachment although
according to him, he did say that “a Judge got himself transferred earlier on account of his
inability to command the goodwill of the Bar due to lack of mutual reverence”. He has also
denied that when the learned Judge asked him as to under which provision the order was passed,
he had replied that the Court had no jurisdiction to ask the same and should admit and grant the
stay order. He has added that such a reply could only be attributed to one who is mad and it is
unbelievable that “he would reply in such a foolish manner”. He has also denied that he had
abused the learned Judge and the allegations made against him in that behalf were vague.
According to the contemner, if he had committed the contempt, the senior member of the Bench
would have initiated proceedings under “Article 129” of the Constitution for committing
contempt in facie curiae. He has also stated that even the learned Judge himself could have done
so but he did not do so and deferred the matter for the next day and “adopted a devious way of
writing to the acting Chief Justice for doing something about it” which shows that the version of
the episode was not correct. The contemner has also then expressed his “uncomprehension” why
the learned Judge should have come to this Court when he had ample and sufficient legal and
constitutional powers to arraign the contemner at the “Bar for what was attributed” to him.

32. Before we refer to the other contentions raised by the contemner, the question is which of
the two versions has to be accepted as correct. The contemner has no doubt asked for an inquiry
and an opportunity to produce evidence. For reasons stated earlier, we declined his request for
such inquiry, but gave him ample opportunity to produce whatever material he desired to, including the affidavits of whomsoever he desired. Our order dated 15-7-1994 is clear on the subject. Pursuant to the said order, the contemner has not filed his further affidavit or material or the affidavit of any other person. Instead he tendered a written apology dated 7-10-1994 which will be considered at the proper place. In his earlier counter and additional counter, he has stated that it is not he who had committed contempt but it is the learned Judge who had committed contempt of his own court. According to him, the learned Judge had gagged him from discharging his duties as an advocate and the statement of senior member of the Bench concerned was necessary. He has taken exception to the learned Judge speaking in the Court except through the Senior Judge of the Bench which according to him, had been the practice in the said High Court and has also alleged that the learned Judge did not follow the said convention.

33. Normally, no Judge takes action for in facie curiae contempt against the lawyer unless he is impelled to do so. It is not the heat generated in the arguments but the language used, the tone and the manner in which it is expressed and the intention behind using it which determine whether it was calculated to insult, show disrespect, to overbear and overawe the court and to threaten and obstruct the course of justice. After going through the report of the learned Judge and the affidavits and the additional affidavits filed by the contemner and after hearing the learned counsel appearing for the contemner, we have come to the conclusion that there is every reason to believe that notwithstanding his denials, and disclaimers, the contemner had undoubtedly tried to browbeat, threaten, insult and show disrespect personally to the learned Judge. This is evident from the manner in which even in the affidavits filed in this Court, the contemner has tried to justify his conduct. He has started narration of his version of the incident by taking exception to the learned Judge’s taking charge of the court proceedings. We are unable to understand what exactly he means thereby. Every member of the Bench is on a par with the other member or members of the Bench and has a right to ask whatever questions he wants to, to appreciate the merits or demerits of the case. It is obvious that the contemner was incensed by the fact that the learned Judge was asking the questions to him. This is clear from his contention that the learned Judge being a junior member of the Bench, was not supposed to ask him any question and if any questions were to be asked, he had to ask them through the senior member of the Bench because that was the convention of the Court. We are not aware of any such convention in any court at least in this country. Assuming that there is such a convention, it is for the learned Judges forming the Bench to observe it inter se. No lawyer or a third party can have any right or say in the matter and can make either an issue of it or refuse to answer the questions on that ground. The lawyer or the litigant concerned has to answer the questions put to him by any member of the Bench. The contemner has sought to rely on the so-called convention and to spell out his right from it not to have been questioned by the learned Judge. This contention coupled with his grievance that the learned Judge had taken charge of the proceedings, shows that the contemner was in all probability perturbed by the fact that the learned Judge was asking him questions. The learned Judge’s version, therefore, appears to be correct when he states that the contemner lost his temper when he started asking him questions. The contemner has further
admitted that he got “emotionally perturbed” and his “professional and institutional sensitivity got deeply wounded” because the learned Judge, according to him, apparently lost his temper and told him in no unconcealed terms that he would set aside the order in toto disregarding what he had said. The learned Judge’s statement that the contemner threatened him with transfer and impeachment proceedings also gets corroboration from the contemner’s own statement in the additional affidavit that he did tell the learned Judge that a Judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence. No one expects a lawyer to be subservient to the Court while presenting his case and not to put forward his arguments merely because the Court is against him. In fact, that is the moment when he is expected to put forth his best effort to persuade the Court. However, if, in spite of it, the lawyer finds that the court is against him, he is not expected to be discourteous to the court or to fling hot words or epithets or use disrespectful, derogatory or threatening language or exhibit temper which has the effect of overbearing the court. Cases are won and lost in the court daily. One or the other side is bound to lose. The remedy of the losing lawyer or the litigant is to prefer an appeal against the decision and not to indulge in a running battle of words with the court. That is the least that is expected of a lawyer. Silence on some occasions is also an argument. The lawyer is not entitled to indulge in unbecoming conduct either by showing his temper or using unbecoming language.

34. The incident had undoubtedly created a scene in the court since even according to the contemner, the exchange between the learned Judge and him was “a little heated up” and the contemner asked the learned Judge “whether he was creating scene to create conditions for getting himself transferred as also talked earlier”. He had also to remind the learned Judge that “a Judge got himself transferred earlier on account of his inability to command the goodwill of the Bar due to lack of mutual reverence”. He has further stated in his affidavit that “the entire Bar at Allahabad” knew that he was unjustly “roughed” by the Judge and was being punished for taking “a fearless and non-servile stand” and that he was being prosecuted for ‘asserting’ a right of audience and “using the liberty to express his views when a Judge takes a course which in the opinion of the Bar is irregular”. He has also stated that any punishment meted out to the ‘outspoken’ lawyer will completely emasculate the freedom of the profession and make the Bar a subservient tail-wagging appendage to the judicial branch which is an anathema to a healthy democratic judicial system. He has further stated in his petition for taking contempt action against the learned Judge that the incident was “witnessed by a large number of advocates”.

35. We have reproduced the contents of the letter written by the learned Judge and his reply to the affidavits filed by the contemner. The learned Judge’s version is that when he put the question to the contemner as to under which provision, the lower court had passed the order in question, the contemner started shouting and said that no question could have been put to him. The contemner also stated that he would get him transferred or see that impeachment motion was brought against him in Parliament. He further said that he had “turned up” many judges and created a good scene in the Court. The contemner further asked him to follow the practice of the
Court. The learned Judge has stated that in sum and substance, it was a matter where except “to abuse of his mother and sister”, he had insulted him “like anything”. The learned Judge has further stated that the contemner wanted to convey to him that admission of every matter was as a matter of course and no arguments were heard at the admission stage. He has reiterated the said version in his reply to the affidavits and in particular, has denied the allegations made against him by the contemner. He has defended his asking the question to the contemner since he was a member of the Bench. The learned Judge has stated that the contemner took exception to his asking the said question as if he had committed some wrong and started shouting. He has further stated that he had asked only the question referred to above and the contemner had created the scene on account of his putting the said question to him, and made it difficult to continue the court’s proceedings. Ultimately, when it became impossible to hear all the slogans and insulting words and threats, he requested the senior learned member of the Bench to list that case before another Bench and to retire to the chamber. Accordingly, an order was made by the senior member of the Bench and both of them retired to the chamber. The learned Judge has denied that he had conveyed to the contemner that he was going to set aside the entire order against a portion of which the contemner had come in appeal. He has stated that it was a case where the contemner did not permit the court proceedings to be proceeded with and both the members of the Bench had ultimately to retire to the chambers. The learned Judge has stated that the defence of the conduct of the contemner in the counter-affidavit “was a manufactured” one. He has then dealt with each paragraph of the contemner’s counter-affidavit. He has also stated that there was no question of his having directed the stenographer to take down the order for setting aside of the whole order since that function was performed by the senior member of the Bench. He has also stated that the contemner has made absolutely wrong allegations when he states that he had made the following remarks: “I am from the Bar and if need be I can take to goondaism.” He has also denied that he had said: “I never opted for Allahabad. I had opted for Gujarat and Himachal Pradesh. I do not know why the Chief Justice of India disregarded my options and transferred me to this place, which I never liked.” He has stated that the contemner has made false allegations against him.

37. To resent the questions asked by a Judge, to be disrespectful to him, to question his authority to ask the questions, to shout at him, to threaten him with transfer and impeachment, to use insulting language and abuse him, to dictate the order that he should pass, to create scenes in the court, to address him by losing temper are all acts calculated to interfere with and obstruct the course of justice. Such acts tend to overawe the court and to prevent it from performing its duty to administer justice. Such conduct brings the authority of the court and the administration of justice into disrespect and disrepute and undermines and erodes the very foundation of the judiciary by shaking the confidence of the people in the ability of the court to deliver free and fair justice.

38. The stance taken by the contemner is that he was performing his duty as an outspoken and fearless member of the Bar. He seems to be labouring under a grave misunderstanding. Brazenness is not outspokenness and arrogance is not fearlessness. Use of intemperate language
is not assertion of right nor is a threat an argument. Humility is not servility and courtesy and politeness are not lack of dignity. Self-restraint and respectful attitude towards the court, presentation of correct facts and law with a balanced mind and without overstatement, suppression, distortion or embellishment are requisites of good advocacy. A lawyer has to be a gentleman first. His most valuable asset is the respect and goodwill he enjoys among his colleagues and in the Court.

39. The rule of law is the foundation of a democratic society. The Judiciary is the guardian of the rule of law. Hence judiciary is not only the third pillar, but the central pillar of the democratic State. In a democracy like ours, where there is a written Constitution which is above all individuals and institutions and where the power of judicial review is vested in the superior courts, the judiciary has a special and additional duty to perform, viz., to oversee that all individuals and institutions including the executive and the legislature act within the framework of not only the law but also the fundamental law of the land. This duty is apart from the function of adjudicating the disputes between the parties which is essential to peaceful and orderly development of the society. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. It is for this purpose that the courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside the courts, which tend to undermine their authority and bring them in disrepute and disrespect by scandalising them and obstructing them from discharging their duties without fear or favour. When the court exercises this power, it does not do so to vindicate the dignity and honour of the individual judge who is personally attacked or scandalised, but to uphold the majesty of the law and of the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded.

40. It cannot be disputed and was not disputed before us that the acts indulged into by the contemner in the present case as stated by the learned Judge per se amount to criminal contempt of court. What was disputed was their occurrence. We have held above that we are satisfied that the contemner did indulge in the said acts.

43. The contemner has obviously misunderstood his function both as a lawyer representing the interests of his client and as an officer of the court. Indeed, he has not tried to defend the said acts in either of his capacities. On the other hand, he has tried to deny them. Hence, much need not be said on this subject to remind him of his duties in both the capacities. It is, however, necessary to observe that by indulging in the said acts, he has positively abused his position both as a lawyer and as an officer of the court, and has done distinct disservice to the litigants in general and to the profession of law and the administration of justice in particular. It pains us to
note that the contemner is not only a senior member of the legal profession, but holds the high offices of the Chairman of the Bar Council of India, Member of the Bar Council of U.P., Chairman and Member, Executive Council and Academic Council of the National Law School University of India at Bangalore and President of the High Court Bar Association, Allahabad. Both as a senior member of the profession and as holder of the said high offices, special and additional duties were cast upon him to conduct himself as a model lawyer and officer of the court and to help strengthen the administration of justice by upholding the dignity and the majesty of the court. It was in fact expected of him to be zealous in maintaining the rule of law and in strengthening the people’s confidence in the judicial institutions. To our dismay, we find that he has acted exactly contrary to his obligations and has in reality set a bad example to others while at the same time contributing to weakening of the confidence of the people in the courts.

44. The contemner has no doubt tendered an unconditional apology on 7-10-1994 by withdrawing from record all his applications, petitions, counter-affidavits, prayers and submissions made at the Bar and to the court earlier. We have reproduced that apology verbatim earlier. In the apology he has pleaded that he has deeply and regretfully realised that the situation, meaning thereby the incident, should never have arisen and the fact that it arose has subjected him to anguish and remorse and a feeling of moral guilt. That feeling has been compounded with the fact that he was a senior advocate and was holding the elective posts of the President of the High Court Bar Association and the Chairman of the Bar Council of India which by their nature show that he was entrusted by his professional fraternity to set up an example of an ideal advocate. He has guiltily realised his failure to approximate to this standard resulting in the present proceedings and he was, therefore, submitting his unconditional apology for the incident in question. We have not accepted this apology, firstly because we find that the apology is not a free and frank admission of the misdemeanour he indulged in the incident in question. Nor is there a sincere regret for the disrespect he showed to the learned Judge and the Court, and for the harm that he has done to the judiciary. On the other hand, the apology is couched in a sophisticated and garbed language exhibiting more an attempt to justify his conduct by reference to the circumstances in which he had indulged in it and to exonerate himself from the offence by pleading that the condition in which the ‘situation’ had developed was not an ideal one and were it ideal, the ‘situation’ should not have arisen. It is a clever and disguised attempt to refurbish his image and get out of a tight situation by not only not exhibiting the least sincere remorse for his conduct but by trying to blame the so-called circumstances which led to it. At the same time, he has attempted to varnish and re-establish himself as a valiant defender of his “alleged duties” as a lawyer. Secondly, from the very inception his attitude has been defiant and belligerent. In his affidavits and application, not only he has not shown any respect for the learned Judge, but has made counter-allegations against him and has asked for initiation of contempt proceedings against him. He has even chosen to insinuate that the learned Judge, by not taking contempt action on the spot and instead writing the letter to the Acting Chief Justice of the High Court, had adopted a devious way and that he had also come to Delhi to meet ‘meaningful’ people. These allegations may themselves amount to contempt of court. Lastly, to accept any apology for a conduct of this
kind and to condone it, would tantamount to a failure on the part of this Court to uphold the majesty of the law, the dignity of the court and to maintain the confidence of the people in the judiciary. The Court will be failing in its duty to protect the administration of justice from attempts to denigrate and lower the authority of the judicial officers entrusted with the sacred task of delivering justice. A failure on the part of this Court to punish the offender on an occasion such as this would thus be a failure to perform one of its essential duties solemnly entrusted to it by the Constitution and the people. For all these reasons, we unhesitatingly reject the said so-called apology tendered by the contemner.

45. The question now is what punishment should be meted out to the contemner. We have already discussed the contempt jurisdiction of this Court under Article 129 of the Constitution. That jurisdiction is independent of the statutory law of contempt enacted by Parliament under Entry 77 of List I of Seventh Schedule of the Constitution. The jurisdiction of this Court under Article 129 is sui generis. The jurisdiction to take cognizance of the contempt as well as to award punishment for it being constitutional, it cannot be controlled by any statute. Neither, therefore, the Contempt of Courts Act, 1971 nor the Advocates Act, 1961 can be pressed into service to restrict the said jurisdiction. We had, during the course of the proceedings indicated that if we convict the contemner of the offence, we may also suspend his licence to practise as a lawyer. The learned counsel for the contemner and the interveners and also the learned Solicitor General appointed amicus curiae to assist the Court were requested to advance their arguments also on the said point. Pursuant to it, it was sought to be contended on behalf of the contemner and the U.P. Bar Association and the U.P. Bar Council that the Court cannot suspend the licence which is a power entrusted by the Advocates Act, 1961 specially made for the purpose, to the disciplinary committees of the State Bar Councils and of the Bar Council of India. The argument was that even the constitutional power under Articles 129 and 142 was circumscribed by the said statutory provisions and hence in the exercise of our power under the said provisions, the licence of an advocate was not liable either to be cancelled or suspended. A reference was made in this connection to the provisions of Sections 35 and 36 of the Advocates Act, which show that the power to punish the advocate is vested in the disciplinary committees of the State Bar Councils and the Bar Council of India. Under Section 37 of the Advocates Act, an appeal lies to the Bar Council of India, when the order is passed by the disciplinary committee of the State Bar Council. Under Section 38, the appeal lies to this Court when the order is made by the disciplinary committee of the Bar Council of India, either under Section 36 or in appeal under Section 37. The power to punish includes the power to suspend the advocate from practice for such period as the disciplinary committee concerned may deem fit under Section 35(3)(c) and also to remove the name of the advocate from the State roll of the Advocates under Section 35(3)(d). Relying on these provisions, it was contended that since the Act has vested the powers of suspending and removing the advocate from practice exclusively in the disciplinary committees of the State Bar Councils and the Bar Council of India, as the case may be, the Supreme Court is denuded of its power to impose such punishment both under Articles 129 and 142 of the Constitution. In support of this contention, reliance was placed on the observations of the majority of this Court in Prem
Chand Garg v. Excise Commr., U.P. [AIR 1963 SC 996] relating to the powers of this Court under Article 142 which are as follows:

“In this connection, it may be pertinent to point out that the wide powers which are given to this Court for doing complete justice between the parties, can be used by this Court for instance, in adding parties to the proceedings pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken for the first time. It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties.

That takes us to the second argument urged by the Solicitor General that Article 142 and Article 32 should be reconciled by the adoption of the rule of harmonious construction. In this connection, we ought to bear in mind that though the powers conferred on this Court by Article 142(1) are very wide, and the same can be exercised for doing complete justice in any case, as we have already observed, this Court cannot even under Article 142(1) make an order plainly inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any constitutional provisions. There can, therefore, be no conflict between Article 142(1) and Article 32. In the case of K.M. Nanavati v. State of Bombay [AIR 1961 SC 112], on which the Solicitor General relies, it was conceded, and rightly, that under Article 142(1) this Court had the power to grant bail in cases brought before it, and so, there was obviously a conflict between the power vested in this Court under the said Article and that vested in the Governor of the State under Article 161. The possibility of a conflict between these powers necessitated the application of the rule of harmonious construction. The said rule can have no application to the present case, because on a fair construction of Article 142(1), this Court has no power to circumscribe the fundamental right guaranteed under Article 32. The existence of the said power is itself in dispute, and so, the present case is clearly distinguishable from the case of K.M. Nanavati.”

46. Apart from the fact that these observations are made with reference to the powers of this Court under Article 142 which are in the nature of supplementary powers and not with reference to this Court’s power under Article 129, the said observations have been explained by this Court in its later decisions in Delhi Judicial Service Assn. v. State of Gujarat and Union Carbide Corp. v. Union of India. In para 51 of the former decision, it has been, with respect, rightly pointed out that the said observations were made with regard to the extent of this Court’s power under Article 142(1) in the context of fundamental rights. Those observations have no bearing on the present issue. No doubt, it was further observed there that those observations have no bearing on the question in issue in that case as there was no provision in any substantive law restricting this Court’s power to quash proceedings pending before subordinate courts. But it was also added
there that this Court’s power under Article 142(1) to do complete justice was entirely of a different level and of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court is in seisin of a matter before it, it has power to issue any order or direction to do complete justice in the matter. A reference was made in that connection to the concurring opinion of Justice A.N. Sen in Harbans Singh v. State of U.P., where the learned Judge observed as follows:

“Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution, I am of the opinion that this Court retains and must retain an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice.”

The Court has then gone on to observe there that no enactment made by Central or State legislature can limit or restrict the power of this Court under Article 142 of the Constitution, though the Court must take into consideration the statutory provisions regulating the matter in dispute. What would be the need of complete justice in a cause or matter, would depend upon the facts and circumstances of each case.

47. In the latter case, i.e., the Union Carbide case [(1991) 4 SCC 584], the Constitution Bench in para 83 stated as follows:

“It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the Apex Court under Article 142(1) is unsound and erroneous. In both Garg as well as Antulay cases [A.R. Antulay v. R.S. Nayak (1988) 2 SCC 602] the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers - limited in some appropriate way - is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Shri Sorabjee, learned Attorney General, referring to Garg case, said that limitation on the
powers under Article 142 arising from ‘inconsistency with express statutory provisions of substantive law’ must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression ‘prohibition’ is read in place of ‘provision’ that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of ‘complete justice’ of a cause or matter, the Apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not ‘complete justice’ of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise.”

49. The consequence of accepting the said contention advanced on behalf of the contemner and the other parties will be twofold. This Court while exercising its power under Article 142(1) would not even be entitled to reprimand the advocate for his professional misconduct which includes exhibition of disrespect to the Court as per Rule 2 of Section I of Chapter II of Part VI of the Bar Council of India Rules made under the Advocates Act, which is also a contempt of court, since the reprimand of the advocate is a punishment which the disciplinary committees of the State Bar Councils and of the Bar Council of India are authorised to administer under Section 35 of the Advocates Act. Secondly, it would also mean that for any act of contempt of court, if it also happens to be an act of professional misconduct under the Bar Council of India Rules, the courts including this Court, will have no power to take action since the Advocates Act confers exclusive power for taking action for such conduct on the disciplinary committees of the State Bar Councils and the Bar Council of India, as the case may be. Such a proposition of law on the face of it deserves rejection for the simple reason that the disciplinary jurisdiction of the State Bar Councils and the Bar Council of India to take action for professional misconduct is different from the jurisdiction of the courts to take action against the advocates for the contempt of court. The said jurisdictions coexist independently of each other. The action taken under one jurisdiction does not bar an action under the other jurisdiction.

50. The contention is also misplaced for yet another and equally, if not more, important reason. In the matter of disciplinary jurisdiction under the Advocates Act, this Court is constituted as the final appellate authority under Section 38 of the Act as pointed out earlier. In that capacity this Court can impose any of the punishments mentioned in Section 35(3) of the Act including that of removal of the name of the advocate from the State roll and of suspending him from practice. If that be so, there is no reason why this Court while exercising its contempt jurisdiction
under Article 129 read with Article 142 cannot impose any of the said punishments. The punishment so imposed will not only be not against the provisions of any statute, but in conformity with the substantive provisions of the Advocates Act and for conduct which is both a professional misconduct as well as the contempt of court. The argument has, therefore, to be rejected.

51. What is further, the jurisdiction and powers of this Court under Article 142 which are supplementary in nature and are provided to do complete justice in any matter, are independent of the jurisdiction and powers of this Court under Article 129 which cannot be trammelled in any way by any statutory provision including the provisions of the Advocates Act or the Contempt of Courts Act. As pointed out earlier, the Advocates Act has nothing to do with the contempt jurisdiction of the court including of this Court and the Contempt of Courts Act, 1971 being a statute cannot denude, restrict or limit the powers of this Court to take action for contempt under Article 129. It is not disputed that suspension of the advocate from practice and his removal from the State roll of advocates are both punishments. There is no restriction or limitation on the nature of punishment that this Court may award while exercising its contempt jurisdiction and the said punishments can be the punishments the Court may impose while exercising the said jurisdiction.

52. Shri P.P. Rao, learned counsel appearing for the High Court Bar Association of Allahabad contended that Articles 19(1)(a) and 19(2), and 19(1)(g) and 19(6) have to be read together and thus read the power to suspend a member of the legal profession from practice or to remove him from the roll of the State Bar Council is not available to this Court under Article 129. We have been unable to appreciate this contention. Article 19(1)(a) guarantees freedom of speech and expression which is subject to the provisions of Article 19(2) and, therefore, to the law in relation to the contempt of court as well. Article 19(1)(g) guarantees the right to practise any profession or to carry on any occupation, trade or business and is subject to the provisions of Article 19(6) which empowers the State to make a law imposing reasonable restrictions, in the interests of general public, on the exercise of the said right and, in particular, is subject to a law prescribing technical or professional qualifications necessary for practising the profession or carrying on the occupation, trade or business. On our part we are unable to see how these provisions of Article 19 can be pressed into service to limit the power of this Court to take cognizance of and punish for the contempt of court under Article 129. The contention that the power of this Court under Article 129 is subject to the provisions of Articles 19(1)(a) and 19(1)(g), is unexceptional. However, it is not pointed out to us as to how the action taken under Article 129 would be violative of the said provisions, since the said provisions are subject to the law of contempt and the law laying down technical and professional qualifications necessary for practising any profession, which includes the legal profession. The freedom of speech and expression cannot be used for committing contempt of court nor can the legal profession be practised by committing the contempt of court. The right to continue to practise is subject to the law of contempt. The law does not mean merely the statute law but also the constitutional provisions. The right, therefore, is subject to the
restrictions placed by the law of contempt as contained in the statute - in the present case, the Contempt of Courts Act, 1971 as well as to the jurisdiction of this Court and of the High Court to take action under Articles 129 and 215 of the Constitution respectively. We, therefore, do not see any conflict between the provisions of Articles 129 and 215, and Article 19(1)(a) and Article 19(1)(g) read with Articles 19(2) and 19(6) respectively.

53. When the Constitution vests this Court with a special and specific power to take action for contempt not only of itself but of the lower courts and tribunals, for discharging its constitutional obligations as the highest custodian of justice in the land, that power is obviously coupled with a duty to protect all the limbs of the administration of justice from those whose actions create interference with or obstruction to the course of justice. Failure to exercise the power on such occasions, when it is invested specifically for the purpose, is a failure to discharge the duty. In this connection, we may refer to the following extract from the decision of this Court in *Chief Controlling Revenue Authority and Superintendent of Stamps v. Maharashtra Sugar Mills Ltd.* [AIR 1950 SC 218]:

“But when a capacity or power is given to a public authority there may be circumstances which couple with the power a duty to exercise it. To use the language of Lord Cairns in the case of *Julius v. Bishop of Oxford* [(1880) 5 AC 214]:

‘There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so’.”

54. For the reasons discussed above, we find the contemner, Shri Vinay Chandra Mishra, guilty of the offence of the criminal contempt of the Court for having interfered with and obstructed the course of justice by trying to threaten, overawe and overbear the Court by using insulting, disrespectful and threatening language, and convict him of the said offence. Since the contemner is a senior member of the Bar and also adorns the high offices such as those of the Chairman of the Bar Council of India, the President of the U.P. High Court Bar Association, Allahabad and others, his conduct is bound to infect the members of the Bar all over the country. We are, therefore, of the view that an exemplary punishment has to be meted out to him.

55. The facts and circumstances of the present case justify our invoking the power under Article 129 read with Article 142 of the Constitution to award to the contemner a suspended sentence of imprisonment together with suspension of his practice as an advocate in the manner directed herein. We accordingly sentence the contemner for his conviction for the offence of criminal contempt as under:
(a) The contemner Vinay Chandra Mishra is hereby sentenced to undergo simple imprisonment for a period of six weeks. However, in the circumstances of the case, the sentence will remain suspended for a period of four years and may be activated in case the contemner is convicted for any other offence of contempt of court within the said period; and

(b) The contemner shall stand suspended from practising as an advocate for a period of three years from today with the consequence that all elective and nominated offices/posts at present held by him in his capacity as an advocate, shall stand vacated by him forthwith. The contempt petition is disposed of in the above terms.
K.T. THOMAS, J. - We thought that the question involved in this appeal would generate much interest to the legal profession and hence we issued notices to the Bar Council of India as well as the State Bar Council concerned. But the Bar Council of India did not respond to the notice. We therefore requested Mr Dushyant A. Dave, Senior Advocate, to help us as amicus curiae. The learned Senior Counsel did a commendable job to help us by projecting a wide screen focussing on the full profiles of the subject with his usual felicity. We are beholden to him.

2. When an advocate was punished for contempt of court can he appear thereafter as a counsel in the courts, unless he purges himself of such contempt? If he cannot, then what is the way he can purge himself of such contempt? That question has now come to be determined by the Supreme Court.

3. This matter concerns an advocate practising mostly in the courts situated within Ernakulam District of Kerala State. He was hauled up for contempt of court on two successive occasions. We wish to skip the facts in both the said cases which resulted in his being hauled up for such contempt as those facts have no direct bearing on the question sought to be decided now. [The detailed facts leading to the said proceedings have been narrated in the two decisions of the High Court of Kerala reported in C.N. Presannan v. K.A. Mohammed Ali, 1991 Cri LJ 2194 (Ker) & 1991 Cri LJ 2205 (Ker)]. Nonetheless, it is necessary to state that the High Court of Kerala found the respondent Advocate guilty of criminal contempt in both cases and convicted him under Section 12 of the Contempt of Courts Act, 1971, and sentenced him in one case to a fine of Rs 10,000 (to be credited, if realised, to the funds of Kerala Legal Aid Board). In the second case he was sentenced to pay a fine of Rs 2000. Though he challenged the conviction and sentence imposed on him by the High Court, he did not succeed in the Supreme Court except getting the fine of Rs 2000 in one case deleted. The apology tendered by him in this Court was not accepted, for which a two-Judge Bench made the following observation:

“We regretfully will not be able to accept his apology at this belated juncture, but would rather admonish the appellant for his conduct under our plenary powers under the Constitution, which we do hereby.”

4. The above conviction and sentence and refusal to accept the apology tendered on his behalf did not create any ripple in him, so far as his resolve to continue to appear and conduct cases in the courts was concerned. The present appellant (who represents an association “Lalan Road Residents’ Association, Cochin”) brought to the notice of the Bar Council of Kerala that the
delinquent Advocate continued to conduct cases before the courts in Ernakulam District in spite of the conviction and sentence.

5. The Bar Council of Kerala thereupon initiated disciplinary proceedings against the respondent Advocate and finally imposed a punishment on him debarring him from “acting or pleading in any court till he gets himself purged of the contempt of court by an order of the appropriate court”. The respondent Advocate challenged the order of the State Bar Council in an appeal filed before the Bar Council of India. By the impugned order the Bar Council of India set aside the interdict imposed on him.

6. This appeal, in challenge of the aforesaid order of the Bar Council of India, is preferred by the same person at whose instance the State Bar Council initiated action against the respondent Advocate.

8. The above Rule shows that it was not necessary for the Disciplinary Committee of the Bar Council to impose the said interdict as a punishment for misconduct. Even if the Bar Council had not passed proceedings (which the Disciplinary Committee of the Bar Council of India has since set aside as per the impugned order) the delinquent Advocate would have been under the disability contained in Rule 11 quoted above. It is a self-operating rule for which only one stipulation need be satisfied i.e. the advocate concerned should have been found guilty of contempt of court. The terminus of the period of operation of the interdict is indicated by the next stipulation i.e. the contemnor purges himself of the contempt. The inhibition will therefore start operating when the first stipulation is satisfied, and it would continue to function until the second stipulation is fulfilled. The latter condition would remain eluded until the delinquent Advocate himself initiates steps towards that end.

9. Regarding the first condition there is no difficulty whatsoever in the present case because it is an admitted fact that the respondent Advocate has been found guilty of contempt of court by the High Court of Kerala in two cases successively. For the operation of the interdict contained in Rule 11 it is not even necessary that the Advocate should have been sentenced to any punishment after finding him guilty. The difficulty arises in respect of the second condition mentioned above.

10. The Disciplinary Committee of the Bar Council of India seems to have approached the question from a wrong angle by posing the following question:

“The fundamental question arising for consideration in this appeal is whether Rule 11 of the Rules framed by the Hon’ble High Court of Kerala under Section 34(1) of the Advocates Act, 1961, is binding on the Disciplinary Committee of the State Bar Council and if not, whether the Disciplinary Committee was justified in ordering that on account of the disqualification under Rule 11 the appellant could not be allowed to appear, act or plead till he gets himself purged of the contempt by an order of the appropriate court.”

11. There is no question of Rule 11 being binding on the Disciplinary Committee or any other organ of the Bar Council. There is nothing in the said Rule which would involve the Bar Council in any manner. But there is nothing wrong in the Bar Council informing a delinquent advocate of
the existence of a bar contained in Rule 11 and remind him of his liability to abide by it. Hence
the question formulated by the Disciplinary Committee of the Bar Council of India, as
aforequoted, was unnecessary and fallacious.

12. In the impugned order the Disciplinary Committee rightly stated that “the exercise of the
disciplinary powers over the advocates is exclusively vested with the Bar Council and this power
cannot be taken away by the High Court either by a judicial order or by making a rule”. This is
precisely the legal position adumbrated by the Constitution Bench of this Court in Supreme
Court Bar Assn. v. Union of India [(1998) 4 SCC 409]. In fact the relevant portions of the said
decision have been quoted in the impugned order in extenso. But having informed themselves of
the correct legal position regarding the powers of the Bar Council the members of the
Disciplinary Committee of the Bar Council of India embarked on a very erroneous concept when
it observed the following:

“But to say that an advocate who had been found guilty of contempt of court shall not be
permitted to appear, act or plead in a court unless he has purged himself of the contempt
would amount to usurpation of powers of Bar Council.”

13. After examining Rule 11 of the Rules the Disciplinary Committee of the Bar Council of
India held that

there cannot be an automatic deprivation of the right of an advocate to appear, act or
plead in a court, since such a course would be unfair and even violative of the
fundamental rights guaranteed under Articles 14, 19(1)(g) and 21 of the Constitution of
India”.

In the end the Disciplinary Committee of the Bar Council of India made an unwarranted
proposition on a misplaced apprehension as follows:

“The independence and autonomy of the Bar Council cannot be surrendered to the
provisions contained in Rule 11 of the Rules made by the High Court of Kerala under
Section 34(1) of the Advocates Act.”

14. By giving expression to such a proposition the Bar Council of India has obviously
overlooked the legal position laid down by the Constitution Bench in Supreme Court Bar Assn.
v. Union of India. In para 57 of the decision the Bench said thus:

“57. In a given case, an advocate found guilty of committing contempt of court may
also be guilty of committing ‘professional misconduct’, depending upon the gravity or
nature of his contumacious conduct, but the two jurisdictions are separate and distinct
and exercisable by different forums by following separate and distinct procedures. The
power to punish an advocate by suspending his licence or by removal of his name from
the roll of the State Bar Council for proven professional misconduct vests exclusively in
the statutory authorities created under the Advocates Act, 1961, while the jurisdiction to
punish him for committing contempt of court vests exclusively in the courts.”
15. Thereafter in para 80, the Constitution Bench said the following:

“80. In a given case it may be possible, for this Court or the High Court, to prevent the contemnor advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debarring him to practise as an advocate. In a case of contumacious, unbecoming or blameworthy conduct of an Advocate-on-Record, this Court possesses jurisdiction, under the Supreme Court Rules itself, to withdraw his privilege to practise as an Advocate-on-Record because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practise as an advocate in other courts or tribunals.”

16. Rule 11 of the Rules is not a provision intended for the Disciplinary Committee of the Bar Council of the State or the Bar Council of India. It is a matter entirely concerning the dignity and the orderly functioning of the courts. The right of the advocate to practise envelops a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions etc. Rule 11 has nothing to do with all the acts done by an advocate during his practice except his performance inside the court. Conduct in court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by the Bar Council in exercise of its disciplinary powers. The right to practise, no doubt, is the genus of which the right to appear and conduct cases in the court may be a specie. But the right to appear and conduct cases in the court is a matter on which the court must have the major supervisory power. Hence the court cannot be divested of the control or supervision of the court merely because it may involve the right of an advocate.

17. When the Rules stipulate that a person who committed contempt of court cannot have the unreserved right to continue to appear and plead and conduct cases in the courts without any qualm or remorse, the Bar Council cannot overrule such a regulation concerning the orderly conduct of court proceedings. Courts of law are structured in such a design as to evoke respect and reverence for the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in a dignified and orderly manner. The very sight of an advocate, who was found guilty of contempt of court on the previous hour, standing in the court and arguing a case or cross-examining a witness on the same day, unaffected by the contumacious behaviour he hurled at the court, would erode the dignity of the court and even corrode the majesty of it besides impairing the confidence of the public in the efficacy of the institution of the courts. This necessitates vesting of power with the High Court to formulate rules for regulating the proceedings inside the court including the conduct of advocates during such proceedings. That power should not be
confused with the right to practise law. While the Bar Council can exercise control over the latter, the High Court should be in control of the former.

22. We have already pointed out that Rule 11 of the Rules is a self-operating provision. When the first postulate of it is completed (that the advocate has been found guilty of contempt of court) his authority to act or plead in any court stands snapped, though perhaps for the time being. If he does such things without the express permission of the court he would again be guilty of contempt of court besides such act being a misconduct falling within the purview of Section 34 of the Advocates Act. The interdict as against him from appearing in court as a counsel would continue until such time as he purges himself of the contempt.

23. Now we have to consider the crucial question - how can a contemnor purge himself of the contempt? According to the Disciplinary Committee of the Bar Council of India, purging oneself of contempt can be done by apologising to the court. The said opinion of the Bar Council of India can be seen from the following portion of the impugned order:

―Purging oneself of contempt can be only by regretting or apologising in the case of a completed action of criminal contempt. If it is a case of civil contempt, by subsequent compliance with the orders or directions the contempt can be purged of. There is no procedural provision in law to get purged of contempt by an order of an appropriate court.‖

24. Purging is a process by which an undesirable element is expelled either from one’s own self or from a society. It is a cleaning process. Purge is a word which acquired implications first in theological connotations. In the case of a sin, purging of such sin is made through the expression of sincere remorse coupled with doing the penance required. In the case of a guilt, purging means to get himself cleared of the guilt. The concept of purgatory was evolved from the word “purge”, which is a state of suffering after this life in which those souls, who depart this life with their deadly sins, are purified and rendered fit to enter into heaven where nothing defiled enters. In Black’s Law Dictionary the word “purge” is given the following meaning: “To cleanse; to clear. To clear or exonerate from some charge or imputation of guilt, or from a contempt.” It is preposterous to suggest that if the convicted person undergoes punishment or if he tenders the fine amount imposed on him the purge would be completed.

25. We are told that a learned Single Judge of the Allahabad High Court has expressed a view that purging process would be completed when the contemnor undergoes the penalty [vide Madan Gopal Gupta (Dr) v. Agra University, AIR 1974 All 39]. This is what the learned Single Judge said about it:

“In my opinion a party in contempt purged its contempt by obeying the orders of the court or by undergoing the penalty imposed by the court.”

26. Obeying the orders of the court would be a mode by which one can make the purging process in a substantial manner when it is a civil contempt. Even for such a civil contempt the purging process would not be treated as completed merely by the contemnor undergoing the
penalty imposed on him unless he has obeyed the order of the court or he has undone the wrong. If that is the position in regard to civil contempt the position regarding criminal contempt must be stronger. Section 2 of the Contempt of Courts Act categorises contempt of court into two categories. The first category is “civil contempt” which is the wilful disobedience of the order of the court including breach of an undertaking given to the court. But “criminal contempt” includes doing any act whatsoever, which tends to scandalise or lowers the authority of any court, or tends to interfere with the due course of a judicial proceeding or interferes with, or obstructs the administration of justice in any other manner.

27. We cannot therefore approve the view that merely undergoing the penalty imposed on a contemnor is sufficient to complete the process of purging himself of the contempt, particularly in a case where the contemnor is convicted of criminal contempt. The danger in giving accord to the said view of the learned Single Judge in the aforecited decision is that if a contemnor is sentenced to a fine he can immediately pay it and continue to commit contempt in the same court, and then again pay the fine and persist with his contemptuous conduct. There must be something more to be done to get oneself purged of the contemp when it is a case of criminal contempt.

28. The Disciplinary Committee of the Bar Council of India highlighted the absence of any mode of purging oneself of the guilt in any of the Rules as a reason for not following the interdict contained in Rule 11. Merely because the Rules did not prescribe the mode of purging oneself of the guilt it does not mean that one cannot purge the guilt at all. The first thing to be done in that direction when a contemnor is found guilty of a criminal contempt is to implant or infuse in his own mind real remorse about his conduct which the court found to have amounted to contempt of court. Next step is to seek pardon from the court concerned for what he did on the ground that he really and genuinely repented and that he has resolved not to commit any such act in future. It is not enough that he tenders an apology. The apology tendered should impress the court to be genuine and sincere. If the court, on being impressed of his genuineness, accepts the apology then it could be said that the contemnor has purged himself of the guilt.

29. This Court has held in M.Y. Shareef v. Hon’ble Judges of the Nagpur High Court [AIR 1955 SC 19], that

“an apology is not a weapon of defence to purge the guilty of their offence; nor is it intended to operate as a universal panacea, but it is intended to be evidence of real contriteness”.

Ahmadi, J. (as the learned Chief Justice then was) in M.B. Sanghi, Advocate v. High Court of Punjab and Haryana [(1991) 3 SCC 600], while considering an apology tendered by an advocate in a contempt proceeding has stated thus:

“And here is a member of the profession who has repeated his performance presumably because he was let off lightly on the first occasion. Soft justice is not the answer - not that the High Court has been harsh with him - what I mean is he cannot be let off on an apology which is far from sincere. His apology was hollow, there was no
remorse - no regret - it was only a device to escape the rigour of the law. What he said in his affidavit was that he had not uttered the words attributed to him by the learned Judge; in other words the learned Judge was lying - adding insult to injury - and yet if the court finds him guilty (he contested the matter tooth and nail) his unqualified apology may be accepted. This is no apology, it is merely a device to escape.”

30. A four-Judge Bench of this Court in Mulk Raj v. State of Punjab [(1972) 3 SCC 839] made the following observations which would throw considerable light on the question before us:

“9. Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace apology is shorn of penitence. If apology is offered at a time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and it becomes an act of a cringing coward. The High Court was right in not taking any notice of the appellant’s expression of apology ‘without any further word’. The High Court correctly said that acceptance of apology in the case would amount to allow the offender to go away with impunity after having committed gross contempt.”

31. Thus a mere statement made by a contemnor before court that he apologises is hardly enough to amount to purging himself of the contempt. The court must be satisfied of the genuineness of the apology. If the court is so satisfied and on its basis accepts the apology as genuine the court has to make an order holding that the contemnor has purged himself of the contempt. Till such an order is passed by the court the delinquent advocate would continue to be under the spell of the interdict contained in Rule 11 of the Rules.

32. Shri Sadrul Anam, learned counsel for the respondent Advocate submitted first, that the respondent has in fact apologised before this Court through the counsel engaged by him, and second is that when this Court observed that “this course should set everything at rest” it should be treated as the acknowledgement made by this Court that the contemnor has purged himself of the guilt.

33. We are unable to accept either of the said contentions. The observation that “this course should set everything at rest” in the judgment of this Court cannot be treated as anything beyond the scope of the plea made by the respondent in that case. That apart, this Court was certainly disinclined to accept the apology so tendered in this Court which is clearly manifested from the outright repudiation of that apology when this Court said thus:

“We regretfully will not be able to accept his apology at this belated juncture, but would rather admonish the appellant for his conduct under our plenary powers under the Constitution, which we do hereby.”

34. The respondent Advocate continued to appear in all the courts where he was earlier appearing even after he was convicted by the High Court for criminal contempt without being objected by any court. This is obviously on account of the fact that presiding officers of the court were not informed of what happened. We, therefore, direct that in future, whenever an advocate is
convicted by the High Court for contempt of court, the Registrar of that High Court shall intimate the fact to all the courts within the jurisdiction of that High Court so that presiding officers of all courts would get the information that the particular advocate is under the spell of the interdict contained in Rule 11 of the Rules until he purges himself of the contempt.

35. It is still open to the respondent Advocate to purge himself of the contempt in the manner indicated above. But until that process is completed the respondent Advocate cannot act or plead in any court situated within the domain of the Kerala High Court, including the subordinate courts thereunder. The Registrar of the High Court of Kerala shall intimate all the courts about this interdict as against the respondent Advocate.

* * * * *
Bal Thackrey vs Harish Pimpalkhute & Ors
(2005) 1 SCC 254E

Bench: Y.K. Sabharwal, D.M. Dharmadhikari, Tarun Chatterjee

JUDGMENT:

Action for contempt is divisible into two categories, namely, that initiated suo motu by the Court and that instituted otherwise than on the court's own motion. The mode of initiation in each case would necessarily be different. While in the case of suo motu proceedings, it is the Court itself which must initiate by issuing a notice, in the other cases initiation can only be by a party filing an application. [Pallav Sheth v. Custodian and Others (2001) 7 SCC 549].

The main issue for determination in these appeals is whether contempt proceedings were initiated against the appellant suo motu by the court or by respondents. First we may note the background under which these matters were referred to a larger Bench.

Delhi High Court in the case of Anil Kumar Gupta v. K.Suba Rao & Anr. [ILR (1974) 1 Del.1] issued following directions:

"The office is to take note that in future if any information is lodged even in the form of a petition inviting this Court to take action under the Contempt of Courts Act or Article 215 of the Constitution, where the informant is not one of the persons named in Section 15 of the said Act, it should not be styled as a petition and should not be placed for admission on the judicial side. Such a petition should be placed before the Chief Justice for orders in Chambers and the Chief Justice may decide either by himself or in consultation with the other judges of the Court whether to take any cognizance of the information."

In P.N.Duda v. P.Shiv Shanker & Ors. [(1988) 3 SCC 167] this Court approving the aforesaid observation of Delhi High Court directed as under:

"...the direction given by the Delhi High Court sets out the proper procedure in such cases and may be adopted, at least in future, as a practice direction or as a rule, by this Court and other High Courts."

Challenging the conviction of the appellant for offence under Section 15 of the Contempt of Courts Act, 1971 (for short 'the Act') it was, inter alia, contended that the directions in P.N.Duda's
case (supra) were not followed by the High Court inasmuch as the informative papers styled as contempt petitions were not placed before the Chief Justice of the High Court for suo motu action and, therefore, the exercise was uncalled for and beyond legal sanctity. This aspect assumed significant importance because admittedly the contempt petitions were filed in the High Court without the consent of the Advocate-General and, therefore, not competent except when the court finds that the contempt action was taken by the court on its own motion. The two-judge bench hearing the appeals expressed the view that the aforesaid directions approved by this Court in P.N.Duda's case are of far-reaching consequences. The Bench observed that the power under Section 15 of the Act to punish contemners for contempt rests with the court and in Duda's case, they seem to have been denuded to rest with the Chief Justice on the administrative side. Expressing doubts about the correctness of the observations made in Duda's case, and observing that the same require reconsideration, these appeals were directed to be referred for decision by a larger Bench. Under this background, these matters have been placed before us. For determination of the main issue in these appeals including the aforesaid aspect arising out of Duda's case, it is necessary to briefly note the object of the power of the Court to punish a person for contempt. Every High Court besides powers under the Act has also the power to punish for contempt as provided in Article 215 of the Constitution of India. Repealing the Contempt of Courts Act, 1952, the Act was enacted, inter alia, providing definition of civil and criminal contempt and also providing for filtering of criminal contempt petitions. The Act laws down 'contempt of court' to mean civil contempt or criminal contempt. We are concerned with criminal contempt. 'Criminal contempt' is defined in Section 2(c) of the Act. It, inter alia, means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court. The procedure for initiating a proceeding of contempt when it is committed in the face of the Supreme Court or High Court has been prescribed in Section 14 of the Act. In the case of criminal contempt, other than a contempt referred to in Section 14 the manner of taking cognizance has been provided for in Section 15 of the Act. This section, inter alia, provides that action for contempt may be taken on court's own motion or on a motion made by

(a) the Advocate-General, or

(b) any other person, with the consent in writing of the Advocate-General.

The contempt jurisdiction enables the Court to ensure proper administration of justice and maintenance of the rule of law. It is meant to ensure that the courts are able to discharge their functions properly, unhampered and unsullied by wanton attacks on the system of administration of justice or on officials who administer it, and to prevent willful defiance of orders of the court or undertakings given to the court [Commissioner, Agra v. Rohtas Singh (1998) 1 SCC 349]. In Supreme Court Bar Association v. Union of India & Anr. [(1998) 4 SCC 409] it was held that
"The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law. It is an unusual type of jurisdiction combining "the jury, the judge and the hangman" and it is so because the court is not adjudicating upon any claim between litigating parties. This jurisdiction is not exercised to protect the dignity of an individual judge but to protect the administration of justice from being maligned. In the general interest of the community it is imperative that the authority of courts should not be imperiled and there should be no unjustifiable interference in the administration of justice." Dealing with the nature and character of the power of the courts to deal with contempt in the case of Pritam Pal, v. High Court of Madhya Pradesh, Jabalpur Through Registrar, [(1993) Supp. (1) SCC 529], this Court observed:

"15. Prior to the Contempt of Courts Act, 1971, it was held that the High Court has inherent power to deal with a contempt of itself summarily and to adopt its own procedure, provided that it gives a fair and reasonable opportunity to the contemnor to defend himself. But the procedure has now been prescribed by Section 15 of the Act in exercise of the powers conferred by Entry 14, List III of the Seventh Schedule of the Constitution. Though the contempt jurisdiction of the Supreme Court and the High Court can be regulated by legislation by appropriate legislature under Entry 77 of List I and Entry 14 of List III in exercise of which the Parliament has enacted the Act of 1971, the contempt jurisdiction of the Supreme Court and the High Court is given a constitutional foundation by declaring to be 'Courts of Record' under Articles 129 and 215 of the Constitution and, therefore, the inherent power of the Supreme Court and the High Court cannot be taken away by any legislation short of constitutional amendment. In fact, Section 22 of the Act lays down that the provisions of this Act shall be in addition to and not in derogation of any other law relating to contempt of courts. It necessarily follows that the constitutional jurisdiction of the Supreme Court and the High Court under Articles 129 and 215 cannot be curtailed by anything in the Act of 1971"

The nature and power of the Court in contempt jurisdiction is a relevant factor for determining the correctness of observations made in Duda's case (supra). Dealing with the requirement to follow the procedure prescribed by law while exercising powers under Article 215 of the Constitution to punish for contempt, it was held by this Court in Dr. L.P. Misra v. State of U.P. [(1998) 7 SCC 379] that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law. The exercise of jurisdiction under Article 215 of the Constitution is also governed by laws and the rules subject to the limitation that if such laws/rules stultify or abrogate the constitutional power then such laws/rules would not be valid. In L.P.Misra's case (supra) it was observed that the procedure prescribed by the Rules has to be followed even in exercise of jurisdiction under Article 215 of the Constitution. To the same effect are the observations in Pallav Sheth's case (supra).
For determination of the issues involved, it would also be useful to note the observations made in the case of S.K. Sarkar, Member, Board of Revenue, U.P., Lucknow v. Vinay Chandra Misra, [(1981) 1 SCC 436] to the following effect:

"Section 15 does not specify the basis or the source of information on which the High Court can act on its own motion. If the High Court acts on information derived from its own sources, such as from a perusal of the records of a subordinate court or on reading a report in a newspaper or hearing a public speech, without there being any reference from the subordinate court or the Advocate General, it can be said to have taken cognizance on its own motion. But if the High Court is directly moved by a petition by a private person feeling aggrieved, not being the Advocate General, can the High Court refuse to entertain the same on the ground that it has been made without the consent in writing of the Advocate General? It appears to us that the High Court, has, in such a situation, a discretion to refuse to entertain the petition, or to take cognizance on its own motion on the basis of the information supplied to it in that petition."

In P.N. Duda's case (supra), it was held that:

"54. A conjoint perusal of the Act and rules makes it clear that, so far as this Court is concerned, action for contempt may be taken by the court on its own motion or on the motion of the Attorney General (or Solicitor General) or of any other person with his consent in writing. There is no difficulty where the Court or the Attorney General chooses to move in the matter. But when this is not done and a private person desires that such action should be taken, one of three courses is open to him. He may place the information in his possession before the court and request the court to take action (vide C. K. Daphtary v. O. P. Gupta and Sarkar v. Misra); he may place the information before the Attorney General and request him to take action; or he may place the information before the Attorney General and request him to permit him to move to the court."

The direction issued and procedure laid down in Duda's case is applicable only to cases that are initiated suo motu by the Court when some information is placed before it for suo motu action for contempt of court.

A useful reference can also be made to some observations made in J.R. Parashar, Advocate, and Others v. Prasant Bhushan, Advocate and Others [(2001) 6 SCC 735]. In that case noticing the Rule 3 of the Rules to regulate proceedings for contempt of the Supreme Court, 1975 which like Section 15 of the Act provides that the Court may take action in cases of criminal contempt either (a) suo motu; or (b) on a petition made by Attorney-General or Solicitor-General, or (c) on a petition made by any person and in the case of a criminal contempt with consent in writing of
the Attorney-General or the Solicitor-General as also Rule 5 which provides that only petitions under Rules 3(b) and (c) shall be posted before the Court for preliminary hearing and for orders as to issue of notice, it was observed that the matter could have been listed before the Court by the Registry as a petition for admission only if the Attorney-General or Solicitor-General had granted the consent. In that case, it was noticed that the Attorney-General had specifically declined to deal with the matter and no request had been made to the Solicitor-General to give his consent. The inference, therefore, is that the Registry should not have posted the said petition before the Court for preliminary hearing. Dealing with taking of suo motu cognizance in para 28 it was observed as under:-

"Of course, this Court could have taken suo motu cognizance had the petitioner prayed for it.

They had not. Even if they had, it is doubtful whether the Court would have acted on the statements of the petitioners had the petitioners been candid enough to have disclosed that the police had refused to take cognizance of their complaint. In any event the power to act suo motu in matters which otherwise require the Attorney-General to initiate proceedings or at least give his consent must be exercised rarely. Courts normally reserve this exercise to cases where it either derives information from its own sources, such as from a perusal of the records, or on reading a report in a newspaper or hearing a public speech or a document which would speak for itself. Otherwise sub-section (1) of Section 15 might be rendered otiose"

The whole object of prescribing procedural mode of taking cognizance in Section 15 is to safeguard the valuable time of the court from being wasted by frivolous contempt petition. In J.R. Parashar's case (supra) it was observed that underlying rational of clauses (a), (b) and (c) of Section 15 appears to be that when the court is not itself directly aware of the contumacious conduct, and the actions are alleged to have taken place outside its precincts, it is necessary to have the allegations screened by the prescribed authorities so that Court is not troubled with the frivolous matters. To the similar effect is the decision in S.R.Sarkar's case (supra). In the light of the aforesaid, the procedure laid and directions issued in Duda's case are required to be appreciated also keeping in view the additional factor of the Chief Justice being the master of the roster. In State of Rajasthan v. Prakash Chand and Others [ (1998) 1 SCC 1] it was held that it is the prerogative of the Chief Justice of the High Court to distribute business of the High Court both judicial and administrative. He alone has the right and power to decide how the Benches of the High Court are to be constituted; which Judge is to sit alone and which cases he can and is required to hear as also to which Judges shall constitute a Division Bench and what work those Benches shall do. The directions in Duda's case when seen and appreciated in the light of what we have noticed hereinbefore in respect of contempt action and the powers of the Chief Justice, it would be clear that the same prescribe the procedure to be followed by High Courts to ensure smooth working and streamlining of such contempt actions which are intended to be taken up by the court suo motu on its own motion. These directions have no effect of curtailing or denuding
the power of the High Court. It is also to be borne in mind that the frequent use of suo motu
power on the basis of information furnished in a contempt petition otherwise incompetent
under Section 15 of the Act may render the procedural safeguards of Advocate-General's consent
nugatory. We are of the view that the directions given in Duda's case are legal and valid. Now,
the question is whether in these matters the High Court initiated contempt action on its own
motion or on motions made by the respondents. It is not in dispute that the two contempt petitions
(Contempt Petition No.12 and Contempt Petition No.13 of 1996) were filed in the High Court
against the appellant under Section 15 of the Act for having committed contempt of court as
postulated under Section 2(c) of the Act for having made a public speech. According to the
petitions, the appellant scandalised the court or at least the offending speech had the tendency to
scandalise or lower the authority of the Court. The contempt petitions were filed without
obtaining the consent of the Advocate-General. In one of the petitions consent had not even been
sought for and besides the prayer for holding the appellant guilty of contempt, further prayers
were also made for suitable inquiry being made in the allegations made by the appellant in the
speech and for issue of directions to him to appear before Court and reveal the truth and for
prosecuting him. The applicant before the High Court, it seems clear from the averments made in
the contempt petition was in an opposite political camp. The petition was based on utterances
made by appellant in public meetings held on 21st October, 1996.

It is well settled that the requirement of obtaining consent in writing of the Advocate-General for
making motion by any person is mandatory. A motion under Section 15 not in conformity with
the requirements of that Section is not maintainable. [State of Kerala v. M.S.Mani and
Others[(2001) 8 SCC 82].

In Contempt Petition No.12 an application dated 22nd October, 1996 was submitted to the
Advocate-General along with proposed contempt petition stating that the applicant wanted to file
petition by 2nd December, 1996 and, therefore, the permission may be granted before that date
and further stating that if no answer is received from the Advocate-General it would be presumed
that permission has been granted and the applicant will proceed with the intended contempt
proceedings. Such a course is not permissible under Section 15 of the Act. There is no question of
any presumption. In fact, Contempt Petition No.12 was filed on 2nd December, without the
consent of the Advocate-General. It further appears that the application seeking permission of the
Advocate-General was received by him on 26th November, 1996. It also appears that the
Advocate-General appeared before the Court on 3rd February, 1997 and stated that he can decide
the question of consent within a reasonable time. The impugned judgment holding appellant
guilty of contempt and inflicting simple imprisonment for a period of one week and fine of
Rs.2000/- was passed on 7th February, 1997.

A perusal of record including the notices issued to the appellant shows that the Court had not
taken suo motu action against the appellant. In contempt petitions, there was no prayer for taking
suo motu action for contempt against the appellant. The specific objection taken that though suo motu action could be taken under Section 15 of the Act on any information or newspaper but not on the basis of those contempt petitions which were filed in regular manner by private parties, was rejected by the High Court observing that being Court of Record it can evolve its own procedure, which means that the procedure should provide just and fair opportunity to the contemner to defend effectively and that the contemner has not expressed any prejudice or canvassed any grievance that he could not understand the charge involved in the proceeding which he had been called upon to defend. It is, however, not in dispute that the charge against the appellant was not framed.

In these matters, the question is not about compliance or non-compliance of the principles of natural justice by granting adequate opportunity to the appellant but is about compliance of the mandatory requirements of Section 15 of the Act. As already noticed the procedure of Section 15 is required to be followed even when petition is filed by a party under Article 215 of the Constitution, though in these matters petitions filed were under Section 15 of the Act. From the material on record, it is not possible to accept the contention of the respondents that the Court had taken suo motu action. Of course, the Court had the power and jurisdiction to initiate contempt proceedings suo motu and for that purpose consent of the Advocate-General was not necessary. At the same time, it is also to be borne in mind that the Courts normally take suo motu action in rare cases. In the present case, it is evident that the proceedings before the High Court were initiated by the respondents by filing contempt petitions under Section 15. The petitions were vigorously pursued and strenuously argued as private petitions. The same were never treated as suo motu petitions. In absence of compliance of mandatory requirement of Section 15, the petitions were not maintainable. As a result of aforesaid view, it is unnecessary to examine in the present case, the effect of non-compliance of the directions issued in Duda's case by placing the informative papers before the Chief Justice of the High Court.

For the foregoing reasons we set aside the impugned judgment and allow the appeals. Fine, if deposited by the appellant shall be refunded to him.

Before parting, it is necessary to direct framing of necessary rule or practice direction by the High Courts in terms of Duda's case. Accordingly, we direct Registrar-General to send a copy of this judgment to the Registrar-Generals of the High Courts so that wherever rule and/or practice direction on the line suggested in Duda's case has not been framed, the High Courts may now frame the same at their earliest convenience.
PART B - PROFESSIONAL ETHICS

PART - A : STANDARDS OF ETIQUETTE AND PROFESSIONAL ETHICS

An Advocate v. Bar Council of India

1989 Supp (2) SCC 25

M.P. THAKKAR, J. - A host of questions of seminal significance, not only for the advocate who has been suspended from practising his profession for 3 years on the charge of having withdrawn a suit (as settled) without the instructions from his client, but also for the members of the legal profession in general have arisen in this appeal:

(1) Whether a charge apprising him specifically of the precise nature and character of the professional misconduct ascribed to him needs to be framed?

(2) Whether in the absence of an allegation or finding of dishonesty or mens rea a finding of guilt and a punishment of this nature can be inflicted on him?

(3) Whether the allegations and the finding of guilt require to be proved beyond reasonable doubt?

(4) Whether the doctrine of benefit of doubt applies?

(5) Whether an advocate acting bona fide and in good faith on the basis of oral instructions given by someone purporting to act on behalf of his client, would be guilty of professional misconduct or of an unwise or imprudent act, or negligence simpliciter, or culpable negligence punishable as professional misconduct?

2. The suit was a suit for recovery of Rs 30,098 (Suit No. 65 of 1981 on the file of Additional City Civil Judge, Bangalore). It appears that the complainant had entrusted the brief of the appellant which he in his turn had entrusted to his junior colleague (Respondent 2 herein) who was attached to his office and was practising along with him at his office at the material time. At the point of time when the suit was withdrawn, Respondent 2 was practising on his own having set up his separate office. On the docket of the brief pertaining to the suit, the appellant made an endorsement giving instructions to withdraw the suit as settled. A sketch was drawn on the back of the cover to enable the person carrying the brief to the junior colleague to locate his office in order to convey the instructions as per the endorsement made by the appellant. The allegations made by the complainant against the appellant are embodied in paras 1 and 2 of his complaint:
(1) The petitioner submits that he entrusted a matter to Respondent 2 to file a case against Shri A. Anantaraju for recovery of a sum of Rs 30,098 with court costs and current interest in Case No. OS 1965 of 1981 on the file of the City Civil Judge at Bangalore. The petitioner submits that the said suit was filed by the first respondent who was then a junior of Respondent 2. The petitioner submits that the matter in dispute in the suit was not settled at all and the first respondent without the knowledge and without the instructions of the petitioner has filed a memo stating that the matter is settled out of court and got the suit dismissed and he has also received half of the institution court fee within 10 days since the date of the disposal of the suit. The petitioner submits that he has not received either the suit amount or the refund of court fee and he is not aware of the dismissal of the suit as settled out of court.

(2) The petitioner submits that when the case was posted for filing of written statement itself the first respondent has filed such a memo stating that the suit was settled out of court. The petitioner submits that in fact, the respondents did not even inform the petitioner about the dates of hearing and when the petitioner asked the dates of hearing the respondents informed the petitioner stating that his presence is not required in the court since the case was posted for filing of written statement and therefore, the petitioner did not attend the court on that day. The petitioner submits that when he enquired about the further date of hearing the respondents did not give the date and said that they would verify the next date of hearing since they have not attended the case since the case was posted for filing written statement by the defendant. The petitioner submits that when he himself went to the court and verified he found to his great surprise that the suit is dismissed as settled out of court and later learnt that even the half of the institution court fee is also taken by the first respondent within 10 days.

3. The version of the appellant may now be unfolded:

(1) One Gautam Chand (RW 3) has been a longstanding client of the appellant. Gautam Chand had business dealings with the plaintiff Haradara and the defendant Anantaraju. Besides, Anantaraju executed an agreement dated 9-8-1980 to sell his house property to Gautam Chand. He received earnest money in the sum of Rs 35,000 from Gautam Chand. Anantaraju, however, did not execute the sale deed within the stipulated period and during the extended period. It was in these circumstances that Gautam Chand (RW 3) approached the appellant for legal advice.

(2) It is the common case of parties that Gautam Chand introduced the complainant Haradara to the appellant and his colleague advocate Respondent 2.

(3) The appellant caused the issue of notice dated 1-6-1981 (Ex. R/15) on behalf of Gautam Chand addressed to the seller Anantaraju calling upon him to execute the sale deed. On the same date, a notice was separately issued on behalf of the complainant Haradara addressed to Anantaraju demanding certain amounts due on the three 'self' bearer cheques
aggregating Rs 30,098 issued by Anantaraju in course of their mutual transactions. This notice was issued by the advocate Respondent 2 acting on behalf of the complainant Haradara.

(4) Gautam Chand (RW 3) and Haradara (PW 1) were friends. Anantaraju was their common adversary. There was no conflict of interests as between Gautam Chand and Haradara. Gautam Chand instructed the appellant and his colleague Respondent 2 Ashok, that he was in possession of the said cheques issued by Anantaraju and that no amount was actually due from Anantaraju to the complainant Haradara. Gautam Chand was desirous of steps to induce Anantaraju to execute the sale deed in his favour.

(5) A suit being OS No. 1965 of 1981 was instituted on behalf of the complainant Haradara claiming an amount of Rs 30,000 and odd, from the defendant Anantaraju on the basis of the aforesaid cheques. It was instituted on 30-6-1981. An interlocutory application was moved on behalf of Haradara by Respondent 2 as his advocate seeking the attachment before judgment of the immovable property belonging to the defendant Anantaraju. The property was in fact the subject of an agreement to sell between Anantaraju and Gautam Chand (RW 3). The court initially declined to grant an order of attachment. In order to persuade the court, certain steps were taken through the said Gautam Chand. He caused the publication of a notice stating that the property in question was the subject-matter of an agreement between Anantaraju and himself and it should not be dealt with by anyone. The publication of this notice was relied upon subsequently on behalf of the complainant Haradara by his advocate (Respondent 2), Ashok in seeking an order of attachment. The court accepted his submissions and passed the order of attachment.

(6) Subsequently the defendant Anantaraju executed the sale deed dated 27-11-1981 in favour of Gautam Chand. The object of the suit was achieved. The sale deed was in fact executed during the subsistence of the order of attachment concerning the same property. The plaintiff Haradara has not objected to it at any time. Consistently, the appellant had reasons to believe the information of settlement of dispute, conveyed by the three parties together on 9-12-1981.

(7) Gautam Chand (RW 3) and the complainant Haradara acted in mutual interest and secured the attachment of property which was the subject-matter of an agreement to sell in favour of Gautam Chand. The suit instituted in the name of the complainant Haradara was only for the benefit of Gautam Chand by reference to this interest in the property.

(8) The appellant conveyed information of the settlement of dispute by his note made on the docket. He drew a diagram of the location of residence of the Respondent 2 Ashok advocate (Ex. R-l-A at p. 14 Additional Documents). The papers were delivered to Respondent 2 Ashok advocate by Gautam Chand (RW 3).

(10) Even though the plaintiff Haradara gained knowledge of the disposal of suit, he did not meet the appellant nor did he address him for over 1½ years until May 1983. He did not also immediately apply for the restoration of suit. An application for restoration was filed on the last date of limitation on 11-1-1982. The application Misc. 16 of 1982 was later allowed to be dismissed for default on 30-7-1982. It was later sought to be revived by application Misc. No. 581 of 1982. Necessary orders were obtained on 16-7-1982. Thus Misc. 16 of 1982 (Application for restoration of suit) is pending in civil court.

On a survey of the legal landscape in the area of disciplinary proceedings this scenario emerges:

(1) In exercise of powers under Section 35 contained in Chapter V entitled “conduct of advocates”, on receipt of a complaint against an advocate (or suo motu) if the State Bar Council has ‘reason to believe’ that any advocate on its roll has been guilty of “professional or other misconduct”, disciplinary proceeding may be initiated against him.

(2) Neither Section 35 nor any other provision of the Act defines the expression ‘legal misconduct’ or the expression ‘misconduct’.

(3) The Disciplinary Committee of the State Bar Council is authorised to inflict punishment, including removal of his name from the rolls of the Bar Council and suspending him from practice for a period deemed fit by it, after giving the advocate concerned and the ‘Advocate General’ of the State an opportunity of hearing.

(4) While under Section 42(1) of the Act the Disciplinary Committee has been conferred powers vested in a civil court in respect of certain matters including summoning and enforcing attendance of any person and examining him on oath, the Act which enjoins the Disciplinary Committee to ‘afford an opportunity of hearing’ (vide Section 35) to the advocate does not prescribe the procedure to be followed at the hearing.

(5) The procedure to be followed in an enquiry under Section 35 is outlined in Part VII of the Bar Council of India Rules made under the authority of Section 60 of the Act.

(6) Rule 8(1) of the said Rules enjoins the Disciplinary Committee to hear the concerned parties that is to say the complainant and the concerned advocate as also the Attorney General or the Solicitor General or the Advocate General. It also enjoins that if it is considered appropriate to take oral evidence the procedure of the trial of civil suits shall as far as possible be followed.
4. At this juncture it is appropriate to articulate some basic principles which must inform the disciplinary proceedings against members of the legal profession in proceedings under Section 35 of the Advocates Act, read with the relevant Rules:

(i) essentially the proceedings are quasi-criminal in character inasmuch as a member of the profession can be visited with penal consequences which affect his right to practise the profession as also his honour; under Section 35(3)(d) of the Act, the name of the advocate found guilty of professional or other misconduct can be removed from the State Roll of Advocates. This extreme penalty is equivalent of death penalty which is in vogue in criminal jurisprudence. The advocate on whom the penalty of his name being removed from the roll of advocates is imposed would be deprived of practising the profession of his choice, would be robbed of his means of livelihood, would be stripped of the name and honour earned by him in the past and is liable to become a social apartheid. A disciplinary proceeding by a statutory body of the members of the profession which is statutorily empowered to impose a punishment including a punishment of such immense proportions is quasi-criminal in character;

(ii) as a logical corollary it follows that the Disciplinary Committee empowered to conduct the enquiry and to inflict the punishment on behalf of the body, in forming an opinion must be guided by the doctrine of benefit of doubt and is under an obligation to record a finding of guilt only upon being satisfied beyond reasonable doubt. It would be impermissible to reach a conclusion on the basis of preponderance of evidence or on the basis of surmise, conjecture or suspicion. It will also be essential to consider the dimension regarding mens rea.

This proposition is hardly open to doubt or debate particularly having regard to the view taken by this Court in *L.D. Jaisinghani v. Narindas N. Punjabi* [(1976) 1 SCC 354], wherein Ray, C.J., speaking for the Court has observed:

“In any case, we are left in doubt whether the complainant’s version, with which he had come forward with considerable delay was really truthful. *We think that in a case of this nature, involving possible disbarring of the advocate concerned, the evidence should be of a character which should leave no reasonable doubt about guilt.* The Disciplinary Committee had not only found the appellant guilty but had disbarred him permanently.” *(emphasis added)*

(iii) in the event of a charge of negligence being levelled against an advocate, the question will have to be decided whether negligence simpliciter would constitute misconduct. It would also have to be considered whether the standard expected from an advocate would have to answer the test of a reasonably equipped prudent practitioner carrying reasonable workload. A line will have to be drawn between tolerable negligence and culpable negligence in the sense of negligence which can be treated as professional misconduct exposing a member of the profession to punishment in the course of
disciplinary proceedings. In forming the opinion on this question the standards of professional conduct and etiquette spelt out in Chapter 2 of Part VI of the Rules governing advocates, framed under Section 60(3) and Section 49(1)(g) of the Act, which form a part of the Bar Council of India Rules may be consulted. As indicated, in the preamble of the Rules, an advocate shall, at all times compose himself in a manner befitting his status as an officer of the court, a privileged member of the community and a gentleman bearing in mind what may be lawful and moral for one who is not a member of the Bar may still be improper for an advocate and that his conduct is required to conform to the rules relating to the duty to the court, the duty to the client, to the opponent, and the duty to the colleagues, not only in letter but also in spirit.

It is in the light of these principles the Disciplinary Committee would be required to approach the question as regards the guilt or otherwise of an advocate in the context of professional misconduct levelled against him. In doing so apart from conforming to such procedure as may have been outlined in the Act or the Rules, the Disciplinary Authority would be expected to exercise the power with full consciousness and awareness of the paramount consideration regarding principles of natural justice and fair play.

5. The State Bar Council, after calling for the comments of the appellant in the context of the complaint, straightway proceeded to record the evidence of the parties. No charge was framed specifying the nature and content of the professional misconduct attributed to the appellant. Nor were any issues framed or points for determination formulated. The Disciplinary Committee straightway proceeded to record evidence. As the case could not be concluded within the prescribed time limit the matter came to be transferred to the Bar Council of India which has heard arguments and rendered the order under appeal.

6. The questions which have surfaced are:

   (1) Whether a specific charge should have been framed apprising the appellant of the true nature and content of the professional misconduct ascribed to him?

   (2) Whether the doctrine of benefit of doubt and the need for establishing the basic allegations were present in the mind of the Disciplinary Authority in recording the finding of guilt or in determining the nature and extent of the punishment inflicted on him?

   (3) Whether in the absence of the charge and finding of dishonesty against him the appellant could be held guilty of professional misconduct even on the assumption that he had acted on the instructions of a person not authorised to act on behalf of his client if he was acting in good faith and in a bona fide manner. Would it amount to lack of prudence or non-culpable negligence or would it constitute professional misconduct?

Now so far as the procedure followed by the State Bar Council at the enquiry against the appellant, is concerned it appears that in order to enable the concerned advocate to defend himself properly, an appropriate specific charge was required to be framed. No doubt the Act does not
outline the procedure and the Rules do not prescribe the framing of a charge. But then even in a departmental proceeding in an enquiry against an employee, a charge is always framed. Surely an advocate whose honour and right to earn his livelihood are at stake can expect from his own professional brethren, what an employee expects from his employer? Even if the rules are silent, the paramount and overshadowing considerations of fairness would demand the framing of a charge. In a disciplinary proceeding initiated at the level of this Court even though the Supreme Court Rules did not so prescribe, in Re Shri ‘M’ an Advocate of the Supreme Court of India [AIR 1957 SC 149], this Court framed a charge making these observations:

We treated the enquiry in chambers as a preliminary enquiry and heard arguments on both sides with reference to the matter of that enquiry. We came to the conclusion that this was not a case for discharge at that stage. We accordingly reframed the charges framed by our learned brother, Bhagwati, J. and added a fresh charge. No objection has been taken to this course. But it is as well to mention that, in our opinion, the terms of Order IV, Rule 30 of the Supreme Court Rules do not preclude us from adopting this course, including the reframing of, or adding to, the charges specified in the original summons, where the material at the preliminary enquiry justifies the same. The fresh enquiry before us in court has proceeded with reference to the following charges as reframed and added to by us.

It would be extremely difficult for an advocate facing a disciplinary proceeding to effectively defend himself in the absence of a charge framed as a result of application of mind to the allegations and to the question as regards what particular elements constituted a specified head of professional misconduct.

7. The point arising in the context of the non-framing of issues has also significance. As discussed earlier Rule 8(1) enjoins that “the procedure for the trial of civil suits, shall as far as possible be followed”. Framing of the issues based on the pleadings as in a civil suit would be of immense utility. The controversial matters and substantial questions would be identified and the attention focussed on the real and substantial factual and legal matters in context. The parties would then become aware of the real nature and content of the matters in issue and would come to know (1) on whom the burden rests (2) what evidence should be adduced to prove or disprove any matter (3) to what end cross-examination and evidence in rebuttal should be directed. When such a procedure is not adopted there exists inherent danger of miscarriage of justice on account of virtual denial of a fair opportunity to meet the case of the other side. We wish the State Bar Council had initially framed a charge and later on framed issues arising out of the pleadings for the sake of fairness and for the sake of bringing into forefront the real controversy.

8. In the light of the foregoing discussion the questions arising in the present appeal may now be examined. In substance the charge against the appellant was that he had withdrawn a suit as settled without the instructions from the complainant. It was not the case of the complainant that the appellant had any dishonest motive or that he had acted in the matter by reason of lack of probity or by reason of having been won over by the other side for monetary considerations or
otherwise. The version of the appellant was that the suit which had been withdrawn had been instituted in a particular set of circumstances and that the complainant had been introduced to the appellant for purposes of the institution of the suit by an old client of his viz. RW 3 Gautam Chand. The appellant was already handling a case on behalf of RW 3 Gautam Chand against RW 4 Anantaraju. The decision to file a suit on behalf of the complainant against RW 4 Anantaraju was taken in the presence of RW 3 Gautam Chand. It was at the instance and inspiration of RW 3 Gautam Chand that the suit had been instituted by the complainant, but really he was the nominee of Gautam Chand and that the complainant himself had no real claim on his own. It transpires from the records that it was admitted by the complainant that he was not maintaining any account books in regard to the business and he was not an income tax assessee. In addition, the complainant (PW 1) Haradara himself has admitted in his evidence that it was Gautam Chand who had introduced him to the appellant, and that he was in fact taken to the office of the appellant for filing the said suit, by Gautam Chand. It was this suit which was withdrawn by the appellant. Of course it was withdrawn without any written instructions from the complainant. It was also admitted by the complainant that he knew the defendant against whom he had filed the suit for recovery of Rs 30,000 and odd through Gautam Chand and that he did not know the defendant intimately or closely. He also admitted that the cheques used to be passed in favour of the party and that he was not entitled to the entire amount. He used to get only commission.

9. Even on the admission of the complainant himself he was taken to the office of the appellant for instituting the suit, by RW 3 Gautam Chand, an old client of the appellant whose dispute with the defendant against whom the complainant had filed the suit existed at the material time and was being handled by the appellant. The defence of the appellant that he had withdrawn the suit in the circumstances mentioned by him required to be considered in the light of his admissions. The defence of the appellant being the suit was withdrawn under the oral instructions of the complainant in the presence of RW 3 Gautam Chand and RW 4 Anantaraju and inasmuch as RWs 3 and 4 supported the version of the appellant on oath, the matter was required to be examined in this background. Assuming that the evidence of the appellant corroborated by RWs 3 and 4 in regard to the presence of the complainant was not considered acceptable, the question would yet arise as to whether the withdrawal on the part of the appellant as per the oral instructions of RW 3 Gautam Chand who had taken the complainant to the appellant for instituting the suit, would amount to professional misconduct. Whether the appellant had acted in a bona fide manner under the honest belief that RW 3 Gautam Chand was giving the instructions on behalf of the complainant requires to be considered. If he had done so in a bona fide and honest belief would it constitute professional misconduct, particularly having regard to the fact that no allegation regarding corrupt motive was attributed or established. Here it has to be mentioned that the appellant had acted in an open manner in the sense that he had in his own hand-made endorsement for withdrawing the suit as settled and sent the brief to his junior colleague. If the appellant had any oblique motive or dishonest intention, he would not have made the endorsement in his own hand.
10. No doubt Rule 19 contained in Section 2 captioned ‘Duty to the clients’ provides that an advocate shall not act on the instructions of any person other than his client or his authorised agent. If, therefore, the appellant had acted under the instructions of RW 3 Gautam Chand bona fide believing that he was the authorised agent to give instructions on behalf of the client, would it constitute professional misconduct. Even if RW 3 was not in fact an authorised agent of the complainant, but if the appellant bona fide believed him to be the authorised agent having regard to the circumstances in which the suit came to be instituted, would it constitute professional misconduct? Or would it amount to only an imprudent and unwise act or even a negligent act on the part of the appellant? These were the questions which directly arose to which the Committee never addressed itself. There is also nothing to show that the Disciplinary Committee has recorded a finding on the facts and the conclusion as regards the guilt in full awareness of the doctrine of benefit of doubt and the need to establish the facts and the guilt beyond reasonable doubt. As has been mentioned earlier, no charge has been formulated and framed, no issues have been framed. The attention of the parties was not focussed on what were the real issues. The appellant was not specifically told as to what constituted professional misconduct and what was the real content of the charge regarding the professional misconduct against him.

11. In the order under appeal the Disciplinary Committee has addressed itself to three questions viz.:  

(i) Whether the complainant was the person who entrusted the brief to the appellant and whether the brief was entrusted by the complainant to the appellant? 

(ii) Whether report of settlement was made without instruction or knowledge of the complainant?  

(iii) Who was responsible for reporting settlement and instructions of the complainant? 

In taking the view that the appellant had done so probably with a view to clear the cloud of title of RW 3 as reflected in para 22 quoted herein, the Disciplinary Committee was not only making recourse to conjecture, surmise and presumption on the basis of suspicion but also attributing to the appellant a motive which was not even attributed by the complainant and of which the appellant was not given any notice to enable him to meet the charge: 

“It is not possible to find out as to what made PW 2 to have done like that. As already pointed out the house property which was under attachment which had been purchased by RW 3 during the subsistence of the attachment. Probably with a view to clear the cloud of title of RW 3, PW 2 might have done it. This is only our suspicion whatever it might be, it is clear that RW 2 had acted illegally in directing RW 1 to report settlement.”

12. In our opinion the appellant has not been afforded reasonable and fair opportunity of showing cause inasmuch as the appellant was not apprised of the exact content of the professional
misconduct attributed to him and was not made aware of the precise charge he was required to rebut. The conclusion reached by the Disciplinary Committee in the impugned order further shows that in recording the finding of facts on the three questions, the applicability of the doctrine of benefit of doubt and need for establishing the facts beyond reasonable doubt were not realised. Nor did the Disciplinary Committee consider the question as to whether the facts established that the appellant was acting with bona fides or with mala fides, whether the appellant was acting with any oblique or dishonest motive, whether there was any mens rea, whether the facts constituted negligence and if so whether it constituted culpable negligence. Nor has the Disciplinary Committee considered the question as regards the quantum of punishment in the light of the aforesaid considerations and the exact nature of the professional misconduct established against the appellant. The impugned order passed by the Disciplinary Committee, therefore cannot be sustained. Since we do not consider it appropriate to examine the matter on merits on our own without the benefit of the finding recorded by the Disciplinary Committee of the apex judicial body of the legal profession, we consider it appropriate to remit the matter back to the Disciplinary Committee. As observed by this Court in O.N. Mohindroo v. District Judge, Delhi [(1971) 2 SCR 11], we have no doubt that the Disciplinary Committee will approach the matter with an open mind:

From this it follows that questions of professional conduct are as open as charges of cowardice against Generals or reconsideration of the conviction of persons convicted of crimes. Otherwise how could the Hebron brothers get their conviction set aside after Charles Peace confessed to the crime for which they were charged and held guilty?

We must explain why we consider it appropriate to remit the matter back to the Bar Council of India. This matter is one pertaining to the ethics of the profession which the law has entrusted to the Bar Council of India. It is their opinion of a case which must receive due weight because in the words of Hidayatullah, C.J., in Mohindroo case:

This matter is one of the ethics of the profession which the law has entrusted to the Bar Council of India. It is their opinion of a case which must receive due weight.

It appears to us that the Bar Council of India must have an opportunity to examine the very vexed and sensitive question which has arisen in the present matter with utmost care and consideration, the question being of great importance for the entire profession. We are not aware of any other matter where the apex body of the profession was required to consider whether the bona fide act of an advocate who in good faith acted under the instructions of someone closely connected with his client and entertained a bona fide belief that the instructions were being given under the authority of his client, would be guilty of misconduct. It will be for the Bar Council of India to consider whether it would constitute an imprudent act, an unwise act, a negligent act or whether it constituted negligence and if so a culpable negligence, or whether it constituted a professional misconduct deserving severe punishment, even when it was not established or at least not established beyond reasonable doubt that the concerned advocate was acting with any oblique or dishonest motive or with mala fides. This question will have to be determined in the light of the
evidence and the surrounding circumstances taking into account the doctrine of benefit of doubt and the need to record a finding only upon being satisfied beyond reasonable doubt. In the facts and circumstances of the present case, it will also be necessary to re-examine the version of the complainant in the light of the foregoing discussion keeping in mind the admission made by the complainant that he was not maintaining any books of accounts and he was not an income tax assessee and yet he was the real plaintiff in the suit for Rs 30,000 and odd instituted by him, and in the light of the admission that it was RW 3 Gautam Chand who had introduced him to the appellant and that he was in fact taken to the office of the appellant, for filing the suit, by RW 3 Gautam Chand. The aforesaid question would arise even if the conclusion was reached that the complainant himself was not present and had not given instructions and that the appellant had acted on the instructions of RW 3 Gautam Chand who had brought the complainant to the appellant’s office for instituting the suit and who was a close associate of the complainant. Since all these aspects have not been examined at the level of the Bar Council, and since the matter raises a question of principle of considerable importance relating to the ethics of the profession which the law has entrusted to the Bar Council of India, it would not be proper for this Court to render an opinion on this matter without the benefit of the opinion of the Bar Council of India which will accord close consideration to this matter in the light of the perspective unfolded in this judgment both on law and on facts. We are reminded of the high degree of fairness with which the Bar Council of India had acted in Mohindroo case. The advocate concerned was suspended from practice for four years. The Bar Council had dismissed the appeal. Supreme Court had dismissed the special leave petition summarily. And yet the whole matter was reviewed at the instance of the Bar Council and this Court was persuaded to grant the review. A passage extracted from Mohindroo case deserves to be quoted in this connection:

We find some unusual circumstances facing us. The entire Bar of India are of the opinion that the case was not as satisfactorily proved as one should be and we are also of the same opinion. All processes of the court are intended to secure justice and one such process is the power of review. No doubt frivolous reviews are to be discouraged and technical rules have been devised to prevent persons from reopening decided cases. But as the disciplinary committee themselves observed there should not be too much technicality where professional honour is involved and if there is a manifest wrong done, it is never too late to undo the wrong. This Court possesses under the Constitution a special power of review and further may pass any order to do full and effective justice. This Court is moved to take action and the Bar Council of India and the Bar Association of the Supreme Court are unanimous that the appellant deserves to have the order debarring him from practice set aside.

13. We have therefore no doubt that upon the matter being remitted to the Bar Council of India it will be dealt with appropriately in the light of the aforesaid perspective. We accordingly allow this appeal, set aside the order of the Bar Council insofar as the appellant is concerned and remit the matter to the Bar Council of India. We, however, wish to make it clear that it will not be open to the complainant to amend the complaint or to add any further allegation. We also clarify
that the evidence already recorded will continue to form part of the record and it will be open to
the Bar Council of India to hear the matter afresh on the same evidence. It is understood that an
application for restoration of the suit which has been dismissed for default in the city civil court at
Bangalore has been made by the complainant and is still pending before the court. It will be open
to the Bar Council of India to consider whether the hearing of the matter has to be deferred till the
application for restoration is disposed of. The Bar Council of India may give appropriate
consideration to all these questions.

14. We further direct that in case the judgment rendered by this Court or any part thereof is
reported in law journals or published elsewhere, the name of the appellant shall not be mentioned
because the matter is still sub judice and fairness demands that the name should not be specified.
The matter can be referred to as *An Advocate v. Bar Council or In re an Advocate* without
naming the appellant. The appeal is disposed of accordingly.

* * * * *
The appeal is preferred by the plaintiff against the judgment and order of a Division Bench of the Calcutta High Court allowing the appeal preferred by the respondent/defendant. The appeal before the High Court was directed against an order of the city civil court, Calcutta dismissing an application filed by the defendant to set aside the ex parte decree passed against him, under Order 9 Rule 13 of the Civil Procedure Code. The relevant facts may be noticed briefly.

3. The plaintiff/appellant filed a suit for ejecting the defendant-tenant on the ground of default in paying rent and also on the ground that the such premises are required for his own use and occupation. The suit was posted for final hearing on June 9, 1988 - seven years after its institution. On an earlier occasion, the defendant had filed two interlocutory applications, one under Order 14 Rule 5 and the other under Order 6 Rule 16 CPC. On May 19, 1988 the city civil court had passed an order on the said applications observing that the said applications shall be considered at the final hearing of the suit. According to the defendant (as per his statement made in the application filed by him for setting aside the ex parte decree) his advocate advised him that he need not be present at the hearing of the suit on June 9, 1988, and thereafter till the applications filed by him under Order 14 Rule 5 and Order 6 Rule 16 CPC are disposed of. Be that as it may, on June 9, 1988, the advocate for the defendant prayed for an adjournment till the next day. It was adjourned accordingly. On June 10, neither the advocate for the defendant nor
the defendant appeared, with the result the defendant was set ex parte. Hearing of the suit was commenced and concluded on June 11, 1988. The suit was posted for delivery of judgment to June 13, 1988. On June 11, 1988, an application was made on behalf of the defendant stating the circumstances in which his advocate had to retire from the case. This application, however, contained no prayer whatsoever. The suit was decreed ex parte on June 13, 1988. Thereafter the defendant filed the application to set aside the ex parte decree. In this application he referred to the fact of his filing two interlocutory applications as aforesaid, the order of the court thereon passed on May 19, 1988 and then stated “due to the advice of the learned advocate-on-record that your petitioner need not be present at the hearing of the suit on June 9, 1988 and thereafter till the disposal of the application filed under Order 6 Rule 16 and Order 14 Rule 5 read with Section 151 of the Code of Civil Procedure in the above suit,” the defendant did not appear before the Court. It was stated that Mr. Ravindran the Principal Officer of the defendant-company was out of town on that date. It was submitted that because the defendant had acted on the basis of the advice given by the advocate-on-record of the defendant, there was sufficient cause to set aside the ex parte decree within the meaning of Order 9 Rule 13 CPC. The trial court dismissed the said application against which an appeal was preferred by the defendant to the Calcutta High Court. The appeal was heard by a Division Bench and judgment pronounced in open court on July 8, 1991 dismissing the appeal. However, it appears, before the judgment was signed by the learned judges constituting the Division Bench, an application was moved by the defendant for alteration or modification and/or reconsideration of the said judgment mainly on the ground that the defendants’ counsel could not bring to the notice of the Division Bench the decision of this Court in Rafiq v. Munshilal [AIR 1981 SC 1400] and that the said decision clearly supports the defendants’ case. The counsel for the plaintiff opposed the said request. He submitted that once the judgment was pronounced in open court, it was final and that matter cannot be reopened just because a relevant decision was not brought to the notice of the Court. After hearing the counsel for both the parties, the Division Bench reopened the appeal on the ground that “technicalities should not be allowed to stand in the way of doing justice to the parties”. The Bench observed that when they disposed of the appeal, their attention was not invited to the decision of this Court in Rafiq v. Munshilal and that in view of the said judgment they were inclined to reopen the matter. The Division Bench was of the opinion that “after a judgment is delivered by the High Court ignoring the decision of the Supreme Court or in disobedience of a clear judgment of the Supreme Court, it would be treated as non-est and absolutely without jurisdiction .... when our attention has been drawn that our judgment is per incuriam, it is our duty to apply this decision and to hold that our judgment was wrong and liable to be recalled”. (We express no opinion on the correctness of the above premise since it is not put in issue in this appeal.) Accordingly, the Division Bench heard the counsel for the parties and by its judgment and order dated March 3, 1992 allowed the appeal mainly relying upon the decision of this Court in Rafiq.

5. Since the judgment under appeal is exclusively based upon the decision of this Court in Rafiq it is necessary to ascertain what precisely does the said decision say. The appellant, Rafiq had preferred a second appeal in the Allahabad High Court through an advocate. His advocate
was not present when the second appeal was taken up for hearing with the result it was dismissed for default. The appellant then moved an application to set aside the order of dismissal for default which was dismissed by the High Court. The correctness of the said order was questioned in this Court. The matter came up before a Bench comprising D.A. Desai and Baharul Islam, JJ. D.A. Desai, J. speaking for the Bench observed thus:

The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court’s procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.

6. It was then argued by the counsel for the respondent in that appeal that a practice has grown up in the High Court of Allahabad among the lawyers to remain absent when they did not like a particular Bench and that the absence of the appellant’s advocate in the High Court was in accordance with the said practice, which should not be encouraged. While expressing no opinion upon the existence or justification of such practice, the learned Judge observed that if the dismissal order is not set aside “the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented,” and then made the following further observations:

The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted.

7. The question is whether the principle of the said decision comes to the rescue of the defendant respondent herein. Firstly, in the case before us it was not an appeal preferred by an outstation litigant but a suit which was posted for final hearing seven years after the institution of the suit. The defendant is a private limited company having its registered office at Calcutta itself. The persons in charge of the defendant-company are not rustic villagers nor they are innocent illiterates unaware of court procedures. Prior to the suit coming up for final hearing on June 9, 1988 the defendant had filed two applications whereupon the court ordered that they will be considered at the time of the final hearing of the suit. The plaintiff’s case no doubt is that the said
applications were part of delaying tactics being adopted by the defendant-tenants with a view to protract the suit. Be that as it may, the defendant thereafter refused to appear before the court. According to the defendant, their advocate advised them that until the interlocutory applications filed by them are disposed of, the defendant need not appear before the court which means that the defendants need not appear at the final hearing of the suit. It may be remembered that the court proposed to consider the said interlocutory applications at the final hearing of the suit. It is difficult to believe that the defendants implicitly believed their advocate’s advice. Being educated businessmen they would have known that non-participation at the final hearing of the suit would necessarily result in an adverse decision. Indeed we are not prepared to believe that such an advice was in fact tendered by the advocate. No advocate worth his salt would give such advice to his client. Secondly, the several contradictions in his deposition which are pointed out by the Division Bench in the impugned order go to show that the whole story is a later fabrication. The following are the observations made in the judgment of the Division Bench with respect to the conduct of the said advocate: “We found that the said learned advocate conducted the proceedings in a most improper manner and that his absence on June 10, 1988 and on subsequent date was not only discourteous but possibly a dereliction of duty to his client ... the learned advocate had forgotten his professional duty in not making inquiry to the court as to what happened on June 10, 11 and 13, 1988 ... the learned advocate acted in a most perfunctory manner in the matter and the learned advocate dealt with the matter in a most unusual manner. We have also found that the said learned advocate had made serious contradiction in the deposition before the court below. The learned advocate in his deposition stated that he did not file an application for adjournment on June 9, 1988. But from the record it was evident that it was on the basis of the application filed on June 9, 1988, the case was adjourned for cross-examination of the witnesses whose examination was called on the next date.” The above facts stated in the deposition of the advocate show that he indeed made an application for adjournment on June 9, 1988 to enable him to cross-examine the witnesses on the next date. Therefore, his present stand that he advised his client not to participate in the trial from and including June 9, 1988 onwards is evidently untrue. We are, therefore, of the opinion that the story set up by the defendant in his application under Order 9 Rule 13 is an after-thought and ought not to have been accepted by the Division Bench in its order dated March 3, 1992 - more particularly when it had rejected the very case in its earlier judgment dated July 8, 1991.

8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this
was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head-office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hearing they felt piqued and refused to appear before the court. Maybe, it was part of their delaying tactics as alleged by the plaintiff. May be not. But one thing is clear - they chose to non-cooperate with the court. Having adopted such a stand towards the court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.

9. For the above reasons, the appeal is allowed.

* * * * *
State of Maharashtra v. Budhikota Subbarao (Dr)

(1993) 3 SCC 71

R.M. SAHAI, J. - Strictures of ‘sharp practice’, suppression of facts, obtaining orders by playing fraud upon the court against State by Mr Justice Saldanha of the Bombay High Court, while deciding criminal miscellaneous petition filed by the opposite party, accused of leaking official secrets and violating provisions of the Atomic Energy Act, 1962 and awarding Rs 25,000 as compensation, for consultancy loss, suffered by him, due to ex parte order obtained by the State against order of the trial Judge permitting the opposite party to go abroad, compelled the State to file this appeal and assail the order not only for legal infirmities but factual inaccuracies.

2. Reasons to quote the learned Judge which, ‘compelled the conscience of court to pass’ the impugned order were, ‘the unfortunate proceedings that bristled(s) with mala fides’. Basis for these inferences was, the conclusion by the learned Judge, that the State, deliberately, procured the interim order by another learned Judge by filing a separate writ petition, when it knew that the main petition for quashing of the proceedings was pending before the Division Bench (Puranik and Saldanha, JJ). The learned Judge felt, strongly, against the public prosecutor as she being aware of the proceedings before the Division Bench failed in her duty of apprising the learned Judge of correct facts.

3. Was this so? Did the State procure the order by concealing facts? Was the public prosecutor guilty of violating professional ethics or her duty as responsible officer of the court? What led to all this was an application filed by the opposite party, in the writ petition pending for quashing the charge-sheet framed under [The Indian] Official Secrets Act, 1923 and the Atomic Energy Act, 1962, for release of his passport on which the Division Bench of which Mr Justice Saldanha was a member, passed the order on February 13, 1991 that it may be presented before the trial Judge. On the very next day the Additional Sessions Judge, (‘ASJ’) after hearing the parties, directed that the passport and identity card of the opposite party be returned. He, further, permitted the opposite party to leave India and travel abroad as per the itinerary during the period from February 17, 1991 to February 22, 1991 on executing a personal bond of Rs 50,000. The State was, obviously, disturbed by this order as serious charges had been levelled against the opposite party who had been arrested, earlier, just when he was about to leave the country and board the plane, for leakage of official secrets and whose bail had, even, been cancelled by this Court, appeared to be in danger of leaving the country again. Since the order was passed on February 14, 1991 and the opposite party was to fly on February 17, 1991 and February 16, 1991 was Saturday, the State challenged the correctness of the order passed by the ASJ by way of a writ petition under Article 227 of the Constitution read with Section 482 of Criminal Procedure Code and the learned Judge, who under the rules was entitled to hear such a petition, passed an ex parte order on February 15, 1991 staying that part of the order which permitted the opposite party to leave the country and directed the application to be listed for further orders on February 18, 1991. On coming to know of this order, in the evening, the opposite party approached the
Division Bench where the main petition was pending on February 16, which after making an observation that the public prosecutor ought to have brought it to the notice of the learned Single Judge that the main matter was pending before the Division Bench and the trial Judge had passed the order in pursuance of the direction issued by the Division Bench, directed that the matter, being urgent, it should be placed before the same learned Single Judge. Consequently parties appeared before the learned Judge on February 16, who, after hearing, confirmed the interim order passed, a day earlier.

4. With confirmation of interim order the proceedings which had commenced on the application filed by the opposite party to leave the country came to an end. But the writ petition in which the interim order was passed remained pending. And when the revision filed by the State, directed against the order acquitting the accused, was taken up for hearing by Mr Justice Saldanha, and observations were made, during course of judgment dictated in open court from October 5 to 12, 1991 against the public prosecutor and the State, the opposite party appears to have made a mention on October 10, that the writ petition filed by the State against the order of the trial Judge releasing his passport and permitting him to travel abroad may be summoned and disposed of. The request was accepted and on direction of the learned Judge the office listed the case before him on October 11. When the petition was taken up, on October 11, and the public prosecutor was asked if she had any objection to hearing it was stated by her that it did not survive. But the learned Judge after completion of judgment in criminal revision on October 12, appears to have, taken up the writ petition. It was pointed out by the learned senior counsel for the State that since the criminal revision filed by the State against the order acquitting the accused had been dismissed, the writ petition had become infructuous and orders may be passed accordingly.

5. Yet the learned Judge passed the impugned order. What weighed with the learned Judge to infer mala fides against the State was that the order dated February 14, 1991 having been passed in open court in presence of the opposite party and counsel for the State, permitting the opposite party to leave the country on February 17, 1991, the opposite party, genuinely expected and according to the learned Judge, rightly, that any further application which the State would make could only be addressed to the Bench, namely, the Bench of Puranik and Saldanha, JJ., before whom the petition was pending, therefore, the opposite party, justifiably, waited and watched in the Bench, whole day for moving of any application but the State instead of moving any such application filed a fresh writ petition and obtained an ex parte order, the information of which was given to opposite party in the evening. The learned Judge was of opinion that it was deliberate as it was known to the public prosecutor that the Bench on February 13, 1991 after scrutinising the papers was of opinion that it was a genuine case in which the passport should be released and the opposite party should be permitted to travel abroad but due to paucity of time the Bench instead of passing the order directed the opposite party to approach the trial Judge. The learned Judge further held that even though the public prosecutor and the Inspector of Police knew these facts and that the opposite party was to fly on February 17, 1991 yet the notice was
obtained from the learned Judge returnable on February 18, 1991 by which time the delegation from Reliance Industries of which the accused was to be a member was to have left the country. Since the effect of the interim order and the fixing of the petition on February 18, 1991 nullified the opposite party’s going to United States of America, the court felt that the order was obtained not only unfairly, but that it constituted a sharp practice. The motive of the public prosecutor and the State was further attempted to be shown to be dishonest and motivated as the averments in the petition on which the interim order was obtained were false to their knowledge. The falsity found was that the State had deliberately tried to mislead the court by alleging that the trial was fixed for hearing on February 18, 1991 and the same had been adjourned to February 24, 1991. The court found that the learned Single Judge was misled in passing the order as was clear from ground No. 6 which was to the effect that the trial being fixed for February 18, 1991, the trial Judge was not justified in issuing the orders in favour of opposite party. The learned Judge also felt aggrieved by the conduct of the public prosecutor in not informing the learned Single Judge that the main writ petition was already listed for hearing before the Division Bench and that the direction to the ASJ to consider the application for return of passport had been issued by the Bench. The learned Single Judge was not satisfied with explanation of the State that a petition under Article 227 of the Constitution read with Section 482 of Criminal Procedure Code being maintainable before the learned Single Judge under the High Court rules it had no option but to proceed in accordance with law. The learned Single Judge pointed out that if the State would have pointed out to the Registry the correct facts then the case could not have been listed before the learned Single Judge.

6. That any party aggrieved by an order passed by a court is entitled to approach the higher court cannot be disputed nor can it be disputed that a petition under Article 227 of the Constitution read with Section 482 of the Criminal Procedure Code against the order of trial Judge was maintainable and under rules of the court it could be listed before the learned Single Judge only. The State, therefore, in filing the petition against the order of the Sessions Judge did not commit any illegality or any impropriety. A copy of the writ petition, has been annexed to this special leave petition which, does not show any disclosure of incorrect facts or any attempt to mislead the court. Even the learned Single Judge did not find that the trial was not fixed for February 18, 1991. Disclosing correct facts and then obtaining order in favour is not same as procuring an order on incorrect facts. Former is legitimate being part of advocacy, latter is reprehensible and against profession. But if the State persuaded the court to stay the operation of the order passed by the trial Judge while mentioning the details about the pendency of the earlier petition before the Division Bench and issuing of directions to the Sessions Judge to decide the application for release of passport etc. it is difficult to imagine how any inference of obtaining order on incorrect facts could be drawn. During arguments the opposite party attempted to highlight averments in paragraph 6 of the writ petition to the effect that the Division Bench had dismissed the application of the opposite party when no such order was passed. The sentence, in fact, reads as under:
“The application was dismissed and directed the respondent to move trial court and further directed the trial court to consider the same in accordance with law.”

True, the application was not dismissed. But the sentence had to be read in its entirety. No court could be misled from the use of the word dismissed as the directions issued by the court were mentioned correctly. The inference drawn by court and the finding recorded by it of obtaining the order by ‘suppression of facts and making positively false statements’ is factually incorrect and legally unsound. The grief of the opposite party in missing an opportunity of going to the United States and the grievance against functionaries of the State, namely, public prosecutor and prosecuting Inspector can be appreciated. We can, also, visualise the vehemence and eloquence of the opposite party, of which he is capable of, as appeared from his submission when he appeared in person in this Court, but what has baffled us that the learned Judge was persuaded to record the finding of suppression of facts on such weak and insufficient material.

7. Mala fides violating the proceedings may be legal or factual. Former arises as a matter of law where a public functionary acts deliberately in defiance of law without any malicious intention or improper motive whereas the latter is actuated by extraneous considerations. But neither can be assumed or readily inferred. It requires strong evidence and unimpeachable proof. Neither the order passed by the learned Single Judge granting ex parte order of stay preventing opposite party from going abroad was against provisions of law nor was the State guilty of acting mala fides in approaching the learned Single Judge by way of writ petition. The order of the trial Judge could not be challenged before the Division Bench. Under the rules of the court, the correctness of the order could be assailed only in the manner it was done by the State. Any party aggrieved by an order is entitled to challenge it in a court of law. Such action is neither express malice nor malice in law.

8. The opposite party was charged with very serious offence. He was arrested when he was about to leave the country. The State was possessed of material that he had, even, applied for matrimonial alliance in response to an advertisement issued from New York. The order of the trial Judge, therefore, permitting opposite party to leave the country without trial must have created a flutter in the department. It was by all standards a sensational and a sensitive case. The public prosecutor and the prosecuting Inspector who were entrusted with responsibility to prosecute the opposite party must have felt worked up by the order permitting the opposite party to leave the country. Decision must have been taken to prevent the opposite party by approaching the High Court by way of a writ petition instead of approaching the Division Bench. Assuming that the State took recourse to this method, as it might have been apprehensive that it would not get any order from the Division Bench, the State could not be accused of mala fides so long it proceeded in accordance with law. Apart from that once it was brought to the notice of the Division Bench that the State had procured an ex parte order from the learned Judge who was requested by the Division Bench to treat the matter urgent and hear parties and the application was heard on February 16 and the learned Judge refused to vacate the interim order and confirmed it, the entire basis of mala fide stood demolished. The learned Judge was not justified
in blaming the State for getting the notice returnable on February 18. That was order of the court. In any case the opposite party having appeared on 16th yet the learned Judge having refused to modify his order it was too much to hold the State or public prosecutor responsible for it.

9. Sharp practice is not a court language. We are sorry to say so. Facts did not justify it. Legal propriety does not countenance use of such expressions favourably. The learned Judge, to our discomfort, used very harsh language without there being any occasion for it. A State counsel with all the aura of office suffers dual handicap of being looked upon by the other side as the necessary devil and the courts too at times, find it easier to frown upon him. The moral responsibility of a State counsel, to place the facts correctly, honestly and fairly before the court, having access to State records, coupled with his duty to secure an order in favour of his client requires him to discharge his duty responsibly and sensibly. Even so if a State lawyer who owes a special duty and is charged with higher standard of conduct in his zeal or due to pressure, not uncommon in the present day, adopts a partisan approach that by itself is not sufficient to warrant a finding of unfairness or resorting to sharp practice. In this case too not more than this appears to have happened. May be the public prosecutor may have exhibited more zeal. But that could not be characterised as unfair. Maybe it would have been proper and probably better to inform the learned Single Judge about the earlier order passed by the Division Bench. But assuming the public prosecutor did not inform and remained content with its disclosure in the body of the petition she could not be held to have acted dishonestly.

10. We are constrained to observe our unhappiness on the manner in which the writ petition was summoned by Mr Justice Saldanha from the office, heard and decided. As stated earlier the writ petition was directed by the learned Judge to be listed before him, on a mention made by the opposite party in course of dictation of judgment in criminal revision wherein he had made observations against the public prosecutor. A Judge of the High Court may have unchallenged and unfettered power to direct the office to list a case before him. But that by itself restricts the exercise of power and calls for strict judicial discipline. We do not intend to make any comment but we are of opinion that if the learned Judge would have avoided sending for and deciding the petition, which as pointed out by the learned senior counsel for the State had become infructuous, it would have been more in keeping with judicial culture.

11. For reasons stated above by us this appeal succeeds and is allowed. The order dated October 28, 1991 passed in civil miscellaneous writ petition is set aside. It shall stand dismissed as infructuous. The Intervention Application No. 943 of 1992 of the Public Prosecutor is allowed. We make it clear that all the observations and remarks made by the learned Judge against the State and Public Prosecutor shall stand expunged.

* * * * *
The petitioner, a practising advocate, has initiated the public interest litigation under Article 32 of the Constitution seeking to issue an appropriate writ, order or direction restraining permanently the Bar Council of Maharashtra and Goa (BCMG), Bombay Bar Association (BBA) and the Advocates’ Association of Western India (AAWI), Respondents 2 to 4 respectively, coercing Justice A.M. Bhattacharjee (the 1st respondent), Chief Justice of Bombay High Court, to resign from the office as Judge. He also sought an investigation by the Central Bureau of Investigation etc. (Respondents 8 to 10) into the allegations made against the 1st respondent and if the same are found true, to direct the 5th respondent, Speaker, Lok Sabha to initiate action for his removal under Article 124(4) and (5) read with Article 218 of the Constitution of India and Judges (Inquiry) Act, 1968 (for short, ‘the Act’). This Court on 24-3-1995 issued notice to Respondents 2 to 4 only and rejected the prayer for interim direction to the President of India and the Union of India (Respondents 6 and 7 respectively) not to give effect to the resignation by the 1st respondent. We have also issued notice to the Attorney General for India and the President of the Supreme Court Bar Association (SCBA). The BBA filed a counter-affidavit through its President, Shri Iqbal Mahomedali Chagla. Though Respondents 2 and 4 are represented through counsel, they did not file any counter-affidavit. The SCBA informed the Court that its newly elected office-bearers required time to take a decision on the stand to be taken and we directed them to file their written submission. Shri F.S. Nariman, learned Senior Counsel appeared for the BBA and Shri Harish N. Salve, learned Senior Counsel, appeared for AAWI, the 4th respondent. The learned Attorney General also assisted the Court. We place on record our deep appreciation for their valuable assistance.

3. The petitioner in a well-documented petition stated and argued with commitment that the news published in various national newspapers does prove that Respondents 2 to 4 had pressurised the 1st respondent to resign from the office as Judge for his alleged misbehaviour. The Constitution provides for independence of the Judges of the higher courts, i.e., the Supreme Court and the High Courts. It also lays down in proviso (a) to clause (2) of Article 124; so too in Article 217(1) proviso (a) and Article 124(4), procedure for voluntary resignation by a Judge, as well as for compulsory removal, respectively from office in the manner prescribed therein and in accordance with the Act and the Rules made thereunder. The acts and actions of Respondents 2 to 4 are unknown to law, i.e., removal by forced resignation, which is not only unconstitutional but also deleterious to the independence of the judiciary. The accusations against the 1st respondent without proper investigation by an independent agency seriously damage the image of judiciary and efficacy of judicial adjudication and thereby undermine credibility of the judicial institution itself. Judges are not to be judged by the Bar. Allowing adoption of such demands by collective pressure rudely shakes the confidence and competence of judges of integrity, ability, moral vigour and ethical firmness, which in turn, sadly destroys the very foundation of democratic
polity. Therefore, the pressure tactics by the Bar requires to be nipped in the bud. He, therefore, vehemently argued and requested the Court to adopt such procedure which would safeguard the independence of the judiciary and protect the judges from pressure through unconstitutional methods to demit the office.

4. Shri Chagla in his affidavit and Shri Nariman appearing for the BBA explained the circumstances that led the BBA to pass the resolution requesting the 1st respondent to demit his office as a Judge in the interest of the institution. It is stated in the affidavit that though initially he had in his custody the documents to show that the 1st respondent had negotiated with Mr S.S. Musafir, Chief Executive of Roebuck Publishing, London and the acceptance by the 1st respondent for publication and sale abroad of a book authored by him, viz., *Muslim Law and the Constitution* for two years at a royalty of US $ 80,000 (Eighty thousand US Dollars) and an inconclusive negotiation for US $ 75,000 (Seventy-five thousand US Dollars) for overseas publishing rights of his book *Hindu Law and the Constitution* (2nd Edn.), he did not divulge the information but kept confidential. From about late 1994, there was considerable agitation amongst the members of Respondents 3 and 4 that certain persons whose names were known to all and who were seen in the court and were being openly talked about, were bringing influence over the 1st respondent and could “influence the course of judgments of the former Chief Justice of Bombay”. “The names of such persons though known are not being mentioned here since the former Chief Justice of Bombay has resigned as Chief Justice and Judge of the Bombay High Court.” It was also rumoured that “the former Chief Justice of Bombay has been paid a large sum of money in foreign exchange purportedly as royalty for a book written by him, viz. *Muslim Law and the Constitution*. The amount of royalty appeared to be totally disproportionate to what a publisher abroad would be willing to pay for foreign publication of a book which might be of academic interest within India (since the book was a dissertation of Muslim Law in relation to the Constitution of India). There was a growing suspicion at the Bar that the amount might have been paid for reasons “other than the ostensible reason”. He further stated that the 1st respondent himself had discussed with the Advocate General on 14-2-1995 impressing upon the latter that the Chief Justice “had decided to proceed on leave from the end of February and would resign in April 1995”. The Advocate General had conveyed it to Shri Chagla and other members of the Bar. By then, the financial dealings referred to above were neither known to the public nor found mention in the press reports. Suddenly on 19-2-1995 the advocates found to their surprise a press interview published in *The Times of India* said to have been given by the 1st respondent stating that “he had not seriously checked the antecedents of the publishers and it was possible that he had made a mistake in accepting the offer”. He was not contemplating to resign from judgeship at that stage and was merely going on medical leave for which he had already applied for and was granted. The BCMG passed a resolution on 19-2-1995 seeking “resignation forthwith” of the 1st respondent. On 21-2-1995 the BBA received a requisition for holding its general body meeting to discuss the financial dealings said to have been had by the 1st respondent “for a purpose other than the ostensible purpose thereby raising a serious doubt as to the integrity of the Chief Justice”. The meeting was scheduled to be held at 2.15 p.m. on 22-2-1995 as per its bye-laws.
The 1st respondent appears to have rung up Shri Chagla in the evening on 21-2-1995 but he was not available. Pursuant to a contact by Shri W.Y. Yande, the President of AAWI, at the desire of Chief Justice to meet him, Shri Chagla and Shri Yande met the 1st respondent at his residence at 10.00 a.m. in the presence of two Secretaries of the 1st respondent, who stated thus to Shri Chagla as put in his affidavit:

The Bar Council of Maharashtra and Goa had already shot an arrow and that the wound was still fresh and requested me to ensure that he would not be hurt any further by a resolution of the Bombay Bar Association. The 1st respondent informed me that he had already agreed to resign and in fact called for and showed me a letter dated 17-2-1995 addressed by him to the Honourable the Chief Justice of India in which he proposed to go on medical leave for a month and that at the end of the leave or even earlier he proposed to tender his resignation.

5. They had reminded the 1st respondent of the assurance given to the Advocate General expressing his desire to resign and he conveyed his personal inconveniences to be encountered etc. The 1st respondent assured them that he would “resign within a week which resignation would be effective some 10 or 15 days thereafter and that in the meanwhile he would not do any judicial work including delivery of any judgment”. Shri Chagla appears to have told the 1st respondent that though he would not give an assurance, he would request the members of the Association to postpone the meeting and he had seen that the meeting was adjourned to 5.00 p.m. on 1-3-1995. On enquiry being made on 1-3-1995 from the Principal Secretary to the 1st respondent whether the 1st respondent had tendered his resignation, it was replied in the negative which showed that the 1st respondent had not kept his promise. Consequently, after full discussion, for and against, an overwhelming majority of 185 out of 207 permanent members resolved in the meeting held on 1-3-1995 at 5.00 p.m. demanding the resignation of the 1st respondent.

6. Since the 1st respondent has already resigned, the question is whether a Bar Council or Bar Association is entitled to pass resolution demanding a Judge to resign, what is its effect on the independence of the judiciary and whether it is constitutionally permissible. Shri Nariman contended that the Supreme Court and the High Court are two independent constitutional institutions. A High Court is not subordinate to the Supreme Court though constitutionally the Supreme Court has the power to hear appeals from the decisions or orders or judgments of the High Courts or any Tribunal or quasi-judicial authority in the country. The Judges and the Chief Justice of a High Court are not subordinate to the Chief Justice of India. The constitutional process of removal of a Judge as provided in Article 124(4) of the Constitution is only for proved misbehaviour or incapacity. The recent impeachment proceedings against Justice V. Ramaswami and its fall out do indicate that the process of impeachment is cumbersome and the result uncertain. Unless corrective steps are taken against Judges whose conduct is perceived by the Bar to be detrimental to the independence of the judiciary, people would lose faith in the efficacy of judicial process. Bar being a collective voice of the court concerned has responsibility and owes a
duty to maintain the independence of the judiciary. It is its obligation to bring it to the notice of the Judge concerned the perceived misbehaviour or incapacity and if it is not voluntarily corrected they have to take appropriate measures to have it corrected. Bar is not aware of any other procedure than the one under Article 124(4) of the Constitution and the Act. Therefore, the BBA, instead of proceeding to the press, adopted democratic process to pass the resolution, in accordance with its bye-laws, when all attempts made by it proved abortive. The conduct of the Judge betrayed their confidence in his voluntary resignation. Consequently, the BBA was constrained to pass the said resolution. Thereby it had not transgressed its limits. Its action is in consonance with its bye-laws and in the best tradition to maintain independence of the judiciary. Shri Nariman also cited the instance of non-assignment of work to four Judges of the Bombay High Court by its former Chief Justice when some allegations of misbehaviour were imputed to them by the Bar. He, however, submitted that in the present case the allegations were against the Chief Justice himself, and so, he could not have been approached. He urged that if some guidelines could be laid down by this Court in such cases, the same would be welcomed.

7. The counsel appearing for the BCMG, who stated that he is its member, submitted that when the Bar believes that the Chief Justice has committed misconduct, as an elected body it is its duty to pass a resolution after full discussion demanding the Judge to act in defence of independence of the judiciary by demitting his office.

9. The learned Attorney General contended that any resolution passed by any Bar Association tantamounts to scandalising the court entailing contempt of the court. It cannot coerce the Judge to resign. The pressure brought by the Chief Justice of India upon the Judge would be constitutional but it should be left to the Chief Justice of India to impress upon the erring Judge to correct his conduct. This procedure would yield salutary effect. The Chief Justice of India would adopt such procedure as is appropriate to the situation. He cited the advice tendered by Lord Chancellor of England to Lord Denning, when the latter was involved in the controversy over his writing on the jury trial and the composition of the black members of the jury, to demit the office, which he did in grace.

Rule of Law and Judicial Independence - Why need to be preserved?

10. The diverse contentions give rise to the question whether any Bar Council or Bar Association has the right to pass resolution against the conduct of a Judge perceived to have committed misbehaviour and, if so, what is its effect on independence of the judiciary. With a view to appreciate the contentions in their proper perspective, it is necessary to have at the back of our mind the importance of the independence of the judiciary. In a democracy governed by rule of law under a written constitution, judiciary is sentinel on the qui vive to protect the fundamental rights and to poise even scales of justice between the citizens and the State or the States inter se. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure, independence of the judiciary is an essential attribute of rule of law. In S.P. Gupta v. Union of India [1981 Supp SCC 87], this Court held that if there is one principle which runs through the entire fabric of the Constitution it is the principle of the rule of
law, and under the Constitution it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. Judicial review is one of the most potent weapons in the armoury of law. The judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive. It is, therefore, absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details. The independence of judiciary is not limited only to the independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices. It has many dimensions, viz., fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong.

**Judicial individualism - Whether needs protection?**

11. Independent judiciary is, therefore, most essential when liberty of citizen is in danger. It then becomes the duty of the judiciary to poise the scales of justice unmoved by the powers (actual or perceived) undisturbed by the clamour of the multitude. The heart of judicial independence is judicial individualism. The judiciary is not a disembodied abstraction. It is composed of individual men and women who work primarily on their own. Judicial individualism, in the language of Justice Powell of the Supreme Court of United States in his address to the American Bar Association, Labour Law Section on 11-8-1976, is “perhaps one of the last citadels of jealously preserved individualism ....”

14. The arch of the Constitution of India pregnant from its Preamble, Chapter III (Fundamental Rights) and Chapter IV (Directive Principles) is to establish an egalitarian social order guaranteeing fundamental freedoms and to secure justice - social, economic and political - to every citizen through rule of law. Existing social inequalities need to be removed and equality in fact is accorded to all people irrespective of caste, creed, sex, religion or region subject to protective discrimination only through rule of law. The Judge cannot retain his earlier passive judicial role when he administers the law under the Constitution to give effect to the constitutional ideals. The extraordinary complexity of modern litigation requires him not merely to declare the rights to citizens but also to mould the relief warranted under given facts and circumstances and often command the executive and other agencies to enforce and give effect to the order, writ or direction or prohibit them to do unconstitutional acts. In this ongoing complex of adjudicatory process, the role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. Therefore, the Judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law. Thereby, the society demands active judicial roles which formerly were considered exceptional but now a routine. The Judge must act independently, if he is to perform the functions as expected.
of him and he must feel secure that such action of his will not lead to his own downfall. The
independence is not assured for the Judge but to the judged. Independence to the Judge, therefore,
would be both essential and proper. Considered judgment of the court would guarantee the
constitutional liberties which would thrive only in an atmosphere of judicial independence. Every
deavour should be made to preserve independent judiciary as a citadel of public justice and
public security to fulfil the constitutional role assigned to the Judges.

15. The Founding Fathers of the Constitution advisedly adopted a cumbersome process of
impeachment as a mode to remove a Judge from office for only proved misbehaviour or
incapacity which implies that impeachment process is not available for minor abrasive behaviour
of a Judge. It reinforces that independence to the Judge is of paramount importance to sustain,
strengthen and elongate rule of law. Parliament sparingly resorts to the mechanism of
impeachment designed under the Constitution by political process as the extreme measure only
upon a finding of proved misbehaviour or incapacity recorded by a committee constituted under
Section 3 of the Act by way of address to the President in the manner laid down in Article 124(4)
and (5) of the Constitution, the Act and the Rules made thereunder.

16. In all common law jurisdictions, removal by way of impeachment is the accepted norm
for serious acts of judicial misconduct committed by a Judge. Removal of a Judge by
impeachment was designed to produce as little damage as possible to judicial independence,
public confidence in the efficacy of judicial process and to maintain authority of courts for its
effective operation.

17. In United States, the Judges appointed under Article III of the American Constitution
could be removed only by impeachment by the Congress. The Congress enacted the Judicial
Councils Reform and Judicial Conduct and Disability Act of 1980 (the 1980 Act) by which
Judicial Council was explicitly empowered to receive complaints about the judicial conduct
“prejudicial to the effective and expeditious administration of the business of the courts, or
alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of
mental or physical disability”.

18. Jeffrey N. Barr and Thomas E. Willging conducted research on the administration of the
1980 Act and in their two research volumes, they concluded that “several Chief Judges view the
Act as remedial legislation designed not to punish Judges but to correct aberrant behaviour and
provide opportunity for corrective action as a central feature of the Act”. From 1980 to 1992,
2388 complaints were filed. 95 per cent thereof resulted in dismissal. 1.7 per cent of the
complaints ended in either dismissal from service or corrective action of reprimands - two of
public reprimands and one of private reprimand. Two cases were reported to judicial conference
by the judicial councils certifying that the grounds might exist for impeachment.

19. Our Constitution permits removal of the Judge only when the motion was carried out with
requisite majority of both the Houses of Parliament recommending to the President for removal.
In other words, the Constitution does not permit any action by any agency other than the initiation
of the action under Article 124(4) by Parliament. In *Sub-Committee on Judicial Accountability v. Union of India* [(1991) 4 SCC 699], this Court at p. 54 held that the removal of a Judge culminating in the presentation of an address by different Houses of Parliament to the President, is committed to Parliament alone and no initiation of any investigation is possible without the initiative being taken by the Houses themselves. At p. 71 it was further held that the constitutional scheme envisages removal of a Judge on proved misbehaviour or incapacity and the conduct of the Judge was prohibited to be discussed in Parliament by Article 121. Resultantly, discussion of the conduct of a Judge or any evaluation or inferences as to its merit is not permissible elsewhere except during investigation before the Inquiry Committee constituted under the Act for this purpose.

20. Articles 124(4) and 121 would thus put the nail squarely on the projections, prosecutions or attempts by any other forum or group of individuals or Associations, statutory or otherwise, either to investigate or inquire into or discuss the conduct of a Judge or the performance of his duties and on/off court behaviour except as per the procedure provided under Articles 124(4) and (5) of the Constitution, and Act and the Rules. Thereby, equally no other agency or authority like the CBI, Ministry of Finance, the Reserve Bank of India (Respondents 8 to 10) as sought for by the petitioner, would investigate into the conduct or acts or actions of a Judge. No mandamus or direction would be issued to the Speaker of Lok Sabha or Chairman of Rajya Sabha to initiate action for impeachment. It is true, as contended by the petitioner, that in *K. Veeraswami v. Union of India* [(1991) 3 SCC 655], majority of the Constitution Bench upheld the power of the police to investigate into the disproportionate assets alleged to be possessed by a Judge, an offence under Section 5 of the Prevention of Corruption Act, 1947 subject to prior sanction of the Chief Justice of India to maintain independence of the judiciary. By interpretive process, the Court carved out primacy to the role of the Chief Justice of India, whose efficacy in a case like one at hand would be considered at a later stage.

**Duty of the Judge to maintain high standard of conduct. Its judicial individualism — Whether protection imperative?**

21. Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge’s official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher
than that expected of a layman and also higher than that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

22. In *Krishna Swami v. Union of India* [(1992) 4 SCC 605], one of us (K. Ramaswamy, J.) held that the holder of office of the Judge of the Supreme Court or the High Court should, therefore, be above the conduct of ordinary mortals in the society. The standards of judicial behaviour, both on and off the Bench, are normally high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well-established traditions is the guidelines for judicial conduct. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed. It is expected of him to voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities.

23. To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore, should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not susceptible to any pressure, economic, political or of any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office-holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of the judiciary. In short, the behaviour of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law.

**Scope and meaning of ‘misbehaviour’ in Article 124(4)**

24. Article 124(4) of the Constitution sanctions action for removal of a Judge on proved misbehaviour or incapacity. The word ‘misbehaviour’ was not advisedly defined. It is a vague and elastic word and embraces within its sweep different facets of conduct as opposed to good conduct. In the *Law Lexicon* by P. Ramanatha Aiyar, 1987 Edn. at p. 821, collected from several decisions, the meaning of the word ‘misconduct’, is stated to be vague and relative term. Literally, it means wrong conduct or improper conduct. It has to be construed with reference to the subject-matter and the context wherein the term occurs having regard to the scope of the Act or the statute under consideration. In the context of disciplinary proceedings against a solicitor, the word misconduct was construed as professional misconduct extending to conduct “which shows him to be unworthy member of the legal profession”. In the context of misrepresentation made by a pleader, who obtained adjournment of a case on grounds to his knowledge to be false a Full Bench of the Madras High Court in *First Grade Pleader, Re* [AIR 1931 Mad 422], held that if a legal practitioner deliberately made, for the purpose of impeding the course of justice, a statement to the court which he believed to be untrue and thereby gained an advantage for his client, he was guilty of gross improper conduct and as such rendered himself liable to be dealt
with by the High Court in the exercise of its disciplinary jurisdiction. Misconduct on the part of an arbitrator was construed to mean that misconduct does not necessarily comprehend or include misconduct of a fraudulent or improper character, but it does comprehend and include action on the part of the arbitrator which is, upon the face of it, opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide upon questions in difference and dispute referred to him by the parties. Misconduct in office was construed to mean unlawful behaviour or include negligence by public officer, by which the rights of the party have been affected. In *Krishna Swami* case, one of us, K. Ramaswamy, J., considered the scope of ‘misbehaviour’ in Article 124(4) and held in para 71 that:

Every act or conduct or even error of judgment or negligent acts by higher judiciary per se does not amount to misbehaviour. Wilful abuse of judicial office, wilful misconduct in the office, corruption, lack of integrity, or any other offence involving moral turpitude would be misbehaviour. Misconduct implies actuation of some degree of mens rea by the doer. Judicial finding of guilt of grave crime is misconduct. Persistent failure to perform the judicial duties of the Judge or wilful abuse of the office *dolus malus* would be misbehaviour. Misbehaviour would extend to conduct of the Judge in or beyond the execution of judicial office. Even administrative actions or omissions too need accompaniment of mens rea.

25. Guarantee of tenure and its protection by the Constitution would not, however, accord sanctuary for corruption or grave misbehaviour. Yet every action or omission by a judicial officer in the performance of his duties which is not a good conduct necessarily, may not be misbehaviour indictable by impeachment, but its insidious effect may be pervasive and may produce deleterious effect on the integrity and impartiality of the Judge. Every misbehaviour in juxtaposition to good behaviour, as a constitutional tautology, will not support impeachment but a misbehaviour which is not a good behaviour may be improper conduct not befitting to the standard expected of a Judge. Threat of impeachment process itself may swerve a Judge to fall prey to misconduct but it serves disgrace to use impeachment process for minor offences or abrasive conduct on the part of a Judge. The bad behaviour of one Judge has a rippling effect on the reputation of the judiciary as a whole. When the edifice of judiciary is built heavily on public confidence and respect, the damage by an obstinate Judge would rip apart the entire judicial structure built in the Constitution.

26. Bad conduct or bad behaviour of a Judge, therefore, needs correction to prevent erosion of public confidence in the efficacy of judicial process or dignity of the institution or credibility to the judicial office held by the obstinate Judge. When the Judge cannot be removed by impeachment process for such conduct but generates widespread feeling of dissatisfaction among the general public, the question would be who would stamp out the rot and judge the Judge or who would impress upon the Judge either to desist from repetition or to demit the office in grace? Who would be the appropriate authority? Who would be the principal mover in that behalf? The hiatus between bad behaviour and impeachable misbehaviour needs to be filled in to stem erosion
of public confidence in the efficacy of judicial process. Whether the Bar of that Court has any role to play either in an attempt to correct the perceived fallen standard or is entitled to make a demand by a resolution or a group action to pressurise the Judge to resign his office as a Judge? The resolution to these questions involves delicate but pragmatic approach to the questions of constitutional law.

**Role of the Bar Council or Bar Associations - Whether unconstitutional?**

27. The Advocates Act, 1961 gave autonomy to a Bar Council of a State or Bar Council of India and Section 6(1) empowers them to make such action deemed necessary to set their house in order, to prevent fall in professional conduct and to punish the incorrigible as not befitting the noble profession apart from admission of the advocates on its roll. Section 6(1)(c) and rules made in that behalf, Sections 9, 35, 36, 36-B and 37 enjoin it to entertain and determine cases of misconduct against advocates on its roll. The members of the judiciary are drawn primarily and invariably from the Bar at different levels. The high moral, ethical and professional standards among the members of the Bar are preconditions even for high ethical standards of the Bench. Degeneration thereof inevitably has its eruption and tends to reflect the other side of the coin. The Bar Council, therefore, is enjoined by the Advocates Act to maintain high moral, ethical and professional standards which of late is far from satisfactory. Their power under the Act ends thereat and extends no further. Article 121 of the Constitution prohibits discussion by the members of Parliament of the conduct of any Judge of the Supreme Court or of High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as provided under Article 124(4) and (5) and in the manner laid down under the Act, the Rules and the rules of business of Parliament consistent therewith. By necessary implication, no other forum or fora or platform is available for discussion of the conduct of a Judge in the discharge of his duties as a Judge of the Supreme Court or the High Court, much less a Bar Council or group of practising advocates. They are prohibited to discuss the conduct of a Judge in the discharge of his duties or to pass any resolution in that behalf.

28. Section 2(c) of the Contempt of Courts Act, 1971, defines “criminal contempt” to mean publication whether by words spoken or written, signs, visible representations or otherwise of any matter or the doing of any act whatsoever which scandalises or tends to scandalise, lowers or tends to lower the authority of any court or prejudices or interferes or tends to interfere with the due course of any judicial proceeding, or interferes or tends to interfere with or obstructs or tends to obstruct the administration of justice in any other manner.

**Freedom of expression and duty of Advocate**

31. It is true that freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution is one of the most precious liberties in any democracy. But equally important is the maintenance of respect for judicial independence which alone would protect the life, liberty and reputation of the citizen. So the nation’s interest requires that criticism of the judiciary must be measured, strictly rational, sober and proceed from the highest motives without being coloured by
partisan spirit or pressure tactics or intimidatory attitude. The Court must, therefore, harmonise constitutional values of free criticism and the need for a fearless curial process and its presiding functionary, the Judge. If freedom of expression subserves public interest in reasonable measure, public justice cannot gag it or manacle it; but if the court considered the attack on the Judge or Judges scurrilous, offensive, intimidatory or malicious, beyond condonable limits, the strong arm of the law must strike a blow on him who challenges the supremacy of the rule of the law by fouling its source and stream. The power to punish the contemner is, therefore, granted to the court not because Judges need the protection but because the citizens need an impartial and strong judiciary.

32. It is enough if all of us bear this in mind while expressing opinions on courts and Judges. But the question that still remains is when the Bar of the Court, in which the Judge occupies the seat of office, honestly believes that the conduct of the Judge or of the Bench fouls the fountain of justice, or undermines or tends to undermine the dignity expected of a Judge and the people are tending to disbelieve the impartiality or integrity of the Judge, who should bear the duty and responsibility to have it/them corrected so as to restore the respect for judiciary?

33. In Brahma Prakash Sharma v. State of U.P. [AIR 1954 SC 10], the Bar Association passed resolutions and communicated to the superior authorities that certain judicial officers were incompetent due to their conduct in the court and High Court took action for contempt of the court. The question was whether the members of the Executive Committee of the Bar Association had committed contempt of the court? This Court held that the attack on a Judge is a wrong done to the public and if it tends to create apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge and to deter actual and prospective litigants from placing complete reliance upon the court’s administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties, it would be scandalising the court and be dealt with accordingly.

34. The threat of action on vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer - in one word the unpopular. Insidious attempts pave way for removing the inconvenient. Therefore, proper care should be taken by the Bar Association concerned. First, it should gather specific, authentic and acceptable material which would show or tend to show that conduct on the part of a Judge creating a feeling in the mind of a reasonable person doubting the honesty, integrity, impartiality or act which lowers the dignity of the office but necessarily, is not impeachable misbehaviour. In all fairness to the Judge, the responsible office-bearers should meet him in camera after securing interview and apprise the Judge of the information they had with them. If there is truth in it, there is every possibility that the Judge would mend himself. Or to avoid embarrassment to the Judge, the office-bearers can approach the Chief Justice of that High Court and apprise him of the situation with material they have in their possession and impress upon the Chief Justice to deal with the matter appropriately.

Primacy of the Chief Justice of India
35. It is true that this Court has neither administrative control over the High Court nor power on the judicial side to enquire into the misbehaviour of a Chief Justice or Judge of a High Court. When the Bar of the High Court concerned reasonably and honestly doubts the conduct of the Chief Justice of that Court, necessarily the only authority under the Constitution that could be tapped is the Chief Justice of India, who in common parlance is known as the head of the judiciary of the country. It is of importance to emphasise here that impeachment is meant to be a drastic remedy and needs to be used in serious cases. But there must exist some other means to ensure that Judges do not abuse the trust the society has in them. It seems to us that self-regulation by the judiciary is the only method which can be tried and adopted. Chief Justice of India is the first among the Judges. Under Articles 124(2) and 217(1), the President of India always consults the Chief Justice of India for appointment of the Judges in the Supreme Court and High Courts. Under Article 222, the President transfers Judges of High Courts in consultation with the Chief Justice of India. In *Supreme Court Advocates-on-Record Assn. v. Union of India* [(1993) 4 SCC 441], it was reinforced and the Chief Justice of India was given centre stage position. The primacy and importance of the office of the Chief Justice was recognised judicially by this Court in *Veerawasmi* case. This Court, while upholding power to register a case against a retired Chief Justice of the High Court, permitted to proceed with the investigation for the alleged offence under Section 5 of the Prevention of Corruption Act. The Constitution Bench per majority, however, held that the sanction and approval of the Chief Justice of India is a condition precedent to register a case and investigate into the matter and sanction for prosecution of the said Judge by the President after consultation with the Chief Justice of India.

36. In *Sub-Committee on Judicial Accountability* also the same primacy had been accorded to the Chief Justice at p. 72 thus:

“It would also be reasonable to assume that the Chief Justice of India is expected to find a desirable solution in such a situation to avoid embarrassment to the learned Judge and to the institution in a manner which is conducive to the independence of judiciary and should the Chief Justice of India be of the view that in the interests of the institution of judiciary it is desirable for the learned Judge to abstain from judicial work till the final outcome under Article 124(4), he would advise the learned Judge accordingly. It is further reasonable to assume that the concerned learned Judge would ordinarily abide by the advice of the Chief Justice of India.”

40. Bearing all the above in mind, we are of the considered view that where the complaint relates to the Judge of the High Court, the Chief Justice of that High Court, after verification, and if necessary, after confidential enquiry from his independent source, should satisfy himself about the truth of the imputation made by the Bar Association through its office-bearers against the Judge and consult the Chief Justice of India, where deemed necessary, by placing all the information with him. When the Chief Justice of India is seized of the matter, to avoid embarrassment to him and to allow fairness in the procedure to be adopted in furtherance thereof, the Bar should suspend all further actions to enable the Chief Justice of India to appropriately
deal with the matter. This is necessary because any action he may take must not only be just but must also appear to be just to all concerned, i.e., it must not even appear to have been taken under pressure from any quarter. The Chief Justice of India, on receipt of the information from the Chief Justice of the High Court, after being satisfied about the correctness and truth touching the conduct of the Judge, may tender such advice either directly or may initiate such action, as is deemed necessary or warranted under given facts and circumstances. If circumstances permit, it may be salutary to take the Judge into confidence before initiating action. On the decision being taken by the Chief Justice of India, the matter should rest at that. This procedure would not only facilitate nipping in the bud the conduct of a Judge leading to loss of public confidence in the courts and sustain public faith in the efficacy of the rule of law and respect for the judiciary, but would also avoid needless embarrassment of contempt proceedings against the office-bearers of the Bar Association and group libel against all concerned. The independence of judiciary and the stream of public justice would remain pure and unsullied. The Bar Association could remain a useful arm of the judiciary and in the case of sagging reputation of the particular Judge, the Bar Association could take up the matter with the Chief Justice of the High Court and await his response for the action taken thereunder for a reasonable period.

41. In case the allegations are against Chief Justice of a High Court, the Bar should bring them directly to the notice of the Chief Justice of India. On receipt of such complaint, the Chief Justice of India would in the same way act as stated above qua complaint against a Judge of the High Court, and the Bar would await for a reasonable period the response of the Chief Justice of India.

42. It would thus be seen that yawning gap between proved misbehaviour and bad conduct inconsistent with the high office on the part of a non-cooperating Judge/Chief Justice of a High Court could be disciplined by self-regulation through in-house procedure. This in-house procedure would fill in the constitutional gap and would yield salutary effect. Unfortunately, recourse to this procedure was not taken in the case at hand, may be, because of absence of legal sanction to such a procedure.

* * * * *
D.P. WADHIWA, J. - The appellant is an advocate practising in Delhi. He has filed this appeal under Section 38 of the Advocates Act, 1961 (“the Act”) against order dated 4-5-1996 of the Disciplinary Committee of the Bar Council of India holding him guilty of misconduct and suspending him from practice for a period of one year. This order by the Bar Council of India was passed as the Disciplinary Committee of the Bar Council of Delhi could not dispose of the complaint received by it within a period of one year and proceedings had thus been transferred to the Bar Council of India under Section 36-B of the Act. Section 36-B enjoins upon the Disciplinary Committee of the State Bar Council to dispose of the complaint received by it under Section 35 of the Act expeditiously and in any case to conclude the proceedings within one year from the date of the receipt of the complaint or the date of initiation of the proceedings if at the instance of the State Bar Council. Under Section 35 of the Act where on the receipt of a complaint or otherwise the State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its Disciplinary Committee.

2. One Srikishan Dass died on 5-1-1980 leaving behind extensive properties, both moveable and immovable. One Vidya Wati claiming to be the sister and the only legal heir of Srikishan Dass filed a petition under Section 276 of the Indian Succession Act in the Court of District Judge, Delhi for grant of probate/letters of administration to the estate of deceased Srikishan Dass. This she filed in February 1980. It is not that there was any Will. The complainant Ram Murti (who is now respondent before us) and two other persons also laid claim to the properties of Srikishan Dass claiming themselves to be his heirs and propounding three different Wills. They also filed separate proceedings under Section 276 of the Indian Succession Act before the District Judge, Delhi. Since there was dispute regarding inheritance to the properties of Srikishan Dass, Vidya Wati also filed a civil suit in the Delhi High Court for declaration and injunction against various defendants numbering 23, including the complainant Ram Murti who is Defendant 21. This suit was filed on 10-2-1982. Vidya Wati had prayed for a decree of injunction against the defendants restraining them from trespassing into property bearing No. 4852 Harbans Singh Street, 24 Daryaganj, New Delhi or from interfering with or disturbing peaceful possession and enjoyment of immovable properties detailed in Schedule A to the plaint. She also sought a declaration that she was the absolute owner of the properties mentioned therein in the Schedule. It is not necessary for us to detail the properties shown in Schedule A except to note two properties at 24 Daryaganj, New Delhi bearing No. 4852 and 4852-A. It is stated that this suit is still pending in the Delhi High Court and all the proceedings under Section 276 of the Indian Succession Act filed by various persons relating to the estate of Srikishan Dass have also been transferred from the Court of District Judge, Delhi to the High Court and are being tried along with the suit filed by Vidya Wati as aforesaid.
3. It would appear that Vidya Wati also filed various other proceedings respecting the properties left by deceased Srikishan Dass against the occupants or otherwise. P.D. Gupta, Advocate, who is the appellant before us had been her counsel throughout in all these proceedings. The complaint alleged against him is that though he knew that there was doubt cast on the right of Vidya Wati inheriting the properties of Srikishan Dass on account of pendency of various proceedings and further that the complainant and others had alleged that she was in fact an impostor and her claim to be sister of Srikishan Dass was false yet P.D. Gupta purchased the ground floor of property bearing No. 4858-A, 24 Daryaganj from Vidya Wati by a sale deed dated 30-12-1982. The complainant also alleged that Vidya Wati had been describing herself either as the real sister, stepsister or even half-blood sister of Srikishan Dass which fact was well known to P.D. Gupta, her counsel.

4. It is not for us to go into the merits or demerits of the controversy raised by the parties in various proceedings pending in the courts and still awaiting adjudication, the grievance of the complainant is as to how an advocate could purchase property from his client which property is the subject-matter of dispute between the parties in a court of law. During the course of hearing of this appeal it was also brought to our notice that the second floor of the property bearing No. 4858-A, 24 Daryaganj was purchased by Suresh Kumar Gupta, son-in-law of Advocate P.D. Gupta from Vidya Wati. Then again it was brought to our notice that Advocate P.D. Gupta sold the property purchased by him in November 1987 for a consideration of Rs 3,40,000 when he himself had purchased the property for Rs 1,80,000 in December 1982. It is pointed out that the facts relating to purchase of different portions of property No. 4858-A, 24 Daryaganj and subsequent sale by P.D. Gupta were not brought on record of the said suit filed by Vidya Wati.

5. Be that as it may the Bar Council of India has commented upon the conduct of P.D. Gupta in buying the property from Vidya Wati in the circumstances aforesaid who had been describing herself sometimes as a half-blood sister and sometimes as real sister or even stepsister of Srikishan Dass. The explanation given by P.D. Gupta is that though Vidya Wati was the stepsister of Srikishan Dass but the latter always treated her like his real sister and that is how Vidya Wati also at times described herself as his real sister.

6. There are some more facts which could also be noted. Vidya Wati herself has died and she is stated to be survived by her only daughter Maya Devi who is also now dead. Before her death Vidya Wati allegedly executed a Will in favour of her grandson Anand Prakash Bansal who is stated to be the son of Maya Devi bequeathing all her properties to him. Vidya Wati died on 26-10-1991 and Maya Devi on 13-4-1992. It is stated that P.P. Bansal, husband of Maya Devi and father of Anand Prakash Bansal, has been acting as General Attorney of Vidya Wati and instructing P.D. Gupta.

7. In support of his case P.D. Gupta filed affidavit of Anand Prakash Bansal wherein it is claimed that sale deeds executed by Vidya Wati in favour of P.D. Gupta and his son-in-law Suresh Kumar Gupta were without any pressure from anyone and were by free will of Vidya Wati. P.D. Gupta has claimed that the complaint filed by Ram Murti is motivated and he himself
had no title to the properties of Srikishan Dass being no relative of his and the Will propounded by him had been found to be forged as opined by the CFSL/CBI laboratory. The fact that the Will propounded by Ram Murti is forged or not is still to be decided by the Court. In the affidavit filed by P.D. Gupta, in answer to the complaint of Ram Murti, he has stated that “Lala Srikishan Dass left behind his sister Smt Vidya Wati who succeeded to the estate on the death of Lala Srikishan Dass and took over the entire moveable and immovable estate. Thereafter the complainant and two other persons propounded the Will of Lala Srikishan Dass”. This statement of P.D. Gupta has been verified by him as true and correct to his knowledge. It does appear to us to be rather odd for a lawyer to verify such facts to his knowledge. It is claimed that when Srikishan Dass died, subject immovable property was plot bearing No. 4858-A, 24 Daryaganj measuring 1500 sq. feet and the same was got mutated in the name of Vidya Wati in the records of the Municipal Corporation of Delhi and then she got plans sanctioned from the Municipal Corporation of Delhi for construction of the house on this plot and which she did construct and got completion certificate on 28-8-1981. It is peculiar, rather astounding, how Vidya Wati could get the property of Srikishan Dass mutated in her name when she is yet to be granted letters of administration or declaration to her title.

8. We examined the two sale deeds transferring this property, one executed in favour of P.D. Gupta and the other in favour of his son-in-law Suresh Kumar Gupta and we have also examined the proceedings on the basis of which the Bar Council of India came to the conclusion that P.D. Gupta was guilty of misconduct and he be debarred from practising for the period of one year. When Ram Murti complained that P.D. Gupta had fraudulently purchased the property of deceased Srikishan Dass being the entire ground floor property bearing No. 4858-A, 24 Daryaganj, Delhi as per sale deed executed on 30-12-1982 from Vidya Wati as also in the name of his son-in-law Suresh Kumar, son of Suraj Bhan, knowing fully well that Vidya Wati was not the owner of the property, the reply given by P.D. Gupta is as under:

“5. Para 5 as stated is false, misleading and ill-motivated, in view of the above submissions. This respondent did purchase the ground floor portion from Smt Vidya Wati by a registered sale deed and sold the same by a registered sale deed in November 1987, and has no longer any concern with any of the properties of Smt Vidya Wati. (As per) the information of the respondent, no proceedings disputing the title of Smt Vidya Wati or cancellation of sale deed in favour of any of the buyers from Smt Vidya Wati who are more than 20 in number, has been filed so far. One of such buyers is Shri P.P. Sharma, the ex-Registrar of the Delhi High Court. This respondent believed Smt Vidya Wati as the right owner according to the facts and law and sold it as aforesaid. The applicant is in no way concerned with the rights of the respondent and the matter pending for adjudication is between the complainant and the parties concerned.”

9. In the sale deed which is dated 30-12-1982 executed in favour of P.D. Gupta recitals show that the agreement for sale was entered into on 3-9-1980. The completion certificate of the building was obtained on 28-8-1981, payment of Rs 1,50,000 made before execution of the
sale deed on various dates from 3-8-1980 to 20-11-1981 by means of cheques except one payment of Rs 10,000 made by cash on 3-9-1980. Balance amount of consideration of Rs 30,000 was paid at the time of registration of the sale deed. In the sale deed there is no mention of any civil suit respecting this property pending in the High Court. Rather it is stated that the vendor had constructed various floors and had assured/represented to the vendee that she had a good and marketable title to the property and the same was free from all sorts of liens, charges, encumbrances or other like burdens, and in case any defect in the title of the vendor was later on proved, the vendor undertook to compensate the vendee for all losses, damages and claims, which might be caused to him in this regard. In the other sale deed dated 2-12-1982 executed in favour of the son-in-law of P.D. Gupta, which was filed during the course of the hearing of this appeal, it is mentioned that after obtaining completion certificate on 28-8-1981 Vidya Wati let out the second floor of the property comprising five rooms, kitchen, two bathrooms on a monthly rent of rupees five hundred to Suraj Bhan Gupta. Recitals to this deed show that in order to fetch a better price Vidya Wati agreed to sell the property being on the second floor which according to her was not giving good returns for consideration of Rs 1,75,000 to Suresh Kumar Gupta. Now this Suresh Kumar Gupta, son-in-law of P.D. Gupta, is no other person than the son of Suraj Bhan Gupta, the tenant. There is no mention of any agreement to sell in this sale deed but what we find is that first payment of Rs 20,000 towards consideration was made on 5-11-1981, second payment of Rs 25,000 on 20-2-1982 and third of Rs 30,000 on 26-4-1982. Balance payment has been made at the time of execution of the sale deed on 2-12-1982.

10. The Bar Council of India has taken note of the following facts:

1. P.D. Gupta claims to know Vidya Wati since 1980 when Srikishan Dass was alive. He knew Vidya Wati closely and yet contradictory stands were taken by Vidya Wati when she varyingingly described herself as half-blood sister, real sister or stepsister of Srikishan Dass. These contradictory stands in fact cast doubt on the very existence of Vidya Wati herself. This also created doubt about bona fides of P.D. Gupta who seemed to be a family lawyer of Vidya Wati.

2. P.D. Gupta knew that the property purchased by him from Vidya Wati was the subject-matter of litigation and title of Vidya Wati to that property was in doubt.

3. Huge property situated in Daryaganj was purchased by P.D. Gupta for a mere sum of Rs 1,80,000 in 1982.

4. The agreement for sale of property was entered into as far back on 3-9-1980 and P.D. Gupta had been advancing money to Vidya Wati from time to time which went to show that as per the version of P.D. Gupta he knew Vidya Wati quite well. When P.D. Gupta knew Vidya Wati so closely how could Vidya Wati take contradictory stands vis-à-vis her relationship with Srikishan Dass?
11. The Bar Council of India was thus of the view that the conduct of P.D. Gupta in the circumstances was unbecoming of professional ethics and conduct. The Bar Council of India also observed:

“It is an acknowledged fact that a lawyer conducting the case of his client has a commanding status and can exert influence on his client. As a member of the Bar it is in our common knowledge that lawyers have started contracting with the clients and enter into bargains that in case of success he will share the result. A number of instances have been found in the cases of Motor Accident Claims. No doubt there is no bar for a lawyer to purchase property but on account of common prudence specially a law-knowing person will never prefer to purchase the property, the title of which is under doubt.”

Finally it said:

“But for the purpose of the present complaint, having regard to all the facts and circumstances of the case, the Committee is of the opinion that the conduct of the respondent is patently unbecoming of a lawyer and against professional ethics. Consequently, we feel that as an exemplary punishment, Shri P.D. Gupta should be suspended from practice for a period of one year so that other erring lawyers should learn a lesson and refrain themselves from indulging in such practice.”

12. The question which arises for consideration is:

In view of the aforementioned facts is P.D. Gupta guilty of professional or other misconduct and if so is the punishment awarded to him disproportionate to the professional or other misconduct of which he has been found guilty?

13. Mr Y.K. Jain, learned counsel appearing for the appellant P.D. Gupta, submitted that if in a case like this it was held that a lawyer was guilty of professional misconduct particularly on a complaint filed by an interested person like Ram Murti no lawyer would be able to conduct henceforth the case of his client fearlessly. Mr Jain said that the aggrieved person, if any, in this case would have been either Vidya Wati, her daughter Maya Devi or her grandson Anand Prakash Bansal and neither of them had complained. It was also submitted that though the property was purchased by P.D. Gupta in late 1982 the complaint by Ram Murti was filed only on 16-12-1992. Mr Jain explained that as to how Vidya Wati had been varyingly described in various litigations was on account of instruction from her or her attorney and it was no fault of P.D. Gupta on that account. Then it was submitted that no specific charges had been framed in the disciplinary proceedings which had caused prejudice to P.D. Gupta in the conduct of his defence. Lastly, it was contended that P.D. Gupta was no longer concerned with the property as he had sold away the same.
14. There appears to be no substance in the submissions of Mr Jain. P.D. Gupta was fully aware of the allegations he was to meet. It was not a complicated charge. He has been sufficiently long in practice. The argument that a charge had not been formulated appears to be more out of the discontentment of P.D. Gupta in being unable to meet the allegation. Now, P.D. Gupta says that he has washed his hands off the property and thus he is not guilty of any misconduct. That is not the issue. It is his conduct in buying the property, the subject-matter of litigation between the parties, from his client on which he could exercise undue influence especially when there was a doubt cast on his client’s title to the property. Had P.D. Gupta sold the property back to Vidya Wati and got the sale deed in his favour cancelled something could have been said in his favour. But that is not so. He sold the property to a third person, made profit and created more complications in the pending suit. P.D. Gupta purchased the properties which were the subject-matter of the dispute for himself and also for his son-in-law at almost throw-away prices and thus he himself became a party to the litigation. The conduct of P.D. Gupta cannot be said to be above board. It is not material that Vidya Wati or anyone claiming through her has not complained against him. We are concerned with the professional conduct of P.D. Gupta as a lawyer conducting the case for his client. A lawyer owes a duty to be fair not only to his client but also to the court as well as to the opposite party in the conduct of the case. Administration of justice is a stream which has to be kept pure and clean. It has to be kept unpolluted. Administration of justice is not something which concerns the Bench only. It concerns the Bar as well. The Bar is the principal ground for recruiting Judges. No one should be able to raise a finger about the conduct of a lawyer. While conducting the case he functions as an officer of the court. Here, P.D. Gupta in buying the property has in effect subverted the process of justice. His action has raised serious questions about his fairness in the conduct of the trial touching his professional conduct as an advocate. By his action he has brought the process of administration of justice into disrepute.

15. The Bar Council of India and the State Bar Councils are statutory bodies under the Act. These bodies perform varying functions under the Act and the rules framed thereunder. The Bar Council of India has laid standards of professional conduct for the members. The code of conduct in the circumstances can never be exhaustive. The Bar Council of India and the State Bar Councils are representative bodies of the advocates on their rolls and are charged with the responsibility of maintaining discipline amongst members and punishing those who go astray from the path of rectitude set out for them. In the present case the Bar Council of India, through its Disciplinary Committee, has considered all the relevant circumstances and has come to the conclusion that P.D. Gupta, Advocate is guilty of misconduct and we see no reason to take a different view. We also find no ground to interfere with the punishment awarded to P.D. Gupta in the circumstances of the case.

17. The appeal is dismissed.

* * * * *
T.C. Mathai v. District & Sessions Judge, Thiruvananthapuram
(1999) 3 SCC 614

K.T. THOMAS, J. - 2. The appellant claims to be the power-of-attorney holder of a couple (husband and wife) now living in Kuwait. He sought permission of the Sessions Court, Trivandrum to appear and plead on behalf of the said couple who are arrayed as respondents in a criminal revision petition filed before the said Sessions Court (they will be referred to as the respondent-couple). But the Sessions Judge declined to grant permission as the request for such permission did not emanate from the respondent-couple themselves. Thereupon the appellant moved the High Court of Kerala under Article 226 of the Constitution for issuance of a direction to the Sessions Judge concerned to grant the permission sought for. A Single Judge of the High Court dismissed the original petition against which the appellant filed a writ appeal which too was dismissed by a Division Bench of the High Court.

3. Undeterred by the successive setback in securing a right of audience on behalf of the aforesaid couple the appellant travelled a long distance from the southern end of the country right up to the national capital to personally argue before the Apex Court that he is entitled to plead for the respondent-couple in the Sessions Court. We heard the appellant-in-person though we are still now unable to appreciate why he, instead of incurring so much expenses and strain, did not advise the respondent-couple to engage a counsel for pleading their cause before the Sessions Court.

4. The appellant, during the course of his arguments, referred to a commentary on criminal law to support his contention that a power-of-attorney holder has all powers to act on behalf of his principal. We would assume that the respondent-couple would have executed an instrument of power of attorney empowering the appellant to act on their behalf. Can he become a pleader for the respondent-couple on the strength of it?

5. Section 303 of the Code of Criminal Procedure (“the Code”) entitles a person to the right of being defended by a “pleader” of his choice when proceedings are initiated against him under the Code. “Pleader” is defined in Section 2(q) as thus:

“2.(q) ‘pleader’, when used with reference to any proceeding in any court, means a person authorised by or under any law for the time being in force, to practise in such court, and includes any other person appointed with the permission of the court to act in such proceeding;”

6. The definition envelopes two kinds of pleaders within its ambit. The first refers to legal practitioners who are authorised to practise law and the second refers to “any other person”. If it is the latter, its essential requisite is that such person should have been appointed with the permission of the court to act in such proceedings. This is in tune with Section 32 of the Advocates Act, 1961 which empowers a court to permit any person, who is not enrolled as an
advocate to appear before it in any particular case. But if he is to plead for another person in a
criminal court, such permission should be sought for by that person.

7. It is not necessary that the “pleader” so appointed should be the power-of-attorney holder
of the party in the case. What seems to be a condition precedent is that his appointment should
have been preceded by grant of permission of the court. It is for the court to consider whether
such permission is necessary in the given case and whether the person proposed to be appointed is
capable of helping the court by pleading for the party, for arriving at proper findings on the issues
involved in the case.

8. The work in a court of law is a serious and responsible function. The primary duty of a
criminal court is to administer criminal justice. Any lax or wayward approach, if adopted towards
the issues involved in the case, can cause serious consequences for the parties concerned. It is not
just somebody representing the party in the criminal court who becomes the pleader of the party.
In the adversary system which is now being followed in India, both in civil and criminal
litigation, it is very necessary that the court gets proper assistance from both sides.

9. Legally qualified persons who are authorised to practise in the courts by the authority
prescribed under the statute concerned can appear for parties in the proceedings pending against
them. No party is required to obtain prior permission of the court to appoint such persons to
represent him in court. Section 30 of the Advocates Act confers a right on every advocate whose
name is entered in the Roll of Advocates maintained by a State Bar Council to practise in all the
courts in India including the Supreme Court. Section 33 says that no person shall be entitled to
practise in any court unless he is enrolled as an advocate under that Act. Every advocate so
enrolled becomes a member of the Bar. The Bar is one of the main wings of the system of justice.
An advocate is the officer of the court and is hence accountable to the court. Efficacious
discharge of judicial process very often depends upon the valuable services rendered by the legal
profession.

10. But if the person proposed to be appointed by the party is not such a qualified person, the
court has first to satisfy itself whether the expected assistance would be rendered by that person.
The reason for Parliament for fixing such a filter in the definition clause [Section 2(q) of the
Code] that prior permission must be secured before a non-advocate is appointed by the party to
plead his cause in the court, is to enable the court to verify the level of equipment of such a
person for pleading on behalf of the party concerned.

11. V.R. Krishna Iyer, J. had occasion to deal with a similar matter while considering a plea
like this in a chamber proceeding in the Supreme Court. In that case, a party sought permission to
be represented by another person in a criminal case. Learned Judge then struck a note of caution
in the following terms in Harishankar Rastogi v. Girdhari Sharma [AIR 1978 SC 1019]:

“If the man who seeks to represent has poor antecedents or irresponsible behaviour
or dubious character, the court may receive counter-productive service from him. Justice
may fail if a knave were to represent a party. Judges may suffer if quarrelsome, ill-informed or blackguardly or blockheadedly private representatives filing arguments at the court. Likewise, the party himself may suffer if his private representative deceives him or destroys his case by mendacious or meaningless submissions and with no responsibility or respect for the court. Other situations, settings and disqualifications may be conceived of where grant of permission for a private person to represent another may be obstructive, even destructive of justice.”

12. The appellant submitted that he is the duly appointed attorney of the respondent-couple by virtue of an instrument of power of attorney executed by them and on its strength he contended that his right to represent the respondent-couple in the court would be governed by the said authority in the instrument.

14. Under the English law, “every person who is sui juris has a right to appoint an agent for any purpose whatsoever, and he can do so when he is exercising statutory right no less than when he is exercising any other right”. But this Court has pointed out that the aforesaid common law principle does not apply where the act to be performed is personal in character, or when it is annexed to a public office or to an office involving any fiduciary obligation,

15. Section 2 of the Power of Attorney Act cannot override the specific provision of a statute which requires that a particular act should be done by a party-in-person. When the Code requires the appearance of an accused in a court it is no compliance with it if a power-of-attorney holder appears for him. It is a different thing that a party can be permitted to appear through counsel. Chapter XVI of the Code empowers the Magistrate to issue summons or warrant for the appearance of the accused. Section 205 of the Code empowers the Magistrate to dispense with “the personal attendance of the accused, and permit him to appear by his pleader” if he sees reasons to do so. Section 273 of the Code speaks of the powers of the court to record evidence in the presence of the pleader of the accused, in cases when personal attendance of the accused is dispensed with. But in no case can the appearance of the accused be made through a power-of-attorney holder. So the contention of the appellant based on the instrument of power of attorney is of no avail in this case.

16. In this context reference can be made to a decision rendered by a Full Bench of the Madras High Court in M. Krishnammal v. T. Balasubramania Pillai [AIR 1937 Mad 937], when a person, who was the power-of-attorney holder of another, claimed right of audience in the High Court on behalf of his principal. A Single Judge referred three questions to be considered by the Full Bench, of which the one which is relevant here was whether an agent with the power of attorney to appear and conduct judicial proceedings has the right of audience in court. Beasley, C.J., who delivered the judgment on behalf of the Full Bench stated the legal position thus: (AIR Headnote)

“An agent with a power of attorney to appear and conduct judicial proceedings, but who has not been so authorised by the High Court, has no right of audience on behalf of
the principal, either in the appellate or original side of the High Court. ... There is no warrant whatever for putting a power of attorney given to a recognized agent to conduct proceedings in court in the same category as a vakalat given to a legal practitioner, though latter may be described as a power of attorney [which] is confined only to pleaders, i.e., those who have a right to plead in courts.”

17. The aforesaid observations, though stated sixty years ago, would represent the correct legal position even now. Be that as it may, an agent cannot become a “pleader” for the party in criminal proceedings, unless the party secures permission from the court to appoint him to act in such proceedings. The respondent-couple have not even moved for such a permission and hence no occasion has arisen so far to consider that aspect.

18. The appeal is accordingly dismissed.
K.T. THOMAS, J. (for himself and Sethi, J.) The main issue posed in this appeal has sequential importance for members of the legal profession. The issue is this: has the advocate a lien for his fees on the litigation papers entrusted to him by his client? In this case the Bar Council of India, without deciding the above crucial issue, has chosen to impose punishment on a delinquent advocate debarring him from practising for a period of 18 months and a fine of Rs 1000. The advocate concerned was further directed to return all the case bundles which he got from his respondent client without any delay. This appeal is filed by the said advocate under Section 38 of the Advocates Act, 1961.

The appellant, now a septuagenarian, has been practising as an advocate mostly in the courts at Bhopal, after enrolling himself as a legal practitioner with the State Bar Council of Madhya Pradesh. According to him, he was appointed as legal advisor to Madhya Pradesh State Cooperative Bank Ltd. (“the Bank” for short) in 1990 and the Bank continued to retain him in that capacity during the succeeding years. He was also engaged by the said Bank to conduct cases in which the Bank was a party. However, the said retainership did not last long. On 17-7-1993 the Bank terminated the retainership of the appellant and requested him to return all the case files relating to the Bank. Instead of returning the files the appellant forwarded a consolidated bill to the Bank showing an amount of Rs 97,100 as the balance payable by the Bank towards the legal remuneration to which he is entitled. He informed the Bank that the files would be returned only after settling his dues.

3. Correspondence went on between the appellant and the Bank regarding the amount, if any, payable to the appellant as the balance due to him. The respondent Bank disclaimed any liability outstanding from them to the appellant. The dispute remained unresolved and the case bundles never passed from the appellant’s hands. As the cases were pending the Bank was anxious to have the files for continuing the proceedings before the courts/tribunals concerned. At the same time the Bank was not disposed to capitulate to the terms dictated by the appellant which they regarded as grossly unreasonable. A complaint was hence filed by the Managing Director of the Bank, before the State Bar Council (Madhya Pradesh) on 3-2-1994. It was alleged in the complaint that the appellant is guilty of professional misconduct by not returning the files to his client.

4. In the reply which the appellant submitted before the Bar Council he admitted that the files were not returned but claimed that he has a right to retain such files by exercising his right of lien and offered to return the files as soon as payment is made to him.

5. The complaint was then forwarded to the Disciplinary Committee of the District Bar Council. The State Bar Council failed to dispose of the complaint even after the expiry of one year. So under Section 36-B of the Advocates Act the proceedings stood transferred to the Bar
Council of India. After holding inquiry the Disciplinary Committee of the Bar Council of India reached the conclusion that the appellant is guilty of professional misconduct. The Disciplinary Committee has stated the following in the impugned order:

“On the basis of the complaint as well as the documents available on record we are of the opinion that the respondent is guilty of professional misconduct and thereby he is liable for punishment. The complainant is a public institution. It was the duty of the respondent to return the briefs to the Bank and also to appear before the Committee to revert his allegations made in application dated 8-11-1995. No such attempt was made by him.”

6. In this appeal learned counsel for the appellant contended that the failure of the Bar Council of India to consider the singular defence set up by the appellant i.e. he has a lien over the files for his unpaid fees due to him, has resulted in miscarriage of justice. The Bank contended that there was no fee payable to the appellant and the amount shown by him was on account of inflating the fees. Alternatively, the respondent contended that an advocate cannot retain the files after the client terminated his engagement and that there is no lien on such files.

7. We would first examine whether an advocate has lien on the files entrusted to him by the client. Learned counsel for the appellant endeavoured to base his contention on Section 171 of the Indian Contract Act which reads thus:

“171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.”

8. Files containing copies of the records (perhaps some original documents also) cannot be equated with the “goods” referred to in the section. The advocate keeping the files cannot amount to “goods bailed”. The word “bailment” is defined in Section 148 of the Contract Act as the delivery of goods by one person to another for some purpose, upon a contract that they shall be returned or otherwise disposed of according to the directions of the person delivering them, when the purpose is accomplished. In the case of litigation papers in the hands of the advocate there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of. That apart, the word “goods” mentioned in Section 171 is to be understood in the sense in which that word is defined in the Sale of Goods Act.

9. Thus understood “goods” to fall within the purview of Section 171 of the Contract Act should have marketability and the person to whom they are bailed should be in a position to dispose of them in consideration of money. In other words the goods referred to in Section 171 of the Contract Act are saleable goods. There is no scope for converting the case files into money, nor can they be sold to any third party. Hence, the reliance placed on Section 171 of the Contract Act has no merit.
10. In England the solicitor had a right to retain any deed, paper or chattel which had come into his possession during the course of his employment. It was the position in common law and it was later recognized as the solicitor’s right under the Solicitors Act, 1860.

12. After independence the position would have continued until the enactment of the Advocates Act, 1961 which has repealed a host of enactments including the Indian Bar Council Act. When the new Bar Council of India came into existence it framed rules called the Bar Council of India Rules as empowered by the Advocates Act. Such Rules contain provisions specifically prohibiting an advocate from adjusting the fees payable to him by a client against his own personal liability to the client. As a rule an advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client (vide Rule 24). In this context a reference can be made to Rules 28 and 29.

13. Thus, even after providing a right for an advocate to deduct the fees out of any money of the client remaining in his hand at the termination of the proceeding for which the advocate was engaged, it is important to notice that no lien is provided on the litigation files kept with him. In the conditions prevailing in India with lots of illiterate people among the litigant public it may not be advisable also to permit the counsel to retain the case bundle for the fees claimed by him. Any such lien if permitted would become susceptible to great abuses and exploitation.

14. There is yet another reason which dissuades us from giving approval to any such lien. We are sure that nobody would dispute the proposition that the cause in a court/tribunal is far more important for all concerned than the right of the legal practitioner for his remuneration in respect of the services rendered for espousing the cause on behalf of the litigant. If a need arises for the litigant to change his counsel pendente lite, that which is more important should have its even course flow unimpeded. Retention of records for the unpaid remuneration of the advocate would impede such course and the cause pending judicial disposal would be badly impaired. If a medical practitioner is allowed a legal right to withhold the papers relating to the treatment of his patient which he thus far administered to him for securing the unpaid bill, that would lead to dangerous consequences for the uncured patient who is wanting to change his doctor. Perhaps the said illustration may be an overstatement as a necessary corollary for approving the lien claimed by the legal practitioner. Yet the illustration is not too far-fetched. No professional can be given the right to withhold the returnable records relating to the work done by him with his client’s matter on the strength of any claim for unpaid remuneration. The alternative is that the professional concerned can resort to other legal remedies for such unpaid remuneration.

15. A litigant must have the freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative.
16. In civil cases, the appointment of an advocate by a party would be deemed to be in force until it is determined with the leave of the court [vide Order 3 Rule 4(1) of the Code of Civil Procedure]. In criminal cases, every person accused of an offence has the right to consult and be defended by a legal practitioner of his choice which is now made a fundamental right under Article 22(1) of the Constitution. The said right is absolute in itself and it does not depend on other laws. The words “of his choice” in Article 22(1) indicate that the right of the accused to change an advocate whom he once engaged in the same case, cannot be whittled down by that advocate by withholding the case bundle on the premise that he has to get the fees for the services already rendered to the client.

17. If a party terminates the engagement of an advocate before the culmination of the proceedings that party must have the entire file with him to engage another advocate. But if the advocate who is changed midway adopts the stand that he would not return the file until the fees claimed by him are paid, the situation perhaps may turn to dangerous proportions. There may be cases when a party has no resources to pay the huge amount claimed by the advocate as his remuneration. A party in a litigation may have a version that he has already paid the legitimate fee to the advocate. At any rate if the litigation is pending the party has the right to get the papers from the advocate whom he has changed so that the new counsel can be briefed by him effectively. In either case it is impermissible for the erstwhile counsel to retain the case bundle on the premise that fees were yet to be paid.

18. Even if there is no lien on the litigation papers of his client an advocate is not without remedies to realise the fee which he is legitimately entitled to. But if he has a duty to return the files to his client on being discharged the litigant too has a right to have the files returned to him, more so when the remaining part of the lis has to be fought in the court. This right of the litigant is to be read as the corresponding counterpart of the professional duty of the advocate.

19. Misconduct envisaged in Section 35 of the Advocates Act is not defined. The section uses the expression “misconduct, professional or otherwise”. The word “misconduct” is a relative term. It has to be considered with reference to the subject-matter and the context wherein such term occurs. It literally means wrong conduct or improper conduct.

20. Corpus Juris Secundum contains the following passage at p.740 (Vol. 7):

“Professional misconduct may consist in betraying the confidence of a client, in attempting by any means to practise a fraud or impose on or deceive the court or the adverse party or his counsel, and in fact in any conduct which tends to bring reproach on the legal profession or to alienate the favourable opinion which the public should entertain concerning it.”

23. We, therefore, hold that the refusal to return the files to the client when he demanded the same amounted to misconduct under Section 35 of the Act. Hence, the appellant in the present case is liable to punishment for such misconduct.
24. However, regarding the quantum of punishment we are disposed to take into account two broad aspects:

(1) This Court has not pronounced, so far, on the question whether the advocate has a lien on the files for his fees.

(2) The appellant would have bona fide believed, in the light of decisions of certain High Courts, that he did have a lien.

In such circumstances it is not necessary to inflict a harsh punishment on the appellant. A reprimand would be sufficient in the interest of justice on the special facts of this case.

25. We, therefore, alter the punishment to one of reprimanding the appellant. However, we make it clear that if any advocate commits this type of professional misconduct in future he would be liable to such quantum of punishment as the Bar Council will determine and the lesser punishment imposed now need not be counted as a precedent.
D.P. Chadha v. Triyugi Narain Mishra

(2001) 2 SCC 221

R.C. LAHOTI, J. - Shri D.P. Chadha, Advocate, the appellant, has been held guilty of professional misconduct by the Rajasthan State Bar Council and punished with suspension from practice for a period of five years. Shri Anil Sharma, Advocate was also proceeded against along with Shri D.P. Chadha, Advocate and he too having been found guilty was reprimanded. An appeal preferred by Shri D.P. Chadha, Advocate under Section 37 of the Advocates Act, 1961 has not only been dismissed but the Bar Council of India has chosen to vary the punishment of the appellant by enhancing the period of suspension from practice to ten years. The Bar Council of India has also directed notice to show cause against enhancement of punishment to be issued to Shri Anil Sharma, Advocate. The Bar Council of India has further directed proceedings for professional misconduct to be initiated against one Shri Rajesh Jain, Advocate. Shri D.P. Chadha, Advocate has preferred this appeal under Section 38 of the Advocates Act, 1961 (“the Act”).

2. It is not disputed that Upasana Construction Pvt. Ltd. had filed a suit for ejectment based on landlord-tenant relationship against the complainant Shri Triyugi Narain Mishra, who was running a school in the tenanted premises wherein about 2000 students were studying. Shri D.P. Chadha was engaged by the complainant for defending him in the suit.

3. It is not necessary to set out in extenso the contents of the complaint made by Shri Triyugi Narain Mishra to the Bar Council. It would suffice to notice in brief the findings concurrently arrived at by the State Bar Council and the Bar Council of India constituting the gravamen of the charge against the appellant. While the proceedings in the ejectment suit were going on in the civil court at Jaipur, the complainant was contesting an election in the State of U.P. Polling was held on 18-11-1993 and again on 22-11-1993 on which dates as also on the days intervening, Shri Triyugi Narain Mishra was in Chilpur in the State of U.P. looking after the election and was certainly not available at Jaipur. Shri D.P. Chadha was in possession of a blank vakalatnama and a blank paper, both signed by the complainant, given to him in the first week of October 1993. These documents were used for fabricating a compromise petition whereby the complainant has been made to suffer a decree for eviction. The blank vakalatnama was used for engaging Shri Anil Sharma, Advocate, on behalf of the complainant, who got the compromise verified. Though the compromise was detrimental to the interest of the complainant yet the factum of compromise and its verification was never brought to the notice of the complainant in spite of ample time and opportunity being available for the purpose. The proceedings of the court show a deliberate attempt having been made by three erring advocates to avoid the appearance of the complainant before the court, to prevent the complainant from gathering knowledge of the compromise filed in court and creating a situation whereby the court was virtually compelled to pass a decree though the court was feeling suspicious of the compromise and wanted presence of the complainant to be secured before it before the decree was passed.
4. The proceedings of the court and the several documents relating thereto, go to show that earlier the plaintiff Company was being represented by Shri Vidya Bhushan Sharma, Advocate. An application was moved on behalf of the plaintiff discharging Shri Vidya Bhushan Sharma from the case and instead engaging Shri Rajesh Jain, Advocate on behalf of the plaintiff and in place of Shri Vidya Bhushan Sharma, Advocate. On 17-11-1993 Shri D.P. Chadha was present in the court though the defendant was not present when an adjournment was taken from the court stating that there was possibility of an amicable settlement between the parties whereupon hearing was adjourned to 14-2-1994 for reporting compromise or framing of issues. On 20-11-1993, which was not a date fixed for hearing, Shri Rajesh Jain and Shri Anil Sharma, Advocates appeared in the court on behalf of the plaintiff and the defendant respectively and filed a compromise petition. Shri Anil Sharma filed Vakalatnama purportedly on behalf of the complainant.

5. The compromise petition purports to have been signed by the parties as also by Shri Rajesh Jain, Advocate on behalf of the plaintiff and Shri Anil Sharma, Advocate on behalf of the defendant. The compromise petition is accompanied by another document purporting to be a receipt executed by the complainant acknowledging receipt of an amount of Rs. 5 lakhs by way of damages for the loss of school building standing on the premises. The receipt is typed but the date 20-11-1993 is written in hand. A revenue stamp of 20 p is fixed on the receipt in a side of the paper and at a place where ordinarily the ticket is not affixed. The factum of the defendant having received an amount of Rs 5 lakhs as consideration amount for the compromise does not find a mention in the compromise petition.

6. The Learned Additional Civil Judge before whom the compromise petition was filed directed the parties to remain personally present before the court on 17-12-1993 so as to verify the compromise. Instead of complying with the orders, Shri Rajesh Jain, Advocate filed a miscellaneous civil appeal raising a plea that the trial court was not justified in directing personal appearance of the parties and should have recorded the compromise on verification by the advocates. The complainant Shri Triyugi Narain Mishra was impleaded as respondent “through advocate Shri Anil Sharma” - as stated in the cause title of memo of appeal. The appeal was filed on 20-12-1993. Notice of appeal was not issued to the complainant; the same was issued in the name of Shri Anil Sharma, Advocate, who accepted the same. Shri Anil Sharma, Advocate did not file any vakalatnama on behalf of the complainant in the appeal and instead made his appearance by filing a memo of appearance reciting his authority to appear in appeal on the basis of his being a counsel for the complainant in the trial court. This appeal was dismissed by the Learned Additional District Judge on 24-1-1994 holding the appeal to be not maintainable.

7. On 30-1-1994, the trial court’s record was returned to it by the appellate court. On 17-12-1993 also the trial court had directed personal appearance of the parties. On 16-2-1994 the counsel appearing for the parties (the names of the counsel not mentioned in the order-sheet dated 16-2-1994) took time for submitting case-law for the perusal of the court. Similar prayer was made on 21-2-1994 and 18-3-1994. On 8-4-1994, the plaintiff was present with his counsel. The
defendant/complainant was not present. Shri D.P. Chadha, Advocate appeared on behalf of the
defendant and argued that personal presence of Shri Triyugi Narain Mishra was not required for
verification of compromise and the presence of the advocate was enough for the court to verify
the compromise and take the same on record. The court was requested to recall its earlier order
directing personal appearance of the parties. A few decided cases were cited by Shri D.P. Chadha,
Advocate before the court for its consideration. The trial court suspected the conduct of the
counsel and passed a detailed order directing personal presence of the defendant to be secured
before the court. The trial court also directed a notice to be issued to the defendant for his
personal appearance on the next date of hearing before passing any order on the compromise
petition.

8. Shri Rajesh Jain, Advocate again filed an appeal against the order dated 8-4-1994. Again
the complainant was arrayed as a respondent in the cause title “through Shri Anil Sharma,
Advocate”. An application was moved before the appellate court seeking a shorter date of hearing
as the defendant was likely to go out. On 21-8-1994 the appellate court directed the record of the
trial court to be requisitioned. Shri Anil Sharma, Advocate appeared in the appellate court without
filing any vakalatnama from the complainant. He conceded to the appeal being allowed and
personal appearance of the defendant not being insisted upon for the purpose of recording the
compromise. The appellate court was apparently oblivious of the legal position that such a
miscellaneous appeal was not maintainable under any provision of law.

9. Certified copy of the order of the appellate court was obtained in hot haste. Unfortunately,
the Presiding Officer of the trial court who was dealing with the matter, had stood transferred in
the meanwhile. An application was filed before the successor trial Judge by Shri Rajesh Jain,
Advocate requesting compliance with the order of the appellate court and to record the
compromise and pass a decree in terms thereof, dispensing with the necessity of personal
presence of the parties. On 23-7-1994, the trial Judge, left with no other option, passed a decree in
terms of compromise in the presence of Shri Rajesh Jain and Shri Anil Sharma, Advocates. The
decree directed the suit premises to be vacated by 30-11-1993 (the date stated in the compromise
petition).

10. Shri Triyugi Narain Mishra, the complainant, moved the State Bar Council complaining
of the professional misconduct of the three advocates who had colluded to bring the false
compromise in existence without his knowledge and also made all efforts to prevent the
complainant gathering knowledge of the alleged compromise.

11. In response of the notice issued by the State Bar Council, Shri Anil Sharma, Advocate
submitted that he did not know Shri Triyugi Narain Mishra personally. The vakalatnama and the
compromise petition were handed over to him by Shri D.P. Chadha, Advocate for the purpose of
being filed in the court. Shri Anil Sharma was told by Shri D.P. Chadha, Advocate that he was
not well and if there was any difficulty in securing the decree then he was available to assist Shri
Anil Sharma. In the two miscellaneous civil appeals preferred by Shri Rajesh Jain, Advocate, Shri
Anil Sharma accepted the notices of the appeals on the advice of Shri D.P. Chadha, Advocate.
12. Shri D.P. Chadha, Advocate took the plea that he was not aware of the compromise petition and the various proceedings relating thereto, leading to verification of the compromise and passing of the decree. He submitted that he never obtained blank paper or blank vakalatnama signed by anyone at any time and not even Shri Triyugi Narain Mishra, the complainant. He also submitted that on 8-4-1994 his presence had been wrongly recorded in the proceedings and he had not appeared before the court to argue that the personal presence of the parties was not required for verification of compromise petition filed in the court and that the counsel was competent to sign and verify the compromise whereon the court should act.

13. Amongst other witnesses the complainant and the three counsel have all been examined by the State Bar Council and cross-examined by the parties to the disciplinary proceedings. The defence raised by the appellant has been discarded by the State Bar Council as well as by the Bar Council of India in their orders. Both the authorities have dealt extensively with the improbabilities of the defence and assigned detailed reasons in support of the findings arrived at by them. Both the authorities have found the charge against the appellant proved to the hilt. The statement of the complainant has been believed that he had never entered into any compromise and he did not even have knowledge of it. His statement that Shri D.P. Chadha, the appellant, had obtained blank paper and blank vakalatnama signed by him and the same have been utilised for the purpose of fabricating the compromise and appointing Shri Anil Sharma, Advocate, has also been believed. Here it may be noted that Shri D.P. Chadha had denied on oath having obtained any blank paper or vakalatnama from Shri Triyugi Narain Mishra. However, while cross-examining the complainant first he was pinned down in stating that only one paper and one vakalatnama (both blank) were signed by him and then Shri D.P. Chadha produced from his possession one blank vakalatnama and one blank paper signed by the complainant.

The Bar Council has found that the blank paper, so produced by the appellant, bore the signature of the complainant almost at the same place of the blank space at which the signature appears on the disputed compromise. Production of signed blank vakalatnama and blank paper from the custody of the complainant before the Bar Council belied the appellant’s defence emphatically raised in his written statement. On 8-4-1994 the presence of the appellant is recorded by the trial court at least at two places in the order-sheet of that date. It is specifically recorded in the context of his making submissions before the court relying on several rulings to submit that personal appearance of the party was not necessary to have the compromise verified and taken on record. The appellant had not moved the court at any time for correcting the record of the proceedings and deleting his appearance only if the order-sheet did not correctly record the proceedings of the court. On and around the filing of the compromise petition before the trial court the appellant was keeping a watch on the proceedings and noting the appointed dates of hearing though he was not actually appearing in the court on the dates other than 8-4-1994. In short, it has been found both by the State Bar Council and the Bar Council of India that the complainant had not entered into any compromise and that he was not even aware of it. Blank vakalatnama and blank paper entrusted by him in confidence to his counsel, i.e. the appellant,
were used for the purpose of bringing a false compromise into existence and appointing Shri Anil Sharma, Advocate for the defendant, without his knowledge, to have compromise verified and brought on record followed by a decree. Shri Vidya Bhushan Sharma, the counsel originally appointed by the plaintiff might not have agreed to a decree being secured in favour of the plaintiff on the basis of a false compromise and that is why he was excluded from the proceedings and instead Shri Rajesh Jain was brought to replace him. The decree resulted into closure of the school, demolition of school building and about 2000 students studying in the school being thrown on the road.

14. We have heard the learned counsel for the parties at length. We have also gone through the evidence and the relevant documents available on record of the Bar Council. We are of the opinion that the State Bar Council as well as the Bar Council of India have correctly arrived at the findings of the fact and we too find ourselves entirely in agreement with the findings so arrived at.

15. In the very nature of things there was nothing like emergency, not even an urgency for securing verification of compromise and passing of a decree in terms thereof. Heavens were not going to fall if the recording of the compromise was delayed a little and the defendant was personally produced in the court who was certainly not available in Jaipur being away in the State of U.P. contesting an election. The counsel for the parties were replaced apparently for no reason. The trial court entertained doubts about the genuineness of the compromise and therefore directed personal appearance of the parties for verification of the compromise. The counsel appearing in the case made all possible efforts at avoiding compliance with the direction of the trial court and to see that the compromise was verified and taken on record culminating into a decree without the knowledge of the defendant/complainant. Instead of securing presence of the defendant before the court, the counsel preferred miscellaneous appeals twice and ultimately succeeded in securing an appellate order, which too is collusive, directing the trial court to verify and take on record the compromise without insisting on personal appearance of the defendant. The proceedings in the appellate court as also before the trial court show an effort on the part of the counsel appearing thereat to have the matter as to compromise disposed of hurriedly, obviously with a view to exclude the possibility of the defendant-complainant gathering any knowledge of what was transpiring.

17. Byram Pestonji Gariwala v. Union of India [AIR 1991 SC 2234] is an authority for the proposition that in spite of the 1976 Amendment in Order 23 Rule 3 CPC which requires agreement or compromise between the parties to be in writing and signed by the parties, the implied authority of counsel engaged in the thick of the proceedings in court, to compromise or agree on matters relating to the parties, was not taken away. Neither the decision in Byram Pestonji Gariwala nor any other authority cited on 8-4-1994 before the trial court dispenses with the need of the agreement or compromise being proved to the satisfaction of the court. In order to
be satisfied whether the compromise was genuine and voluntarily entered into by the defendant, the trial court had felt the need of parties appearing in person before the court and verifying the compromise. In the facts and circumstances of the case the move of the counsel resisting compliance with the direction of the court was nothing short of being sinister. The learned Additional District Judge who allowed the appeal preferred by Shri Rajesh Jain unwittingly fell into trap. It was expected of the learned Additional District Judge, who must have been a senior judicial officer, to have seen that he was allowing an appeal which was not even maintainable. But for his order the learned Judge of the trial court would not have taken on record the compromise and passed decree in terms thereof unless the parties had personally appeared before him.

In our opinion the appellant Shri D.P. Chadha was not right in resisting the order of the trial court requiring personal appearance of the defendant for verifying the compromise. The resistance speaks volumes of sinister design working in the minds of the guilty advocates. Even during the course of these proceedings and also during the course of hearing of the appeal before us there is not the slightest indication of any justification behind resistance offered by the counsel to the appearance of the defendant in the trial court. The correctness of the proceedings dated 8-4-1994 as recorded by the court cannot be doubted. The order-sheet of the trial court dated 8-4-1994 records as under:

“8-4-1994

(Cutting). Plaintiff with counsel present. Defendant’s counsel Shri D.P. Chadha present. Arguments heard. Judicial precedents Tashi Dorji v. Birendra Kumar Roy [AIR 1980 Cal 51], Vishnu Kumar v. State Bank of Bikaner and Jaipur [AIR 1976 Raj 195], Byram Pestonji cited by Shri D.P. Chadha perused. In the matter under consideration, compromise was filed on 20-11-1993 and the same day the counsel were directed to keep the parties present in court but parties were not produced. On behalf of the plaintiff-appellant, an appeal was also preferred against the order dated 20-11-1993 before the Hon’ble District and Sessions Judge but the order of trial court being not appealable, appeal has been dismissed.

Para 40 of the decision Byram Pestonji is as under:

‘Accordingly, we are of the view that the words ‘in writing and signed by the parties’ inserted by the CPC (Amendment) Act, 1976, must necessarily mean, to borrow the language of Order III Rule 1 CPC:

“any appearance, …or by a pleader, appearing, applying or acting as the case may be, on his behalf:

Provided that any such appearance shall, if the court so directs, be made by the party in person.”’
Thus in my view the court can direct any party to be present in court under Order III Rule 1 in compliance with the said decision of the Hon’ble Supreme Court. The counsel for the defendant has not produced the defendant in court. Therefore, notice be issued to the defendant to appear personally in court. For service of notice, the case be put up on 5-5-1994. Before (cutting) preparing the decree on the basis of compromise, I deem it proper in the interest of justice to direct the opposite party to personally appear in the court.

Sd/- Illegible Seal of Additional Civil Judge and Additional Chief Judicial Magistrate No. 6, Jaipur City.”

18. The record of the proceedings made by the court is sacrosanct. The correctness thereof cannot be doubted merely for asking. In State of Maharashtra v. Ramdas Shrinivas Nayak [AIR 1982 SC 1249], this Court has held:

“(T)he Judges’ record was conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else. The court could not launch into inquiry as to what transpired in the High Court.

The Court is bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. It cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of facts as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.”

20. The explanation given by the appellant for not moving the trial court for rectification in the record of proceedings is that the presiding Judge of the court had stood transferred and therefore it would have been futile to move for rectification. Such an explanation is a ruse merely. The application for rectification should have been moved as the only course permissible and, if necessary, the record could have been sent to that very Judge for dealing with the prayer of rectification wherever he was posted. In the absence of steps for rectification having been taken a challenge to the correctness of the facts recorded in the order-sheet of the court cannot be entertained, much less upheld. We agree with the finding recorded in the order under appeal that the proceedings dated 8-4-1994 correctly state the appellant having appeared in the court and argued the matter in the manner recited therein.
21. The term “misconduct” has not been defined in the Act. However, it is an expression with a sufficiently wide meaning. In view of the prime position which the advocates occupy in the process of administration of justice and justice delivery system, the courts justifiably expect from the lawyers a high standard of professional and moral obligation in the discharge of their duties. Any act or omission on the part of a lawyer which interrupts or misdirects the sacred flow of justice or which renders a professional unworthy of right to exercise the privilege of the profession would amount to misconduct attracting the wrath of disciplinary jurisdiction.

22. A mere error of judgment or expression of a reasonable opinion or taking a stand on a doubtful or debatable issue of law is not a misconduct; the term takes its colour from the underlying intention. But at the same time misconduct is not necessarily something involving moral turpitude. It is a relative term to be construed by reference to the subject-matter and the context wherein the term is called upon to be employed. A lawyer in discharging his professional assignment has a duty to his client, a duty to his opponent, a duty to the court, a duty to the society at large and a duty to himself. It needs a high degree of probity and poise to strike a balance and arrive at the place of righteous stand, more so, when there are conflicting claims. While discharging duty to the court, a lawyer should never knowingly be a party to any deception, design or fraud. While placing the law before the court a lawyer is at liberty to put forth a proposition and canvass the same to the best of his wits and ability so as to persuade an exposition which would serve the interest of his client so long as the issue is capable of that resolution by adopting a process of reasoning. However, a point of law well settled or admitting of no controversy must not be dragged into doubt solely with a view to confuse or mislead the Judge and thereby gaining an undue advantage to the client to which he may not be entitled. Such conduct of an advocate becomes worse when a view of the law canvassed by him is not only unsupportable in law but if accepted would damage the interest of the client and confer an illegitimate advantage on the opponent. In such a situation the wrong of the intention and impropriety of the conduct is more than apparent. Professional misconduct is grave when it consists of betraying the confidence of a client and is gravest when it is a deliberate attempt at misleading the court or an attempt at practising deception or fraud on the court. The client places his faith and fortune in the hands of the counsel for the purpose of that case; the court places its confidence in the counsel in case after case and day after day. A client dissatisfied with his counsel may change him but the same is not with the court. And so the bondage of trust between the court and the counsel admits of no breaking.

24. It has been a saying as old as the profession itself that the court and counsel are two wheels of the chariot of justice. In the adversarial system, it will be more appropriate to say that while the Judge holds the reigns, the two opponent counsel are the wheels of the chariot. While the direction of the movement is controlled by the Judge holding the reigns, the movement itself is facilitated by the wheels without which the chariot of justice may not move and may even collapse. Mutual confidence in the discharge of duties and cordial relations between Bench and Bar smoothen the movement of the chariot. As responsible officers of the court, as they are called
- and rightly, the counsel have an overall obligation of assisting the courts in a just and proper manner in the just and proper administration of justice. Zeal and enthusiasm are the traits of success in profession but overzealousness and misguided enthusiasm have no place in the personality of a professional.

25. An advocate while discharging duty to his client, has a right to do everything fearlessly and boldly that would advance the cause of his client. After all he has been engaged by his client to secure justice for him. A counsel need not make a concession merely because it would please the Judge. Yet a counsel, in his zeal to earn success for a client, need not step over the well-defined limits or propriety, repute and justness. Independence and fearlessness are not licences of liberty to do anything in the court and to earn success to a client whatever be the cost and whatever be the sacrifice of professional norms.

26. A lawyer must not hesitate in telling the court the correct position of law when it is undisputed and admits of no exception. A view of the law settled by the ruling of a superior court or a binding precedent even if it does not serve the cause of his client, must be brought to the notice of court unhesitatingly. This obligation of a counsel flows from the confidence reposed by the court in the counsel appearing for any of the two sides. A counsel, being an officer of court, shall apprise the Judge with the correct position of law whether for or against either party.

28. We are aware that a charge of misconduct is a serious matter for a practising advocate. A verdict of guilt of professional or other misconduct may result in reprimanding the advocate, suspending the advocate from practice for such period as may be deemed fit or even removing the name of the advocate from the roll of advocates which would cost the counsel his career. Therefore, an allegation of misconduct has to be proved to the hilt. The evidence adduced should enable a finding being recorded without any element of reasonable doubt. In the present case, both the State Bar Council and the Bar Council of India have arrived at, on proper appreciation of evidence, a finding of professional misconduct having been committed by the appellant. No misreading or non-reading of the evidence has been pointed out. The involvement of the appellant in creating a situation resulting into recording of a false and fabricated compromise, apparently detrimental to the interest of his client, is clearly spelled out by the findings concurrently arrived at with which we have found no reason to interfere. The appellant canvassed a proposition of law before the court by pressing into service such rulings which did not support the interpretation which he was frantically persuading the court to accept. The provisions of Rule 3 of Order 23 are clear. The crucial issue in the case was not the authority of a counsel to enter into a compromise, settlement or adjustment on behalf of the client. The real issue was of the satisfaction of the court whether the defendant had really, and as a matter of fact, entered into compromise. The trial Judge entertained a doubt about it and therefore insisted on the personal appearance of the party to satisfy himself as to the correctness of the factum of compromise and genuineness of the statement that the defendant had in fact compromised the suit in the manner set out in the petition of compromise.
29. The power of the court to direct personal presence of any party is inherent and implicit in jurisdiction vesting in the court to take decision. This power is a necessary concomitant of court’s obligation to arrive at a satisfaction and record the same as spelt out from the phraseology of Order 23 Rule 3 CPC. It is explicit in Order 3 Rule 1. This position of law admits of no doubt. Strong resistance was offered to an innocuous and cautious order of the court by canvassing an utterly misconceived proposition, even by invoking a wrong appellate forum and with an ulterior motive. The counsel appearing for the defendant, including the appellant, did their best to see that their own client did not appear in the court and thereby, gather knowledge of such proceedings. At no stage, including the hearing before this Court, the appellant has been able to explain how and in what manner he was serving the interest of his client, i.e. the defendant in the suit by raising the plea which he did. What was the urgency of having the compromise recorded without producing the defendant in person before the court when the court was insisting on such appearance? The compromise was filed in the court. The defendant was away electioneering in his constituency. At best or at the worst, the recording of the compromise would have been delayed by a few days. In the facts and circumstances of the case we find no reason to dislodge the finding of professional misconduct as arrived at by the State Bar Council and the Bar Council of India.

30. It has been lastly contended by the learned counsel for the appellant that the Bar Council of India was not justified in enhancing the punishment by increasing the period of suspension from 5 years to 10 years. It is submitted that the order enhancing the punishment to the prejudice of the appellant is vitiated by non-compliance with principles of natural justice and also for having been passed without affording the appellant a reasonable opportunity of being heard.

32. Very wide jurisdiction has been conferred on the Bar Council of India by sub-section (2) of Section 37. The Bar Council of India may confirm, vary or reverse the order of the State Bar Council and may remit or remand the matter for further hearing or rehearing subject to such terms and directions as it deems fit. The Bar Council of India may set aside an order dismissing the complaint passed by the State Bar Council and convert it into an order holding the advocate proceeded against guilty of professional or other misconduct. In such a case, obviously, the Bar Council of India may pass an order of punishment which the State Bar Council could have passed. While confirming the finding of guilt the Bar Council of India may vary the punishment awarded by the Disciplinary Committee of the State Bar Council which power to vary would include the power to enhance the punishment. An order enhancing the punishment, being an order prejudicially affecting the advocate, the proviso mandates the exercise of such power to be performed only after giving the advocate reasonable opportunity of being heard. The proviso embodies the rule of fair hearing. Accordingly, and consistently with the well-settled principles of natural justice, if the Bar Council of India proposes to enhance the punishment it must put the guilty advocate specifically on notice that the punishment imposed on him is proposed to be
enhanced. The advocate should be given a reasonable opportunity of showing cause against such proposed enhancement and then he should be heard.

33. In the case at hand we have perused the proceedings of the Bar Council of India. The complainant did not file any appeal or application before the Bar Council of India praying for enhancement of punishment. The appeal filed by the appellant was being heard and during the course of such hearing it appears that the Disciplinary Committee of the Bar Council of India indicated to the appellant’s counsel that it was inclined to enhance the punishment. This is reflected by the following passage occurring in the order under appeal:

“While hearing the matter finally parties were also heard as to the enhancement of sentence.”

34. The appellant himself was not present on the date of hearing. He had prayed for an adjournment on the ground of his sickness which was refused. The counsel for the appellant was heard in appeal. It would have been better if the Bar Council of India having heard the appeal would have first placed its opinion on record that the findings arrived at by the State Bar Council against the appellant were being upheld by it. Then the appellant should have been issued a reasonable notice calling upon him to show cause why the punishment imposed by the State Bar Council be not enhanced. After giving him an opportunity of filing a reply and then hearing him the Bar Council could have for reasons to be placed on record, enhanced the punishment. No such thing was done. The exercise by the Bar Council of India of power to vary the sentence to the prejudice of the appellant is vitiated in the present case for not giving the appellant reasonable opportunity of being heard. The appellant is about 60 years of age. The misconduct alleged relates to the year 1993. The order of the State Bar Council was passed in December 1995. In the facts and circumstances of the case we are not inclined to remit the matter now to the Bar Council of India for compliance with the requirements of proviso to sub-section (2) of Section 37 of the Act as it would entail further delay and as we are also of the opinion that the punishment awarded by the State Bar Council meets the ends of justice.

35. For the foregoing reasons the appeal is partly allowed. The finding that the appellant is guilty of professional misconduct is upheld but the sentence awarded by the Rajasthan State Bar Council suspending the appellant from practice for a period of five years is upheld and restored. Accordingly, the order of the Bar Council of India, only to the extent of enhancing the punishment, is set aside.
Shambhu Ram Yadav v. Hanuman Das Khatry

(2001) 6 SCC 1

Y.K. SABHARWAL, J. - Legal profession is not a trade or business. It is a noble profession. Members belonging to this profession have not to encourage dishonesty and corruption but have to strive to secure justice to their clients, if it is legally possible. The credibility and reputation of the profession depends upon the manner in which the members of the profession conduct themselves. There is a heavy responsibility on those on whom duty has been vested under the Advocates Act, 1961 to take disciplinary action when the credibility and reputation of the profession comes under a clout (sic cloud) on account of acts of omission and commission by any member of the profession.

A complaint filed by the appellant against the respondent Advocate before the Bar Council of Rajasthan was referred to the Disciplinary Committee constituted by the State Bar Council. In substance, the complaint was that the respondent while appearing as a counsel in a suit pending in a civil court wrote a letter to Mahant Rajgiri, his client inter alia stating that another client of his has told him that the Judge concerned accepts bribe and he has obtained several favourable orders from him in his favour; if he can influence the Judge through some other gentleman, then it is a different thing, otherwise he should send to him a sum of Rs 10,000 so that through the said client the suit is got decided in his (Mahant Rajgiri’s) favour. The letter further stated that if Mahant can personally win over the Judge on his side then there is no need to spend money. This letter is not disputed. In reply to the complaint, the respondent pleaded that the services of the Presiding Judge were terminated on account of illegal gratification and he had followed the norms of professional ethics and brought these facts to the knowledge of his client to protect his interest and the money was not sent by his client to him. Under these circumstances it was urged that the respondent had not committed any professional misconduct.

3. The State Bar Council noticing that the respondent had admitted the contents of the letter came to the conclusion that it constitutes misconduct. In the order the State Bar Council stated that keeping in view the interest of the litigating public and the legal profession such a practice whenever found has to be dealt with in an appropriate manner. Holding the respondent guilty of misconduct under Section 35 of the Advocates Act, the State Bar Council suspended him from practice for a period of two years with effect from 15-6-1997.

4. The respondent challenged the aforesaid order before the Disciplinary Committee of the Bar Council of India. By order dated 31-7-1999 the Disciplinary Committee of the Bar Council of India comprising of three members enhanced the punishment and directed that the name of the respondent be struck off from the roll of advocates, thus debarring him permanently from the practice. The concluding paragraph of the order dated 31-7-1999 reads thus:

In the facts and circumstances of the case, we also heard the appellant as to the punishment since the advocate has considerable standing in the profession. He has served
as an advocate for 50 years and it was not expected of him to indulge in such a practice of corrupting the judiciary or offering bribe to the Judge and he admittedly demanded Rs 10,000 from his client and he orally stated that subsequently order was passed in his client’s favour. This is enough to make him totally unfit to be a lawyer by writing the letter in question. We cannot impose any lesser punishment than debarring him permanently from the practice. His name should be struck off from the roll of advocates maintained by the Bar Council of Rajasthan. Hereafter the appellant will not have any right to appear in any court of law, tribunal or before any authority. We also impose a cost of Rs 5000 on the appellant which should be paid by the appellant to the Bar Council of India which has to be paid within two months.

5. The respondent filed a review petition under Section 44 of the Advocates Act against the order dated 31-7-1999. The review petition was allowed and the earlier order modified by substituting the punishment already awarded permanently debarring him with one of reprimanding him. The impugned order was passed by the Disciplinary Committee comprising of three members of which two were not members of the earlier Committee which had passed the order dated 31-7-1999.

6. The review petition was allowed by the Disciplinary Committee for the reasons, which, in the words of the Committee, are these:

“(1) The Committee was under the impression as if it was the petitioner who had written a letter to his client calling him to bribe the Judge. But a perusal of the letter shows that the petitioner has simply given a reply to the query put by his client regarding the conduct of the Judge and as such it remained a fact that it was not an offer on the side of the delinquent advocate to bribe a Judge. This vital point which touches the root of the controversy seems to have been ignored at the time of the passing of the impugned order.

(2) The petitioner is an old man of 80 years. He had joined the profession in the year 1951 and during such a long innings of his profession, it was for the first time that he conducted himself in such an irresponsible manner although he had no intention to bribe.

(3) The Committee does not approve the writing of such a letter on the part of the lawyer to his client but keeping in view the age and the past clean record of the petitioner in the legal profession the Committee is of the view that it would not be appropriate to remove the advocate permanently from the roll of advocates…. The Committee is of the considered view that ends of justice would be met in case the petitioner is reprimanded for the omission he had committed. He is warned by the Committee that he should not encourage such activities in life and he should be careful while corresponding with his client.
In view of the aforesaid observations, the review petition is accepted and the earlier judgment of the Committee dated 31-7-1999 is modified to the extent and his suspension for life is revoked and he is only reprimanded.”

7. We have perused the record. The original order has been reviewed on non-existent grounds. All the factors taken into consideration in the impugned order were already on record and were considered by the Committee when it passed the order dated 31-7-1999. The power of review has not been exercised by applying well-settled principles governing the exercise of such power. It is evident that the reasons and facts on the basis whereof the order was reviewed had all been taken into consideration by the earlier Committee. The relevant portion of the letter written by the advocate had been reproduced in the earlier order. From that quotation it was evident that the said Committee noticed that the advocate was replying to a letter received from his client. It is not in dispute that the respondent had not produced the letter received by him from his client to which the admitted letter was sent requiring his client to send Rs 10,000 for payment as bribe to the Judge concerned. We are unable to understand as to how the Committee came to the conclusion that any vital point in regard to the letter had been ignored at the time of the passing of the order dated 31-7-1999. The age and the number of years the advocate had put in had also been noticed in the order dated 31-7-1999. We do not know how the Committee has come to the conclusion that the respondent “had no intention to bribe the Judge”. There is nothing on the record to suggest it. The earlier order had taken into consideration all relevant factors for coming to the conclusion that the advocate was totally unfit to be a lawyer having written such a letter and punishment lesser than debarring him permanently cannot be imposed. The exercise of power of review does not empower a Disciplinary Committee to modify the earlier order passed by another Disciplinary Committee taking a different view of the same set of facts.

8. The respondent was indeed guilty of a serious misconduct by writing to his client the letter as aforesaid. Members of the legal profession are officers of the court. Besides courts, they also owe a duty to the society which has a vital public interest in the due administration of justice. The said public interest is required to be protected by those on whom the power has been entrusted to take disciplinary action. The disciplinary bodies are guardians of the due administration of justice. They have requisite power and rather a duty while supervising the conduct of the members of the legal profession, to inflict appropriate penalty when members are found to be guilty of misconduct. Considering the nature of the misconduct, the penalty of permanent debarment had been imposed on the respondent which without any valid ground has been modified in exercise of power of review. It is the duty of the Bar Councils to ensure that lawyers adhere to the required standards and on failure, to take appropriate action against them. The credibility of a Council including its disciplinary body in respect of any profession whether it is law, medicine, accountancy or any other vocation depends upon how they deal with cases of delinquency involving serious misconduct which has a tendency to erode the credibility and reputation of the said profession. The punishment, of course, has to be commensurate with the gravity of the misconduct.
9. In the present case, the earlier order considering all relevant aspects directed expulsion of the respondent from the profession which order could not be lightly modified while deciding a review petition. It is evident that the earlier Committee, on consideration of all relevant facts, came to the conclusion that the advocate was not worthy of remaining in the profession. The age factor and the factor of number of years put in by the respondent were taken into consideration by the Committee when removal from the roll of the State Council was directed. It is evident that the Bar Council considered that a high standard of morality is required from lawyers, more so from a person who has put in 50 years in the profession. One expects from such a person a very high standard of morality and unimpeachable sense of legal and ethical propriety. Since the Bar Councils under the Advocates Act have been entrusted with the duty of guarding the professional ethics, they have to be more sensitive to the potential disrepute on account of action of a few black sheep which may shake the credibility of the profession and thereby put at stake other members of the Bar. Considering these factors, the Bar Council had inflicted in its earlier order the condign penalty. Under these circumstances, we have no hesitation in setting aside the impugned order dated 4-6-2000 and restoring the original order of the Bar Council of India dated 31-7-1999.

10. The appeal is thus allowed in the above terms with costs quantified at Rs 10,000.

*** ***
The appellant has filed this appeal, under Section 38 of the Advocates Act, 1961 (hereinafter referred to as “the Act”) against the judgment and order dated 4-11-1998 passed by the Disciplinary Committee of the Bar Council of India, confirming the order passed by the Disciplinary Committee of the Bar Council of Punjab and Haryana removing the name of the appellant from the State’s Roll of Advocates under Section 35(3)(d) of the Act.

2. The appellant was enrolled with the State Bar Council as an advocate on 16-9-1994 vide Enrolment No. P/771/94. On 9-9-1995, the respondent-Association made a written complaint to the State Bar Council making allegations of misconduct against the appellant. The State Bar Council took cognizance of the complaint and referred the complaint to its Disciplinary Committee. After the completion of the proceedings in DCE No. 1 of 1996, order was passed by the Disciplinary Committee of the State Bar Council to remove the name of the appellant from the State’s Roll of Advocates and the same was confirmed by the Disciplinary Committee of the Bar Council of India, in appeal. Hence, this appeal.

3. The learned Senior Counsel for the appellant strongly contended that the allegations made in the complaint were not established or proved, judged by the standard of proof required in a case like this; the appellant was not actually carrying on business and the evidence on this point was not properly appreciated; at any rate, the punishment imposed on the appellant is grossly disproportionate even assuming that the misconduct was proved.

4. Per contra, the learned Senior Counsel for the respondent made submissions supporting the impugned order. He drew our attention to the evidence brought on record to show how the findings recorded against the appellant are justified. He also strongly contended that the misconduct of the appellant before and even after filing of the appeals before the Bar Council of India and this Court in continuing the business cannot be condoned; further in spite of giving undertaking before this Court, he is still continuing his business as is supported by the report of the Sub-Judge made to this Court. According to him, the punishment imposed on the appellant is proper in the absence of any good ground to take any lenient view.

6. The complaint contained allegations of misconduct against the appellant for the period prior to the date of enrolment as an advocate and also subsequent to his enrolment. Since the Disciplinary Committee of the State Bar Council did not go into the allegations of misconduct pertaining to the period prior to the date of enrolment, it is unnecessary to refer to them.

7. According to the complainant, the appellant was guilty of professional misconduct as he was carrying on and continued his business and business activities even after his enrolment as an advocate, stating thus:
“(i) he was running a photocopier documentation centre in the court compound, Pathankot, and the space for the same was allotted to the appellant in his personal capacity on account of his being handicapped;

(ii) he was running a PCO/STD booth which was allotted in his name from the P&T Department under handicap quota;

(iii) he was the Proprietor/General Manager of the Punjab Coal Briquettes, Pathankot, a private concern and he was pursuing the business/his interest in the said business even on the date when his statement was recorded by the Disciplinary Committee on 12-5-1996.”

8. The defence of the appellant was that although he was running business prior to his enrolment, he did not continue the same after his enrolment as an advocate and he ceased to have any business interest, and that it is his father and brother who were carrying on the business after he became an advocate under some oral arrangement. The Disciplinary Committee of the State Bar Council, after considering the evidence placed on record, both oral and documentary, recorded a finding that the appellant was guilty of professional misconduct in carrying on business in the aforementioned concerns even after his enrolment as an advocate and passed order to remove his name from the State’s Roll of Advocates under Section 35(3)(d) of the Act and debarred him from practising as an advocate. The Disciplinary Committee of the Bar Council of India, in the appeal filed by the appellant on reappreciation of the material on record, concurred with the finding recorded by the Disciplinary Committee of the State Bar Council and held that the appellant was guilty of professional misconduct and that the punishment imposed on him debarring the appellant from practising for all time was just. Hence, dismissed the appeal.

9. In the impugned order, it is also noticed that the appellant submitted his application form for enrolment. Column 12 of the application form reads:

‘12. Whether or not applicant was engaged or has ever been engaged in any trade, business or profession, if so the nature of such trade, business/profession and the place where it is or was carried on. The answer submitted by the appellant Advocate is as under:

‘No, not applicable.’”

10. According to the Disciplinary Committee of the Bar Council of India, the appellant had not only procured enrolment by submitting the false declaration but also suppressed the material fact; otherwise the appellant would not have been enrolled at all. In the said order, it is further stated that as a matter of fact, besides it being a case of misconduct, it is also a case where the name of the appellant could be removed for suppressing the material fact; anyhow, since the reference had not been made for the same, it is left open to the State Bar Council to take such action under Section 26 of the Act.
11. CW 1 Shri Manohar Lal, Senior Telecommunication Office Assistant, has deposed that STD/PCO has been allotted to the appellant on 6-4-1992 in the handicap quota and the same is continuing in the name of the appellant as per the record even after his enrolment as an advocate; no intimation was given by the appellant to the Department to transfer STD/PCO in the name of his brother Satish Mohan. CW 3 Shri Vipin Tripathi, a clerk in the office of SDO in his evidence has stated that space for kiosk for installation of photocopy machine on payment of Rs 120 per month, was allotted on lease basis on 6-5-1991 by the Deputy Commissioner, Gurdaspur, to the appellant in the handicap quota; there was no intimation to change lease in favour of anybody and there is no transfer of lease in favour of any other person; the lease amount is paid even after the appellant’s enrolment as an advocate in his name. CW 3 H.S. Pathania, in his evidence has supported the allegations made in the complaint. The appellant in his evidence has stated that he has no concern with the business of STD/PCO and photostat machine. RW 2 Satish Mohan, the brother of the appellant has stated that he has no arrangement with the appellant regarding PCO. In his cross-examination he has admitted that he is still in the service of Sugar Mills, Dasuya. Hence, it was rightly concluded that STD/PCO business is being run by the appellant himself even after becoming an advocate. RW 3 Shri Puran Chand Sharma, the father of the appellant in his evidence has admitted that the appellant is having his office in the same cabin where the photocopier machine is installed. In the evidence led on behalf of the complainant, it is stated that the site of kiosk for running the photostat business is still in the name of the appellant and lease money is also being paid by the appellant and in the absence of the appellant giving intimation to the Department/authorities concerned regarding handing over of business to Shri Puran Chand Sharma or Satish Mohan, the assertion regarding the oral agreement was not believed by the Disciplinary Committee of the State Bar Council and rightly so in our opinion. The Disciplinary Committee of the State Bar Council in its order has objectively considered the evidence brought on record. As already stated above, the Disciplinary Committee of the Bar Council of India on reappraisal of the evidence has concurred with the findings recorded by the Disciplinary Committee of the State Bar Council based on oral and documentary evidence.

12. Having perused both the orders and the evidence placed on record, we are of the view that the finding recorded holding the appellant guilty of professional misconduct is supported by and based on cogent and convincing evidence even judged by the standard required to establish misconduct as required to prove a charge in a quasi-criminal case beyond reasonable doubt. We do not find any merit in the argument that the misconduct alleged against the appellant was not properly proved by the standard required to prove such a misconduct. There is also no merit in the contention that the evidence was not properly appreciated by both the Disciplinary Committees; nothing was brought on record to discredit the evidence led on behalf of the complainant and no material was placed to support the allegation of the appellant that the members of the respondent-Association had any grudge or ill will against the appellant.

13. It is to be further noticed that this Court on 26-2-1999 passed the following order:
“Learned counsel for the appellant wants to file an affidavit in the form of an undertaking that the petitioner is not personally engaging himself in any of the family businesses. Adjourned for two weeks.”

14. Pursuant to the said order, the appellant has filed affidavit/undertaking. Para 3 of the affidavit/undertaking reads:

“I state on oath before this Hon’ble Court that since the day of my enrolment as an advocate, I have not engaged myself in any business except my practice of law as an advocate and I undertake before this Hon’ble Court that I shall not ever engage either actively or otherwise, in any other business or profession while I continue my enrolment as an advocate.”

15. The order made by this Court on 2-9-1999 reads:

“Mr Sudhir Walia, learned counsel appearing for the Bar Association, Pathankot placed before us the photographs of the cabin where the photocopying machine is installed. The photograph discloses the name board of the petitioner and also an inscription in Punjabi language ‘Bhupindra Photostat Centre’. The learned counsel appearing for the Bar Association, Pathankot says that these photographs placed before us have been taken yesterday only. It is contended that, therefore, the undertaking filed in this Court that the petitioner was not conducting any business in his name, could not be accepted. This fact is disputed by learned Senior Counsel appearing for the petitioner.

We are, therefore, constrained to call for a report from the learned Sub-Judge at Pathankot as to whether the cabin in which the photocopying machine is installed contains, apart from the name board of the petitioner an inscription ‘Bhupindra Photostat Centre’ and whether such inscription was there till yesterday and is continuing as of today. The learned Sub-Judge shall also furnish the details regarding the allotment of the place within the court compound wherein this cabin has been put up. The report will be submitted within four weeks from today. A copy of this order will be sent to the learned Sub-Judge at Pathankot today itself.

List the matter after the report from the learned Sub-Judge at Pathankot is received.”

17. We are unable to say that the concurrent finding recorded by both the Disciplinary Committees against the appellant as to his professional misconduct, is a finding based on no evidence or is based on mere conjecture and unwarranted inference. Hence, the same cannot be disturbed.

18. What remains to be seen is whether the punishment imposed on the appellant is grossly disproportionate. Having regard to the nature of misconduct and taking note of the handicap of the appellant, in our opinion, debarring him from practising for all time is too
harsh. We consider it just and appropriate to modify the punishment to debar the appellant from practising up to the end of December 2006. Except the modification of punishment as stated above, the impugned order remains undisturbed in all other respects. The appeal is disposed of in the above terms.

* * * * *
Ex-Capt. Harish Uppal v. Union of India

(2003) 2 SCC 45

S.N. VARIAVA, J - All these petitions raise the question whether lawyers have a right to strike and/or give a call for boycott of court/s. In all these petitions a declaration is sought that such strikes and/or calls for boycott are illegal. As the questions vitally concerned the legal profession, public notices were issued to Bar Associations and Bar Councils all over the country. Pursuant to those notices some Bar Associations and Bar Councils have filed their responses and have appeared and made submissions before us.

2. In Writ Petition (C) No. 821 of 1990, an interim order came to be passed. This order is reported in Common Cause, A Regd. Society v. Union of India [(1995) 1 SCALE 6]. The circumstances under which it is passed and the nature of the interim order are set out in the order. The relevant portion reads as under:

“2. The Officiating Secretary, Bar Council of India, Mr C.R. Balaram filed an affidavit on behalf of the Bar Council of India wherein he states that a ‘National Conference’ of members of the Bar Council of India and State Bar Councils was held on 10-9-1994 and 11-9-1994 and a working paper was circulated on behalf of the Bar Council of India by Mr V.C. Misra, Chairman, Bar Council of India, inter alia on the question of strike by lawyers. In that working paper a note was taken that the Bar Associations had proceeded on strike on several occasions in the past, at times, State-wide or nationwide, and ‘while the profession does not like it as members of the profession are themselves the losers in the process’ and while it is not necessary to sit in judgment over the wider question whether members of the profession can at all go on strike or boycott of courts, it was felt that even if it is assumed that such a right enures to the members of the profession, the circumstances in which such a step should be resorted to should be clearly indicated. Referring to an earlier case before the Delhi High Court, it was stated that the Bar Council of India had made its position clear to the effect

‘(a) the Bar Council of India is against resorting to strike excepting in rarest of rare cases involving the dignity and independence of the judiciary as well as of the Bar; and (b) whenever strikes become inevitable, efforts shall be made to keep it short and peaceful to avoid causing hardship to the litigant public.’

It was in response to the above that a consensus emerged at the Bar at the hearing of the matter that instead of the court going into the wider question whether or not the members of the legal profession can resort to strike or abstain from appearing in cases in court in which they are engaged, the court may see the working of the interim arrangement and if that is found to be satisfactory it may perhaps not be required to go into the wider
question at this stage. Pursuant to the discussion that took place at the last hearing on 30-11-1994, the following suggestions have emerged as an interim measure consistent with the Bar Council of India’s thinking that except in the rarest of rare cases strike should not be resorted to and instead peaceful demonstration may be resorted to avoid causing hardship to the litigant public. The learned counsel suggested that to begin with, the following interim measures may be sufficient for the present:

(1) In the rare instance where any association of lawyers including statutory Bar Councils considers it imperative to call upon and/or advise members of the legal profession to abstain from appearing in courts on any occasion, it must be left open to any individual member/members of that association to be free to appear without let, fear or hindrance or any other coercive steps.

(2) No such member who appears in court or otherwise practises his legal profession, shall be visited with any adverse or penal consequences whatever, by any association of lawyers, and shall not suffer any expulsion or threat of expulsion therefrom.

(3) The above will not preclude other forms of protest by practising lawyers in court such as, for instance, wearing of armbands and other forms of protest which in no way interrupt or disrupt the court proceedings or adversely affect the interest of the litigant. Any such form of protest shall not however be derogatory to the court or to the profession.

(4) Office-bearers of a Bar Association (including Bar Council) responsible for taking decisions mentioned in clause (1) above shall ensure that such decisions are implemented in the spirit of what is stated in clauses (1), (2) and (3) above.

3. Mr P.N. Duda, Senior Advocate representing the Bar Council of India was good enough to state that he will suggest to the Bar Council of India to incorporate clauses (1), (2), (3) and (4) in the Bar Council of India (Conduct and Disciplinary) Rules, so that it can have statutory support should there be any violation or contravention of the aforementioned four clauses. The suggestion that we defer the hearing and decision on the larger question whether or not members of the profession can abstain from work commends to us. We also agree with the suggestion that we see the working of the suggestions in clauses (1) to (4) above for a period of at least six months by making the said clauses the rule of the court. Accordingly we make clauses (1) to (4) mentioned above the order of this Court and direct further course of action in terms thereof. The same will operate prospectively. We also suggest to the Bar Councils and Bar Associations that in order to clear the pitch and to uphold the high traditions of the profession as well as to maintain the unity and integrity of the Bar they consider dropping action already initiated against their members who had appeared in court.
notwithstanding strike calls given by the Bar Council or Bar Association. Besides, members of the legal profession should be alive to the possibility of Judges of different courts refusing adjournments merely on the ground of there being a strike call and insisting on proceeding with cases.”

The above interim order was passed in the hope that better sense could prevail and lawyers would exercise self-restraint. In spite of the above interim directions and the statement of Mr P.N. Duda, the Bar Council of India has not incorporated clauses (1) to (4) in the Bar Council of India (Conduct and Disciplinary) Rules. The phenomenon of going on strike at the slightest provocation is on the increase. Strikes and calls for boycott have paralysed the functioning of courts for a number of days. It is now necessary to decide whether lawyers have a right to strike and/or give a call for boycott of court/s.

4. Mr Dipankar Gupta referred to various authorities of this Court and submitted that the reasons why strikes have been called by the Bar Associations and/or Bar Councils are:

(a) confrontation with the police and/or the legal administration;

(b) grievances against the Presiding Officer;

(c) grievances against judgments of courts;

(d) clash of interest between groups of lawyers; and

(e) grievances against the legislature or a legislation.

Mr Gupta submitted that the law was well established. He pointed out that this Court has declared that strikes are illegal. He submitted that even a call for strike is bad. He submitted that it is time that the Bar Council of India as well as various State Bar Councils monitor strikes within their jurisdiction and ensure that there are no call for strikes and/or boycotts. He submitted that in all cases where redressal can be obtained by going to a court of law there should be no strike.

9. The learned Attorney-General submitted that strike by lawyers cannot be equated with strikes resorted to by other sections of the society. He submitted that the basic difference is that members of the legal profession are officers of the court. He submitted that they are obliged by the very nature of their calling to aid and assist in the dispensation of justice. He submitted that strike or abstention from work impaired the administration of justice and that the same was thus inconsistent with the calling and position of lawyers. He submitted that abstention from work, by lawyers, may be resorted to in the rarest of rare cases, namely, where the action protested against is detrimental to free and fair administration of justice such as there being a direct assault on the independence of the judiciary or a provision is enacted nullifying a judgment of a court by an executive order or in case of supersession of judges by departure from the settled policy and convention of seniority. He submitted that even in cases where the action eroded the autonomy of the legal profession e.g. dissolution of Bar Councils and recognized Bar Associations or packing
them with government nominees, a token strike of one day may be resorted to. He submitted, even in the above situations the duration of abstention from work should be limited to a couple of hours or at the maximum one day. He submitted that the purpose should be to register a protest and not to paralyse the system. He suggested that alternative forms of protest can be explored e.g. giving press statements, TV interviews, carrying banners and/or placards, wearing black armbands, peaceful protest marches outside court premises etc. He submitted that abstention from work for the redressal of a grievance should never be resorted to where other remedies for seeking redressal are available. He submitted that all attempts should be made to seek redressal from the authorities concerned. He submitted that where such redressal is not available or not forthcoming, the direction of the protest can be against that authority and should not be misdirected e.g. in cases of alleged police brutalities, courts and litigants should not be targeted in respect of actions for which they are in no way responsible. He agreed that no force or coercion should be employed against lawyers who are not in agreement with the “strike call” and want to discharge their professional duties.

11. Before considering the question raised it is necessary to keep in mind the role of lawyers in the administration of justice and also their duties and obligations as officers of this Court. In the case of Lt. Col. S.J. Chaudhary v. State (Delhi Admn.) [(1984) 1 SCC 722], the High Court had directed that a criminal trial goes on from day to day. Before this Court it was urged that the advocates were not willing to attend day to day as the trial was likely to be prolonged. It was held that it is the duty of every advocate who accepts a brief in a criminal case to attend the trial day to day. It was held that a lawyer would be committing breach of professional duties if he fails to so attend.

12. In the case of K. John Koshy v. Dr Tarakeshwar Prasad Shaw [(1998) 8 SCC 624], one of the questions was whether the court should refuse to hear a matter and pass an order when counsel for both the sides were absent because of a strike call by the Bar Association. This Court held that the court could not refuse to hear the matter as otherwise it would tantamount to the court becoming a privy to the strike.

20. Thus the law is already well settled. It is the duty of every advocate who has accepted a brief to attend trial, even though it may go on day to day and for a prolonged period. It is also settled law that a lawyer who has accepted a brief cannot refuse to attend court because a boycott call is given by the Bar Association. It is settled law that it is unprofessional as well as unbecoming for a lawyer who has accepted a brief to refuse to attend court even in pursuance of a call for strike or boycott by the Bar Association or the Bar Council. It is settled law that courts are under an obligation to hear and decide cases brought before them and cannot adjourn matters merely because lawyers are on strike. The law is that it is the duty and obligation of courts to go on with matters or otherwise it would tantamount to becoming a privy to the strike. It is also settled law that if a resolution is passed by Bar Associations expressing want of confidence in judicial officers, it would amount to scandalising the courts to undermine its authority and thereby the advocates will have committed contempt of court. Lawyers have known, at least since
**Mahabir Singh** case that if they participate in a boycott or a strike, their action is ex facie bad in view of the declaration of law by this Court. A lawyer’s duty is to boldly ignore a call for strike or boycott of court/s. Lawyers have also known, at least since **Ramon Services** case [(2001) 1 SCC 118], that the advocates would be answerable for the consequences suffered by their clients if the non-appearance was solely on grounds of a strike call.

21. It must also be remembered that an advocate is an officer of the court and enjoys special status in society. Advocates have obligations and duties to ensure smooth functioning of the court. They owe a duty to their clients. Strikes interfere with administration of justice. They cannot thus disrupt court proceedings and put interest of their clients in jeopardy. In the words of Mr H.M. Seervai, a distinguished jurist:

“Lawyers ought to know that at least as long as lawful redress is available to aggrieved lawyers, there is no justification for lawyers to join in an illegal conspiracy to commit a gross, criminal contempt of court, thereby striking at the heart of the liberty conferred on every person by our Constitution. Strike is an attempt to interfere with the administration of justice. The principle is that those who have duties to discharge in a court of justice are protected by the law and are shielded by the law to discharge those duties, the advocates in return have duty to protect the courts. For, once conceded that lawyers are above the law and the law courts, there can be no limit to lawyers taking the law into their hands to paralyse the working of the courts. ‘In my submission’, he said that ‘it is high time that the Supreme Court and the High Courts make it clear beyond doubt that they will not tolerate any interference from any body or authority in the daily administration of justice. For in no other way can the Supreme Court and the High Courts maintain the high position and exercise the great powers conferred by the Constitution and the law to do justice without fear or favour, affection or ill will.”

22. It was expected that having known the well-settled law and having seen that repeated strikes and boycotts have shaken the confidence of the public in the legal profession and affected administration of justice, there would be self-regulation. The abovementioned interim order was passed in the hope that with self-restraint and self-regulation the lawyers would retrieve their profession from lost social respect. The hope has not fructified. Unfortunately strikes and boycott calls are becoming a frequent spectacle. Strikes, boycott calls and even unruly and unbecoming conduct are becoming a frequent spectacle. On the slightest pretence strikes and/or boycott calls are resorted to. The judicial system is being held to ransom. Administration of law and justice is threatened. The rule of law is undermined.

23. It is held that submissions made on behalf of the Bar Council of U.P. merely need to be stated to be rejected. The submissions based on the Advocates Act are also without merit. Section 7 of the Advocates Act provides for the functions of the Bar Council of India. None of the functions mentioned therein authorise paralysing of the working of courts in any manner. On the contrary, the Bar Council of India is enjoined with the duty of laying down standards of
professional conduct and etiquette for advocates. This would mean that the Bar Council of India ensures that advocates do not behave in an unprofessional and unbecoming manner. Section 48-A gives a right to the Bar Council of India to give directions to the State Bar Councils. The Bar Associations may be separate bodies but all advocates who are members of such Associations are under disciplinary jurisdiction of the Bar Councils and thus the Bar Councils can always control their conduct. Further, even in respect of disciplinary jurisdiction the final appellate authority is, by virtue of Section 38, the Supreme Court.

25. In the case of *Supreme Court Bar Assn. v. Union of India* [(1998) 4 SCC 409], it has been held that professional misconduct may also amount to contempt of court (para 21). It has further been held as follows:

“79. An advocate who is found guilty of contempt of court may also, as already noticed, be guilty of professional misconduct in a given case but it is for the Bar Council of the State or Bar Council of India to punish that advocate by either debarring him from practice or suspending his licence, as may be warranted, in the facts and circumstances of each case. The learned Solicitor-General informed us that there have been cases where the Bar Council of India taking note of the contumacious and objectionable conduct of an advocate, had initiated disciplinary proceedings against him and even punished him for ‘professional misconduct’, on the basis of his having been found guilty of committing contempt of court. We do not entertain any doubt that the Bar Council of the State or Bar Council of India, as the case may be, when apprised of the established contumacious conduct of an advocate by the High Court or by this Court, would rise to the occasion, and take appropriate action against such an advocate. Under Article 144 of the Constitution ‘all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court’. The Bar Council which performs a public duty and is charged with the obligation to protect the dignity of the profession and maintain professional standards and etiquette is also obliged to act ‘in aid of the Supreme Court’. It must, whenever facts warrant, rise to the occasion and discharge its duties uninfluenced by the position of the contemner advocate. It must act in accordance with the prescribed procedure, whenever its attention is drawn by this Court to the contumacious and unbecoming conduct of an advocate which has the tendency to interfere with due administration of justice. It is possible for the High Courts also to draw the attention of the Bar Council of the State to a case of professional misconduct of a contemner advocate to enable the State Bar Council to proceed in the manner prescribed by the Act and the Rules framed thereunder. There is no justification to assume that the Bar Councils would not rise to the occasion, as they are equally responsible to uphold the dignity of the courts and the majesty of law and prevent any interference in the administration of justice. Learned counsel for the parties present before us do not dispute and rightly so that whenever a court of record records its findings about the conduct of an advocate while finding him guilty of committing contempt of court and desires or refers the matter to be considered by the Bar
Council concerned, appropriate action should be initiated by the Bar Council concerned in accordance with law with a view to maintain the dignity of the courts and to uphold the majesty of law and professional standards and etiquette. Nothing is more destructive of public confidence in the administration of justice than incivility, rudeness or disrespectful conduct on the part of a counsel towards the court or disregard by the court of the privileges of the Bar. In case the Bar Council, even after receiving ‘reference’ from the Court, fails to take action against the advocate concerned, this Court might consider invoking its powers under Section 38 of the Act by sending for the record of the proceedings from the Bar Council and passing appropriate orders. Of course, the appellate powers under Section 38 would be available to this Court only and not to the High Courts. We, however, hope that such a situation would not arise.

80. In a given case it may be possible, for this Court or the High Court, to prevent the contemner advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debarring him to practise as an advocate. In a case of contemptuous, contumacious, unbecoming or blameworthy conduct of an Advocate-on-Record, this Court possesses jurisdiction, under the Supreme Court Rules itself, to withdraw his privilege to practise as an Advocate-on-Record because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practise as an advocate in other courts or tribunals.”

Thus a Constitution Bench of this Court has held that the Bar Councils are expected to rise to the occasion as they are responsible to uphold the dignity of courts and majesty of law and to prevent interference in administration of justice. In our view it is the duty of the Bar Councils to ensure that there is no unprofessional and/or unbecoming conduct. This being their duty no Bar Council can even consider giving a call for strike or a call for boycott. It follows that the Bar Councils and even Bar Associations can never consider or take seriously any requisition calling for a meeting to consider a call for a strike or a call for boycott. Such requisitions should be consigned to the place where they belong viz. the waste-paper basket. In case any Association calls for a strike or a call for boycott the State Bar Council concerned and on their failure the Bar Council of India must immediately take disciplinary action against the advocates who give a call for strike and if the Committee members permit calling of a meeting for such purpose, against the Committee members. Further, it is the duty of every advocate to boldly ignore a call for strike or boycott.

26. It must also be noted that courts are not powerless or helpless. Section 38 of the Advocates Act provides that even in disciplinary matters the final appellate authority is the Supreme Court. Thus even if the Bar Councils do not rise to the occasion and perform their duties by taking disciplinary action on a complaint from a client against an advocate for non-appearance by reason of a call for strike or boycott, on an appeal the Supreme Court can and will. Apart from
this, as set out in *Ramon Services* case every court now should and must mulct advocates who hold *vakalats* but still refrain from attending courts in pursuance of a strike call with costs. Such costs would be in addition to the damages which the advocate may have to pay for the loss suffered by his client by reason of his non-appearance.

28. The Bar Council of India has since filed an affidavit wherein extracts of a joint meeting of the Chairmen of various State Bar Councils and members of the Bar Council of India, held on 28-9-2002 and 29-9-2002, have been annexed. The minutes set out that some of the causes which result in lawyers abstaining from work are:

(I) *Local issues*

1. Disputes between lawyer/lawyers and the police and other authorities.

2. Issues regarding corruption/misbehaviour of judicial officers and other authorities.

3. Non-filling of vacancies arising in courts or non-appointment of judicial officers for a long period.


(II) *Issues relating to one section of the Bar and another section*

1. Withdrawal of jurisdiction and conferring it to other courts (both pecuniary and territorial).

2. Constitution of Benches of High Courts. Disputes between the competing District and other Bar Associations.

(III) *Issues involving dignity, integrity, independence of the Bar and judiciary*

(IV) *Legislation without consultation with the Bar Councils*

(V) *National issues and regional issues affecting the public at large/the insensitivity of all concerned.*

29. At the meeting, it is then resolved as follows:

“RESOLVED to constitute Grievance Redressal Committees at the taluk/sub-division or tehsil level, at the district level, High Court and Supreme Court levels as follows:
(I)(a) A committee consisting of the Hon’ble Chief Justice of India or his nominee, Chairman, Bar Council of India, President, Supreme Court Bar Association, Attorney-General of India.

(b) At the High Court level a committee consisting of the Hon’ble Chief Justice of the State High Court or his nominee, Chairman, Bar Council of the State, President or Presidents of the High Court Bar Association, Advocate-General, Member, Bar Council of India from the State.

(c) At the district level, District Judge, President or Presidents of the District Bar Association, District Government Pleader, member of the Bar Council from the district, if any, and if there are more than one, then senior out of the two.

(d) At taluk/tehsil/sub-division, seniormost Judge, President or Presidents of the Bar Association, Government Pleader, representative of the State Bar Council, if any.

(II) Another reason for abstention at the district and taluk level is arrest of an advocate or advocates by the police in matters in which the arrest is not justified. Practice may be adopted that before arrest of an advocate or advocates, President, Bar Association, the District Judge or the seniormost Judge at the place be consulted. This will avoid many instances or abstentions from court.

(III) IT IS FURTHER RESOLVED that in the past abstention of work by advocates for more than a day was due to inaction of the authorities to solve the problems that the advocates placed.

(IV) IT IS FURTHER RESOLVED that in all cases of legislation affecting the legal profession which includes enactment of new laws or amendments of existing laws, matters relating to jurisdiction and creation of tribunal, the Government both Central and State should initiate the consultative process with the representatives of the profession and take into consideration the views of the Bar and give utmost weight to the same and the State Government should instruct their officers to react positively to the issues involving the profession when they are raised and take all steps to avoid confrontation and inaction and in such an event of indifference, confrontation etc. to initiate appropriate disciplinary action against the erring officials and including but not limited to transfer.

(V) The Councils are of the view that abstentions of work in courts should not be resorted to except in exceptional circumstances. Even in exceptional circumstances, the abstention should not be resorted to normally for more than one day in the first
instance. The decision for going on abstention will be taken by the General Body of the Bar Association by a majority of two-third members present.

(VI) It is further resolved that in all issues as far as possible legal and constitutional methods should be pursued such as representation to authorities, holding demonstrations and mobilising public opinion etc.

(VII) It is resolved further that in case the Bar Associations deviate from the above resolutions and proceed on cessation of work in spite or without the decision of the Grievance Redressal Committee concerned except in the case of emergency the Bar Council of the State will take such action as it may deem fit and proper, the discretion being left to the Bar Council of the State concerned as to enforcement of such decisions and in the case of an emergency the Bar Association concerned will inform the State Bar Council.

The Bar Council of India resolves that this resolution will be implemented strictly and the Bar Associations and the individual members of the Bar Associations should take all steps to comply with the same and avoid cessation of the work except in the manner and to the extent indicated above.”

30. Whilst we appreciate the efforts made, in view of the endemic situation prevailing in the country, in our view, the above resolutions are not enough. It was expected that the Bar Council of India would have incorporated clauses as those suggested in the interim order of this Court in their disciplinary rules. This they have failed to do even now. What is at stake is the administration of justice and the reputation of the legal profession. It is the duty and obligation of the Bar Council of India to now incorporate clauses as suggested in the interim order. No body or authority, statutory or not, vested with powers can abstain from exercising the powers when an occasion warranting such exercise arises. Every power vested in a public authority is coupled with a duty to exercise it, when a situation calls for such exercise. The authority cannot refuse to act at its will or pleasure. It must be remembered that if such omission continues, particularly when there is an apparent threat to the administration of justice and fundamental rights of citizens i.e. the litigating public, courts will always have authority to compel or enforce the exercise of the power by the statutory authority. The courts would then be compelled to issue directions as are necessary to compel the authority to do what it should have done on its own.

31. It must immediately be mentioned that one understands and sympathises with the Bar wanting to vent their grievances. But as has been pointed out there are other methods e.g. giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or any colour armbands, peaceful protest marches outside and away from court premises, going on dharnas or relay fasts etc. More importantly in many instances legal remedies are always available. A lawyer being part and parcel of the legal system is instrumental in upholding the rule of law. A person cast with the legal and moral obligation of upholding law can
hardly be heard to say that he will take the law in his own hands. It is therefore time that self-
restraint be exercised.

34. One last thing which must be mentioned is that the right of appearance in courts is still
within the control and jurisdiction of courts. Section 30 of the Advocates Act has not been
brought into force and rightly so. Control of conduct in court can only be within the domain of
courts. Thus Article 145 of the Constitution of India gives to the Supreme Court and Section 34
of the Advocates Act gives to the High Court power to frame rules including rules regarding
condition on which a person (including an advocate) can practise in the Supreme Court and/or in
the High Court and courts subordinate thereto. Many courts have framed rules in this behalf. Such
a rule would be valid and binding on all. Let the Bar take note that unless self-restraint is
exercised, courts may now have to consider framing specific rules debarring advocates, guilty of
contempt and/or unprofessional or unbecoming conduct, from appearing before the courts. Such a
rule if framed would not have anything to do with the disciplinary jurisdiction of the Bar
Councils. It would be concerning the dignity and orderly functioning of the courts. The right
of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his
professional duties. Apart from appearing in the courts he can be consulted by his clients, he can
give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any
other documents, he can participate in any conference involving legal discussions, he can work in
any office or firm as a legal officer, he can appear for clients before an arbitrator or arbitrators
etc. Such a rule would have nothing to do with all the acts done by an advocate during his
practice. He may even file vakalat on behalf of a client even though his appearance inside the
court is not permitted. Conduct in court is a matter concerning the court and hence the Bar
Council cannot claim that what should happen inside the court could also be regulated by them in
exercise of their disciplinary powers. The right to practise, no doubt, is the genus of which the
right to appear and conduct cases in the court may be a specie. But the right to appear and
conduct cases in the court is a matter on which the court must and does have major supervisory
and controlling power. Hence courts cannot be and are not divested of control or supervision of
conduct in court merely because it may involve the right of an advocate. A rule can stipulate that
a person who has committed contempt of court or has behaved unprofessionally and in an
unbecoming manner will not have the right to continue to appear and plead and conduct cases in
courts. The Bar Councils cannot overrule such a regulation concerning the orderly conduct of
court proceedings. On the contrary, it will be their duty to see that such a rule is strictly abided by.
Courts of law are structured in such a design as to evoke respect and reverence to the majesty
of law and justice. The machinery for dispensation of justice according to law is operated by the
court. Proceedings inside the courts are always expected to be held in a dignified and orderly
manner. The very sight of an advocate, who is guilty of contempt of court or of unbecoming or
unprofessional conduct, standing in the court would erode the dignity of the court and even
corrode its majesty besides impairing the confidence of the public in the efficacy of the institution
of the courts. The power to frame such rules should not be confused with the right to practise law.
While the Bar Council can exercise control over the latter, the courts are in control of the former.
This distinction is clearly brought out by the difference in language in Section 49 of the Advocates Act on the one hand and Article 145 of the Constitution of India and Section 34(1) of the Advocates Act on the other. Section 49 merely empowers the Bar Council to frame rules laying down conditions subject to which an advocate shall have a right to practise i.e. do all the other acts set out above. However, Article 145 of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the court including inter alia rules as to persons practising before this Court. Similarly Section 34 of the Advocates Act empowers High Courts to frame rules, inter alia to lay down conditions on which an advocate shall be permitted to practise in courts. Article 145 of the Constitution of India and Section 34 of the Advocates Act clearly show that there is no absolute right to an advocate to appear in a court. An advocate appears in a court subject to such conditions as are laid down by the court. It must be remembered that Section 30 has not been brought into force and this also shows that there is no absolute right to appear in a court. Even if Section 30 were to be brought into force control of proceedings in court will always remain with the court. Thus even then the right to appear in court will be subject to complying with conditions laid down by courts just as practice outside courts would be subject to conditions laid down by the Bar Council of India. There is thus no conflict or clash between other provisions of the Advocates Act on the one hand and Section 34 or Article 145 of the Constitution of India on the other.

35. In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or any colour armbands, peaceful protest marches outside and away from court premises, going on dharnas or relay fasts etc. It is held that lawyers holding vakalats on behalf of their clients cannot refuse to attend courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only 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. It is being clarified that it will be for the court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge before advocates decide to absent themselves from court. The decision of the Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all courts to go on with matters on their boards even in the absence of lawyers. In other words, courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a vakalat of a client, abstains from attending court
due to a strike call, he shall be personally liable to pay costs which shall be in addition to
damages which he might have to pay his client for loss suffered by him.

36. It is now hoped that with the above clarifications, there will be no strikes and/or calls for
boycott. It is hoped that better sense will prevail and self-restraint will be exercised. The petitions
stand disposed of accordingly.

37. Hence, it is directed that (a) all the Bar Associations in the country shall implement the
resolution dated 29-9-2002 passed by the Bar Council of India, and (b) under Section 34 of the
Advocates Act, the High Courts would frame necessary rules so that appropriate action can be
taken against defaulting advocate/advocates.

* * * * *
ADVOCATES RIGHT TO TAKE UP LAW TEACHING

The Advocates Right to take up Law Teaching Rules, 1979

[Rules made by the Bar Council of India under Section 49A of the Advocates Act, 1961]

“3. Right of practicing advocates to take up law teaching.- (1) Notwithstanding anything to the contrary contained in any rule under this Act, an advocate may, while practising, take up teaching of law in any educational institution which is affiliated to a University within the meaning of the University Grants Commission Act, 1956 (3 of 1956), so long as the hours during which he is so engaged in the teaching of law do not exceed three hours a day.”

* * * *

Anees Ahmed v. University of Delhi

AIR 2002 Del 440

CW. 3412/97: This writ petition was filed by the petitioners by way of public interest litigation for a direction to respondent No. 1/Delhi University to take disciplinary action against all Full Time Law Teachers of the Delhi University, who were practicing in the courts and also praying for a direction to prohibit all Full Time Law Teachers of the Faculty of Law of the University of Delhi from carrying on legal practice/profession and also from appearing in the courts of law any manner. The petitioner had also sought for a direction to the Delhi State Bar Council, respondent No. 3 to cancel the enrolment/licence to practice given to Full Time Law Teachers. The petitioner No. 1 was an Advocate practicing in the High Court of Delhi and had filed the writ petition as he was interested in the advancement of legal education in India. The petitioner No. 2, at the time of filing of the writ petition, was a Law Graduate, who passed out and obtained Degree of law at the relevant time when the writ petition was being filed.

CW. 3519/97: This writ petition was filed by the petitioner, who was a Professor of Law the Faculty of Law, of the University of Delhi. The petitioner was initially appointed as a Lecturer in Law and posted at Law Centre-II of the Faculty of Law of the University of Delhi in August, 1971. Thereafter the petitioner got his promotion and in due course of time, became a Professor in Law in the Faculty of Law of the University of Delhi. The petitioner filed the present petition challenging the order passed by the Bar Council of India on 9-8-1997 cancelling and removing the name of the petitioner from the roll of Advocates of the Bar Council with a further direction
that it would be open to the petitioner to make a fresh application for enrolment as an Advocate
on his ceasing to be in employment.

The common question that arose for consideration was whether a faculty member in the
Faculty of Law, University of Delhi could subsequently enroll himself as an advocate and appear
in a court of law and simultaneously carry on the duties of a full-time faculty member of the
Faculty of Law, University of Delhi.

The private respondents in the writ petition filed by way of public interest litigation were all
full time faculty members of the University of Delhi, who employed as full time faculty members
in the University of Delhi and subsequently got themselves enrolled as Advocates with Delhi
State Bar Council.

DR. MUKUNDAKAM SHARMA, J. - 7. The petitioners No. 1 in the writ petition filed by way
of public interest litigation, appeared in person and during the course of his arguments referred to
various statutes and ordinances or the University of Delhi as also the provisions of The Advocates
Act, 1961 and the rules framed by the Bar Council of India and in the light thereof submitted that
the aforesaid provisions prohibit Full Time Law Teachers from practicing in the law courts and,
therefore, the Full Time Law Teachers, who are taking up law practice in law courts
subsequently, after enrolling themselves as advocate are liable to be prohibited/restrained from
pursuing the aforesaid two avocations simultaneously. He submitted that in view of the fact that
most of the full time law teachers are also practicing as advocates, the students community
pursing the law course in the University of Delhi has been neglecting their obligation to their
students and number of complaints to their students and number of complaints on that count have
been lodged. In support of his contention, the petitioner No. 1 relied upon the report submitted by
a committee comprising of Prof. Andre Beteille of Delhi School of Economics and Prof.. K.R.
Sharma of the Faculty of Law, University of Delhi. He also relied upon various decisions of the
Supreme Court of India in support of his contention and also to the Keynotes address in American
Bar association Meeting in August, 2000 by John Sexton of the new York Universities Law
School.

8. The Bar Council of India was also represented by their counsel at the time of arguments,
who had drawn our attention to the various provisions of the Advocates Act, 1961 read with rules
framed by the Bar Council of Delhi, particularly to Rule 103 of the Rules as also the rules framed
by the Central Government called Advocates (Right to take up Law Teaching) Rules, 1979,
hereinafter referred to in short the 1979 Rules. Referring to the said provisions, it was submitted
by the counsel that under rule 103 of the Rules framed by the State Bar Council any person, who
is either in part time or full time service cannot be enrolled as an Advocate, whereas a part-time
teacher of law could be admitted as an Advocate under the proviso to the aforesaid rule 103 of the
Delhi Bar Council Rules. He further submitted that Full Time Law Teachers could not have been enrolled as Advocates as provided for under rule 103 of the Delhi Bar Council Rules and that the 1979 Rule is a rule that operates post-enrolment and has no application to a person, who is not an Advocate. He also referred to the provisions of Rules 49 of Chapter - II (Standards of Professional Conduct and Etiquette). Section VII (Restrictions on other employment) of the Bar Council of India rules laying down that an Advocate shall not be a full time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council, on whose roll his name appears and shall thereupon cease to practice as an Advocate so long as he continues in such employment.

9. He also referred to Resolution No. 108 of 1996, which was passed by the Bar Council of India giving stress to the need of improving the standards of legal education in India. The said resolution states that the Bar Council of India disapproves the practice of enrolling full time salaried teachers in law, who were not enrolled as advocates at the time of their whole time appointment as teachers by misinterpreting the Rules made by the Central Government under S. 49-A of the Advocates Act, 1961 viz. Advocates (Right to take up Law Teaching) Rules, 1979 and direct all the Star Bar Councils to take immediate steps to initiate removal proceedings under the provisions of the Advocates Act and the Rules framed thereunder against such full time salaried law teachers, who have been enrolled as advocates. He submitted that Theban on legal practice by Full Time Law Teachers has salutary objective to achieve, namely, to maintain high standards of legal standards. He further submitted that so far the right of the practicing Advocates to take up the law teaching is concerned, the same is a right, which has been conferred on the practicing Advocates to take up teaching of law under the Rules made by the Central Government under S. 49-A of the Advocates Act, 1961 and , therefore, the members of the Bar would have a right to take up teaching of law. He also submitted that the Full Time Teachers of Law were never entitled to be enrolled as Advocates and were wrongly enrolled by the Bar Council of Delhi by misinterpreting the Rules made by the Central Government under S. 49-A of the Advocates Act, 1961 and as such the Bar Council of India has initiated action against such persons, who have been wrongly enrolled as advocates.

10. He also relied upon various statutes and ordinances of the University of Delhi and, particularly referred to Clause 5 of Ordinance XI, which provides that a teacher shall devote his/her whole time to the service of the University and shall not, without the permission of the University, engage directly or indirectly, in any trade or business whatsoever, or in any private tuition or other work to which and emolument or honorarium is attached.

11. Counsel appearing for the University of Delhi also relied upon various ordinances and statutes of the University of Delhi, in support of his contention that the service conditions of Full Time Teachers of the University of Delhi incorporated in the contract of service, are statutory in nature and that they are binding on the teachers and that a Full Time Teacher of the University of Delhi is required to devote his/her time only to teaching and research in the University and that a
Full time Teacher cannot undertake any other professional activity such as practicing law as an Advocate, without the express permission of the University authorities and that the University has not granted any permission to Full Time Teachers either in the Faculty of Law or any other Faculty to practice as a Lawyer and only Sh. N.S. Bawa was granted a very limited permission to appear in the case of riot victims of 1984. Counsel reiterated the stand taken in the counter affidavit filed by University of Delhi that no Full Time Teacher of the University of Delhi, be it a teacher in the Law Faculty or any other Faculty of the University, is entitled to practice as a Lawyer so long as he is a Full time Teacher in the University.

12. In support of his contention, he referred to various clauses of the University ordinances and the resolutions of the University as also of the University Grants Commission. Referring to the same he submitted that it is imperative that the Full time Teachers devote their time and energy to teach the students in the Faculty of Law and to do research and publication and that the said teachers are not simultaneously entitled to also practice law, as a lawyer.

40. The Petitioner Nos. 1 and 2 were students in the Law Faculty of the Delhi University. During their tenure as students they had first hand knowledge about the manner and mode in which legal education is imparted in the Delhi University. After being enrolled as Advocates the petitioner No.1 filed the present petition in the Court with the intention for betterment and advancement of legal education in Delhi. The other two writ petitions are directed against the impugned orders passed by the Bar Council of India removing two of the full time Law teachers from the roll of Advocates. The teachers from the roll of Advocates. The aforesaid orders are also challenged before this Court on the ground that the Bar Council of India has no such jurisdiction.

41. In view of the aforesaid position, the issues that are raised in the Public Interest Litigation shall have to be dealt with and decided even in order to answer the issues raised by Shri Vats and Shri Srivastav in their writ petitions. Besides if a writ petition is filed by a person driven by public interest and such a writ petitioner comes with clean heart, clean mind and clean objectives and is filed bona fide for the purpose of only serving a public interest, such a petition cannot be dismissed. This was what was held by the Supreme Court in the decision in K. R. Srinivas v. R. M. Premchand [(1994) 6 SCC 620], wherein the Supreme Court held that the writ petitioner who comes to the Court for relief in public interest petition must come not only with clean hands, like any other writ petitioner but must further come with a clean heart, clean mind and clean objective.

42. In a Public Interest Litigation the Court in order to check and prevent misuse of the remedy ought to examine the motive, if any, of the petitioner and ask itself the question, “Is there anything more than what meets the eyes”? That was exactly what was laid down by the Supreme Court in Sachidanand Pandey v. State of West Bengal [AIR 1987 SC 1109].

43. The motive for filing a Public Interest writ petition must be examined by the Court with care and caution. In case the High Court finds the filing of the Public Interest Litigation to be motivated by self interest of the petitioner for wreaking vengeance it will not entertain the same. In Dr. Ambedkar Basti Vikassabha v. Delhi Vidyut Board [AIR 2001 Del. 223] it was held by
the Division Bench of this Court that the Court has to be satisfied about, (a) the correctness of the credentials of the applicant; (b) the prime facie correctness of nature of information given by him; (c) the information being not vague and indefinite. It was also held by this Court that the Court has to strike balance between two conflicting interest namely, (i) no body should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitioner seeking to assail, for oblique motives, justifiable executive actions.

44. The allegations of the full time Law teachers against the petitioners are based on surmises and conjecture. The petitioner No. 1, who has filed the present public interest litigation is an Advocate of this Court and is a responsible officer of the Court. No clear evidence is led by the Respondents - Full time Law teachers to prove and establish that filing of the writ petition is in any manner motivated or instigated by the aforesaid two Professors of the Law Faculty of Delhi, who according to the said respondents were inimical towards them. The cause which is sought to be espoused through the present writ petition is of public importance. The same is also required to be looked into as the Bar Council of India which is the primary body for maintaining discipline amongst the enrolled Advocates has also proceeded to take action against some of the full time Law teachers and against the rest it is dependent on the outcome of these petitions. Therefore, in our considered opinion this writ petition cannot be dismissed on the ground of maintainability. This writ petition filed under the category of Public Interest Litigation by the writ petitioner, who is an Officer of the Court is maintainable and the issues raised being important and having wide ramifications are required to be dealt with and answered.

45. Having held thus, we may now proceed to examine the issues that arise for consideration on merits of the case. Reference is made to the provision of Section 2 (1) (a) of the Advocates Act, 1961 which defines the term “advocate” meaning an Advocate entered in any roll under the provisions of the said Act. Rule 103 of the Rules framed by the Bar Council of Delhi has been extracted above. In the aforesaid rule it is provided that any person either in part-time or full time employment cannot be enrolled as an advocate but under the proviso is provided that a part-time Law teacher could be admitted as an advocate. Therefore, under the aforesaid provision a part-time Law teacher could be enrolled as an advocate but no such privilege or benefit is available to a full time Law teacher.

46. Strong reliance was placed by the respondent-Full time Law teachers on the provisions of Advocates rights to take up Law Teaching Rules, 1979 (“the 1979 Rules”). The said provisions are also extracted hereinabove. A bare reading of the said Rules indicate that the said rule uses the terminology “advocates” and deals with the right of practicing advocate to take up law teaching. By virtue of the aforesaid provision an advocate is empowered to take up law teaching provided the same does not exceed three hours a day. Therefore, the said rules clearly establish that the same are applicable and come into operation post enrollment and have no application to a person prior to his enrollment as an advocate. It was sought to be contended by all the law teachers that a person can combine law teaching and law practice simultaneously provided law teaching does not
exceed three hours a day. It was submitted by them that after adaptation of the aforesaid rules, a lawyer could take up full time law teaching in regular scale of pay and, therefore, the converse is also possible and, therefore, a Law teacher could also be enrolled as an Advocate. However, on proper reading of the said provision would make it crystal clear that such an interpretation is not only fallacious but also absurd. It is settled law that an interpretation which leads to absurdity should always be avoided.

47. It is also settled law that when the provisions of a statute is plain, clear and unambiguous, no word could be added to such a plain wordings of the statute nor it is permissible to add words into it which are not there. In this connection reference may be made to the decision of the Supreme Court in *Union of India v. Deoki Nandan Aggarwal* [AIR 1992 SC 96] wherein it is held as follows at page 101:

“...It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the Legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the Legislature the Court could not go its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be.”

51. When in the context of the aforesaid decisions the wordings used in the Notification issued by the Central Government is read it would make it explicit that under the said notification a right is given to practicing advocate to take up law teaching but no such parallel right is given to teachers of law to be enrolled as advocates. The wordings used in the aforesaid provisions is plain and unambiguous and requires no addition of words to the said statute. The intention of the legislature is also clear and apparent and, therefore, the Court would not proceed to reframe the legislation by giving a meaning which the respondent teachers seek to give.

52. It is true that the course of law particularly the LL.B. course being a professional course, there is a necessity of association of and guidance of the Advocates to the law students so as to enable such students to gain practical experience and to acquire Court craft and professional skills. But at the same time the obligation of the teaching faculty to the students cannot be ignored. There are several facts of teaching namely, delivering lectures, taking tutorials and seminars. Over and above the teaching Faculty also has an obligation of doing research which includes one’s own research as well as supervision of research required to be done by the students. Besides there are other responsibilities to be discharged by a teacher like, administrative responsibilities etc. In order to give an exposure to the students undergoing the law course to acquire some practical experience, permission is granted to lawyers practicing in the Courts to undertake such law teaching provided such teaching does not take up more than three hours a day.
53. It was argued by the law teachers that they are in fact not required to teach for more than three hours in a day and that they are, therefore, eligible to practice in the Courts and to retain their membership of the Bar Council. When the statute does not by itself permit such a situation and when Rule 103 has specifically prohibited full time law teachers from enrolling as advocate, no such permission could be granted to a full time law teacher to be enrolled as an advocate. The aforesaid interpretation is also in consonance with Statutes, Ordinance and the Resolutions adopted by the Delhi University and the University Grants Commission. Since both Rule 103 of the Delhi State Bar Council Rules and Rule 3 of the Rules framed by the Central Government operate in two distinct and different fields and relate to different set of persons, there is no repugnancy as sought to be submitted by the full time law teachers and, therefore, the said contention is rejected. It is also worthwhile to mention at this stage that the validity of the 1979 Rules is not under challenge before us. Therefore, we are to decide this matter proceeding on the basis that the said Rules are valid and are applicable to the set of persons who are specifically mentioned in the said Rules. No deviation or addition is permissible to the clean and the plain intention and meaning. Therefore, we also hold that reliance by the full time law teachers on the said Rules to advance their cause is misplaced.

54. The service conditions of full time teachers of the Delhi University are incorporated in the Contract of Service and, therefore, they are statutory in nature and they are binding on the teachers. Reference is already made to Clause 5 of the Ordinance which provides that a full time teacher of the Delhi University is required to devote his time only to teaching and research in the University and, therefore, a full time teacher cannot undertake any other professional activity, such as practicing law as an advocate. The University which is arrayed as one of the respondents in the present cases has specifically stated in the counter affidavit filed by it that the University has not granted any permission to full time teachers either in the Law Faculty or in any other Faculty to practice as a Lawyer and that one Mr. N. S. Bawa was granted a very limited permission to appear in the case of Riot Victims of 1984. The averments in the Public Interest writ petition disclose that request made by the members of the Law Faculty of Delhi that in legal aid cases teachers of the Law Faculty may be permitted to appear in Court was considered by the Executive Council of the Delhi University and it was rejected by the Executive Council, which is the final administrative Body of the University. The same position was again reiterated by the University in a communication to all the teachers dated 3-11-1995. It is, therefore, the specific stand of the Delhi University that no full time teacher of the Delhi be he or she is in the Law Faculty or in any other Faculty of the University is not entitled to practice as a lawyer as long as he is a full time teacher in the University. If such a privilege is granted to the law teacher to be enrolled as an advocate, there could be no reasonable ground to deny the same privilege to other Faculty Members of other departments of the University. The aforesaid stand of the Delhi University is found to be valid and reasonable. Under the 1979 Rules and Advocate is permitted to take up law teaching based no the number of hours of teaching being undertaken. The Committee constituted by the University upon enquiry has held that the obligation of a teacher, though somewhat diffuse but is extensive in nature which include not only class from teaching
but also research and administration. It was held that such obligations even though cannot be put down to departmental time table the same, however, exists and such time should be included and read into their daily routine. The directions of the University Grants Commission are based on the aforesaid analogy when it conveyed the decision that in order to promote quality education full time law teachers would not be permitted to enroll as members of the Bar entitling them to full time practice in law. Even the permission granted to such teacher to appear and represent in social action/public interest litigation is in the nature of legal aid and social activity and not as a lawyer.

55. In our considered opinion, the same would not by itself empower or enable a full time teacher of the Delhi University to practice as a Lawyer. Even in a case where enrolment is granted by the Bar Council and thereafter the advocate seeks to take up law teaching, the same could be permitted only within the parameter of the 1979 Rules read with the University Statutes and Ordinance.

56. The University Grants Commission also by its letter dated 7-12-1995 informed the Registrar of the Delhi University that full time law teachers in University Departments and affiliated Law Colleges would not be permitted to enroll as members of the Bar entitling them to be a full time lawyer but they should be allowed and permitted to appear in Courts for social action or public interest litigation matters as well as legal aid/public interest litigation connected therewith. The aforesaid permission is restricted and limited to the aforesaid extent only and was allowed to give impetus to the concept of legal aid and making the students of law also aware of the aforesaid concept. The Report of the Committee which was adopted by the Executive Council of the Delhi University on 19-4-1998, the extract of which is quoted hereinbefore would also support the same position.

57. In that view of the matter we hold that the interpretation sought to be given by the respondent-Faculty Members to Rule 103 and to the 1979 Rules cannot be accepted. We also hold that the said teachers are bound by the provisions of Rule 103 of the Bar Council of Delhi Rules and the Rules of 1979 are neither applicable to their cases nor they can seek assistance from the said Rules unless the rules framed by the Competent Authority allow the privilege specifically. No such privilege could be claimed by way of implication or on the basis of surmises or conjectures. Therefore, no such right or privilege could be claimed by the full time law teachers of the Delhi University which is not permitted under the rules.

58. Reference could also be made to Rule 49 of Chapter II, (Standards of Professional Conduct and Etiquette) Section VII (Restrictions on other employments) of the Bar Council of India Rules which provides that an advocate shall not be a full time salaried employee of any person, government, firm corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment.
59. We are also of the considered opinion that the Resolution adopted by the Bar Council of India in 1996 under Resolution No. 108 correctly lays down the law and the practice and we hold that no objection could be taken as against the said Resolution. The said decision is in consonance with the observations of the Supreme Court in the decision of Dr. Haniraj L. Chulani. Therefore, if the interpretation sought to be given by the full time law teachers are accepted the same would not only run counter to the statutory legal position but the same would also be contrary to the law of the land.

60. In terms of the said Resolution the Bar Council of India has proceeded to take suo motu action and has directed all the State Bar Councils to take necessary steps to implement the aforesaid Resolution. The Bar Council of India proceeded to take suo motu action initiating removal proceedings against such full time salaried teachers of law who were subsequently enrolled as advocates by an erroneous interpretation of 1979 Rules. It was held by the Bar Council of India that full time law teachers were enrolled as advocates by misinterpreting the rules made by the Central Government under Section 49A of the Advocates Act, 1961. By adopting the aforesaid Resolution No. 108 of 1996 the Bar Council of India has tried to rectify the mistake by removing the names of such persons who are full time salaried law teachers and who were enrolled as Advocates overlooking the specific provisions of Rule 103 of Bar Council of Delhi Rules and by misinterpreting the provisions of the 1979 Rules.

61. It was contended that no such power could be exercised by the Bar Council of India and that also after expiry of about 20 years from the date of enrolment. Counsel appearing for the Bar Council of India, however, submitted that such a power could be exercised by the Bar Council of India under the provisions of Section 48A of the Advocates Act, 1961.

62. In the foregoing discussions it is held that no full time law teacher drawing regular salary from the University could enroll himself as an advocate. Such full time teachers were allowed to take enrolment by the State Bar Council misinterpreting the provisions of the 1979 Rules. The said full time law teachers were not eligible to be enrolled as an advocate and, therefore, enrolment itself was clearly contrary to Rule 103 of the Rules. When such persons who suffered a bar at the threshold are given enrolment in violation of and contrary to rules, they cannot take up a plea of estoppel. In this connection reference may be made to the decision of the Supreme Court in Satish Kumar Sharma v. Bar Council of Himachal Pradesh [AIR 2001 SC 509], wherein it was held as follows at page 517, of AIR:-

“The contention that the respondent could not have cancelled enrolment of the appellant almost after a decade and half and that the respondent was estopped from doing so on the principle of promissory estoppel, did not impress us for the simple reason that the appellant suffered threshold bar and was not eligible to be enrolled as an Advocate and his enrolment itself as clearly contrary to Rule 49 of the Rules in the light of the facts
stated above. Hence neither the principles of equity nor promissory estoppel will come to
the aid of the appellant.”

63. It is also a settled law that there cannot be any estoppel as against statute to defeat the
provisions of law. That is exactly what was laid down by the Supreme Court in *Indira Bai v. Nand Kishore* [AIR 1991 SC 1055] wherein it was held as follows:-

“There can be no estoppel against statute. Equity, usually, follows law. Therefore
that which is statutorily illegal and void cannot be enforced by resorting to the rule of
estoppel.”

64. As the full time law teachers suffered a threshold bar to get themselves enrolled as
advocate the enrolment given to them by the State Bar Council was per se void and illegal and
contrary to Rule 103 of the State Bar Council Rules and, therefore, the Bar Council of India acted
within its jurisdiction in canceling such enrolment which was done in violation of the extent rules.

65. A power of revision is vested in the Bar Council of India which is a power of general
superintendence over the powers exercised by the State Bar Council. As and when the Bar
Council of India is of the opinion that a particular action is taken by such a State Bar Council
without any proper sanction of law the same can always be corrected and rectified by exercising
the powers of Revision by the Bar Council. A similar plea raised by the aggrieved person in the
case of Satish Kumar Sharma (supra) was rejected by the Supreme Court holding that such a
contention that the respondent could not have cancelled enrolment after a decade and half is not
acceptable, Section 26 of the Advocates Act may not be strictly applicable to the facts of the
present cases but if such action could be taken by the Bar Council of India in exercise of its other
statutory powers the same would be held to be valid.

66. In terms of the aforesaid observations and directions all the writ petitions stand disposed
of holding that the full time law teachers of the Law Faculty of the Delhi University could not
have enrolled themselves as advocates and, therefore, enrolment given to the said teachers by the
State Bar Council was per se void and illegal and any action taken by the Bar Council of India to
rectify the said mistake in exercise of its powers cannot be said to be bad or illegal. We also hold
that a part time teacher of law could be enrolled as an advocate and also that an advocate after
being enrolled could take up part time law teaching. We find no fetter put to the aforesaid
position. Interim order stands vacated.

* * * * *
"I want a divorce."

"It's all so confusing. I don't know why I am here or where to begin."

"I still love him but I can't take anymore." "He tried to kill me last night." "She never loved me. I don't want her to get a cent."

It's the lawyer's move. What should she do? Her client is sitting there, looking at her expectantly. She could remain silent and convey a non-verbal message that her client should continue. Or she could say something. But if she decides to say something, what should she say?

Lawyers need information before they can apply their knowledge of matrimonial law and practice to their client's situation. Information about their clients, their situations, and what they would like to do about them is absolutely essential. They also need to build rapport with their clients. They want working relationships where trust and accurate communication can flourish. How can they achieve these goals in interviews with matrimonial clients?

Matrimonial practice attaches to a set of human experiences that are laden with emotional content. Matrimonial interviews typically involve discussing the possible dissolution of what was once a close human bond, allocation of custody and support privileges and obligations, and distribution of marital assets. Building rapport and acquiring accurate information simultaneously in this environment is challenging. No model exists that helps lawyers attain these twin objectives in every matrimonial interview. Several specific techniques, however, can be consciously employed to reach these goals. These techniques are the tools of an effective matrimonial interviewer. They are the building blocks of all effective interviewing approaches and the units with which lawyers may analyze their performances. This chapter will describe and demonstrate them using specific examples from matrimonial contexts.

Although lawyers who choose to dominate or compete with clients use these tools to some degree, they work best with a decision to collaborate with clients using a participatory model of representation. This choice proceeds from an assumption that matrimonial clients are rational, self-directed, and capable of making their own decisions. Although the strong emotional currents of the divorce experience occasionally challenge these assumptions, most clients ultimately derive more satisfaction from a divorce outcome in which they actively participate.

A client-centered choice makes sense in interviewing. Clients must participate in the fact gathering process because lawyers cannot function competently unless they know basic information about both their clients' marital situations and what they want to do about them.
Lawyers also need client participation to develop a working relationship featuring mutual trust, understanding, and respect. A client-centered approach is the most likely way to generate a client commitment to this type of working relationship. This value bias underlies this and all subsequent chapters.

A. LISTENING

Assume a matrimonial interview begins this way:

C: She never loved me. I don't want her to get a cent.

L: How long have you been married?

C: Seven years and love's been dead the last six. She's never respected me (spoken with increasing agitation and vocal tone)

L: Where were you married?

C: Here. Downtown, at the Courthouse.

L: Are you living together now?

C: No .... (short pause) Not exactly, you see, she ran off with . . .

L: (interrupting) How long have you been separated?

Crisp, probing questions like these are not the only way to gather information. Although they may be entirely appropriate in chambers or a courtroom before a judge who wants to hear a preordained testimonial checklist, they usually are an inefficient way to gather information at the beginning of an interview. They often are also not an effective way to build rapport and they can harm the relationship between lawyer and client.

The lawyer in this excerpt took immediate control of the interview and forced the client to respond to questions from his agenda. This approach does not gather information efficiently because the lawyer cannot, at least at this stage, ask every conceivably relevant question. This approach may also harm rapport because it communicates implicitly that the lawyer knows what is important and what should be talked about. The client here, for example, may incorrectly conclude that his wife's running off with someone is not relevant because the lawyer did not seem to want to hear about it. He may also become passive and dependent, a non-participant in a process that will ultimately ask him to make the inevitably difficult human choices that most matrimonial cases present.
There are other ways to gather information and build rapport. Listening is an excellent way to accomplish both. Lawyers cannot hear and understand information if they are talking and not listening. In addition, a particular kind of listening, called active listening, is the most effective rapport-building tool available to lawyers. So this exploration of effective interviewing tools begins with listening.

To talk and be listened to is a deep and basic human need. This need is often particularly acute for clients suffering the stresses and storms of matrimonial dissolutions. Notwithstanding its basic value, the skill of listening is elusive. It is hard work and difficult to do well. Perhaps it is the demise of radio. Maybe it stems from the fact that many people learn in infancy that being quiet accomplished little while initiating communication by talking or yelling sometimes worked better. Whatever the reason or reasons, lawyers, like many others, are often not effective listeners. Many lawyers think listening is inconsistent with their duty and desire to "do something" for their clients. They fail to see that supportive listening is a way to help clients. These lawyers, during those few times when they are not talking, are usually busy thinking about what they will do, say, or ask next. Listening fully with their ears, eyes, and complete attention is seldom thought important and "lawyerly." It is done skillfully even less frequently.

Listening well can be surprisingly difficult to do. Although it may seem to involve simply sitting back, not talking, and hearing what clients say, it is not that easy. Studies show that people normally speak at the rate of about 125 words per minute while we are able to listen at a rate of 500 words a minute. How lawyers fill this gap determines whether they are listening effectively.

Sometimes lawyer fill this gap with preoccupations about what is going on in their minds. Anxiety and insecurity, which can accompany an inexperienced lawyer's first interviews, are common, distracting preoccupations. They can intensify concern about what to do or say next and minimize concentration on hearing what the client is saying. This tendency also may be aggravated by the chaotic way that information often flows in matrimonial interviews. A client tells a fact relevant to custody in one sentence and jumps to an aspect of property distribution in the next. He then contradicts himself about his feelings toward his wife in the same sentence. This can be both very hard to follow and understand and a terribly unsettling to a lawyer's need for order and structure.

Experienced lawyers need to beware of filling the gap with anticipated information that may or may not actually be involved in the client's situation. The routines of legal practice can easily lead to incorrect factual assumptions and premature diagnoses of situations. Not all divorcing thirty-five year old mothers of two children, for example, fit patterns that a lawyer may have evolved over years of matrimonial practice.

Another common listening mistake that lawyers often make is keeping quiet only to find an opening to get the floor again. This dynamic often occurs when lawyers feel a need to regain
control of the interaction. Asking questions retakes control so lawyers concentrate on what to ask next rather than what their clients communicate.

Daydreaming and fantasizing, although vital to psychological wellbeing, are two more common listening errors. Lawyers must resist them and concentrate on listening to their clients during interviews. Another similar listening problem involve associations which lawyers make to client statements which can distract attention and even cause them to change topics. A client's mention of disciplinary problems with children, for example, may prompt an association with the lawyer's children or parents and cause him to lose track of what his client is saying. These associations can also cause lawyers unconsciously to attribute aspects of their experience to their clients, a phenomenon which psychologists call counter-transference. This can affect the content or tone of what the lawyer says next and trigger a response by the client. The risk of such distracting associations is great because matrimonial cases inevitably involve fundamental human dynamics that everyone has experienced on either a personal or vicarious level.

Awareness of, and determination to avoid, these and other listening traps may help lawyers listen more effectively. The skill of listening involves two broad approaches, passive and active listening:

1. Passive Listening

Passive listening is what most people probably conceptualize listening to be: not talking and letting someone else speak. It is a skill that begins with being silent. Doing it well requires learning to be comfortable with periods of silence. It also requires consciously realizing that being passive is not being incompetent. Talking connotes power and control. Remaining silent, however, is not necessarily the reverse. Lawyers do not lose control of interviews by listening passively. They may by listening, bear amazing things; things that can save them and their clients enormous amounts, of time and energy as their relationship progresses. Listening also builds rapport by conveying, in a powerful way, that lawyers care enough about their clients to stop talking and allow them to speak.

One specific way to use passive listening effectively in matrimonial interviews is to avoid filling every pause in a client's narration with a question. Assume a client suddenly stops speaking. What does that mean? It could mean that she has exhausted that topic and wants further direction from her lawyer. It could also mean that she is pausing to catch her breath; or she has seen a relationship between what she was saying and something else that she wants to organize mentally before sharing. She may even be generating her courage to tell something that is very difficult for her to articulate. There are countless other possibilities. A new question from her lawyer could easily destroy something important. It probably will change the topic. A more effective response would be passive listening, remaining silent and conveying a non-verbal expectation that she should continue.
The non-verbal and non-committal encouragers of communication that are frequently used in social discourse are another type of essentially passive listening responses. Non-verbal encouragers include attentive eye contact, bead nods, and receptive posture. Non-evaluative responses include the "I sees," "yeses," "sures," and all of the other variations that are used to communicate nothing more than the speaker's statement is followed. Although these verbal remarks become troublesome echoes at deposition and trial, they are useful in interviewing. These remarks and actions acknowledge that lawyers are listening while not indicating how they are evaluating the client's messages. They remove the discomfort that might be caused to both participants if lawyers remain completely silent. They also combat inferences that lawyers are bored, disinterested, or falling asleep, possibilities that may be enhanced if nothing is said for long periods of time.

Passive listening is valuable because it lets lawyers receive information from their clients. It also affords a way of giving their clients freedom to communicate thoughts and feelings in interviews.

2 Active Listening

Another type of listening response that builds rapport and gathers information even more effectively than passive listening, is called active listening. This involves responding to pauses, and sometimes even questions, with a response that reflects, in different words, what clients have said. It is called active listening because it forces lawyers to bear what is said, and then to communicate it back in different words that prove an understanding of the client's message. The understandings generated by active listening may be crucial. A client who fears for her physical safety, for example, should receive different information about the economic importance of remaining in the marital home if her lawyer beard and understood her concerns.

An effective active listening response is probably a lawyer's best rapport-building tool. It proves that the lawyer has both heard and comprehended what the client communicated. Passive listening, even when accompanied by non-verbal and non-committal encouragers, only implies that bearing and understanding have occurred. Clients have to believe that their lawyer was listening because no explicit proof is provided.

Being heard and understood usually makes speakers feel better both about the person with whom they are communicating and the process of talking with that person. It creates a motivation for, and a climate conducive to, further sharing. This is particularly true when the topic is a personal, private matter and the listener is a busy professional; precisely the environment of matrimonial interviews.

Making a short speech which produces no feedback from the audience either during or after the presentation is roughly analogous to bow matrimonial clients feel when their lawyers provide
no active listening. Active listening is a way to provide feedback, and no feedback is usually experienced negatively. The speech was probably so bad that no one wants to talk about it. Withholding feedback also encourages less sharing, not more. Getting no feedback on a speech can minimize desire to give another. Similarly, withholding feedback from clients often makes them unwilling to share by narrating. Speeches also seldom involve the personal, intimate, and emotionally charged topics that clients commonly discuss in matrimonial interviews. Feedback in these situations can be crucially important for reasons that will be developed later.

Analogizing active listening to feedback is not completely accurate because feedback often implies evaluation and the most effective active listening responses are neutral and non-evaluative. They convey only proof of hearing and understanding by reflecting statements in different words. They are mirrors, not evaluations. The speech-maker probably wants someone to tell him how good the speech was. Matrimonial clients often also want their lawyers to tell them how good they are but neutral reflections ultimately are more effective.

Active listening responses may be directed at either the content or feelings contained in client statements. Content refers to objective "facts" the who, what, where, and when of situations. It is what courts are usually concerned with. Feelings are the terms clients use to describe their emotional reactions, both past and present, to events and situation. Formulating an active listening response on either level builds rapport and facilitates information gathering.

a. Content Reflections

C: I'd like custody but I just don't think I've got the time it takes to see to their needs. My job is very time-consuming and requires a lot of travel.

L: It would be difficult to balance the time demands of parenting with those of your career.

This is an example of an active listening response focused on the content of a client's statement; the conflict between parenting and a job requiring a lot of time and travel. The listener could have also reflected feeling here, perhaps frustration or anger about this conflict. The content reflection chosen had several advantages over passive listening. It proved that the lawyer heard and understood what the client said. Assuming an appropriate voice tone was used, it was neutral conveying no judgment about the merits of the choice of career over custody. It permitted clarification. If the client's present job was not his career objective, for example, the client could have clarified that and by doing so, perhaps identified a decision to be made regarding the importance of the position. The response also encouraged further sharing on this topic because the client could choose to respond by elaborating further about the conflict, or the career, or both. This content reflection also left the client free to choose whether to continue on this topic or go to another one. An open question such as "tell me more" might have been more intrusive and less
likely to produce information. Such a question, for example, might cause the client to wonder why more detail is wanted. A concealed judgment also might be implied in the question.

Content reflections typically follow a short statement about one fact or a related series of events. It is usually a single statement that follows a fairly short client narrative. You said this about that is how the response is phrased. Here are other examples:

C: I want the house because I was responsible for acquiring it.

L: Getting the house is a priority because your efforts enabled you to get it.

C: I was in the park walking to the subway. He was supposed to be watching our son.

He was reading and not paying any attention. Then Jeremy fell from the jungle gym.

L: You saw both the fall and that your husband was not supervising Jeremy.

The phrasing of content reflections is similar to leading questions because they follow a "you said this about that" pattern. If reflections are limited to what the client said, mistakes usually present no problem because clients will usually correct them. Content reflections are usually heard as requests for clarification if they are inaccurate. Additional information is then often provided.

C: I was in the park walking to the subway. He was supposed to be watching our son but he was reading and not paying any attention. Then Jeremy fell from the jungle gym.

L: You were coming out of the free subway and saw the fall.

C: No. I was walking to the subway. I had not gone down into the station. I was still in the park when Jeremy fell.

Problems can develop, however, with inaccurate content reflections that go beyond what the client has said. These typically occur when lawyers either reflect content that the client did not present or anticipate what they think the client will say next. If the lawyer in the last illustration had said, "you saw Jordan fall and your husband did not," for example, she would be reflecting something that the client did not say; whether her husband saw the accident. The suggestive phrasing raises a risk that the client will agree with the content reflection thinking that it is what the lawyer wants to hear.

Anticipating what the client will say can result from an empathetic presence with the client to the extent that the lawyer has a strong, perhaps intuitive, sense of what is coming next. Supplying the words on the content level, however, runs the same risk of suggestiveness. It
should be avoided unless the client will not respond to suggestiveness. This is difficult to ascertain, particularly early in an interview. Anticipating and identifying unexpressed feelings do not present the same problem.

Both of these problems can be minimized by using frequent invitations to correct errors if accuracy is uncertain. "Please correct me if I get this wrong," "Let me see if I understand this," and "am I correct that" are useful introductory clauses to minimize risks that content reflections are inaccurate. Content responses should also be reflective, not interrogative. Conversational, neutral voice tones should be used.

Content summaries which synopsize larger segments of information are useful and should be used frequently in matrimonial interviewing. Summaries work best after long client narratives. Summarizing the "facts" after a long narrative to see if they are "right" can be an effective way to prove both listening and understanding. They solicit clarification of anything either missed or erroneously understood. They often also invite further elaboration effectively.

Another technique involves phrasing a question by incorporating a portion of the client's previous remarks. This technique, commonly done during direct examination to provide repetition and emphasis, is useful in interviewing to build rapport and stimulate memory. It works best after initial rapport has been established when information gathering is the primary objective. For example, the statement "my husband came home that night very intoxicated; it was quite unusual behavior for him" might be met with a question.

Phrasing the question this way builds more rapport than simply saying "what happened next" because it proves that at least a portion of the client's previous statement was heard and understood. A response that asked "what else did he do that night besides come home drunk" also can stimulate memory by indicating that intoxication has already been mentioned and understood. Since these responses accompany questions focusing on specific information, however, their rapport-building potential are limited. Noninterrogative content reflections are more effective earlier in interviews because they invite further elaboration. Reflecting the above statement by saying "it was surprising to see him that way," for example, would permit this client either to elaborate more on this episode.

Many lawyers may find it difficult to conceptualize listening as a process of reflecting back messages received from clients. It takes practice to develop this skill once the values of active listening are acknowledged. Practicing content reflections is a good way to start because reflecting the content of what matrimonial clients say may be easier to do than reflecting the feelings they either express or imply. Most lawyers can identify facts more easily than feelings because they are the building blocks used in litigation. Claims for relief are constructed on facts so lawyers are thinking about and looking for them during matrimonial interviews.
b. Feeling Reflections

Representing matrimonial clients often means working with people experiencing emotional crises. Matrimonial interviews explore the disintegration of what was presumably once a very important, personal relationship and clients typically experience a progression of emotional reactions as they divorce. Discussing the marital breakdown and its consequences, including how children should be cared for and supported and how marital property should be divided, inevitably generates strong feelings and emotions.

These feelings and emotions are neither logical nor rational requiring neither legal analysis nor therapeutic intervention by matrimonial lawyers. They should, however, be acknowledged because they are important parts of the human experience of divorce. They should not be ignored. They are facts in the sense that they often influence outcomes as much as or even more than objective data.

The most effective way to respond to emotional expressions is with active listening statements that reflect them non-judgmentally. Here is an example:

Ms. Smith: (clenching her fist, speaking with an increasingly loud tone of voice) Then I found out he has been playing around with his secretary. (bangs her fist on the table) I couldn't believe it:

Lawyer: His conduct makes you furious.

The lawyer here identified a strong feeling expressed non-verbally and reflected it. The statement mirrored the feeling; it did not evaluate it. Doing this can both build rapport and generate information with extraordinary effectiveness.

Rapport is built by this type of active listening response in two ways. The most powerful way is its potential for conveying empathy. Reflecting the emotional content of client statements and capturing their correct feeling tone conclusively demonstrates an understanding of their situation. It conveys that the lawyer can enter the client's world and see the situation from that perspective. It proves that the lawyer is, in a sense, feeling with, not for, the client, the crucial distinction between empathy and sympathy.

No one knows exactly why skillful feeling reflections are so effective. Perhaps it is because it is such an unusual experience to have someone listen to intimate feelings without either judging them or substituting other agendas. It also feels good to share a difficult experience in both its factual and emotional components and to be heard and understood on both levels. That good feeling generates rapport and motivates continued disclosure. It also engenders feelings of importance and self-worth when a busy professional listens this carefully.
A neutral, non-judgmental feeling reflection is what most people want when seeking out a friend with whom to share a disturbing personal situation. People want to have their feelings heard and understood, rather than ignored, judged or minimized. Secrets are told to friends who listen well and complete disclosure from most matrimonial clients usually involves sharing several. Skillful active listening responses will uncover these secrets much quicker than reassurances that the communications are protected by evidential privileges will.

Feeling reflections also build rapport by removing blocks to communication. They allow a potential release of emotion because clients who encounter understanding of their feelings may experience a discharge and a sense of relief. This discharge of feelings often makes clients feel better. It also may facilitate their willingness to move on and talk about other issues after their emotions have been acknowledged and discharged. Ms. Smith in the above illustration, for example, may continue to display her anger by other non-verbal means and vague statements if it is not acknowledged. Once it is reflected, however, she may be more inclined to move on to talk about other things. She may sense that there is no point dwelling on her anger since it has been heard and understood.

Reflecting feelings can temporarily intensify the emotions experienced by matrimonial clients. This intensification can be an unpleasant experience for lawyers. It can also discourage them from using additional feeling reflections even though more active listening is usually the best response to make if these storms develop. Remembering that most clients experience this discharge positively may also help lawyers weather these storms.

Although this discharge has slight therapeutic potential, lawyers should not reflect feelings for this purpose. They should reflect feelings to demonstrate empathy and to motivate further communication. They should not press a client to discharge emotion.

If clients choose to do so; fine; if not, fine. It is their choice.

If the intensification continues and no discharge occurs, a lawyer could share his desire to move to another topic and make a motivating statement to encourage it. A statement like this might be effective, for example, with a client who demonstrated a reluctance to do anything other than share anger:

"Ms. Smith, you clearly express your anger. I understand it. It is something you have to live with. You may want to work on resolving it. I have a reading list here of books that may help you start. I will also be happy to refer you to another helping professional who has the skills to work with you on this process. Without minimizing your anger, I'm feeling a need to get additional information about your situation. Could you tell me about…"
If this doesn't work, the other option to consider is adjourning the interview and making a therapeutic referral.

A matrimonial client who chooses not to discharge emotion may often respond to a feeling reflection in a way that generates information because the response is heard as an invitation to talk more about the facts underlying the emotion. The angry Ms. Smith in the above illustration, for example, may respond: "Yes, I am angry. And let me tell you what else that rat has done." Then she may tell me about his penchant for poisoning neighborhood cats. This is a fact that may be relevant to case strategy and probably was not on the lawyer's checklist of topics to explore.

Feeling reflections also generate information in the same clarifying or self-correcting way that content summaries do because clients are usually happy to clarify or correct inaccurate responses. These clarifications also often add additional facts that enhance understanding of the overall situation. Consider this example:

C: I couldn't believe he would stoop so low as to associate with that woman.

L: You were angry.

C: No, I was disgusted, and convinced that the marriage was over. After that I cleaned out our joint accounts and moved in with my sister.

(1) Phrasing Feeling Reflections

Accuracy in reflecting feelings requires correctly gauging the intensity of the emotion rather than its existence. Rapport and motivation to communicate are developed best by feeling reflections that accurately capture the intensity of the emotion mirrored. Grossly inaccurate reflections may actually harm rapport. Responding to a client's clenched fist, desk-banging remarks about her husband's behavior by saying, "you seem a little bit upset about what he did" demonstrates the point. This client communicated a much more intense feeling than "upset." The minimizing phrase "a little bit" was also inaccurate. Common conversational phrases like "little bit," "sort of," "kind of," and the like often make feeling reflections inaccurate. This client may clarify and correct these mistakes and appreciate the effort to hear and understand. On the other hand, she may react negatively and wonder why her strong feelings were minimized.

Although content summaries should be limited only to the facts communicated, reflecting unexpressed feelings and emotions can be very effective because empathy can be dramatically displayed where feelings are either implied by tone and non-verbal conduct or stated vaguely. Bearing and understanding emotions that were not clearly communicated vividly demonstrates careful, attentive listening. Erroneous feeling reflections also seldom cause substantive harm. Reflecting anger when clients feel frustration, for example, usually has little effect even if they choose not to correct it. Since substantive results do not hinge on feelings, erroneous reflections
do not compare to the havoc that occurs when mistaken facts stemming from inaccurate and uncorrected content responses are blasted away by the other lawyer at deposition or trial.

Phrasing feeling reflections is more challenging than content responses for several reasons. The non-objective nature of feelings often tempts lawyers to deviate from neutral responses and use judgmental or reassuring formulations. Both of these common responses present problems. Neither is fully empathetic.

Judgmental responses inhibit subsequent communication because even positive evaluations imply a willingness to judge less than favorable situations negatively. Statements approving a client's anger at her husband's infidelity, for example, may inhibit her willingness to disclose her extramarital activity. Matrimonial clients typically receive a lot of judgment, much of it predictably negative, from their spouse, children, family, and friends. They don't need more from their lawyers and they may be less than candid to avoid it.

Positive judgments can also inadvertently minimize client emotions and overlook the complexity of situations. Saying "It's good to be angry at that drunken, abusive man" minimizes a client's anger by not acknowledging its intensity. It also communicates unclear, disturbing implications about her choice to live with this person for years.

Many matrimonial clients have strong needs to express anger at their spouses and want their lawyers to share their bitterness. Judgmental statements responding to this wish should be avoided. They will undermine explanations that the legal system is no longer concerned with finding fault and vindicating victims that may be necessary later. They also keep clients extremely partisan which usually harms chances to achieve either a creative settlement that benefits both spouses or a favorable outcome if the matter is ultimately litigated.

Lawyers should also recognize that powerful urges to help their clients may cause them to offer reassurances. They are not as effective as neutral reflections are despite their noble motivation. Reassuring responses are often heard as minimizations of feeling. Telling a matrimonial client, "don't worry, everyone is anxious at the start of a divorce, you'll get over it," minimizes the feeling by not acknowledging its intensity. It also communicates subtly that it, and perhaps other emotions as well, are not relevant.

Another ineffective tendency is to use an introductory phrase, often the same one, to begin every feeling reflection. "I can understand," as in "I can understand how that would make you angry," is the chief culprit. Clients often hear this as phony and patronizing, particularly when they are talking about feelings relating to events that, in their perception, a lawyer would never have experienced. If Ms. Smith was talking about her husband's sexual abuse of her daughter, for example, a lawyer expressing understanding of her anger probably is damaging rather than
building rapport. Ms. Smith will probably find it hard to accept that her lawyer has ever dealt with such a situation personally. She will feel patronized and belittled.

Using other introductory phrases like "so you're saying," "I hear you saying," and "as I see it," all lengthen feeling reflections and threaten their effectiveness. They often make feeling reflections seem hollow and insincere. The goal is reflecting emotions that clients express without mechanically applying a communication technique. It is usually more effective to eliminate introductory phrases and use simple reflective statements like "you're angry, frustrated, anxious, frightened," etc.

Making feeling reflections often feels awkward, forced and uncomfortable initially. These problems can seep into voice tones causing reflections to sound mechanical and insincere. An empathetic, confident reflection of the feeling or emotion either expressed or implied should be the goal. The cure for the problem is practice.

Another possible problem may involve finding the right words. Lawyers get so preoccupied with the rational and objective aspects of lawyering that their vocabulary for describing emotions often diminishes. Here is a list of thirty feeling words that may enlarge feeling vocabularies: happy, anxious, depressed, inadequate, fearful, confused, hurt, angry, lonely, guilty, suspicious, resentful, vulnerable, bored, miserable, disappointed, helpless, rejected, embarrassed, distressed, uncomfortable, abandoned, cheated, tricked, nervous, afraid, impatient, worried, troubled, and shocked.

Most matrimonial clients will experience all of these feelings, and others, during their divorce. Some may experience this entire vocabulary during their initial interviews. Looking for opportunities to reflect these feelings neutrally and non-judgmentally with these words will increase rapport and improve communication.

(2) Types of Feeling Reflections

Effectively reflecting client feelings that are either implied by non-verbal conduct or vaguely expressed requires identifying the emotion communicated. Precise identification can help clients understand their emotional reactions and facilitate their ability to make decisions later. Anger is a good guess when a client clenches fists, bangs on the desk, and increases voice tones. Vaguely expressed emotions can be more difficult to discern. What does a client mean, for example, when he says "I'm really freaked." Is he angry, surprised, shocked, disgusted, frightened, or happy? Although identifying this emotion is not easy, wrong guesses run few risks because errors do not affect substantive results.

Feeling reflections can be even more difficult when emotions are expressed clearly and when none are communicated in situations where some would be expected. For example, it can be
difficult to reflect with a paraphrase if a client says, "I am so angry when he acts this way." The emotion has been expressed clearly. Reflecting by parroting, or using the exact words, usually produces a negative reaction. At best it only produces a confirmation as clients either think or say "Yes, that's what I said." using a synonym, like furious or livid, also does little to build rapport and motivate further communication.

Several options are more effective when feelings have been expressed clearly. Passive listening involving pausing and not saying anything is one approach. The silence, accompanied by supportive and encouraging non-verbal conduct, may produce the same reactions that are generated by effective reflections of implied or vaguely expressed feelings. Passively listening to clients who express anger clearly, for example, might encourage them to discuss the reasons for their anger and generate additional information.

A neutral statement that both comments on a process point and reflects using the same words is another effective response. Clients, for example, can be rewarded for expressing themselves clearly. Examples of this include: "You express your anger clearly;" "you are in touch with that anger;" "understanding that you are angry is important because it helps me to get the full picture."

Another option is a statement that mirrors the client's tone. Saying with intensity "yes, you are angry," for example, can minimize the damage done by the paraphrase. This emphasizes that the lawyer has heard the intensity of the emotion that has been clearly expressed.

Lawyers may also express understanding of the feeling if the situation is something either very common or clearly within the client's perception of their experience. No understanding should be expressed if neither is true to avoid patronizing the client. Saying "I can understand how angry you'd feel after seeing your husband drunk again," is probably acceptable because intoxication is an unfortunately common experience. A short statement that explains credibly how the lawyer can understand may also be effective. For example, saying "I've had family experiences with alcoholism and I can relate to how angry that makes you," for example, can make an expression of understanding more credible. These bridging statements should not, however, divert focus from the client's situation to the lawyer's experience.

Occasionally matrimonial clients describe situations which would be extremely emotional for most people without expressing or implying any feeling. What should lawyers do then? Speculating about an expressed emotion might be received as intrusive prying." On the other hand, it might be either facilitative or corrected the speculation was inaccurate. Judging which way to go depends on an almost intuitive sense of how clients will respond. This is another occasion when a feeling reflection should include a short introductory phrase, such as "I imagine you felt angry and frustrated," or "the situation could have made you quite concerned about your health."
There is no easy answer to the question of how much feeling reflection should be done in matrimonial interviews. Much more that most lawyers do now is probably a safe prescription. After every client response is too often. It's always a judgment call in between. Factors in making these judgments include an evaluation of how much rapport has been developed, how openly and freely the client is narrating, and the intensity of the expression.

It may also be useful to distinguish between descriptions of past feelings and emotions that clients are presently experiencing. Matrimonial interviews present ample numbers of each. Strongly implied present feelings should usually be reflected early in the interviews because little rapport has developed and the intensity suggests strong potential for empathetic facilitation of further communication. A clenched fist, desk banging implication of anger is an example of an opportunity to listen actively that should not be ignored. Although brief reflections of past feelings when they are expressed or implied can be empathetic, exploring them in depth may sidetrack interviews. A weak implication of a past feeling later in an interview thus might not warrant a reflection. A statement of how angry it made a client when her husband ignored her birthday seven years ago made late in the interview, for example, should probably be left unreflected.

Every feeling reflection should be purposeful. Lawyers are not going to resolve emotional conflicts therapeutically so they should not focus on feelings unnecessarily. Feeling reflections should not be used for voyeuristic reasons, to satisfy curiosity, or to control clients.

Developing and using active listening skills neither manipulates clients to express their feelings nor invades their privacy. It is simply a way to gain information and build rapport. It is a way to respond to the fact that lawyers can listen faster than clients can speak. It gives lawyers something to think about and concentrate on while their clients are talking. It also gives them a safe harbor during the emotional storms that matrimonial clients frequently experience during interviews. Lawyers often feel that they must say something when these storms come and feeling reflections are usually the most appropriate and effective responses they can make. They usually help both lawyers and clients weather the storm and emerge more fit for a better voyage together.

B. MOTIVATING STATEMENTS

Although active listening is the best general tool for encouraging matrimonial clients to talk during interviews, statements designed to motivate communication can also be effective. They can often be combined with active listening responses but they do not involve reflections of the client's message using different words. Instead, they focus on other aspects of the communication process. The three primary types of motivating statements are: positive feedback about the communication process; expectative motivators; and remarks that recognize and combat communication inhibitors.
1. Positive Feedback about the Communication Process

The technique is simple but important and often overlooked. It involves giving clients occasional, sincere praise for behavior that is cooperative and helpful. Here are some common examples:

"You are doing an excellent job giving me details; I understand much better now."
"This is very helpful narration; I'll be able to focus my questions much more effectively later."
"Your sharing of this information even though it brought back unpleasant memories, has been valuable to my understanding of your situation."

A client-centered interviewing approach stresses active client participation in the information gathering and rapport building processes. Giving clients positive feedback about the valuable contributions they make during interviews motivates them to be more cooperative and communicative. This feedback responds to human needs for recognition and the esteem of others.

Statements providing positive feedback should identify and reinforce specific behaviors. Focusing positive evaluation on communication behavior rather than on either the content or the emotional aspects of client messages is important. Positive feedback about communication behaviors motivates by providing recognition and desire to repeat the rewarded conduct.

2 Expectative Motivators

This technique simply involves sharing expectations with clients. Making statements about expectations motivates communication in two ways. First, it alleviates client anxiety and discomfort creating greater freedom and willingness to communicate. Second, communicating expectations that information will be forthcoming often overcomes a reluctance to talk because the client's need to meet his lawyer's expectation may be stronger than his need to block disclosure.

Many matrimonial clients lack realistic expectations about the process, the law and lawyers. These inaccurate expectations can generate threatening perceptions and be a significant source of stress. Sharing how the system actually works can help many clients communicate better during interviews. Clients who present routine cases from the system's perspective, for example, may unrealistically fear that massive publicity will accompany their divorces. They don't know that the final hearing will take three minutes or less, be held in the virtual privacy of a judge's chambers, and be totally unpublicized. A general explanation of these kinds of systematic features may alleviate many of these concerns and it is probably an appropriate thing to do later in the interviews even if no block has been discerned. Specific expectative statements are usually effective any time client confusion or concern about a role or legal issue is sensed.
Many matrimonial clients have unrealistic expectations about interviews that can be alleviated by expectative statements. Some, for example, will be concerned about the role they should adopt during the interview. They may find a participatory approach discomforting if they expect their lawyer to ask the questions and see their responsibility only as answering them. A statement explaining an expectation that they should be an active participant throughout, beginning with a narration explaining both what their situation is and wishes are, may help alleviate that discomfort.

All clients want to know how much the divorce and their lawyer are going to cost and concerns about these questions can produce anxiety and harm communication throughout an interview. Stating early what fee, if any, is charged for the initial consultation—together with an explanation that later fees and costs will be explained thoroughly usually allays these concerns. Some clients are concerned about how long the interview will last. An expectative statement on this topic is usually effective. This and the initial consultation fee can also be communicated at the time the appointment is made. Questions produced by any of these general expectative statements provide additional opportunities to minimize client worries.

Expectative motivators can also be focused effectively on specific pieces of information. Telling clients that information on a particular topic is expected can powerfully motivate them to meet that expectation. This technique works because of the human tendency to conform to another's explicit expectation. This desire to conform may also be stronger than other client needs being met by not sharing information. Research shows that this dynamic is even more pronounced when the suggestion comes from one perceived, as lawyers often are, as having higher status.

An empathetic identification of the difficulty of remembering the information can often be combined with an expectative statement on specific information. Lawyers need to be explicit about their expectation that information will be forthcoming because simply empathizing with the difficulty in remembering sends a message that no information is expected. Assume a client indicates that she cannot remember what happened immediately after her husband caught her with a lover. An effective empathetic, expectational motivator would be:

"I understand how hard it can be to recall unpleasant details that happened some time ago. I have the same difficulty myself. I often find that if I concentrate for a few minutes, things start to come back. Why don't you think about it for a bit? The information could be very significant to our decision-making down the road."

C. RECOGNIZING AND COMBATTING COMMUNICATION INHIBITORS

Matrimonial clients do not block information simply to make their lawyer's lives miserable even though it sometimes seems that they do. Subjectively valid reasons for the non-disclosure
usually exist. Lawyers need to know the psychological factors that inhibit communication to make effective judgments about when and how to use motivating statements regarding these blocks. Although the underlying psychological sources of these inhibitors do not need to be diagnosed, lawyers should know the common blocks and how to counter them. Professors Binder and Price describe the following six common inhibitors which impede complete communication in legal interviews. All of them are often present in matrimonial interviews.

1. Ego Threat

Most matrimonial clients do not share information which they perceive as threatening to their self-esteem easily. People want to be evaluated favorably; that's why positive feedback is an effective motivator. They also typically fear and seek to avoid negative evaluations. Negative feelings about past or anticipated conduct make it difficult to disclose that information. This concern about self-esteem may also carry over to worry about these negative acts becoming public through the litigation process.

In matrimonial cases these inhibitors range from feelings of embarrassment and failure that the marriage did not work to shame and guilt about either past acts or future plans. Motivations for wanting the divorce may be ego threatening. Aspects of relationships to children may threaten clients' self-esteem. Remaining fault issues such as the relationship of marital misconduct to alimony also require inquiry about potentially ego-threatening topics.

2. Case Threat

This block is the reluctance to share information which clients perceive to be harmful to their case. Substantial misinformation about matrimonial law and procedure exists on cocktail and other circuits. It often produces strange ideas about what and what will not affect a position in a divorce adversely. This inhibitor is similar to ego threat but the two are not always present simultaneously. A client, for example, may have no ego qualms about sharing information about his extra-marital sexual activity. He may even derive ego satisfaction from talking about it. That same client, however, may be reluctant to mention it because he perceives that it could be harmful to his case.

3. Etiquette

This inhibitor includes all of the reasons that information is not disclosed because of role, cultural, or status notions. Candidly disclosing this kind of information would violate client notions of propriety. A man, for example, may think it is inappropriate to talk about relevant but intimate sexual matters with a female lawyer he has just met. There are things that black clients more easily tell black attorneys.

4. Trauma
This block occurs when a person has such unpleasant associations with a topic that recalling and retelling it are extremely painful. Most people are strongly motivated to avoid thinking and talking about unpleasant past events. A spouse who had been savagely beaten in the past, for example, might be very reluctant to discuss it. Recalling and retelling the unpleasant situation can also generate a re-experience of these feelings. Gathering information in matrimonial interviews often requires exploring areas where this inhibitor may be present.

5. Greater Need

This block occurs when a client has a need to talk about a topic different than the one which the lawyer wants to discuss. The inhibition does not come from a perception that the questions are either threatening or irrelevant but rather from a greater need to talk about something else. Clients who insist on sharing angry feelings about their spouses and resist sensitive efforts to move on after a reasonable time offer one common temple of this inhibitor.

6. Perceived Irrelevancy

This block stems from client perceptions that there is no reason to communicate on the point since it has nothing to do with what he or she perceives to be relevant. This block also does not involve client feelings of either threat or discomfort. It is often resolved by a motivational statement indicating why, in general terms, the topic is important. A matrimonial client discussing a custody question, for example, may not be motivated to respond to questions about his spouse's friends until he is told that they may be important sources of information to refute parental fitness claims.

Combatting these communication inhibitors requires recognizing them initially. Then an empathetic statement showing understanding of the difficulty combined with an appropriate motivating expression often dissolves the block. The diagnosis of the block may need to be either general or specific because many topics involve more than one inhibitor. A client who is manifesting verbal and non-verbal reluctance to discuss how she cared for her four year old son immediately after leaving her husband and moving in with another man, for example, could be inhibited by ego threat, case threat, trauma, or perceived irrelevancy. Attempting to identify the specific blocks that are present could both confuse the client and waste time. A general empathetic statement is probably more appropriate. This, for example, might work.

"I sense that this topic is difficult for you to discuss. The information could be very important so I need to ask these questions. Your cooperation will help me analyze the case and give you better information about your options and their consequences."

If it is pretty clear what the block is, a more specific diagnosis and motivating statement will probably be more effective. Assume a client has been divorced for several years and is now living
with another man. Her ex-husband has filed a motion to modify the final judgment seeking to acquire custody of their children. The client has not fully answered questions about how the potential step-father gets along with her children and the block is probably either ego or case threat or both. This might be an effective motivator in this situation:

“This seems to be a difficult area. It is an important topic that I must explore fully before I can help you develop options and information about them. I will not think less of you if there have been some problems here. It is not my role to judge you or your behavior. I want to help you make the best decisions possible and, to do that, I need you help in sharing all relevant information. That includes even things that you fear might either harm our case may embarrass you.”

Facilitating communication from a client blocked by trauma is also best done by a specific diagnosis and motivating statement. Motivating clients blocked by trauma also often requires extensive feeling reflections and may produce the same type of cathartic discharge that can occur when other emotions are mirrored by active listening. This, for example, might work with the client who was savagely beaten and who doesn't want to remember, much less talk, about it:

"This is a painful memory for you and talking about it may cause you to relive some of that agony. I regret that our legal system makes this information important to our case but it does. That's why we need this information. I assure you that I'm not asking these questions to cause pain. These details could be crucial to our case."

Motivating statements indicating that the topic is open for discussion and important can also be used to combat etiquette blocks. This, for example, might be an effective way to begin asking questions about a client's past sexual conduct to ascertain whether an adultery defense will be an obstacle to an alimony claim:

"You may think it is inappropriate to discuss extra-marital sexual conduct by both you and your spouse in this interview These issues, however, have important legal significance and could bear directly on some decisions you will have to make about the case in the near future. I have to ask you some questions on these topics to help you make fully informed decisions. I don't ask you these questions to pry into your life or to embarrass you. I hope you will understand and give me complete answers."

Motivating statements can also help clients blocked by a greater need to talk about something else. SENSITIVELY phrased comments can help clients who insist on staying on intensely emotional levels see the need to discuss other topics. Greater need blocks that are not based on emotions can also be removed by statements of the lawyer's need. This, for example, could be effective:
"I'm concerned that we have only twenty minutes left today and I need to find out more information about other topics so that I can do the legal research necessary before our next appointment. I sense that you need to keep talking about this topic but I've got enough detail on it for now. I would prefer moving on."

Motivating statements should be phrased supportively, empathetically, and flexibly. They should not be presented as demands. Effective motivating statements often produce questions because they usually indicate that the information sought could be important to either the lawyer's full understanding of the situation or the legal standards that apply to it. Clients, after hearing this, occasionally ask why the information is important.

Lawyers should respond to these questions to build rapport and keep the interview a shared, non-threatening experience. They should not be specific about the law if the facts are unknown, however, because of the possibility that clients will then tailor their remarks to produce the best result. A client who learns that marital misconduct might preclude alimony before answering questions exploring this topic, for example, might be motivated to give answers that avoid this result. The best response to such inquiries is a statement slightly more specific than the motivating expression but one that provides no detail that might distort. Here is an example:

L: I need to know whether you have been sexually involved with any men other than your husband since you were married. This information is important. It will help me determine what our options are so I ask the question not intending to embarrass you or to pry needlessly into your privacy.

C: Why is it important?

L: It bears upon some of the options and their potential consequences that you may want to consider.

C: I thought we have no-fault divorce.

L: We do. This information has no effect on your ability to get the divorce. It affects some of the relief you said you wanted.

C: What relief?

L: I'd rather not get into an extensive discussion of how the law applies to your situation until I understand it better. We can certainly talk about this topic later if you wish. It is, however, possibly relevant Everything you tell me is completely confidential. Should we move to another topic and come back to this later?

C: No, I'm willing to talk about this if it is really important.
L: It is.

D. QUESTIONING

Although asking for information may seem to be the easiest way to get it, that is not the case in matrimonial interviews. Passive listening, reflections of content and feelings, and motivating statements often produce information and build rapport better than questions do. There are times during interviews with matrimonial clients, of course, when asking questions is totally appropriate. Using responses other than questions fifty percent of the time is a good rule of thumb in matrimonial interviews. Although this percentage should be even higher near the beginning of interviews if clients are comfortable narrating, a fifty percent rule should help most lawyers avoid taking control of interviews prematurely by excessive questioning.
1. Initial Client Interview

**Lawyer’s Goals: Some Ideas**

--- Obtain necessary facts and information (Get leads for further investigation)
--- Obtain client’s version of facts
--- Establish appropriate A/C relationship (Characteristics: respect and mutual trust)
--- Establish rapport (Open questions and active listening are important techniques)
--- Identify and clarify client’s goals (Caution: don’t leap to conclusions prematurely)
--- Get authorization; establish contractual relationship

* Written retainer agreement; supervisor’s express approval required
* Release of Documents
* Conflict check
* Explain student status, sign certified student form

-Determine if lawyer can/should accept the case
---Professional expertise and experience
---Time
---Personal and professional values
---Motivate client to participate fully

**Client’s Goals: Some Ideas**
Desire to tell her/his story to helping professional

Desire to control to some extent how the interview proceeds

(What topics are discussed; what details are discussed)

Reassurance

Emotional contact with professional (analogy: doctor, dentist, car mechanic)

Basis for deciding whether s/he wants to enter into an attorney/client relationship (N.B. You should always approach relationship as if the client has a choice b/ she/he does!)

Wants to accomplish some substantive result

* Wants violence to stop
* Wants to have c/s at adequate level to cover expenses
* Wants to know what options are

Gain understanding of the legal system (legal options; what she can expect)

Fees (potential fees, costs, expenses)

Closure (Wants to know what to expect next and when)

D. The Lawyer/Client Relationship

1. Opening/small talk
   --How to plan for small talk

   Things that put people at ease (greeting, small talk, furniture arrangement, appearance, genuineness, listening, empathy)

2. Was There Rapport?
   -Did lawyer promote a relationship of trust and confidence?
   -Was lawyer able to remain nonjudgmental?
   -Did lawyer seem to be on the client’s side?

   Was lawyer prepared to answer client’s questions and deal with client’s concerns?
3. **Did Lawyer Use Active Listening Responses?**

- Were they successful?
- What other types of listening did lawyer try (passive, silence, body language, etc.)
  - Why is listening so difficult?

4. **Nature of Questioning**

- Did lawyer use sufficiently open-ended questions to enable client to tell the story from her own point of view?
- Was the lawyer able to refrain from asking closed, probing questions until the story had sufficiently emerged?
  - Did lawyer use T-Funnel technique to clarify, gain specific information?

5. **Organization**

- Was the organization of the interview helpful?
- How could it have been improved?
- How was interviewed structured?

**Opening:** Open question such as: Please tell me about your problem, how it began, and what you’d like to do about it.

**Chronological Overview:**

- Open questions/ Active listening
- Minimum of probing for details
- Minimum interruption

**Preparatory Explanation:**

- Step by step - from beginning - in your own words
- event by event
- Basically, I want you to do the talking
Planning on one hour today

Theory Development:
- juggling info
- T-funnel
- topic by topic (spark other topics)
- systematically

Conclusion of Interview:
- What you will do and by when
- What client needs to do
- Tell client expectations – don’t expect her to read your mind
- establish attorney/client relationship
- signed retainer agreement

6. Did Lawyer Find Out The Necessary Facts:
- What other topics should have been covered?
- Any significant details omitted?

7. Conclusion of Interview
- Did client leave the interview knowing what the lawyer was going to do next, and when they would meet again?
- Did the lawyer give the client any info re the law, legal rights, instructions on how to behave, or the legal system?
- Should more (or less) have been said?
- Was information accurate?

8. Dealing with the Unexpected
- How did lawyer deal with the unexpected?
- Ideas re how to get comfortable with chaos?
- Was lawyer open and encouraging and nonjudgmental?
- Idea: ask client’s permission to address topic X, then Y. Shows her she has been heard and understood.
- Watch tone of voice and body-language.
- What was lawyer communicating

9. What Information Should You Share With Clients? When?
   - personal experiences/-personal values
   - legal theories
   - legal advice
   - court process

Avoid Premature Diagnosis!

10. Safety Planning: what it is and how to do it

A. Other Critique Topics
   1. Techniques
      - eye contact
      - body language
      - tone of voice
      - speed of voice

   2. Form of Questions and Listening
      - open
      - closed
      - leading
- did questions elicit relevant info
- active listening
- silence

3. Substance
- other questions should have asked
- set up next contact
- explain process
- explanation of role and supervisor’s role (asked them to skip this time)
- accuracy of info provided re law and process

4. Team Coordination

5. Ice-Breaking/Small Talk

SPECIAL CONSIDERATIONS WHEN COUNSELING DOMESTIC VIOLENCE CLIENTS?

Domestic Violence
- Non-legal as well as legal consequences are critical, i.e., safety, client’s feelings
- Possibility of PTSD – can impair client’s ability to make decisions
- Safety planning continues at counseling stage

Impact of race/economic class/ gender on ability to effectively counsel client?
- May affect ability to empathize or see from their perspective
- May affect ability to generate alternatives or see all consequences

What to do?
- Be extra careful to ensure partnership model where you leave space for client to generate alternatives, examine consequences
• Identify your own personal position, what you would do --- make sure this is not what is guiding your advice

Some advice given by Dr. Mary Ann Dutton, clinical psychologist at George Washington University

1. Willingness to Hear Details of Violence
2. You might feel like an intruder or may not want to hear all the gory details, make sure your hesitation does not inhibit gathering of relevant information.
3. Avoid Being A Voyeur, Eliciting Details Just To Hear Details
4. Support, Validation Role
5. Don’t get so focused on professional role and forget to be human (e.g., client who confides to you that she is HIV positive)
6. Understand dynamics of control, be aware of power dynamics between you and client
7. (giving decision-making power to clients rather than making decisions for clients)
8. 5. Be aware of compassion fatigue, secondary traumatic stress which can affect those assisting clients who have been battered
7.1 Introduction

As a barrister you hold yourself out as a specialist in various fields of practice and offer your professional expertise and experience in a way that should benefit the client. Commonly the client comes to the lawyer because he or she has been unable to resolve a problem alone. It is likely that this problem is a complex one and almost certainly of great importance to the lay client.

From the outset it is important to recognise that the term 'advising the client' has many connotations. The type of advice you give varies to meet the needs of the different stages of the client's case. You will continue to advise the client throughout your professional involvement, not just at the initial conference. Consider the many decisions that remain to be made by the client during the rest of the litigation process: the pre-trial negotiation, the trial, and in the post-trial period; sentencing and enforcement etc. At each stage you will have some contact with the client and naturally questions will have to be asked and the issues of the case thoroughly investigated. The additional information thrown up by this process will have to be assimilated with any existing knowledge of the case and its issues. Any preliminary conclusions will have to be adjusted to reflect this new, informed picture of the case. It is only at the end of these steps that you will be able to offer the client some concrete advice on the issues in the case. It is crucial that the client not only finds this advice satisfactory and of practical benefit at each stage but that he or she has a thorough understanding of its consequences. In order to meet these requirements you will have to appreciate the client's level of comprehension and be sympathetic to his or her level of education, age, background and so on as well as having an understanding of the legal and factual issues in the case.

The steps that go to make up the advice process are recorded in note form below. Whilst at first glance they may appear mechanical, after some practice the process will become more natural.

7.2 Advising: A Step by Step Guide

(a) Identify the objectives of the conference and isolate all the legal and factual issues of the case. Compare the two to isolate the relevant issues which require your advice in the conference. (See 5.6.)

(b) Gather all necessary information from the papers and ask the client questions as necessary to complete your knowledge of the case. (See 6.6.)

(c) Assimilate the new information with existing knowledge by filling the gaps and clarifying any ambiguities.

(d) Analyse the legal and factual issues in the case considering the new information and your revised view of the client's instructions.
(e) Consider the merits of the case, application and so on with the benefit of this additional legal and factual analysis.

(f) Adjust as necessary any preliminary view that you formulated before the conference.

(g) Formulate your opinion and advice so that it is both practical and appropriate to the needs of the client and the requirements of the case.

(h) Consider how best you may communicate your conclusions to the client by using appropriate language and sufficient explanation.

(i) Identify all the strengths and weaknesses of the case for the client.

(j) Articulate your opinion to the client in a way that he or she can understand. (k) Take the client's final decision and any further instructions.

7.3 Terminology

Before continuing to discuss the advice stage in greater detail it will be helpful to give some explanation of the terminology used in the study of advising clients on legal matters.

7.3.1 ADVICE

This term can be used in a general sense to include the whole process by which a barrister communicates information to clients and assists them during the conference. The information and help may take the form of one or more of the processes described elsewhere in this section. However, the term 'advice' may also be used more narrowly to include the barrister's particular instructions and detailed suggestions for action given to the client. Some commentators on the role of lawyers in conferences suggest that giving specific advice is not appropriate as it imposes the view of the lawyer on the client. However, on many occasions barristers in England and Wales do give overt advice to their clients. Indeed, some would argue that this is what they are engaged to do; in short it is what the client is paying them for.

7.3.2 OPINION

Used in the context of a conference an opinion is a discussion of the merits of the case by the barrister. For example, this might include the chances of success should the case go to trial or the likely outcomes and consequences of a negotiated settlement. In a broad sense this term is also applied to suggestions for future action made by the barrister to the client, but always following an evaluation of the strengths and weaknesses of the relevant features of the case.

7.3.3 COUNSELLING

This is a specific method of advising clients employed by some legal advisors and there is much debate amongst commentators about its various merits. It is designed to be used by the lawyer to advise the client of the full range of options, and the client invited to take the initiative. This involves the selection of a range of options that suit the client's identified needs and personal
characteristics or that accord with the emotional demands of the client. (See 7.16 for a full
discussion of this method.) This method of advising should not be confused with psychological
support. The sort of counselling that might be offered by a qualified counsellor is not an
appropriate method of advising in a legal conference.

7.3.4 EXPLANATION

This is a neutral method of assistance used to give the client definitions, descriptions and
explanations. The lawyer acts as a guide and interpreter of the legal process and it may include
explanations of legal terminology. Thus although statements of personal preference and
suggestions of best choice are not relevant, various and numerous explanations will usually
precede another form of advice-giving.

7.4 Standard of Advice

No matter in what style or method you advise your client, as a practising barrister you must reach
the standards set by the profession.

Generally, a barrister should ensure that advice which he gives is practical, appropriate to the
needs and circumstances of the particular client, and clearly and comprehensibly expressed.

for the Conduct of Professional Work.)

The standard is a high one, and rightly so, as you will be helping people to make some of the
most important decisions in their lives. There are three key objectives for the quality of your
advice that can be identified from this paragraph of the Code:

(a) your advice should be practical;
(b) your advice should be appropriate;
(c) your advice should be expressed in a way that your client can understand.

In this chapter we will discuss the advice process in detail and investigate the skills you need to
develop to meet the standard set by the profession.

When in pupillage and practice you should refresh your memory periodically of the duties you
owe your lay and professional clients and the court. Regular reference should be made to the Bar
Code of Conduct. The Code's paragraphs and appendices are not merely collections of
professional ethics, but also offer clear guidance on good practice. Sometimes the Code deals
with very specific circumstances, but it also indicates the spirit of the Bar's preferred approach to
client care and the execution of the barrister's professional duties. For these reasons the Code's
contents should form part of every barrister's general knowledge. (See Chapter 9 and the
Professional Conduct Manual.)

7.5 Reaching the Advice Stage: Assimilating New Information
The question stage of the conference will only conclude once you have gathered all the information necessary to enable you to advise your client. Before completing that section of the conference you ought to check with the client that you have addressed all the relevant issues in the case. Next it will be necessary to assimilate this extra information with your existing knowledge of the case and the preparation that you carried out beforehand. When considering your preliminary view of the case you must remember that it was based upon facts that might now have to be revised, changed or rejected altogether. Further this provisional opinion will be based to some extent upon guesswork and speculation. In other words you will have passed judgment before you were in full command of all the relevant facts. If necessary you should adjust this prejudged view so that it is suitable to the circumstances of the client as they now appear. Finally you must take into account your impressions of the client formed from listening to his or her concerns and expectations. This will enable you to formulate advice that is both appropriate to these circumstances and practical to the needs of the individual client.

This process is not time-consuming, laborious nor mechanical. Indeed, you cannot afford to be dilatory when a client eager to hear your advice is in front of you. With practice and the experience that it brings this process will become swifter and more natural.

Throughout the conference you must analyse the legal and non-legal options open to your client. At various times during the questioning stage take an opportunity to collect your thoughts. Consult your notes briefly and consider the client's instructions in light of your preparation.

A practical and thorough plan with a clear layout can be your touchstone in the conference. Such a plan will highlight gaps in your knowledge and contain the appropriate legal research and suggest your preliminary view of the case.

7.6 Preparing for Your Oral Advice in the Conference

To give your opinion of the case you will need to be fully prepared beforehand. This is because you will have little opportunity to consider the case in depth during the conference. The mental and social tasks that are part of the conference itself will occupy your mind most of your time. However, new information and perhaps a revised view of the case will materialise during your discussions with the client. Therefore you will have to rely upon your preparation whilst doing some thinking on your feet or seat. Only rarely will there be the chance to consult legal works or seek assistance from colleagues. The client's responses to your questions must be assimilated, analysed and compared with your preliminary view of the case. The client may introduce additional facts and instructions which will demand additional analysis and broaden the areas upon which the client will require advice. All this will have to be done whilst the client and solicitor are with you. The client expects and is entitled to professional advice that will help to resolve the problems he or she is facing. The lay and professional client may wish to participate and add to your comments, questions and opinion and you must listen to these interruptions and deal with them appropriately and tactfully. Always remember the needs of the client are
immediate and real; the person in front of you is the individual experiencing the difficulties firsthand.

### 7.7 How and When to Give the Client Advice

Special care is required when you communicate your advice to the client. A common question is, 'when is it appropriate to inform the client of your advice?'. In the majority of conferences some if not all of your advice can be communicated orally and immediately. However, on certain occasions there will be a reason to delay the advice, if the client needs time to consider the options further or because you need to carry out additional research. A choice arises whether to telephone through this delayed advice to the solicitor or to put it into a written form. In either event it is important to let the client know when to expect your advice. However, if you have fully researched the law and understood the brief and received full answers to your questions you should be able to offer the client your advice at the conference itself.

When you are about to communicate your opinion let the client know that you are doing exactly this and ensure you have his or her undivided attention. Check that the client understands that you are moving to the advice stage. This will not only ensure that the client is listening attentively to what you have to say but also maintain your control of the conference.

To avoid confusing the client by delivering ill-informed advice you must exercise control over the conference. A logical order must be maintained. Ensure that you have covered all the issues with the client and that all relevant questions have been answered. Further you ought continuously to monitor the progress of the conference; keep an eye on the time and how efficiently you are addressing the issues of the case and achieving the objectives of the conference. It is your responsibility to decide when it is appropriate to give your opinion of the case to the client; this can only follow a thorough assessment of the issues by you. However, it does not follow that your advice will be at the end of the conference. If it is communicated too late there will be insufficient time to address the consequences of the client's decision. Often there will be many issues to address and several areas to advise upon. On each instance you will need to gather information on various topics, analyse the facts against the law and formulate and present your opinion. Of course, if you have adequately planned in advance, these tasks will be dealt with more efficiently and fully.

### 7.7.1 HOW TO DO IT: GIVING ADVICE

(a) Any conclusion reached ought to be clear to yourself so that you appear confident and are able to justify your advice.

(b) Formulate the advice in language that is readily comprehensible to the client. Remember to be precise and practical, not vague or patronising.

(c) Explain how you have reached your conclusion and set out the strengths and weaknesses of its consequences for the client personally.
(d) Check that the client has correctly heard your advice and understood it.

(e) Finally, it is of the utmost importance that the client is aware that the final decision is his or hers. Remember, your opinion is merely offered; the client has the freedom to accept or reject it.

**7.8 Making Your Advice Clear to the Client**

A measure of the acceptable degree of conviction with which you can express your opinion to the client is given in an annex to the Code of Conduct. Although it deals specifically with a conference with a defendant in a criminal case, the spirit of the Code suggests that it may be applied generally to civil and criminal cases.

A barrister acting for a defendant should advise his lay client generally about his plea. In doing so he may, if necessary, express his advice in strong terms. He must, however, make it clear that the client has complete freedom of choice and that the responsibility for the plea is the client's.


As is clear from the Code, the client always has freedom to accept or reject the advice that is given. Thus you must make this freedom to choose explicit. This should be done in a way that encourages the client to accept the responsibility rather than in a tone that might suggest that your interest in the conference ends with the client's decision.

At is crucial stage of the conference, when the client is on tenterhooks to hear your opinion of the best course to take, you must proceed with the utmost caution and sensitivity. It is unacceptable, for example, to state your advice boldly in the following way:

What you've just told me suggests that a guilty plea would be appropriate and I must warn you that the maximum sentence for violent disorder is five years' imprisonment.

Imagine the devastating effect of such a bombshell on the client! Also in part at least this advice is misleading.

The suggestion to plead guilty may well be founded on a realistic analysis of the client's position and therefore be justifiable in the circumstances. However, there is a world of difference between robust advice presented with justification to the client and an insensitive instruction to take the course of action that you as the lawyer have decided upon. Further, the bold and intimidating advice on possible sentence is incomplete therefore erroneous. The maximum sentence is only ever used in those rare cases where the offence is at the top end of the bracket; that is, it contains many aggravating features and few if any mitigating ones. There is always something that can be in the defendant's favour and in the majority of cases a sentence well below the maximum can be expected. To overburden the client with the shadow of five years in custody is both inhuman and unprofessional.

**7.9 Warning the Client of the Consequences**
Clients may not always fully appreciate the consequences of any decision that they take, for example, the implications it might have on costs, the ensuing delay, inconvenience or litigation stress. Some side effects are of great importance to the individual client. Consider, for example, the effect of having a criminal record if the client is a wage earner looking for a new job; or the effect of receiving a bad credit rating if the client is setting up a business. Certain consequences will have a less tangible equally devastating effect. The social effect of being convicted for a violent sexual or the loss of face when an employer loses a case of discrimination are two exam It is therefore part of your duty to offer advice in the light of the consequences of decisions that the client has made. This advice on collateral issues may in non-legal considerations as well as the usual advice on the legal consequences of your client’s decision.

7.10 Giving the Client the Full Benefit of Your Services: Time Management

It will be rare for you to receive instructions to hold a conference that covers only one area for advice. If there are several areas to advise upon, time can be scarce during di conference. Clearly you are required to meet all the objectives of the conference to satisfaction of both your lay and professional clients. However, there are limits upon the powers of concentration of both you and your client. Therefore it is legitimate to recognise that some of the issues faced by the client are of greater importance than others.

It is possible to construct a hierarchy of issues that require your advice. Some issues will have priority over others. Some are easy to prioritise; for example, those identified for you in the brief by your solicitor. The relative urgency of other issues can also assist you to decide whether they can be left until later. Thus a sound knowledge of the rules of procedure and the various time limits imposed on litigation is essential. Non-legal considerations that do not have a direct influence on the case may form part of the secondary issues and so may be left until later. Those which are at the heart of the matter, however, cannot. These will be the issues that are priorities in the case, issues that must be addressed and resolved as a matter of urgency or which take precedence over other peripheral issues.

It is not possible to make a list of priorities in the abstract. Only the individual circumstances of the case and the client will be able to tell you which needs are of greater or lesser importance. It is your responsibility to find out from the client what are the central issues. It is always worth considering to which areas to give priority and which to deal with either later or at another meeting. No one is superhuman so you must make a realistic estimation of your powers of concentration and those of the client before and during the conference.

If you are really pushed for time it may be appropriate to prioritise the issues upon which you intend to give your advice based upon your brief fee. You are only paid for that for which you are instructed and it is legitimate, but not automatically appropriate, to emphasise the legal function of the barrister. In any event non-legal advice, as opposed to consideration of non-legal options, may be more suitably given by another professional. For example, if a client instructs you to represent him or her in a personal injury case you might suggest an application for state benefits.
and even give an estimation of the likely financial award. However, it would be negligent not to add that the client should seek professional advice from a benefits officer or a financial advisor working for a disability charity if appropriate.

7.11 Helping the Client to Understand Your Advice

The lay client cannot be expected to understand the legal process nor the legal context of their case to the degree of sophistication that you do. It is therefore common to spend a significant amount of time explaining in everyday language the effect of the law on the client's case. Legal terminology and the court procedures that surround the case will also need to be explained. Further, some extra time may have to be spent explaining to the client why court litigation takes a certain route and warning him or her how to avoid delays. There are two objectives when you communicate your advice. You will obviously want the client to make a decision fully informed of all the consequences of that decision. And you will wish to pass on your advice to the client clearly and comprehensibly. In part you will realise these objectives if you ensure that the client appreciates the legal context of the decision. This might include the finality of the decision, its consequences for the future and the financial obligations that surround litigation. It is your responsibility to guide the client through the labyrinth of the law.

7.11.1 HOW TO CHECK COMPREHENSION

You must avoid prejudice and preconceptions when evaluating your client's apparent intelligence, but you should observe and appraise the client's level of comprehension. His or her formal education alone will not be an adequate indicator. Many clients will feel intimidated or overawed by the complexity of their case even though they have a wide experience of life apart from it. Therefore be patient with the client. This does not mean that you need to be condescending or unnecessarily simplistic in your explanations. For example, an illiterate defendant with a long record will not be able to read the charge sheet but he or she may know a lot about bail application procedures. Further, although the client may appear bewildered to be in a road traffic court, his or her thirty years' experience as a driver has probably given some insight into what is and what is not safe driving. It is easy to belittle clients inadvertently by forgetting that they are capable of contributing their knowledge or experience to assist themselves. Apart from making for poor manners this lapse of common sense can seriously disrupt the rapport established between you and the client. If you treat clients as slow, unintelligent beings, why should they take an active part in the conference? Further, how can you be surprised that they will not trust your judgment or integrity?

An observant stance and a carefully selected vocabulary are the keys to intelligent and considerate explanations. Gauge what you have to say to the client. Avoid clichés and pat phrases; they rarely have a long shelf life. Remember what is comprehensible to one client is not always understood by the next. So try to adapt your approach to suit the individual in front of you after you have learnt something about their personality and level of intelligence.
If asking a question to confirm understanding it is often wise to avoid leading or simple yes/no questions. Attempt to encourage the client to repeat back to you what you have explained or methodically investigate the client’s comprehension with a series of open and closed questions. Illustrate to the client why it is in his or her interest to understand what you are explaining. By showing the benefit of this additional knowledge you will facilitate greater powers of concentration and interest. If the client fails to see the benefit, ask yourself whether this information is wholly relevant. There is little point in overburdening the client with material of little relevance or import to his or her case.

7.11.2 EXPLAINING THE LAW

At different stages in the life of the case the relevance of the substantive law to the client’s case will be greater than at others. It can be expected that by the time the client comes to see the barrister in chambers he or she has some idea of the legal principles of the case. This is usually formed with the help of the solicitor. However, there can be no guarantee that this will always be so. The initial meeting may have been a brief one; the solicitor might not have explained the law sufficiently clearly or the client might simply have forgotten what he or she has been told.

In some circumstances you will be the first lawyer to discuss the case with the client. For example, at a magistrates’ court first appearance hearing after a night in the cells the client may be totally ignorant of the legal basis of the charge. A similar position in a civil setting is an urgent without notice injunction for an ouster, for example. It is always wise to check with the client personally how much they understand with some open questions inviting a statement in simple terms of the case. This knowledge, no matter how rudimentary, can be built upon. If it is wide of the mark then some tactful re-tracking may be called for.

Always concentrate on the specific case and avoid taking a textbook approach to the law. The average lawyer spends three years studying his or her subject at university and the lay client cannot be expected to follow lengthy explanations of the law of evidence or intent. By using the client’s case as a starting point you will focus your mind and help him or her to grasp the essentials of the law as it relates to the case. As part of your preparation you should consider what law needs to be explained to the client and how you are going to do this. As well as being relevant and pithy your explanations should avoid legal terminology where possible and always be free of lawyers’ jargon and slang. (During your pupillage you will soon discover how barristers derive great delight from using their own dialect and shorthand when discussing a case with one another, but, hopefully, how this argot is dropped once they meet the client and address the court.)

7.11.3 EXPLAINING PROCEDURE

Clients are often unaware of the procedural context of their case. The lack of an appreciation of the need for the numerous stages of litigation is illustrated by the common complaint that the law is oblique and unnecessarily slow. This is hardly surprising as it is the solicitor who prepares the
papers in the case and during the initial stages of litigation the client is not always informed of developments that do not have immediate effect upon the conduct of the case. Also there are many stages in the early life of a case at which the client is not personally involved, interlocutory applications or solicitor-to-solicitor correspondence, for example. Lawyers on the other hand are only too aware of the mundane, run-of-the-mill stages through which both civil and criminal cases go. Therefore lawyers can easily overlook the fact that the client will not understand their purpose or indeed the necessity for each step in the litigation process. Your client has a right to a full explanation of what is taking place. There is an advantage for you too: the informed client will more readily take an active role in the case's progress. Thus apart from the tactical advantages of a thorough understanding of the litigation processes, this knowledge is essential so that you can assist your client with clear and accurate explanations of civil and criminal litigation.

When explaining procedure to the client think carefully about how much detail he or she needs at this stage. Your concern is not to protect an arcane system, but rather to keep the client's attention on the issues that are important to the conference. The test is one of relevance: does the client need to know? When the client is being asked to make a choice or take a decision, obviously it will be necessary to a greater or lesser degree to inform him or her of the procedural implications; for example:

(a) what delays might be met?
(b) how long does the client have before he or she must act?
(c) what are the cost or legal aid considerations?

Whilst not advocating the 'you needn't worry yourself about that, leave it to the lawyers' approach, you will need to consider how much time you can allocate to any explanation of procedure. Further, you must consider how easily the client will comprehend and how long he or she will be able to remember this information. Nonetheless the client who is fully informed will be less anxious about the future and will feel more in control of the destiny of the case. The benefit to you is that you will find that the client is more willing to collaborate with you. Most importantly, once people understand what is happening or likely to happen to their case they are better placed to take decisions for themselves and feel confident about the future. The fear of the unknown can be a great impediment to the successful conclusion of the conference.

7.11.4 EXPLAINING FINANCIAL COSTS OF THE CASE

The question of money and indeed figures generally will arise in most conferences and it is always wise to carry a pocket calculator and have an understanding of rudimentary arithmetic. What follows is merely an outline to assist you to think about the difficulties that you and the client can expect to face. (See the Case Preparation Manual, Chapter 18.)

7.11.4.1 Fees
The barrister never accepts money or other forms of payment from the client personally. The solicitor will deal with the financial affairs of the client and your clerk will negotiate any fee on your behalf. Great circumspection is therefore needed when discussing fees with a client. Nonetheless when advising the client on possible future action the financial costs must be discussed. No precise figures can be offered but a sensible range should be given where possible to give the client an accurate estimate of the financial cost of any legal help they seek. This projection will be based upon your experience as well as your knowledge. It may be some time before you feel confident enough to give this advice to the client without some assistance. If you feel unable to advise yourself it may be appropriate to refer the client to the solicitor. Indeed it is your professional client who has the final responsibility of collecting the fees from your lay client.

7.11.4.2 Costs

In civil cases some costs can be stated with a greater degree of certainty than others, but the vast majority will be liable to taxation. Remember that whilst most costs follow the event there are numerous exceptions particularly at interim hearings. In any post-hearing conference you will have to be prepared to explain the effect of the order as to costs. Following a finding of guilt or a plea of guilty the prosecution may request that the defendant pays some of their costs. Care should be taken to discover from the prosecution what costs they are seeking from the defendant if there is a conviction. Note that these are often in addition to any fine or compensation that the court might impose. Again a range can be given based upon experience and knowledge of similar cases. (See further the Civil Litigation Manual and the Criminal Litigation and Sentencing Manual.)

7.11.4.3 Legal aid

In both civil and criminal cases the Legal Aid Board may require a financial contribution from the client and in these circumstances the cost of litigation can be a real concern for the client. The solicitor should include a copy of the Legal Aid Certificate in the brief which contains information about the level of the contribution and the extent and terms of the certificate. Obviously the longer the case goes on the greater the total sum the client will have to pay. In civil cases there is the added danger that the successful client, whether a claimant or a defendant, may have to repay the total amount of legal aid received through a process of recoupment. (See further the Civil Litigation Manual, Chapter 32.) Indeed civil legal aid has been described as being more in the form of a loan than a grant. All of these implications will need to be explained to the client and he or she will also need to be reminded of them at the appropriate times.

7.11.4.4 Non-legal financial considerations

Clients will often be under financial strain besides the cost of litigation. This may because they are prevented from earning a wage following imprisonment or because the demands that the litigation is making on their time. At the early stages proceedings the client may not appreciate
the degree of impact that the case will, on his or her time or purse. You have a duty to keep the client aware of the co-litigation and this will include the non-legal costs. Some clients will lose their livelihoods as a result of their involvement with the criminal courts or by becoming embroiled in civil proceedings. You should not only alert the client to these possible consequences but also offer some practical advice. Suggestions of the non-legal options, or references to other professionals who will be able to offer assistance, ought to be made when appropriate. A working knowledge of the social benefits system is essential if practising family or criminal law where the means of the parties are often of interest to the court itself. (See Remedies Manual.) Once again, when dealing with figures, it is best to think in terms of ranges and to admit uncertainty if it is appropriate to do so. Remember that most social benefits are discretionary so there can be few guarantees.

7.12 Dealing With Conflicting Advice

Occasionally the advice that you believe is appropriate will differ from that already communicated to the client by the solicitor or a counsel who previously held the brief. Two or more lawyers looking at the same case may hold differing, sometimes conflicting opinions. This is not as uncommon as some lay people may expect. Indeed in an adversarial system there is rarely certainty when applying the law to a set of facts identifying the strength or weaknesses of a case. The particular difficulty for the barrister in a situation such as this is that there are two clients and three duties. There is a professional client and a lay client, with separate duties owed to each and a third duty to the court. For the newly qualified lawyer this three-way pull can be the source of great anxiety. This is particularly so when there is the nagging feeling that any upset caused to either of the clients or the court will be reported back to chambers. In this part of the chapter we will look at this dilemma and offer some suggestions to assist you to overcome it.

The Code has set out some clear guidance and rules to assist in such difficult circumstances. The relevant paragraphs are quoted below, but the gist of the rules is that your primary duty is to your lay client.

A practising barrister:

(a) must promote and protect fearlessly and by all proper and lawful means his lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including his professional client or fellow members of the legal profession); ...  

(Paragraph 203.)

A practising barrister must not:

(a) permit his absolute independence, integrity and freedom from external pressures to be compromised; ...

(Paragraph 205.)
A practising barrister is individually and personally responsible for his own conduct and for his professional work: he must exercise his own personal judgment in all his professional activities ...

(Paragraph 206.)

There is also the danger of confusing the client by offering an opinion different from that already indicated by the solicitor. This can be merely irksome to the client or place additional stress on him or her at an already stressful time. In most circumstances the client will only have received a preliminary view of the possibilities from the solicitor. The alert client will appreciate that you are a specialist to whom they have been referred for more certain advice. If the client shows a reluctance to accept your view rather than the solicitor's, you must take control and justify why your views differ. Often the easiest way to support your view is to highlight to the client the additional information that you have gathered at the conference and explain how this affects the legal analysis of their case.

7.12.1 DEALING WITH CONFLICTING ADVICE: HOW TO DO IT

If your view of the case leads you to give advice which, if followed, would alter the litigation to a great degree, you may wish to consider the following suggested approach:

(a) Avoid confusing clients or undermining their faith in their solicitor unless strictly appropriate.

(b) If possible speak with the other lawyer with whom you disagree to discuss his or her views. That lawyer may know something that you do not.

(c) If appropriate and practical recover the process by which you reached your advice to double-check your conclusions.

(d) Highlight to the client your advice and identify its strengths and weaknesses.

(e) Allow clients to make their decision, reminding them if necessary that the final decision remains theirs.

(f) Inform clients of the effect of any change or adjustment that will result, e.g., extra costs, effect on procedure.

(g) Inform the professional client of any changes - be prepared to explain and justify what has taken place.

(h) Ensure that the court is informed of any developments and material changes.

7.13 Expressing Risk to the Client

This section introduces various methods by which you might express the risk involved in litigation to the client and considers the strengths and weaknesses of these methods. It is important to communicate the degree of chance directly to the client who can then make a
decision in the full knowledge of the attendant risks of litigation. There are few certainties in law, trials, for example, are not so much investigations of the truth as testing conflicting testimonies to ascertain which is more believable. The verdict is guilty or not guilty rather than guilty or innocent. Likewise the levels of damages to be awarded for personal injury are not scientifically assessed but approximated. They are often only a symbolic sum to reflect what was suffered by the injured party. The client, however, will want to know what is going to happen: what the chances are of success at trial; how will the damages be assessed and at what level? Clearly, it is part of the lawyer's role to give estimations of these risks and chances.

7.13.1 PRELIMINARY CONSIDERATIONS
You should always attempt to be practical and realistic: do not forget the specific problem faced by the client before you. Any expression of risk will have to be effectively communicated to the individual client; will he or she be able to comprehend what you are saying? There are several methods and styles of expressing risk, which one you choose will depend upon your preference and its suitability for the issue in question. It may, of course, be necessary to experiment, particularly in the early stages of practice. Much can be learnt by observing other members of the profession and lessons can help to develop your repertoire.

7.13.2 INTRODUCING RISK ANALYSIS TO THE CLIENT: A SUGGESTED APPROACH
(a) Check that the client is fully satisfied that he or she has sufficient information about the strengths and weaknesses of the case.
(b) Allow the client to raise any additional concerns if appropriate.
(c) Ask the client to consider how the risk of failure/success is affected by the strengths and weaknesses.
(d) Invite the client to estimate whether the relevant risk is high, nothing.
(e) Ask the client to state explicitly whether he or she is willing to accept that level of risk of failure/success.

7.13.3 USE OF LANGUAGE
The most common way of expressing a risk is to use everyday expressions: 'x is less risky than y'. Alternatively, phrases such as 'there's a good chance that .. ...', or 'such and such is unlikely to succeed' also give a measure of the risks involved. When adopting such expressions the speaker is attempting to pass on his or her judgment as swiftly as possible. Difficulties soon arise, however, once the recipient of this information requests explanation or justification of the estimate, or a clearer statement of what the precise risk is. Sometimes the answer may be that the lawyer runs through the strengths and weaknesses of the case again. For example, the number and quality of witnesses for the prosecution may be used to justify the estimation of the risk of conviction as
'great'. But if the client wants a clearer statement of what is meant by great' problems can arise. This is because the client wishes to know what the risk is not the lawyer's reasons for thinking that there is a risk of conviction in the first place. On occasion the lawyer may be able to side step the issue by using the following: 'by "great" I mean it's more likely than not that you will be convicted'. Although to a la graduate this answer is transparently insufficient and inappropriate, to the lay client it may appear to be an acceptable one. In the worst circumstances it may even be taken as an indication that he or she ought not to question the barrister's advice. Thus there are some shortcomings with this method. However, it also has some advantages. By using everyday language and employing common phrases the level of communication from the lawyer to the client is often high. At a superficial level at least the client will understand what is being said. Further, this style can be utilised several times in the same conference when dealing with the various issues or options, thus maintaining some consistency, e.g., by using a series of comparatives: better than, worse than, etc.

Naturally it is important for the lawyer to keep a tally of which item he or she lists as better than the next and so on. Some review of this list may be necessary as and when changes affect the order of the items on it. In this way the running order can be adjusted in a useful way during the life of the case, for example, if fresh evidence is revealed or a witness does not come up to proof. If this happens the lawyer can then say to the client: 'The chances of success have been reduced from a reasonably good chance to a poor chance of the judge finding in favour of our case'. A second advantage is that the lawyer will be protected against criticism from the client. Some clients will not have a disinterested memory and may complain that the court has imposed costs on them for an unsuccessful trial when the lawyer said that there was an excellent chance of success. The client's faulty memory can be checked against your record.

A final warning must be given. As was suggested, explanations of what is meant by good or bad and so on are not easy to give. One reason is that everyone has their own innate understanding of these words but few have the ability to articulate precisely their personalised meaning to others when applied to a particular situation. The inevitable vagueness that follows often leads to misunderstanding.

7.13.4 METAPHORS AND SIMILES

One can take everyday experiences and adapt them to the particular dilemma faced by the client. The client can, for example, be invited to compare the risks with a financial investment which might provide a series of bonuses. There is a likelihood that the investment may go down as well as up. If the chances of success are particularly low you might compare them with a lottery. These sorts of comparisons can be useful particularly if talking to a client with little or no experience of the law but able to think in an independent fashion. It goes without saying that a simile or comparison must be within the client's personal experience. You cannot expect everyone to have a working knowledge of gambling terms or of the stock market. Whilst this method of communicating risk is entertaining and readily comprehensible, it merely
communicates the degree of risk superficially. There is only the hope that the client will be able to pick up intuitively that which is not being communicated explicitly. Thus an appeal to the client's real or imagined experiences is made in the hope that there will be a process of convergence. In short the lawyer hopes that the client will come to share his or her belief of the estimate of the risk without lengthy reasoning.

7.13.5 NUMBERS, RATIOS, RANGES, FRACTIONS, PERCENTAGES, STATISTICS

Figures carry their own mystique and should be used with caution. Some people will understand that the expressions 'the chances of success are 50:50' and 'the likelihood of us winning is 25%', do not mean that in the first case the chance of success is precisely half or in the second precisely one quarter. However, some people if asked what these two phrases are saying about the risks involved may fall into this trap. Therefore it is necessary to guard against the temptation to believe that what sounds like an accurate statement of the risk is what it appears to be. You therefore have a responsibility to explain to the client clearly and without condescension that you are using the numbers, figures and ratios adverbially; this is to say, not as scientific measurements of the risk but as helpful expressions of your estimation of it.

7.13.6 POUNDS AND PENCE

If discussing monetary figures there are again several ways of expressing them. The most common way of expressing the outcome will be in pounds and pence. The obvious danger here is that the courts do not award monies in a precise fashion. Note should be made of the difference in civil law between liquidated and unliquidated damages (see the Civil Litigation Manual) and in criminal law between fixed and non-fixed fines (see the Criminal Litigation and Sentencing Manual). Most lawyers favour stating a range within which the final figure can be expected to fall. For example, 'In these sorts of whiplash cases the courts usually award damages from £2,000 to £4,000. With the facts as they are in your case I'd expect the final award to be in the £3,000 to £3,500 range'. A similar approach can be taken to fines and so on. Note should be made of the two ranges given. The first sets the general limits found in cases of the same nature, the second the specific limits that apply to the particular case. In this way the client is informed of the whole picture - it can be of particular use when it comes to advising on appeal. If the court in the whiplash case above only awarded £2,750 the lawyer may wish to point out that whilst it is low, and in his professional opinion appealable, it is not advisable to endure the extra costs and stresses of appeal for only a further £750 at most.

7.14 Non-Verbal Expressions of Your Opinion

The lawyer will be closely scrutinised by the client, especially when passing on vital information such as the length of sentence or the chances of successfully defending a civil case. The client will react to the way you give the information which (for him or her at least) is of vital importance. The client will be sensitive to your posture, eye contact and other indicators of confidence as well as the pitch of your voice. The client may be able to understand much of your
opinion of his or her case and its merits observing you as well as listening to you. You ought to be aware of these facts throughout the advising stage and remember how it might affect the client's appreciation of the issues and merits of the case.

At different times some deference to the client's emotions ought to be given. Before dismissing an appeal against a custodial sentence some moments' reflection will you that no matter how slim the chance is, the client may be willing to take it. This may be the case even if there are some attendant risks. Even so, there is the danger being insufficiently forthright if the risk is particularly slim. Clients will often detect your hesitancy but it is up to you to give the client the benefit of your express an honest opinion. There may be occasions when you think that the client's chances are rightly low or that he or she richly deserves the sentence that he or she has received. You must not sit in judgment and must keep your opinion on this point to yourself. On these occasions it is particularly important to guard against inappropriate non-verbal communication: practice itself is the best tutor. This is not merely a question of politeness nor a counsel for empathy. It is a central consideration when deciding how best to communicate your professional advice clearly and accurately to the client.

7.15 Assisting the Client to Estimate Risk

In some circumstances it is not the barrister who has the necessary knowledge to assess the risk but the client. We have seen in Chapter 6 various methods to collect such information and the present chapter has stressed the importance of allowing the client to make the final decision. Just how far the barrister can assist (or interfere) in this process is a matter of degree and context. Clearly on occasions clients may require a little more time or some extra information or simply some reassurance that it is their role to make the decision.

As we have already seen, language has its limitations and non-verbal communication can have its own shortcomings. How can you ensure that the client absorbs the information and goes through the process of reflection and assesses the risks involved for himself or herself? There is no easy answer to this problem. However, if you have ensured that you and the client have acted collaboratively and co-operated during the advising process, there ought to be a convergence of estimates. In the best situations there may be perhaps even a shared, mutually understood language in which the different risks can be described and compared freely and clearly.

7.16 Legal Counselling

7.16.1 INTRODUCTION

In this section we will look at an approach to client advice that takes a different perspective on the client and his or her problems. This approach is known as legal counselling. This form of advice addresses the client's problems broadly and does not particularly isolate the legal options in order to resolve them. As we have already seen, no matter what approach you take to the client's case you should consider the non-legal options as well as the purely legal ones. However, legal counselling gives special prominence to the specifically non-legal options. The philosophy behind
this approach is that the law is the refuge of last resort and anything that can help to avoid or cut short the client's involvement with the legal process is preferable to utilisation of purely legal options. However, this is not to say that the law or legal procedures must or can be avoided. Often the client has no option but to accept that they must continue to take part in the legal process if they are a defendant in a criminal case, for example. Nor does this process of client advice seek to avoid exploiting the procedures that are favourable to his or her cause, for example, using an interlocutory injunction to settle a neighbours’ dispute. Nonetheless, the emphasis is on the future beyond the court-room and the lawyer seeks to help the client to resolve the underlying problems he or she is faced with.

Clearly, legal counselling takes you to the limits of your role as a lawyer and stretches your abilities and resources. It can be a demanding but greatly satisfying process for you and the client. But there are dangers, too. It is important to realise the difference between your professional duties and functions and those of other professionals, for example, social workers, marriage guidance counsellors or financial advisors. You are first and foremost a lawyer and the client instructs you because you can fulfil that specialist function. Given the demands and risks involved you may not feel sufficiently confident to use this form of advising the client in the initial stages of practice. However, it is important that you understand how it functions so that you are prepared to observe it being carried out by senior barristers. Finally, with the ever-rising cost of litigation and the increasing importance of alternative dispute resolution, mediation and conciliation you are likely to have to address this type of conference with your clients regularly in the not too distant future.

7.16.2 THE LEGAL COUNSELLING PROCESS

As with any form of advice, before attempting to engage the client in legal counselling you must gather all the necessary information. It is of particular importance when adopting this method of advising to gather sufficient information from the client to reveal all the relevant legal and non-legal options that are available. As in the advising method you will need to assimilate these new instructions with your existing knowledge of the case. You may need to adjust your preliminary views and opinions of the case if you go ahead with legal counselling.

The next stage is to order the options into logical sets. It may be appropriate to mix legal and non-legal options or to separate contentious from non-contentious options; each case will have to be investigated separately. Then you should analyse and attempt to prioritise the options within each category, or altogether, as is sensible and practical. Finally, before you present these to the client, ensure that the options are appropriate and specifically suited to his or her circumstances.

A brief example should help to clarify that the process is more fluid than it might appear at first sight. Imagine that you are instructed by a client to make a bail application. The client tells you that he wants bail but knows that he is wanted for charges on other offences at another magistrates' court. You gather as much information as is relevant on the current charges and background personal details of the client as far as they are relevant to the application for bail.
However, you also go further and invite the client to state why bail is so important to him today. During this process you learn that the client is 27 years old and is planning to marry. However, he also adds that his girlfriend has told him 'to clean up his act' otherwise the engagement will be broken. From your conference and instructions you identify the following factors:

(a) the client values his freedom;

(b) he dislikes custody but is realistic about the danger of being picked up on the warrants for his arrest;

(c) he has a real incentive to put his involvement with the wrong side of the law behind him.

Given the legal and factual circumstances of the case the options of possible action to take today are limited:

(a) You could advise that the client does not make an application for bail as the chances of it being granted are slim.

(b) You could go ahead and make a bail application in the hope that it will be granted and that the client will subsequently leave court before the police inform the prosecutor that there are outstanding warrants for his arrest.

(c) Alternatively you could counsel the client of the advantages of getting bail today and subsequently surrendering to custody on the outstanding warrants. Once he does that, he could request that all the charges are dealt with together and swiftly. This would enable him to begin to put his past behind him and face the future with his fiancée without the risk of his previous criminal career endangering their marriage.

Options (a) and (b) are both viable, but they ignore the client's background and his non-legal aspirations which option (c) puts at the centre of the advice. Only by asking the right sort of questions in the appropriate circumstances can you expect to discover sufficient insight into the client to be able to counsel him or her on the full range of options available.

There are several approaches to counselling that can be utilised but most follow a similar pattern. It is advisable to follow a suggested pattern if you are unfamiliar with this form of advising, this is because there is often a well-intentioned but misplaced temptation to usurp the client's role of decision maker at the same time as fulfilling one's own as counsellor or adviser. As with any form of advice this process follows an investigation of the client as a source of further information and instructions. The lawyer establishes and maintains control of the process by setting before the client the list of options that are suitable to the client's requirements. The client is then invited to add any options not included. This list will be broad and general; the object at this stage is to consider as many options as possible. A short discussion of the options may be appropriate here. However, the lawyer does not pass comment on their suitability, rather the client is encouraged by the lawyer to lead the discussion of the suitability of the full range of options. The lawyer assists the client to express his or her preferences and to investigate the suitability of the various
options. In particular the various strengths and weaknesses of each option are identified and evaluated. An arrangement of options in order of suitability often follows from these investigations.

7.16.3 KEY AIMS OF COUNSELLING

- To communicate the full range of options to the client in an order that is easy to follow.
- To allow the client sufficient time to consider the options as presented.
- To invite questions or comment from the client to establish clarity.
- To allow the client to make a choice without inappropriate assistance.
- To check that you have correctly understood the client's response.
- If no response is forthcoming, to investigate why and address the reasons for this.
- If more time is required you must give the client a realistic time estimate or deadline for the final decision.

7.16.4 CLIENT CENTRED COUNSELLING

The primary strength and defining feature of this process is the role of the client who is encouraged to be proactive, co-operative and collaborative. The client should be working as hard as, if not harder than, the lawyer during the counselling stage. Within the bounds of reason and the constraints of the time available a complete range of options ought to be discussed.

An appropriate style to adopt here is that of the experienced or advising friend. Compare this with the common advice-giving process where the most relevant role will often be that of the expert or specialist. Obviously with a little subtlety the same lawyer can exploit both roles in one conference. You might consider adopting one strategy for one issue and another for further issues. The key is to maintain control of the conference and to guide the client.

There are some disadvantages to the counselling process. It can be time consuming and the client is required to have a clear understanding of the whole case for the process to be a successful one. However, there are benefits. Because he or she is fully informed and has participated throughout the procedure, the client is more likely to be satisfied with the decision that is reached. There may be, for example, less uncertainty about the appropriateness and desirability of the next steps in the litigation. Additionally there may be occasions when the process can be covered in a short time, for example, when there are only limited options to consider.

Because the process does demand a lot from the client as well as the lawyer, the client must be informed about what is taking place at each stage. Simple questions such as ‘what do you think?’ are often inadequate and so careful preparation is required to get the most out of the client and out of the available time. In the final stage of the process the client makes a decision. The client is now on his or her own - the lawyer should only assist when specifically asked to do so or when
the client is in clear difficulty, for example, acting under a misapprehension. The client may need time to consider the options and make the final selection. As this can be of significant length the lawyer ought to manage the available time appropriately. Once a preference is expressed, the lawyer may invite or pose questions to the client or invite comment to establish absolute clarity of his or her understanding of the final decision. Further, it may be wise to recap briefly the strengths and weaknesses of the final choice. It is vital that the client makes the choice independently. It is the client who has to live with the consequences of that decision. In this process the lawyer must be vigilant against assuming the client’s role. This may even necessitate gently informing the client that you cannot take on the burden of telling the client what to do.

7.16.5 SUMMARY

The advantage of this method of advising is that the client enjoys the freedom to make an informed choice. This is a result of the presentation of the full range of options that are open to him or her. Naturally you will need to encourage the client to think and work independently when you investigate possible options. Thus you should use questions that are designed to help the client to select and order the options. A cooperative and collaborative approach at these early stages will assist the process and set the right atmosphere for its later stages. However, the time that is necessary to carry out this process effectively can militate against its use when both client and lawyer are under a lot of pressure.

7.16.6 USING LEGAL COUNSELLING

There is some debate amongst the commentators about the role of the lawyer in counselling, particularly at the decision stage. Lawyers in the USA are said to be less willing to state their preference to the client as it is seen to be important to allow the client to choose the options unaided. However, what happens in practice is hard to say. Among Commonwealth lawyers, for example, those from New Zealand are said to be more willing to share or at least assist in the process of sifting and selection. The English and Welsh Bar does not appear to have a commonly accepted view; little research has taken place in this jurisdiction in any case. There does not appear to be any professional or ethical objection to the British lawyer effectively mixing joint selection of options with some overt expression of opinions based upon professional experience. (You may wish to experiment with a pure counselling process and one with a mixed constitution.)

7.17 Some Specific Advising Situations

In the final section of this chapter we will look at some conferences that follow a court hearing. These can be particularly difficult to plan for. Most court hearings have an element of the unknown: indeed this is why they can be stressful experiences for the client and the source of no little anxiety for the advocate, too.

After a hearing both you and the client will want to discuss its outcome in detail and address the immediate effects of the result. Following your performance in court as an advocate there is often little time for you to do more than to come down and collect your thoughts. During your
preparation for the court appearance therefore you should always plan for this very important post-hearing conference. You will have little time to produce a plan for this conference as you leave the body of the court and meet the client in the corridor. It is essential, therefore, to have considered the main objectives of this conference in advance.

The following how-to-do-it guides are neither exhaustive nor prescriptive, but they do offer a general format for advising the client that can be applied in most circumstances. However, the post-hearing conference will make similar demands upon your skills as a barrister as that at which you gave your initial advice about the prospect of the case. Therefore remember to apply all the skills discussed above so as to enable you to advise the client satisfactorily. Finally, to ensure that you meet the high standards of the profession you must be flexible in your approach to both the unique characteristics of each case and the individual needs of every client. (See generally Chapter 8.)

7.17.1 CONFERENCE AFTER A SUCCESSFUL CIVIL HEARING

- Ensure that the losing party is out of earshot (it may be wise to allow him or her to leave the court building).
- Attend to any urgent post-hearing court business first, e.g., lodging the draft order.
- Explain the judgment or order to the client in plain English, remembering the effect of the costs order and confirm his or her understanding of its effect (note: legal aid recoupment if applicable).
- Consider the need for preliminary advice on entering or enforcing the judgment.
- Check with the solicitor or his representative that all necessary documentation is in order and tell the client that you will telephone the solicitor from chambers, if appropriate.

7.17.2 CONFERENCE FOLLOWING AN UNSUCCESSFUL CIVIL HEARING

- Ensure that the client understands that the hearing has ended unsuccessfully and explain why his or her case was defeated. Allow time for the client to absorb this.
- Explain in plain terms the effect of the judgment or order to the client and confirm that he or she understands this clearly. For example, spell out the danger of being arrested and placed in custody if the client breaches a non-molestation order with a power of arrest attached to it.
- Encourage the client to raise any questions about the effect of the judgment.
- Offer your preliminary advice on routes of appeal and the chances of success. Remember also to discuss the financial, emotional and other non-legal implications of an appeal.
- Offer the client the opportunity to reconsider alternative legal and non-legal options in the face of the defeat if there are any.
• Discuss and confirm the action that the client must take next, e.g., return of property, payment of money, observance of injunctions.

• Explain to the client the likely methods of enforcement of the judgment or order and any financial effects it will have.

• If appropriate explain to the client the sanctions that the court may apply if he or she disobeys its orders.

• Check with the solicitor or representative that all necessary documentation is in order; inform the client that you will telephone the solicitor from chambers, if appropriate.

7.17.3 CONFERENCE FOLLOWING A SUCCESSFUL CRIMINAL TRIAL

• Ensure that all adverse witnesses and the public are out of earshot, or have left the court building.

• Advise the client on the effect of the 'not guilty' verdict, discontinuance, dismissal, etc.

• Advise the client of any further procedural matters that are outstanding, e.g., sentencing of offences pleaded to before the trial.

• Advise the client on the retrieval of any property retained by the prosecution, police or prison authorities.

• Counsel on immediate future arrangements if appropriate, e.g., accommodation, benefits.

7.17.4 CONFERENCE FOLLOWING AN UNSUCCESSFUL CRIMINAL TRIAL

• Ensure that all adverse witnesses, police officers, prosecutors and so on are out of earshot or have left the court building.

• Explain to the client the effect of the finding of guilt and allow time for this to be absorbed.

• If the sentence has not already been passed, inform the client of the process that will lead to sentence: pre-sentence report interviews, procedure at sentence hearing, the plea in mitigation, etc.

• Give your preliminary advice on the likely form of sentence and its duration.

• If the client has been found guilty after a trial: give your preliminary opinion on the likelihood of success and the attendant risks of an appeal against conviction.

• If bail with conditions attached is granted pending sentence, explain that breach of any condition may result in the client being arrested without warrant and his or her bail being withdrawn.

• If sentence has been passed: see below.
• Offer to address any immediate non-legal concerns.

7.17.5 CONFERENCE FOLLOWING CASE LISTED FOR SENTENCE

• If appropriate, ensure that all adverse witnesses and prosecution counsel are out of earshot or have left the court.

• Explain to the client in plain terms what he or she is required to do by the sentence. Allow the client time to absorb this.

• Explain to the client any comments passed by the judge when sentencing including why the court has passed that form of punishment for that period of time.

• Express your preliminary opinion on the likelihood of success of an appeal against sentence and the attendant risks.

• Advise as to any steps that must be taken by the client, e.g., the payment of a fine by installments or the requirement to co-operate with the Probation Service.

• If appropriate, inform the client that you will furnish the solicitor with a written advice on appeal against sentence within 21 days.

• Offer to investigate any non-legal concerns the client has, e.g., by ensuring the solicitor tells his or her family which prison the client has been sent to.
Summary prepared by Ved Kumari


<table>
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<tr>
<th>KINDS OF QUESTIONS</th>
<th>Advantages</th>
<th>Disadvantages</th>
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| **Open**– leave clients free to provide broad range of information | • Permite clientsto select responses fromtheir frames of reference and relevance  
• Allow free recall without interrupting questions from lawyer’s agenda  
• Clients can/dotell information which lawyer may have never thought of asking  
• Better rapport building and communication motivators | • Develop details poorly  
• No impetustogo back to specific time and search for specific points  
• Rapport difficulties with  
  ➢ Clients who are uncomfortable narrating due to different role expectation  
  ➢ Clients who may ramble onto  
  ➢ Irrelevant matters due to too much freedom |
| **Closed**– seeks specific Information about specific topic | • Excellent for rapport for initially reluctant speakers  
• Allownavigation past threatening areas surfacing before rapport building  
• Eliciting details  
• Generating recall | • Early use may inhibit information  
• Leave client feeling not heard or allowed to speak/express  
• Loose opportunities to let go steam  
• Lawyers cannot show empathy  
• Premature intrusion in threatening areas |
| **Leading** – completely close the inquiry as clients are expected to agree with the suggestion | • Useful when eliciting known information which may not be forthcoming due to ego/case threat | • Enhance chances of distortion and inaccurate answers  
• Imply lack of confidence in client’s ability to give suitable answers |
Questionnaire for Interviewers

Name . ................................. .
(Partner's Name)………………………….
Date of interview ……………………

SECTION ONE
(To be completed before you conduct the interview)
Please read the following questions and answer them briefly in the space provided:

1. Before you meet the 'client' describe briefly:
   A. What are the objectives of the interview?

   B. Describe briefly how you plan to structure the interview (topics, order, time, etc.):

   C. What have you learned from your reading about interviewing that you intend to practice or avoid?

   D. What is your role in the interview and what standpoint do you wish to adopt?

SECTION TWO
(To be completed after the Interview)
2. In your conduct of the interview how well/poorly do you think that you performed the following?

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<thead>
<tr>
<th></th>
<th>Very Well</th>
<th>Well</th>
<th>Average</th>
<th>Not well</th>
<th>Poorly</th>
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<td>a.</td>
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<td>b.</td>
<td>Placing client at ease</td>
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<td>c.</td>
<td>Empathizing with the client</td>
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<td>d.</td>
<td>Eliciting facts</td>
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<td>e.</td>
<td>Checking facts and changes</td>
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<td>f.</td>
<td>Explaining law</td>
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<td>g.</td>
<td>Advising about implications</td>
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<td>h.</td>
<td>Agreeing follow up</td>
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<td>i.</td>
<td>Reassuring client</td>
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<td>j.</td>
<td>Note taking</td>
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<td>k.</td>
<td>Time management</td>
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</table>

B. What, if any, ethical or moral issues did you encounter?

3. A. What in brief are the key facts of the client's legal problem?
B. What is / are the legal issue(s) involved?

C. Were there other facts in the case which seriously concerned the client but which were not related to the legal issue(s)?

4. A. List the other possible outcomes in this case:

B. Which in your opinion is the most likely outcome?

C. What is / are the client's desired outcome(s)?

D. What are the main obstacles, if any, to this / these being achieved?

E. How will it / they (client's desired outcome(s)) be achieved?

F. What alternative strategies were available?

5. A. What did you learn from the interview?

B. What did the interview remind you of from your previous reading about interviewing?

C. What could you have done to improve the interview?

D. What do you think the client thought of the interview?

Name ................

(Partner's Name) .....................

Date of interview
PART D- PROFESSIONAL ACCOUNTING

Section II- Duty to the Client

25. An advocate should keep accounts of the client’s money entrusted to him, and the accounts should show the amounts received from the client or on his behalf, the expenses incurred for him and the debits made on account of fees with respective dates and all other necessary particulars.

26. Where moneys are received from or on account of a client, the entries in the accounts should contain a reference as to whether the amounts have been received for fees or expenses, and during the course of the proceedings, no advocate shall, except with the consent in writing of the client concerned, be at liberty to divert any portion of the expenses towards fees.

27. Where any amount is received or given to him on behalf of his client, the fact of such receipt must be intimated to the client, as early as possible.

28. After the termination of the proceedings, the advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amount paid or sent to him for expenses, or any amount that has come into his hands in that proceeding.

29. Where the fee has been left unsettled, the advocate shall be entitled to deduct, out of any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Court, in force for the time being, or by then settled and the balance, if any, shall be refunded to the client.

30. A copy of the client’s account shall be furnished to him on demand provided the necessary copying charge is paid.

31. An advocate shall not enter into arrangements whereby funds in his hands are concerned into loans.

32. An advocate shall not lend money to his client for the purpose or any action or legal proceedings in which he engaged by such client.

Explanation – An advocate shall not be held guilty for a breach of this rule, if in the course a pending suit or proceeding, and without any arrangement with the client in respect of the same, the advocate feels compelled by reason of the rule of the court to make a payment to the court on account of the client for the progress of the suit or proceeding.

Rules for Advocate on Record:

1. Every advocate-on-record shall keep such books of account as may be necessary to show and distinguish in connection with his practice as an advocate-on-record-
   (i) moneys received from or on account of and the moneys paid to or on account of each
of his clients; and
(ii) the moneys received and the moneys paid on his own account.
2. Every advocate-on-record shall, before taxation of the Bill of Costs, file with the Taxing Officer a Certificate showing the amount of fee paid to him or agreed to be paid to him by his client.