

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 05.03.2019

Order Reserved on:
26.02.2019

Order delivered on:
05.03.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNAM
AND

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.No.532 of 2014,
W.P.No.27681 of 2016 & W.M.P.No.23840 of 2016,
W.P.No.949 of 2017,
Cont.P.No.2694 of 2016 and Sub.Appln.No.614 of 2016

W.A.No.532 of 2014

- 1.The Controller of Patents,
Intellectual Property of Rights Building,
GST Road, Guindy, Chennai - 600 032.
- 2.Union of India,
Rep. by Ministry of Commerce and Industry,
Department of Industrial Policy and Promotion,
Udyog Bhawan,
New Delhi - 110 011. ... Appellants

-vs-

S.P.Chockalingam ... Respondent

PRAYER: Writ appeal filed under Clause 15 of Letters and Patents Act against the order made in W.P.No.8472 of 2006 dated 15.03.2013.

Writ Petition filed under Article 226 of the Constitution of India seeking for issuance of a Writ of declaring that amendment introduced to section 126 of the Patents Act 1970 by Section 67 (a) of the Patents (Amendment) ACT 2005 (Act 15 of 2005) as illegal unconstitutional ultra vires and void.

For Appellants : Mr.G.Rajagopalan
Additional Solicitor General
Assisted by Mr.Venkatasamy Babu and
C.V.Ramachandramurthy, Sr.P.C.

For Respondent : Mr.S.P.Chockalingam
Respondent-in-person

W.P.No.27681 of 2016

Wing Commander T.R.Mohan

... Petitioner in person

-vs-

1.Controller General of Patents, Designs &
Trademarks,
IPO Building, Boudhik Sampada Bhavan,
S.M.Road, Antop Hill, Mumbai - 400 037.

2.Controller of Patents,
Intellectual Property Rights Building,
GST Road, Guindy, Chennai - 600 032.

3.Union of India,
Represented by Ministry of Commerce and Industry,
Department of Industrial Policy and Promotion,
Udyog Bhawan, New Delhi - 110 011. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the
Constitution of India for issuance of Writ of Mandamus,
directing the first respondent to enter my name in the 'Register
of Patent Agents' maintained by first respondent, upon
processing my application for the same which is already on the
records of first respondent, within a reasonable stipulated time.

For Petitioner : Wing Commander T.R.Mohan
Party-in-Person

For Respondents : Mr.G.Rajagopalan
Additional Solicitor General
Assisted by
Mr.C.V.RamachandraMurthy
Senior Panel Counsel

W.P.No.949 of 2017

S.P.Chockalingam

... Petitioner

-vs-

1.Controller of Patents,
Intellectual Property Rights Building,
GST Road, Guindy, Chennai - 600 032.

2.Union of India,
Represented by Ministry of Commerce and Industry,
Department of Industrial Policy and Promotion,
Udyog Bhawan, New Delhi - 110 011.

3.Bar Council of India,
Rep. by its Chairman,
21, Rouse Avenue Institutional Area,
Near Bal Bhawan, New Delhi - 110 002.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Declaration, to declare that amendment brought to Section 126 of the Patents Act, 1970 by Section 53 of the Patents (Amendment) Act, 2002 (Act 38 of 2002) as illegal, unconstitutional, ultra vires and void.

For Petitioner : Mr.S.P.Chockalingam
Party-in-Person

For Respondents : Mr.G.Rajagopalan
Additional Solicitor General
Assisted by
Mr.C.V.RamachandraMurthy
Senior Panel Counsel

Cont.P.No.2694 of 2016

SP.Chockalingam ... Petitioner /Petitioner

-VS-

1.Mr.OP.Gupta,
Controller of Patents,
Intellectual Property Rights Building,
GST Road, Guindy, Chennai - 600 032.

2.Mr.Ramesh Abhishek
Union of India,
Represented by Ministry of Commerce and Industry,
Department of Industrial Policy and Promotion,
Udyog Bhawan, New Delhi - 110 011.

... Respondent/Respondents

PRAYER: Contempt Petition filed under Section 11 of Contempt of Courts Act to punish the respondent for violating the order of this Court dated 15.03.2013 in W.P.No.8472 of 2006.

For Petitioner : Mr.SP.Chockalingam
Party-in-Person

For Respondent : Mr.G.Rajagopalan
Additional Solicitor General
Assisted by
Mr.C.V.RamachandraMurthy
Senior Panel Counsel

COMMON JUDGMENT
(Judgment was delivered by T.S.Sivagnanam, J.)

The question involved in these cases is whether the amendment introduced to Section 126 of the Patent Act, 1970 (hereinafter referred to as "the Act") as made by Section 67(a) of the Patents Amendment Act, 2005 (Central Act 15/2005) is ultra vires Article 14, 19(1)(g) and 21 of Constitution of India. An Advocate practising before this Court specializing in Intellectual property matters filed W.P.No.8472 of 2006 praying a Writ of Declaration to declare the said amendment as illegal, unconstitutional, ultra vires and void. The writ petition was allowed by order dated 15.03.2013 and the learned writ Court declared the amendment to Section 126 as illegal and unconstitutional. The Controller of Patents and the Union of India who were arrayed as respondents in the writ petition have filed W.A.No.532 of 2014.

2.W.P.No.27681 of 2016 has been filed by an Advocate who was earlier serving the Indian Air Force, for issuance of writ of Mandamus upon the Controller General of Patents, Design and Trademarks, the first respondent in the said writ petition to enter his name in the register of Patent Agents by processing his application within a reasonable time.

3.W.P.No.949 of 2017 has been filed by an Advocate who was the petitioner in W.P.No.8472 of 2006 challenging the amendment brought to Section 126 of the Act by Section 53 of the Patents (Amendment) Act, 2002 (Central Act 38/2002) as being illegal, unconstitutional, ultra vires and void.

4.To be noted that a writ petition in W.P.No.949 of 2017 had been filed after 15 years after the amendment was brought out to Section 126 of the Act.

5.For the sake of convenience, the parties shall be referred to as the petitioners and the respondents.

6.The petitioner/Advocate would contend that the amendment carried out to Section 126 of the Act prohibits him from registering his name as a Patent Agent and this is a clear infringement of his right to practice his profession as an Advocate as enshrined under Section 30 of the Advocates Act, 1961. It is submitted that the amendment deprives him of his

right to practice as Patent Attorney and the amendment is in violation of fundamental rights enshrined under Article 19(1)(g) of the Constitution of India. It is submitted that the qualification stipulated by virtue of the amendment to be registered as a Patent Agent is a degree in Science, Engineering or Technology and a person who has graduated in a physics or a computer science may not be conversant or proficient in Biotechnology or Pharmaceutical Sciences and vice versa and insisting upon a degree in Science, Engineering or Technology, there will be a bar for application being filed by graduate Mechanical Engineer in the field of Chemistry or Biological Sciences and therefore, there is no logic or rationale behind the amendment imposing restrictions prescribing technical qualifications to become a patent agent.

7. It is submitted that prior to the amendment an Advocate as a matter of right was allowed to practice as a Patent Agent and several Advocates who are not Science graduates have been registered as Patent Agents. The amendment has permitted such of those Advocates who have registered prior to the amendment to continue as Patent Agent and has barred the entry of Advocates post-amendment, thereby treating equals as unequal. The amendment has established two classes of Advocates, i.e. one who have already registered as Patent Agent prior to the amendment and the others who want to register themselves as Patent Agent after the amendment and thereby violating Article 14 of the Constitution of India. Further, it is submitted that the examination which is conducted by the respondents which is stated to be qualifying examination does not verify the ability of a person in his respective field but it evaluates the persons ability on the basis of marks secured by the candidate based on his knowledge on Patent Act and Rules and if knowledge in Patent Act and Rule is the determinative criteria for qualifying as Patent Agent, then barring an Advocate who is conversant in drafting and Court practice and procedures from being registered as a Patent Agent is illogical and irrational. It is the submission of the petitioner that the Patent Agent will act only on the instruction of his client which is usually the inventor, whereas the Advocate is guided by the provisions of the Acts and Rules and can effectively handle patent matters and he can facilitate the registration of inventions. The classification of Science/Engineering graduates from that of others with regard to qualification to become Patent Agent is not found on intelligible differentia and the amendment fails to justify the rationale relation of the object to be achieved by the statute in question. It is further submitted that the amended Section 126 of the Act does not allow an Advocate to get registered as Patent Agent. However, Section 132 of the Act permits an Advocate though not registered as a Patent Agent from taking

part in any hearing before the Controller on behalf of a party and these inconsistencies clearly bring to light the mischief brought by the amendment and the purpose for which it was brought was only to deprive an Advocate of right to practice as a Patent Agent. Thus, it is the submission of the petitioner that he has been deprived of his right to register his name as a Patent Agent and thereby practice as a Patent Attorney and the amendment is arbitrary, irrational and violative of his fundamental rights and this in turn will adversely affect his career which is in violation of Article 21 of the Constitution of India.

8. In W.P.No.949 of 2017, the petitioner has challenged the amendment which was brought about in the year 2002 by which the necessity to possess a degree in Science, Engineering or Technology was brought into force. In addition to the grounds raised in W.P.No.8472 of 2006, the petitioner would contend that the amendment seeks to monopolise a few, i.e. neo-patent agents who have qualified the departmental examination conducted by the respondents. Further, the respondent though claim that the subject of patent is a techno-legal matter, they do not bother to insist for a degree in law for the science graduates. Thus, in sum and substance the case of the petitioner is that the 2005 amendment clearly infringes the fundamental rights of an Advocate to practice his possession as a Patent Attorney by becoming a Patent Agent.

9. The petitioner in W.P.No.27681 of 2016 after setting out the qualification secured by him submitted that he had filed an application well after the order passed in W.P.No.8472 of 2006 which struck down the 2005 amendment, yet the respondents have not registered the name of the petitioner as a Patent Agent and they kept the application pending and after much difficulty, the petitioner was able to secure a reply from the respondents under the Right to Information Act stating that his name will be taken up for consideration after the decision is rendered by this Court in W.A.No.532 of 2014. Therefore, it is the submission of both the petitioners that the respondents have blatantly flouted the order in W.P.No.8472 of 2006 dated 15.03.2013 and are liable to be punished for contempt.

10. Contempt Petition Diary No.4796 of 2014 has been filed by an Advocate practising in Delhi who states that he is a Science graduate handling patent matters for over 10 years and in spite of that, the learned Single Bench of this Court holding that the 2005 amendment to the Act is illegal and unconstitutional, the respondents are not permitting the Advocates to register themselves as Patent Agents and the application submitted by the petitioner dated 18.04.2013 after tendering the requisite fees has been refused to be accepted and therefore, he was compelled

to send the same through registered post and the same having not been considered for over two months, has approached this Court by way of this contempt petition contending that the respondents have wilfully disobeyed the order passed by the learned Writ Court. From the case records, it is seen that the said petition was dismissed for non-prosecution on 27.06.2014.

11.The petitioner in W.P.Nos.8472 of 2006 and 949 of 2017 has filed Contempt Petition No.2694 of 2016 alleging that there is wilful disobedience of the order passed in W.P.No.8472 of 2006 dated 15.03.2013.

12.We take up W.A.No.532 of 2014. and as prefaced earlier, the parties shall be known as petitioner and the respondents as per their rank assigned in the writ petition. The appellants are Controller of Patent and Union of India.

13.Mr.G.Rajagopalan, learned Additional Solicitor General assisted by Mr.Venkatasamy Babu, learned Senior Panel Counsel and Mr.Ramachandra Murthy, learned Senior Panel Counsel by referring to comparative chart which shows Section 126 prior to 2002 amendment, the provision as it stood as per the amendment in 2002 amendment and the provision as amended in 2005. It would be beneficial to refer to the said chart and the same is quoted hereunder:

Unamended Provision i.e. enacted in 1970	Provision, as amended in 2002	Provision, as amended in 2005
126.Qualifications for registration as patent agents	126.Qualifications for registration as patent agents	126.Qualifications for registration as patent agents
(1) A person shall be qualified to have his name entered in the register of patents agents if he fulfils the following conditions, namely:-	(1) A person shall be qualified to have his name entered in the register of patents agents if he fulfils the following conditions, namely:-	(1) A person shall be qualified to have his name entered in the register of patents agents if he fulfils the following conditions, namely:-
(a) he is a citizen of India	(a) he is a citizen of India	(a) he is a citizen of India
(b) he has completed the age of 21 years	(b) he has completed the age of 21 years	(b) he has completed the age of 21 years

Unamended Provision i.e. enacted in 1970	Provision, as amended in 2002	Provision, as amended in 2005
(c) he has obtained a degree from any University in the territory of India or possesses such other equivalent qualifications as the Central Government may specify in this behalf, and, in addition,-	(c) he has obtained a degree in science, engineering or technology from any University established under Law for the time being in force in the territory of India or possesses such other equivalent qualifications as the Central Government may specify in this behalf, and, in addition	(c) he has obtained a degree in science, engineering or technology from any University established under Law for the time being in force in the territory of India or possesses such other equivalent qualifications as the Central Government may specify in this behalf, and, in addition
(i) is an advocate within the meaning of the Advocates Act, 1961; or	(i) is an advocate within the meaning of the Advocates Act, 1961; or	(omitted)
(ii) has passed the qualifying examination prescribed for the purpose;	(ii) has passed the qualifying examination prescribed for the purpose; or	(ii) has passed the qualifying examination prescribed for the purpose; or
	(iii) has, for a total period of not less than ten years, functioned either as an Examiner or discharged the functions of the Controller under Section 73 or both, but ceased to hold any such capacity at the time of making the application for registration;	(iii) has, for a total period of not less than ten years, functioned either as an Examiner or discharged the functions of the Controller under Section 73 or both, but ceased to hold any such capacity at the time of making the application for registration;
(d) he has paid such fee as may be prescribed	(d) he has paid such fee as may be prescribed	(d) he has paid such fee as may be prescribed

Unamended Provision i.e. enacted in 1970	Provision, as amended in 2002	Provision, as amended in 2005
(2) Notwithstanding anything contained in sub-section (1), a person who has been practising as a patent agent before the 1st day of November 1966 and has filed not less than five complete specifications before the said day, shall, on payment of prescribed fee, be qualified to have his name entered in the register of patent agents.	(2) Notwithstanding anything contained in sub-section (!), a person who has been registered as a patent agent before the commencement of the Patents (Amendment) Act, 2002 shall be entitled to continue to be, or when required to be re-registered, as a patent agent, on payment of the fees as may be prescribed.	(2) Notwithstanding anything contained in sub-section (!), a person who has been registered as a patent agent before the commencement of the Patents (Amendment) Act, 2005 shall be entitled to continue to be, or when required to be re-registered, as a patent agent, on payment of the fees as may be prescribed.

14. It is submitted that prior to 2002 one of the essential conditions to be fulfilled by an applicant to register as a Patent Agent is that he should have obtained a degree from any University in the territory of India or possess such other equivalent qualification as the Central Government may specify and in addition he is an Advocate within the meaning of the Advocates Act, 1961 or has passed the qualifying examination prescribed for the purpose. In 2002, Clause (c) of Section 126 (1) stood amended by imposing a condition that the applicant should have obtained a degree in Science, Engineering or Technology from any University established under law for the time being in force in the territory of India or possess such other equivalent qualification as the Central Government may specify in this behalf and in addition he is an Advocate within the meaning of the Advocates Act, 1961 or has passed the qualifying examination prescribed for the purpose. For the purposes of these matters, the other conditions may not be very germane. In 2005 amendment, the significant change was that Section 126(1)(c)(i) stood omitted. This clause in the 2002 amendment and prior to that included an Advocate within the meaning of the Advocate Act. Thus, in 2005 the requirement to be an Advocate stood omitted. It is submitted that after 2005, an Advocate cannot as a matter of right become a Patent Agent but however, the Advocate who has obtained a degree in Science, Engineering or Technology is entitled to register himself as a Patent Agent provided he passes the qualifying examination prescribed for such purpose. It is submitted that the amendment

in no manner infringes the right of an Advocate under Section 30 of the Advocates Act since Section 132(b) of the Act protects such right and their entitlement to appear on behalf of a party.

15. It is further submitted the legal issue as to whether an Advocate has a vested right to practice before all Courts and Tribunals and this issue was considered by the Hon'ble Supreme Court in the case of Paradip Port Trust vs. Their Workmen [(1977) 2 SCC 339] and N.K. Bajpai vs. Union of India and another [(2012) 4 SCC 653]. It is submitted that in the said decisions, the Court pointed out that there are certain legislations which restrict appearance of Advocates before Specialized or specific Tribunals and when those restrictions were challenged, the Courts have consistently taken a view that limited restrictions are neither violative of the fundamental right nor do they tantamount to deny the equality before law in terms of Article 14 of the Constitution of India. Therefore, it is the submission of the learned Additional Solicitor General that the impugned legislation is a valid piece of legislation and ought not to have been struck down. It is submitted that the learned Writ Court failed to advert to Section 132(b) of the Act which protects the right of an Advocate as enshrined under Section 30 of the Advocates Act. Further, it is submitted that there are two roles, one which is the drawing of a Patent, signing and presenting the same for registration and this can be done by a Patent Agent who is registered in terms of the Act and the other is appearing for another party before the authority either to sustain a Patent or to defend a challenge to a Patent. This distinction was lost sight of by the learned Writ Court, consequently, resulting in an erroneous order. Reference was made to Rules 108 to 120 of the Patent Rules which deals with Patent Agents and it is submitted that elaborate procedure is contemplated under the Rules and Patent being an invention of Science, it is a technical matter and there is no error in the impugned legislation. Further, the learned Writ Court cannot go behind the legislative wisdom in enacting a law or amending the existing law as the Court is not the law making authority. The averments set out by the respondents in the counter affidavit filed in W.P.No.949 of 2017 were referred to, to substantiate his arguments.

16. Mr. T.R. Mohan, the petitioner appearing in person referred to the Agreement on Trade Related Aspects of Intellectual Property Rights [TRIPS] agreement and submitted that the said agreement only stipulates the minimum conditions to be followed and there is no compulsion to make such an amendment and in this regard, referred to Article 1 of the TRIPS agreement. Further, it is submitted that the amendment protects the Patent Agents who were registered prior to the amendment and prohibits persons from getting registered after the amendment and this is not a

reasonable classification. By way of suggestion, the petitioner would submit that the respondents can impart training to such of those persons who are willing to get themselves registered as a Patent Agent and to en-block bar Advocates from registering as Patent Agents is illegal and violative of Articles 14, 19(1)(g) and 21 of the Constitution of India. It is submitted that though the writ petition in W.P.No.8472 of 2006 was allowed on 15.03.2013 and the 2005 amendment was declared unconstitutional, the application filed by the petitioner on 12.08.2015 was not considered till date, thereby depriving his right of getting himself registered as a Patent Agent which has caused irreparable hardship to the petitioner.

17. The petitioner in W.P.No.8472 of 2006 and W.P.No.949 of 2017 submitted that the rights of the Advocates to practice as a patent agent cannot be restricted or interfered with. The contention of the appellant that it is a techno-legal matter is incorrect as the matter concerned is only legal aspects and advocates are best suited to function as patent agents. It is submitted that the invention is a fulcrum of the patent and no qualification is required for an inventor. The purpose of conferring a patent on an inventor is to permit him to exploit the same for a period of 20 years. What is required to be understood is the synergy between the inventor and the Government which grants the patent. The Patents Act spells out as to how a patent has to be obtained and it does not discuss anything about the science or technology as there is no provision to the said effect in the Act. In this regard, the learned counsel referred to the various provisions of the Patents Act. Elaborating on the said submission, the petitioner would contend that the Patents Act does not help to draft a patent and conspicuously the word "specification" has not been defined under the Act. By referring to the affidavit filed in support of the writ petition the learned counsel explained the various activities of a patent agent which includes his right to appear before the Controller after the examination report. Section 77 of the Act was pressed into service to state that the Controller has certain powers of a Civil Court thereby bringing the proceedings before the Controller to fall within the meaning of a legal proceedings and therefore, an Advocate cannot be barred from registering himself as a patent agent. It is further submitted that Section 129 of the Patents Act deals with restriction on practice as patent agents and the explanation (c) in Section 129 of the Act prohibits a patent agent from giving advise on scientific or technical matters. In the event the same is done, Section 123 enables the authority to impose punishment with fine which may extend to Rs.1 lakh in the case of first offence and Rs.5 lakhs in the case of second or subsequent offence and the Advocate can also be penalised by invoking the said provision and the same is draconian.

18.It is further submitted that upto the year 2002, an Advocate as a matter of right can function as a patent agent and this right has been taken away by the 2005 amendment thereby infringing the rights of the Advocate as conferred under Section 30 of the Advocates Act. It is also submitted that sub-section (2) of Section 126 is discriminatory as it treat equals unequally and consequently violative of Article 14 of the Constitution of India. Since the right of an Advocate who has not registered himself as a patent agent prior to the amendment has been taken away, it affects his right to practice his profession thereby infringing Articles 19(1)(g) and 21 of the Constitution of India. The petitioner referred to a sample question paper for the qualifying examination to be a patent agent and it is submitted that baring a few questions, all questions in Paper I are about patent law, Paper II is regarding drafting of patents followed by viva voce. It is submitted that after the 2005 amendment the persons like the petitioner cannot register themselves as patent agents as the petitioner does not hold a science degree and at this juncture, questioning of obtaining a science degree is impossible. Thus, it is the contention of the petitioner that Section 126(1) which amended in 2005 is not happily worded. The petitioner also mentioned about his credentials and that he has obtained a patent, he has written a book on patent in Tamil language for which he was awarded a prize by the Tamil Nadu Government and was also appointed as an Amicus Curiae by the Intellectual Property Appellate Board to assist the Tribunal. Therefore, to state that the petitioner is not qualified to be a patent agent is unacceptable. The petitioner referred to Rule 110 of the Patent Rules which deals with the particulars of the qualifying examination for patent agent. It is submitted that the syllabus does not test the candidate for his/her competency in science and technology. It is further submitted that the Central Government should have made it mandatory for patent agents to have law qualification since technical people are not legally trained or legally qualified.

19.It is submitted that there is an allegation that there is a gross delay on the part of the petitioner in challenging the 2002 amendment to the Patents Act and this allegation is incorrect since on the date when the petitioner challenged the 2005 amendment, the 2002 amendment was no longer in existence in the statute and since a plea was raised by the appellants before the Writ Court that 2002 amendment which insisted upon a degree in science and technology, by way of abundant caution the petitioner had filed W.P.No.949 of 2017. Therefore, there is no delay on the part of the petitioner to have challenged the 2002 amendment in 2017, more so when the said provision was no longer in the statute at the relevant time. By referring to the

counter affidavit filed by the Assistant Controller of Patents and Designs, Chennai in W.P.No.949 of 2017, it is submitted that the averments are vague in the sense that the appellant has stated that the amendments made during 2002 and 2005 were made in view of the changes happening in Society equally the rationale behind the amendment as mentioned in Clause 66 in the Parliamentary discussion is absolutely without any basis. It is submitted that by virtue of 2005 amendment to the Patents Act, the Advocates are left to the mercy of the patent agents which is not desirable. The petitioner referred to the agreement on Trade Related Aspect of Intellectual Property Rights (TRIPS) and by referring to Article 1 therein, it is submitted that there is no compulsion on the part of the Member State to make such amendment as projected by the appellants.

20.The petitioner placed reliance on the decision of the Hon'ble Supreme Court in the case of H.S.Srinivasa Raghavachar etc. vs. State of Karnataka and others [AIR 1987 SC 1518] to support his contention that the rights conferred on the Advocate under Section 30 of the Advocates Act cannot be abridged or taken away. To support the argument that the amendment is arbitrary and unreasonable, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Indian Council of Legal Aid and Advice vs. Bar Council of India and another [AIR 1995 SC 691]. To explain the meaning of the word 'practice', the learned counsel relied on the decision of the Hon'ble Supreme Court in the case of Macquarie Bank Limited vs. Shilpi Cable Technologies Ltd. [(2018) 2 SCC 674]. The petitioner placed reliance on the decision of the High Court of Bombay (Nagpur Bench) in the case of Mohan Madhukar Sudame vs. State of Maharashtra and others [AIR 2012 Bom 89] with regard to the rights flowing in favour of the Advocates under Section 30 of the Advocates Act. Reliance was also placed on the decision in the case of Management, Hindustan Motors Earth Moving Equipment Division Ltd. vs. Presiding Officer, Principal Labour Court, Chennai and others [(2007) 1 MLJ 739 with regard to the right of a legal practitioner. In support of the same argument, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Hygienic Foods vs. Jasbir Singh and others [MANU/SC/0708/2011]. Reliance was placed on the decision of the High Court of Rajasthan in the case of Duduwala & Co. and others vs. Industrial Tribunal and another [AIR 1958 Raj 20]. Further, we have to point out that the said decision has been overruled by the Hon'ble Supreme Court in the case of Paradip Port Trust (supra).

21.Thus, it is the submission of the petitioner that there is no absolutely intelligible differentia in bringing out the amendment in the year 2007 and there is no rationale to bring about such amendment which prohibits the right of the Advocates

from practising their profession. It is the submission of the petitioner that the Advocates cannot be prevented from becoming a patent agent as if he is not competent to be one.

22.Mr.Venkatasamy Babu, learned Senior Panel Counsel appearing for the appellant submitted that Section 132(b) of the Act protects the rights of the Advocates and there is no infringement of the rights to practice conferred under Section 30 of the Advocates Act. It is further submitted that Paper II for the qualifying examination to be a patent agent is a Scientific paper, Engineering drawing is also one of the subject and therefore, it is incorrect to state that the competency in the field of science and technology is not being tested.

23.Mr.C.Ramachandra Murthy, learned Senior Panel Counsel for the appellant reiterated that the syllabus for the qualifying examination is not only legal but it is highly technical and a person without knowledge in Science and Technology cannot be successful in the qualifying examination. With the above submission, the petitioner prayed that the order passed in the writ petitions may be set aside and the amendments made to the Patents Act be held to be valid.

24.We have heard the petitioners appearing in person and the learned Additional Solicitor General.

25.The following questions arises for consideration in these cases:

1.Whether the 2005 amendment to the Patents Act has infringed or violated the right of an Advocate conferred under Section 30 of the Advocates Act, 1961?

2.Whether the role, duties and responsibilities of a Patent Agent registered under the Patent Act would fall within the ambit of right to practice so as to bring it within the umbrage of Section 30 of the Advocates Act?

3.Whether the petitioners have brought out any grounds to challenge the constitutional validity of both the amendments, i.e. 2002 and 2005 on the settled grounds on which constitutional validity of a statute can be challenged?

4.Whether the Patent Act after the amendments in 2002 and 2005 protects the rights of an Advocate conferred under Section 30 of the Advocates Act?

26.The sum and substance of the contention of the writ petitioners is that every Advocate whose name is entered in the State Bar Council Roll should be entitled to get himself/herself registered as a Patent Agent regardless of the fact whether he

possess a Degree in Science, Engineering or Technology and without insisting upon qualifying in the examination prescribed under the Act for the purpose of registering as a Patent Agent. Section 30 of the Act though was in the statute book since 1961, it was notified in the Gazette of India dated 09.06.2011 where under the government appointed 15.06.2011 as the date for giving effect to Section 30 of the Advocates Act.

27. The question which arose for consideration before the Hon'ble Supreme Court in the case of Paradip Port Trust was whether an Advocate was entitled to appear before the Central Industrial Tribunal in a dispute raised by the Workers Union. The Tribunal ruled that the relationship between the employer and the Advocate is clearly that of a client and his lawyer and not that of an employer and employee and hence, cannot be stated to be the officer of the employer and he cannot be permitted to represent the employer. The correctness of the said order was challenged and the matter ultimately reached the Hon'ble Supreme Court which answered the said question on the following lines:

"23. Besides, it is also urged by the appellant that under section 30 of the Advocates Act, 1961, every advocate shall be entitled "as of right" to practise in all courts, and before only tribunal section 30(i) and (ii). This right conferred upon the advocates by a later law will be properly safeguarded by reading the word "and" as "or" in section 36(4), says counsel. We do not fail to see some difference in language in section 30(ii) from the provision in section 14(1) (b) of the Indian Bar Councils Act, 1926, relating to the right of advocates to appear before courts and tribunals. For example, under section 14(1) (b) of the Bar Councils Act, an advocate shall ;be entitled as of right to practise save as otherwise provided by or under any other law in any courts (other than High Court) and tribunal. There is, however, no reference to "any other law" in section 30(ii) of the Advocates Act. This need not detain us. We are informed that section 30 has not yet come into force. Even otherwise, we are not to be trammelled by section 30 of the Advocates Act for more than one reason. First, the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided for with a clear object in view. This special Act will prevail over the Advocates Act which is a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, tribunals

and other authorities. The Industrial Disputes Act is concerned with representation by legal practitioners under certain conditions only before the authorities mentioned under the Act. Generalia Specialibus Non Derogant. As Maxwell puts it:

"Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

24. Second, the matter is not to be viewed from the point of view of legal practitioner but from that of the employer and workmen who are the principal contestants in an industrial dispute. It is only when a party engages a legal practitioner as such that the latter is enabled to enter appearance before courts or tribunals. Here, under the Act, the restriction is upon a party as such and the occasion to consider the right of the legal practitioner may not arise."

28. In the above decision, it was pointed out that the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before the adjudicatory authority therein has been specially provided for with a clear object in view and this special Act will prevail over the Advocates Act which is a general piece of legislation with regard to subject matter of appearance of lawyers before all Courts, Tribunals and other authorities and under the Industrial Disputes Act, representation by legal practitioners is permissible under certain conditions. It was further pointed out that the matter is not to be viewed from the point of view of legal practitioners but from that of an employer and workmen, who are the principal contestants in the industrial dispute. It was further held that it is only when a party engages a legal practitioner as such that the latter is unable to enter appearance before the Courts or Tribunals and under the Industrial Disputes Act, the restriction is upon the authority as such and the occasion to consider the right legal practitioner may not arise.

29. In the case of N.K. Bajpai (supra), one of the questions which arose for consideration is whether Section 129(6) of the Customs Act, 1962 which stipulates that on demitting office as a member of CESTAT, a person shall not be entitled to appear before the CESTAT is ultra vires the Constitution of India. The Court after taking note of various decisions including the decision in the case of Paradip Port Trust (supra) held that there are certain legislations which restrict appearance of Advocates before Specialized or Specific Tribunals and these restrictions are neither violative of fundamental rights nor they tantamount to denying the equality before law in terms of Article 14 of the Constitution of India. Thus in our considered view, the restriction imposed under the Act stipulating qualification for being registered as a Patent Agent would in no manner infringe upon the right conferred on an Advocate in terms of Section 30 of the Advocates Act. Accordingly, the first question is answered.

30. Now, we move on to the second question as to whether the role, duties and responsibilities of a Patent Agent would fall within the ambit of right to practice under Section 30 of the Advocates Act. For easy reference, the same is quoted herein below:

"30. Right of Advocates to practise:- Subject to provisions of this act, every advocate whose name is entered in the State roll shall be entitled as of right to practise throughout the territories to which this Act extends,-
(i) in all Courts including the Supreme Court;
(ii) before any tribunal or person legally authorised to take evidence; and
(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise."

31. Chapter 21 of the Patents Act deal with Patent Agents. Section 125(1) states that the Controller shall maintain a register to be called the register of Patent Agents in which shall be entered the names, addresses and other relevant particulars, as may be prescribed of all persons qualified to have their names so entered under Section 126. Sub-section (2) of Section 125 of the Act permits the Controller to keep the register of patent agents in computer floppies, diskettes or any other electronic form subject to such safeguards as may be prescribed. Section 126 deals with qualification for registration as patent agents. Section 127 deals with rights of patent agents and it states that subject to the provisions contained in this Act and in any rules made thereunder, every patent agent whose name is entered in the register shall be entitled to practice before the Controller and to prepare all

documents, transact all business and discharge such other functions as may be prescribed in connection with any proceedings before the Controller under the Patents Act. Section 128 deals with subscription and verification of certain documents by patent agents and it states that all applications and communications to the Controller under the Act may be signed by a patent agent authorised in writing in this behalf by the person concerned. Section 129 of the Act deals with restriction of practice as patent agent. Sub-section (1) thereunder prohibits him to practice unless he is registered as a patent agent. Sub-section (2) prohibits the Company or any body Corporate to practice, describe itself or hold itself out as patent agents. Section 130 is the power of the Controller to remove the name of any person from the register if the name is entered in the register by error or on account of misrepresentation or suppression of material facts or he has been convicted of any offence and sentenced to a term of imprisonment or has been guilty of misconduct in his professional capacity which in the opinion of the Controller renders him unfit to be kept in the register. Sub-section (2) of Section 130 of the Act empowers the Controller to restore to the register the name of any person removed therefrom. Section 131 of the Act deals with the power of the Controller to refuse to deal with certain agents. By virtue of this provision, the Controller may refuse to recognize as an agent in respect of any business under the Act in respect of the persons who have been mentioned in Clauses (a) to (d) in Section 132(1). Section 132 of the Act deals with savings in respect of other persons authorized to act as an agent and the said section is quoted hereunder:

"132. Savings in respect of other persons authorised to act as agents:-

Nothing in this Chapter shall be deemed to prohibit-

(a) the applicant for a patent from drafting any specification or appearing or acting before the Controller, or

(b) an advocate, not being a patent agent, from taking in any hearing before the Controller on behalf of a party who is taking part in any proceeding under this Act."

32. In terms of Clause (b) of Section 132 nothing in Chapter 21 of the Act shall deem to prohibit an Advocate not being a patent agent from taking part in any hearing before the Controller on behalf of a party who is taking part in any proceedings under the Act. It is true that Section 127 of the Act while defining the rights of patent agent states that every patent agent whose name is entered in the register shall be entitled to "practice", he shall be entitled to prepare

documents, transact all business and discharge other functions. In terms of Section 128, he is entitled to sign all applications and communications to the Controller under the Act upon being authorized to do so by the person concerned. There is a subtle difference in the meaning of the word "to practice" as contained in Section 127(a) of the Patents Act and "the right to practice" as contained in Section 30 of the Advocates Act. This distinction is vividly clear if we read the entire provision which would go to show that the Advocate as a matter of right is entitled to practice throughout the territory to which the Advocates Act extends. The word "to practice" occurring in Section 127 of the Act is restricted and it clearly prescribes as to what are the rights of the patents agent. This subtle yet marked difference becomes more clearer if we examine Chapter XV of Patent Rules, 2003 which deals with patent agent. Thus, a person who is registered under the Patents Act as an agent is entitled to practice before the Controller, sign applications, etc. Thus, this right cannot be confused with the right of an Advocate under Section 30 of the Advocates Act and undoubtedly the right under Section 127 being restrictive and subject to conditions, the petitioners would not be justified in contending that on account of the amendment to Section 126 of the Act, their right to practice under Section 30 of the Advocates Act is infringed. Accordingly, the question No.2 is answered.

33. The third question is whether the petitioners have been able to substantiate a valid challenge to the constitutionality of the amendments to Section 126. Challenge to the constitutional validity of law can be on two grounds, namely, lack of legislative competence and violation of any fundamental rights guaranteed under Part III of the Constitution of India. There can be no third ground of challenge. In this regard, it will be beneficial to refer to the decision in the case of State of Andhra Pradesh and others vs. McDowell & Co. and others [(1996) 3 SCC 709], Union of India vs. R.Gandhi, President, Madras Bar Association [(2010) 11 SCC 1], Greater Bombay Coop. Bank Ltd. vs. United Yarn Tex (P) Ltd. and others [(2007) 6 SCC 236] and Anti Corruption Movement, rep. by its General Secretary vs. The Chief Secretary to Government of Tamil Nadu, Cooperation, Food & Consumer Protection Department and others [(2015) 2 CTC 225]. Admittedly, the petitioners have not raised any ground in their writ petitions questioning the legislative competence of the Central Government to bring about the amendment. Entry 49 of List 1 deals with patents and Entry 77 and 79 of List 1 deals with right to practice, etc and the power to enact laws in this regard vests with the Union Government to bring about the amendment to Section 126 of the Act. The petitioners would contend that the amendment is violative of Article 14, 19(1)(g) and 21 of the Constitution of India. Article 14 is pressed into service on the ground that the

existing patent agents who are Advocates without Science degree and without qualifying themselves in the examination have been permitted to continue in terms of Section 132(b) of the Act, whereas the Advocates who are desirous of registering as patent agents after 2005 amendment are prohibited, this is unreasonable and discriminatory. This argument is further developed to state that their right to practice as an Advocate has been curtailed, thereby their rights enshrined under Article 19(1)(g) of the Constitution of India has been infringed, consequently, their right to livelihood under Article 21 of the Constitution of India has also been infringed.

34. The contentions put forth by the petitioners are thoroughly misconceived and we support this conclusion with the following reasons:

The Patents Act is a specialized enactment prescribing certain restrictions and conditions. It is not for this Court to rule as to how the drafters of the legislation should have thought as to how the law should have been enacted and the wisdom of the legislative power cannot be questioned by Courts. There are several statutes which are specialized in nature prescribe several restrictions and all of them cannot be held to be either arbitrary or unreasonable. The rationale behind the amendment as noted by the Parliament was with a view to prescribe uniform qualification and to improve the skill of the profession as the said matter is scientific and technical in nature. The patent applications are classified in several categories in terms of the International Patent Classification (IPC) which is accepted world wide and the same clarifies that the patent application originate from different fields of science and therefore, the Union of India thought it mandatory to prescribe qualification in Science, Engineering or Technology to be able to draft patent specifications in a scientific way which is of prime importance. In the counter affidavit, the qualification required to be a registered as patent agent in USA has been set out, we find that the qualification to be elaborate and the degree to be possessed by the candidate should be a recognized technical subject and there is a range of subjects mentioned in the Rule. In European Patent Office, a candidate must possess scientific or technical qualification such as Biology, Bio-chemistry, Chemistry, Electronics, Pharmacology or Physics. In France, a degree in Engineering or Natural Science would be sufficient. In Israel, an academic degree in the field of Science or Engineering. In South Africa, a technical or scientific diploma or a degree from a University and in Germany, degree in Engineering or Natural Science. The amendment to the Act in the year 1999 and June 2002 was with a view to meet the India's obligation under TRIPS which form part of the agreement establishing World Trade Organization (WTO). The amendments mainly focus on the obligation which came into force from

01.01.1995 in respect of amendments made in March 1999 and obligations which came into force from 01.01.2000 in respect of amendments notified in June 2002.

35. In W.P.No.8472 of 2006, the respondent has filed counter affidavit from which we find that before making the amendment, a Joint Committee of both the Houses of Parliament examined all aspects and recommended various provisions in order to provide necessary and adequate safeguards for protection of public interest, national security, biodiversity and traditional knowledge, including effective flexibilities to enable appropriate and timely response to national and public interest concerns, especially those relating to public health and nutrition. These were included in the second amendment. The earlier amendments had, inter alia, provided for the modalities for a ten-year transition facility (which India had negotiated at the time of its accession to the WTO), commencing from 1st January 1995. As a consequence, the law was required to be amended further in respect of India's obligations under the TRIPS Agreement, due from 1st January 2005. It is further stated that given the importance of the issues, the Government undertook broad-based and extensive consultations involving different interest groups on aspects critical to the changes which were necessary in the Patents Act, 1970. These included country-wide interactive sessions with various interest groups, including scientists, academicians, economists, representatives of various industry sectors (such as pharmaceutical, biotech and software), chambers of commerce, private and public sector units, journalists, non-governmental organizations, representatives of State Governments, lawyers and attorneys and other interest groups and extensive inter-Ministerial consultations.

36. From the above, it is clear that the time frame for the amendments was most crucial as deadlines had to be met failing which there would have been other consequences in the World Trade Organization. Further, it has been stated that while considering the third set of amendments to the Act, efforts have been made not only to fulfil final obligations under TRIPS but also to simplify and rationalize the procedure governing the grant of patent so as to make the system more efficient and user friendly. As pointed out by the Hon'ble Supreme Court in Paradip Port Trust (supra), a special Act will prevail over the Advocates Act which has been held to be a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, Tribunals and other authorities.

37. In the case of N.K.Bajpai (supra), an argument was made that a person who has obtained a degree of law is entitled to practice anywhere in India, his right, as enshrined in the

Constitution of India and under the Advocates Act cannot be restricted or regulated. This argument was rejected as fallacious in the face of the provisions of the Advocates Act as well as the restrictions contemplated under Article 19(6) of the Constitution of India. It was further held that the legislature is entitled to make a law relating to professional or technical qualification necessary for carrying on of that profession.

38. In the case of Lingappa Pochamma Appelwar vs. State of Maharashtra [(1985) 1 SCC 479], the Court rejected the challenge to the provisions of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 which imposed restriction on Advocates to appear before the Tribunal. Though at that time Section 30 of the Advocates Act had not come into force, yet the Court held that the right of an Advocate to practice after being brought on the roll of the State Bar Council is just what is conferred under the Bar Council Act, 1926 and therefore, Section 9A of the Maharashtra Restoration of Lands to Scheduled Tribes Act which placed that restriction was not unconstitutional or impinging on the rights of the Advocates to practice.

39. In the light of the above discussion, we hold that the petitioners have not brought out any grounds to challenge the constitutional validity of the impugned amendments.

40. The next question is whether after amendments to the Patents Act how the rights of Advocates have been protected. We need not ponder much on the issue since Section 132(b) of the Act states that nothing in Chapter 21 of the Patents Act shall be deemed to prohibit an Advocate, not being a Patent agent, from taking part in any hearing before the Controller on behalf of a party who is taking part in any proceedings under the Patents Act. Therefore, we find there is absolutely no infringement on the right of an Advocate enrolled with a State Bar Council to practice in terms of Section 30 of the Advocates Act. Accordingly, the question is answered.

41. The reasons given by us for all the four questions will equally apply to the challenge to the 2002 amendment. The said writ petition in which the said amendment has been challenged was filed in the year 2017 and it appears that the petitioner had filed the writ petition in 2017 because the Union of India pointed out during the course of argument in W.P.No.8472 of 2006 that the requirement to possess a degree in Science, Engineering or Technology was required since 2002. Therefore, even at that point of time, an Advocate unless he possesses a degree in Science, Engineering or Technology could not have registered himself as a patent agent.

42. As pointed out earlier, we find that there is absolutely no bar for an Advocate to appear before the Controller of

Patents representing his client and the rights and restriction of patent agents alone have been spelt out under Sections 127 and 129 of the Act. It is only the patent agent who is prohibited to give advice on scientific and technical matters in terms of Section 129 explanation (c) and in case there is a violation committed by the patent agent under Section 129, Section 123 would be attracted which gives power to punish the patent agent. Therefore, we do not agree with the submission of the petitioner that an Advocate can also be punished by invoking the power under Section 123 of the Act.

43. The argument that the syllabus prescribed for the qualifying examination pertains only to the patent law is an incorrect submission. Rule 110(2) of the Patent Rules states that the qualifying examination shall consist of two papers, Paper I pertaining to the Patents Act and Rules for 100 marks and Paper II pertaining to drafting and interpretation of patent specification and other documents for 100 marks and viva voce for 50 marks. We had perused the sample papers which were placed before us by the appellants and we find that even in Paper I which deals with Patents Act/Rules, there are analytical questions touching science and technology. Paper II is entirely a scientific paper and it also contains questions on engineering drawing. Therefore the petitioners are incorrect in stating that only legal knowledge is being tested in the qualifying examination. In the preceding paragraphs, we have clearly spelt out as to how the right of the Advocate as conferred under Section 30 of the Advocates Act is in no manner infringed. The rights and restrictions of a patent agent has been clearly circumscribed under Sections 127 and 129 of the Act. The petitioners have failed to note the subtle yet marked distinction in the provisions.

44. The decision in the case of H.S.Srinivas Raghavachar (supra) can be of no assistance to the case of the petitioners since the question which fell for consideration in the said case was with regard to the repugnancy between a State enactment and the Advocates Act. Therefore, the petitioner cannot rely upon the said decision to advance his case. The decision in the case of India Council of Legal Aid and Advice (supra) was rendered in a challenge to a resolution passed by the Bar Council of India by adding Rule 9 to the Bar Council of India Rules placing an age restriction for enrolment as an Advocate before the State Bar Council. While considering the validity of the said Rule, the Hon'ble Supreme Court held that there is no dependable material in support of the rationale on which the Rule is founded apart from the Rule being discriminatory as it debars one group of persons who have crossed the age of 45 years and therefore, the Rule was struck down. The said decision can be of no assistance to the case of the petitioner. The decision in the case of Macquarie Bank Limited (supra), the Hon'ble Supreme

Court considered the expression 'practice' occurring in Section 30 of the Advocates Act and pointed out that the said expression is of extremely wide import and would include all preparatory steps leading to filing of an application before the Tribunal. In our considered view the said decision cannot be applied to the facts of the present case as we have held that the words "right to practice" occurring in Section 30 of the Advocates Act and the right of the patent agent to practice before the Controller under Section 127(a) cannot be equated. Equally for such reason, the decision in the case of Mohan Madhukar Sudame (supra) of the High Court of Bombay does not render any assistance to the case of the petitioner. The decision in the case of Hindustan Motors Earth Moving Equipment Division Ltd (supra), arose under the Industrial Disputes Act and the decision was rendered interpreting the scope of Section 36(a) of the Industrial Disputes Act. The decision can be of no assistance to the case of the petitioner. The decision of the Hon'ble Supreme Court in the case of Hygienic Foods (supra), does not laid down any legal principle rather it was a prima facie opinion recorded by the Court.

45. The petitioner would vehemently contend that the appellants should insist upon patent agents to possess law qualification. However, the Court cannot legislate nor direct the legislature to pass a particular law and therefore, we can take no cognizance of the said submission. Thus, the contention raised by the petitioner does not merit acceptance.

46. Thus, for the reasons assigned by us in the preceding paragraphs, the challenge to the 2002 amendment also should fail apart from the fact that the writ petition is grossly barred by inordinate unexplained delay and laches and the statutory provision having been in force in 2002 is valid for all purposes.

47. For all the above reasons, the challenge to the amendments to the Patents Act is devoid of merits and consequently W.A.No.532 of 2014 is allowed and the order in W.P.No.8472 of 2006 dated 15.03.2013 is set aside by upholding the validity of the 2005 amendment. For the reasons set out by us in the preceding paragraphs, W.P.Nos.27681 of 2016 and 949 of 2017 are dismissed. Cont.P.No.2694 of 2016 is closed. No costs. Consequently, connected miscellaneous petitions and the sub application are closed.

Sd/-

Assistant Registrar (CS-I)

//True Copy//

Sub Assistant Registrar

cse

To

1. Controller General of Patents, Designs &
Trademarks,
IPO Building, Boudhik Sampada Bhavan,
S.M.Road, Antop Hill, Mumbai - 400 037.

2. Controller of Patents,
Intellectual Property Rights Building,
GST Road, Guindy, Chennai - 600 032.

3. Union of India,
Represented by Ministry of Commerce and Industry,
Department of Industrial Policy and Promotion,
Udyog Bhawan, New Delhi - 110 011.

4. Bar Council of India,
Rep. by its Chairman,
21, Rouse Avenue Institutional Area,
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+1cc to Mr.D.Ramesh Kumar, Advocate, S.R.No. 20459

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+5cc to Mr.Wing Commander T.R.Moham, Advocate, S.R.No. 20662

W.A.No.532 of 2014,
W.P.No.27681 of 2016 & W.M.P.No.23840 of 2016,
W.P.No.949 of 2017,
Cont.P.No.2694 of 2016 and Sub.Appln.No.614 of 2016

SR(CO)
GN(27/03/2019)

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