

Date: September 25, 2020

To,
The Chairman,
Bar Council of India,
21, Rouse Avenue Institutional Area,
New Delhi – 110002

Subject: Representation on undue restriction on Advocates to appear in conciliation proceedings

Respected Sir,

1. At the outset, we as members of the legal fraternity congratulate the Bar Council of India ("BCI") for recently having notified that from the academic session 2020-2021, Mediation with Conciliation shall be a course component/ compulsory paper/subject for the pursuit of an LLB degree course, both for 3 years and 5 years integrated courses. This is indeed a step in the right direction towards enabling a great reform of the Indian Legal System, believed to reduce burden on courts and for a quick and efficacious resolution being agreed upon by parties in disputes while having varied points of conflict. The reasoning of the Legal Education Committee of the Bar Council of India that making Mediation a compulsory subject would enable students pursuing LLB to become experts and proficient to enable disputing parties to reach upon a successful conclusion, is commendable at the least. Young Advocates would be armed with an additional tool to enable parties to resolve their conflicts while reducing the overbearing burden of cases pending adjudication before Courts of law – *"a win-win for all"*.

2. Hindrances in Representation of Parties in ADR

2.1. While the objective of the aforementioned step is catering to the interests of Advocates as well as the disputing parties alike, we seek to bring to the kind attention of the BCI that there are still certain undue regulatory hindrances to the representation of parties by Advocates in conciliation proceedings. A few examples of the restrictions are ("Regulatory and Departmental Restrictions"):

- (i) In Paragraph 1.2 (iii), Annexure 3, Procedure/Methodology evolved by Panel for conciliation through Conciliation Committee, Conciliation & Settlement

- Mechanism for Contractual Disputes in Contract Agreements with the Contractors/ Concessionaires/ Consultants in respect of Ministry's Projects - Panel of Independent Experts and constitution of conciliation committee- Reg. dated December 18, 2019, Ministry of Road Transport and Highways, Government of India, mentions restrictions on parties on lawyer representation, "The parties will not be permitted to bring professional lawyers for conciliation";
- (ii) In Regulation 14 (2), the Securities and Exchange Board of India (SEBI) (Ombudsman) Regulations, 2003, dated August 21, 2003 restricts filing of a complaint by a legal practitioner, "The complaint shall be in writing duly signed by the complainant or his authorized representative (not being a legal practitioner) in the Form specified in the Schedule to these regulations and supported by documents, if any."
- (iii) In Paragraph 9 (1), Reserve Bank of India (RBI) Banking Ombudsman Scheme, 2006 dated July 16, 2017 wherein a person aggrieved by a bank may file a complaint before the banking ombudsman either through himself or through an authorized representative who is not an advocate, "Any person who has a grievance against a bank on any one or more of the grounds mentioned in Clause 8 of the Scheme may, himself or through his authorised representative (other than an advocate), make a complaint to the Banking Ombudsman within whose jurisdiction the branch or office of the bank complained against is located."
- (iv) In Paragraph 3(2), Ombudsman Scheme for Digital Transactions, 2019, Reserve Bank of India, RBI, dated January 31, 2020, wherein lawyers are excluded from the ambit of authorized representative, "Authorised Representative means a person (other than an advocate) duly appointed and authorised by a complainant to act on his / her behalf and represent him / her in the proceedings under the Scheme before the Ombudsman as well as Appellate Authority for consideration of his / her complaint." and in Paragraph 9(1), lawyers are excluded from filing a complaint on behalf of a complainant, "Any person who has a grievance on any one or more of the grounds mentioned in Clause 8 of the Scheme may, himself or through his authorized representative (other than an advocate), make a complaint to the Ombudsman for Digital Transactions within whose jurisdiction the branch or office of the System Participant complained against is located."

- (v) In Paragraph 9(1), Ombudsman Scheme for non-banking financial companies, 2018, RBI, dated February 23, 2018, excludes representation and filing of complaint by lawyers, "Any person who has a grievance against a Non-Banking Financial Company on any one or more of the grounds mentioned in Clause 8 of the Scheme may, himself or through his authorised representative (other than an Advocate), make a complaint to the Ombudsman within whose jurisdiction the Branch/ Registered Office of the Non-Banking Financial Company complained against, is located."
- (vi) In Rule 8(a), GAIL (India) Limited Conciliation Rules, 2010, do not allow lawyers to participate in conciliation proceedings, "Advocates shall not be allowed to participate in Conciliation Proceedings under these Rules and Parties shall plead their own cases."
- (vii) In Regulation 22, Pension Fund Regulatory and Development Authority (Redressal of Subscriber Grievance) Regulations, 2015 dated January 29, 2015, wherein an appeal can be filed before an ombudsman only by the complainant or his authorized representative not being a legal practitioner, "The complainant may, himself or through an authorised representative (not being a legal practitioner) file an appeal with the Ombudsman within whose jurisdiction the branch office or head office or registered office of an intermediary under the National Pension System or of any other pension scheme regulated under the Act, is located."
- (viii) In Paragraph 13, Annexure I, Revised guidelines for conciliation through Outside Expert Committee (OEC), Circular No. 03/2015 wherein parties are not allowed to bring in Advocates for conciliation proceedings before the OEC, "The parties shall be represented by their in-house employees/executives. No party shall bring any advocate or outside consultant/advisor/agent. Ex-officers of ONGC who have handled the matter in any capacity are not allowed to attend and present the case before OEC on behalf of Contractor. However, ex-employees of parties may represent their respective organizations."
- (ix) In Paragraph 5, BHEL Conciliation Scheme, 2018, Bharat Heavy Electrical Limited, which states that neither party shall be represented by a lawyer, "The Parties shall be represented by only their duly authorized in-house executives/officers and neither Party shall be represented by a Lawyer."

- (x) In Rule 7(h), Indian Oil Corporation Limited Conciliation Rules, 2014 revised September, 2014 under which Advocates are not be permitted to participate in the conciliation proceedings and parties are expected to present their respective positions themselves, "Advocates shall not be permitted to participate in the Conciliation Proceedings and Parties shall be expected to present their respective positions themselves. Parties shall, however, be free to appoint their duly authorized in-house Legal Officials to present their case."

3. Deprivation of Parties from resorting to Professional Services

- 3.1. Taking the Securities and Exchange Board of India (Ombudsman) Regulations, 2003 (SEBI Regulations) as an example, it is a mechanism where any person who has a grievance against a listed company or an intermediary relating to any of the matters specified in Regulation 13 thereof, may himself or through his authorized representative or any investors association recognized by SEBI, make a complaint against a listed company or an intermediary to the Ombudsman within whose jurisdiction the registered or corporate office of such listed company or intermediary is located. The SEBI Regulations further prescribe that the authorized representative shall not be a legal practitioner. This factor is in itself a huge hindrance to parties seeking out of court resolution of their disputes, being unable to avail the professional services of a trusted legal practitioner armed with training in mediation and conciliation practices.
- 3.2. It may be noted that while the aforementioned rules and regulations, amongst other similar ones, are in conformity with/supplementary to Part – III of the Indian Arbitration and Conciliation Act, 1996, the said rules and regulations do not further the intention of Part-III in making Conciliation as a regular tool for amicable alternate dispute resolution ("ADR") in India. It is said that the thread of "natural justice" should run through the conciliation proceedings. While the same is true, it may be relevant to note that parties as well as Advocates are facing unjust restrictions in the form of archaic laws that prevent parties from seeking the aid of legal practitioners who may be in a far better position, technically and otherwise, to assist the parties in reaching an amicable settlement. It has been stated by the great Abraham Lincoln that because of their skill and experience, advocates have superior opportunities to do good. Therefore, practitioners of law are better equipped in helping their clients

present their side of the dispute even while such a dispute is not pending adjudication before a Court of law.

4. Barring Lawyers from ADR Avenues

- 4.1. While on the one hand we expect law students to appreciate the merits of conciliation and inculcate it as a regular form of dispute resolution, and on the other hand, there are several unjust and meritless Regulatory and Departmental Restrictions, restricting authorized representation by an Advocate/legal practitioner in Mediation and Conciliation proceedings. An absolute bar on representation by a legal practitioner is unjust not only because an entire avenue for ADR practice is barred for lawyers, but also because even parties are not allowed to avail their competent services during such conciliation proceedings. Further, the current pandemic times have drastically reduced work for lawyers, while a whole lot more parties are considering settling their dispute rather than contesting a time consuming and expensive litigation. The Hon'ble Chief Justice of India recently called for a comprehensive legislation spelling out compulsory pre-litigation mediation to help reduce massive pressure on courts of India. In furtherance of the vision, the Hon'ble Supreme Court has set up a panel to draft legislation to provide legal sanctity to disputes settled through mediation under the Chairmanship of Mr. Niranjan Bhatt.
- 4.2. The removal of the afore-stated restriction on lawyers is quintessential for the effective functioning of the policy of dispute resolution by way of mediation and conciliation as well as in order to further aid in reducing the burden of litigation and pending Court cases in India. Moreover, it would also aid in removing the stigma against lawyers that they tend to disrupt amicable ADR proceedings owing to their technical and procedural know-how.

5. Contravention of Section 30, Advocates Act, 1961

- 5.1. The aforesaid Regulatory and Departmental Restrictions imposed by various authorities is also repugnant to Section 30 of the Advocates Act, 1961. Section 30, Advocates Act, 1961 states:

"Right of Advocates to practice

Subject to the provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practice 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 practice."*

5.2. The law as laid down by the Hon'ble Supreme Court of India with respect to non-appearance of lawyers is restricted to disciplinary proceedings of a company/organization where the Hon'ble Court in the matter of *D.G. Railway Protection Force & Ors. vs K. Raghuram Babu* AIR 2008 SC 1958, held that,

"It is well settled that ordinarily in a domestic/departmental inquiry the person accused of misconduct has to conduct his own case vide N. Kalindi and others vs. M/s. Tata Locomotive and Engineering Co. Ltd AIR 1960 SC 914. Such an inquiry is not a suit or criminal trial where a party has a right to be represented by a lawyer. It is only if there is some rule which permits the accused to be represented by someone else, that he can claim to be so represented in an inquiry vide Brook Bond India vs. Subba Raman 1961 (11) LLJ 417."

5.3. Therefore, right of being represented by a lawyer has only been seen to be restricted by the Hon'ble Court in the event of disciplinary proceedings. Mediation and Conciliation proceedings are far from the category of in-house inquiries/disciplinary actions, and therefore the right to be represented by a lawyer should not be denied to a party. Moreover, this is an unnecessary restriction because the person who may be most qualified in aiding a party in reaching an amicable settlement is not being made a part of such proceedings.

5.4. The Hon'ble Supreme Court in the matter of *Madras Bas Association v. Union of India* 2015 SCC Online SC 1094 while deciding the validity of the constitution of National Tax Tribunal ("NTT"), observed as follows with regard to representation by a lawyer vis-à-vis representation by a Chartered Accountant ("CA")/ Company Secretary ("CS"):

"78. Keeping in mind the fact, that in terms of Section 15 of the NTT Act, the NTT would hear appeals from the Income Tax Appellate Tribunal and the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) only on "substantial questions of law", it is difficult for us to appreciate the propriety of representation, on behalf of a party to an appeal, through either Chartered Accountants or Company Secretaries, before the NTT. The determination at the hands of the NTT is shorn of factual disputes. It has to decide only "substantial questions of law". In our understanding, Chartered Accountants and Company Secretaries would at best be specialists in understanding and explaining issues pertaining to accounts. These issues would, fall purely within the realm of facts. We find it difficult to accept the prayer made by the Company Secretaries to allow them, to represent a party to an appeal before the NTT. Even insofar as the Chartered Accountants are concerned, we are constrained to hold that allowing them to appear on behalf of a party before the NTT, would be unacceptable in law. We accordingly reject the claim of Company Secretaries, to represent a party before the NTT. Accordingly, the prayer made by Company Secretaries in Writ Petition (Civil) no. 621 of 2007 is hereby declined. While recording the above conclusion, we simultaneously hold Section 13(1), insofar as it allows Chartered Accountants to represent a party to an appeal before the NTT, as unconstitutional and unsustainable in law."

- 5.5. This is an excellent example of a scenario where professionals with expertise in the practice of law have been allowed to practice, exclusive of Chartered Accountants and Company Secretaries. While mediations and conciliations may not involve substantial questions of law, they are nevertheless stages where the professional help of a lawyer trained in alternate forms of dispute resolution would aid in more cases ending up in an amicable settlement, rather than having an authorised representative who is not lawyer.

5.6. In order to proceed with mediation and conciliation in a structured and well-regulated manner, presence of lawyers (being legally trained minds) is essential for effective dispute resolution.

6. Delegated Legislation needs to be in consonance with the Statutes

6.1. In the case *Mohan Madhukar Sudame v. State of Maharashtra and Ors.* AIR 2012

Bom 89, Nagpur Bench of the Hon'ble Bombay High Court held that,

"the right of an Advocate to practice before the Courts other than the Supreme Court of India includes High Courts, tribunals or any person authorised to take evidence; must be taken as flowing from Section 30 of the Advocates Act. Since Section 64 of the Act deals with exclusion of right of an Advocate to practise before the University and College Tribunal, the provision must be held to be repugnant to Section 30 of the Advocates Act and consequently void"

6.2. Hence, the right of advocates to practice is not limited only to the Hon'ble Supreme Court, Hon'ble High Courts, and Tribunals. From the *Mohan Madhukar Sudame v. State of Maharashtra and Ors.* (supra) judgement by the Hon'ble Bombay High Court, it is a clear position of law that anything repugnant to Section 30 of the Advocates Act, 1961 restricting the right of advocate to practice shall be held void.

6.3. On the same pretext, in the case of *Indian Express Newspapers v. Union Of India & Ors.* 1985 SCR (2) 287 it was held by the Hon'ble Supreme Court that,

"A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. [Emphasis Supplied] That is because subordinate legislation must yield to plenary

legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary."

6.4. Therefore, the judgement in *Indian Express Newspapers v. Union Of India & Ors* (*supra*) is quintessential to elucidate upon the submission that subordinate or delegated legislations shall be in conformity with the Central statutes. The rules and internal regulations made by various regulatory bodies, public sector undertaking and the like to inhibit the representation by lawyers to parties which need such representation as it is not only limited to technical advice but also provides a sense of confidence and belief in the parties on the process of dispute resolution needs to be appropriately amended to remove such restrictions to be in compliance with the Advocates Act, 1961 and the rights of the parties in general.

7. Seamless Dispute Resolution Mechanism for Ease of Doing Business

7.1. We further feel necessitated to point out that the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 was introduced in Lok Sabha mandating reference to pre-litigation mediation before institution of a suit by the plaintiff. It's Statement of Objects and Reasons highlighted that in order for India to improve its ranking in the World Bank 'Doing Business Report', the dispute resolution environment has to be considered as one of the parameters for doing business in the country. In the same light, for the ADR mechanism to thrive in India, it is extremely relevant that an absolute bar is not imposed on appearance of lawyers before Mediations and Conciliation proceedings, more importantly before public sector undertakings and regulatory bodies of the Government since a plethora of cases are already pending in Courts against the State and its instrumentalities. It would indeed result in more parties seeking an out of court amicable settlement, since parties would have the confidence of presenting their case well while being advised by their trusted legal counsel trained in mediation and conciliation practices.

8. Violation of Article 19 (1)(g) of the Constitution of India, 1950

8.1. Further, imposition of an express bar on Lawyers from appearing in the aforesaid conciliation proceedings is also violative of Article 19(1)(g) of the Constitution of

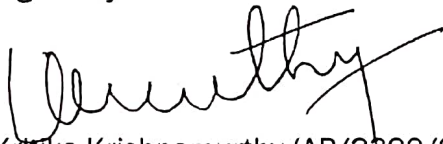
India, 1950, "to practise any profession, or to carry on any occupation, trade or business" without any reasonable protection of the same.

8.2. Moreover, in the current unprecedented times of a global pandemic, such unreasonable and arbitrary restrictions should be removed so as to provide more opportunities to lawyers, who are severely affected due to lack of work and opportunities on account of non-functioning/restricted functioning of Courts.

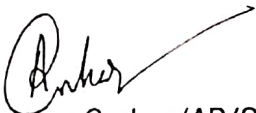
9. Adequate Relief Claim

9.1.1. We therefore request the BCI to undertake appropriate measures to enable removal of restrictions as outlined in the abovementioned Regulatory and Departmental Restrictions and such other restrictions which bars lawyers from practicing ADR across various forums and prohibits the parties-to-a-dispute from availing the right to effective representation from an experienced law professional.

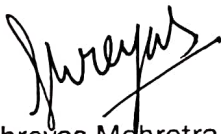
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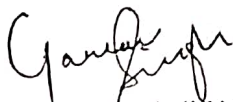
Kritika Krishnamurthy (AP/2390/2012)



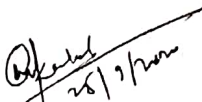
Anuroop Omkar (AP/2383/2012)



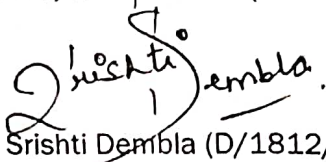
Shreyas Mehrotra (D/755/2012)



Mr. Gaurav Singh (MAH/3640/2015)



Ms. Akanksha Rathore (UP05154/19)



Ms. Srishti Dembla (D/1812/2020)