

## ORIGINAL SIDE—FULL BENCH.

*Before Sir Murray Coultts Trotter, Kt., Chief Justice,  
Mr. Justice Kumaraswami Sastri and Mr. Justice  
Pakenham Walsh.*

1928,  
September 6.

*In re* THE POWERS OF THE ADVOCATES UNDER  
THE INDIAN BAR COUNCILS ACT ON THE  
INSOLVENCY SIDE OF THE HIGH COURT.\*

*Indian Bar Councils Act (I of 1926), ss. 2 (a), 8, 14 and 19—  
Right of Advocates enrolled in the High Court of Madras,  
under the Act, to act in the Insolvency jurisdiction—Rule  
128 of the Insolvency Rules—“ Practise ”, meaning of.*

Advocates enrolled in the High Court of Madras under the Indian Bar Councils Act (I of 1926) are by virtue of sections 2 (a), 8 and 14 of the Act entitled not only to appear and plead but also to “ act ” in the Insolvency jurisdiction of the High Court. Rule 128 of the Insolvency Rules of the High Court which allowed Advocates only to appear and plead in that jurisdiction is no longer in force.

“ Practise ” in sections 8 and 14 (1) of the Act includes “ acting ”. *Laurentius Ekka v. Dhuki Koeri*, (1925) I.L.R., 4 Pat., 766, followed.

CASE referred by Mr. Justice KUMARASWAMI SASTRI for the Opinion of the Full Bench under the following circumstances:—Mr. V. V. Devanadhan, a Vakil enrolled as an Advocate of the Madras High Court, on 16th July 1928, under the Indian Bar Councils Act (I of 1926), presented at the end of July 1928 a vakalat and papers on behalf of a party in a cause before the Insolvency Court. The presiding Judge, Mr. Justice KUMARASWAMI SASTRI, being of opinion that under the Insolvency Rules of the High Court (Rules 128 and 129) as they stood, an

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\* *In re* the Powers of Statutory Advocates.

Advocate was entitled only to "appear and plead" and not "to act" in the Insolvency jurisdiction, directed the return of the vakalat and the papers to the Advocate but referred the question to the CHIEF JUSTICE for the expression of an Opinion by a Full Bench. His Lordship the CHIEF JUSTICE accordingly referred the matter for disposal by a Full Bench constituted as above.

Rules 128 and 129 of the Insolvency Rules are given in the judgment.

*A. Krishnaswami Ayyar* for the Advocates' Association, urged the arguments stated in paragraph 2 of Mr. Justice KUMARASWAMI SASTRI's judgment and argued that the Bar Councils Act was a consolidating and amending Act as regards the powers of Advocates and that the object of the Act was to unify the different classes of practitioners till now obtaining by repealing the powers of the High Court under the Letters Patent in the matter of enrolling practitioners for the High Court and in vesting the same powers in the Bar Council. The Act gives Advocates wide powers and they cannot be curtailed by the Rules. Section 19 (4) repeals all Rules till now obtaining which are repugnant to the Bar Councils Act; Rule 128 of the Insolvency Rules being repugnant to the Act must be deemed to have been repealed by the Act. "Practise" in sections 8 and 14 (1) of the Act means not only to appear and plead but also to "act": see *Laurentius Ekka v. Dhruki Koeri*(1) and *Bakhtawar Singh v. Sant Lal*(2). The Insolvency jurisdiction is part of the Original jurisdiction of the High Court; see In the matter of *Candas Narrondas Navivahu v. C. A. Turner*(3). The provisions of the Civil Procedure Code are applicable to the Insolvency proceedings and under that Code a litigant can authorize a practitioner to act for him in any cause therein. If the High Court was so minded, it could have framed rules, enabling Advocates to act on the Insolvency Side; there was nothing to prevent its doing so under any of the Charters or Letters Patent issued since 1800.

*F. S. Vaz* for the Bar Association adopted the above arguments and urged that under Rule 4 of the Original Side Rules a "Pleader" was defined to include an Attorney.

(1) (1925) I.L.R., 4 Pat., 766.

(2) (1887) I.L.R., 9 All., 617.

(3) (1889) I.L.R., 13 Bom., 520 (P.C.).

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V. V. Srinivasa Ayyangar for the Attorneys' Association, urged the arguments stated in paragraph 3 of Mr. Justice KUMARASWAMI SASTRI's judgment. He quoted, *Blackpool Corporation v. Star Estate Co.*(1), and *The London and Blackwall Railway Co. v. The Limehouse District Board of Works*(2) for the position that a general Act, like the Bar Councils Act, cannot be deemed to control or affect a special Act such as the Presidency Towns Insolvency Act unless it expressly so enacts, and argued that an Advocate who is not allowed to act but is only allowed to plead cannot be said to have his right to practise, in any way curtailed.

### JUDGMENT.

COURTS  
TROTTER, C.J.

COURTS TROTTER, C.J.—I have had the advantage of reading the judgment about to be delivered by my brother KUMARASWAMI SASTRI and I entirely agree with it. It is clear that the object of the Act must be taken to have been to put all classes of practitioners on the same footing and if the Insolvency jurisdiction of the Original Side were to be held to be on a different footing as regards the right of audience from the rest of its jurisdiction, it would obviously have been an anomaly left outstanding by the Act *per incuriam*. I confess that such a result would not have surprised me in so ill-considered and ill-drafted a measure as the Bar Councils Act. Moreover, with the mass of evidence collected by the Bar Committee in 1923-24 it is remarkable that those responsible for the Bar Councils Act made no attempt whatever to provide for the peculiar state of things obtaining in the Madras High Court which has no parallel in any other High Court in India. But I agree with my learned brother that we are not driven to hold that this anomaly still persists and I therefore concur in his judgment.

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KUMARASWAMI SASTRI, J.—The question for determination is whether Advocates enrolled under the Indian

(1) [1922] 1 A.C., 27, 34.

(2) (1856) 3 K and J., 123; 69 E.R., 1048.

Bar Councils Act of 1926 are entitled to act in the Insolvency jurisdiction of the High Court. Under the rules as they now stand they are only entitled to plead.

The contention of the Advocates is that having regard to sections 8 and 14 and the definition of "Advocates" in section 2 (a), they are as a matter of right entitled to practise in the High Court, that the word "practise" in its ordinary meaning carries with it the right to appear, act and plead and that there being no differentiation of jurisdiction so far as the Bar Councils Act is concerned and no limitation placed on the word "practise" in the Act, the rules hitherto in force which prevent Advocates from acting in the Insolvency jurisdiction can no longer prevent them from acting after the Act has come into force.

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For the Attorneys it is argued that the Insolvency jurisdiction of the High Court is a separate jurisdiction which had its inception in the Indian Insolvency Act, 11 and 12 Vic., Ch. 21, which was repealed by the Presidency Towns Insolvency Act of 1909 which transferred the jurisdiction to the High Court, that under the Indian Insolvency Act, Advocates were only entitled to plead and Attorneys were only entitled to act in the Insolvency jurisdiction, that section 121 of the Presidency Towns Insolvency Act expressly reserves to Advocates and Attorneys the rights they had under the Indian Insolvency Act and that the Bar Councils Act which does not purport to deal with Insolvency jurisdiction cannot be invoked to give Advocates a larger right of audience than that which existed at the date of the passing of the Act, and that the Indian Insolvency Act and the Presidency Towns Insolvency Act being special enactments dealing with special jurisdiction, they cannot be controlled or affected by the Bar Councils Act, which is a general enactment. It is also argued that even if

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the Bar Councils Act should apply, section 19 (4) saves all rules in force which are not inconsistent with the Act and that the rules framed by the High Court under the Letters Patent which confine the Advocates to plead only in the Insolvency Court are not inconsistent with the Act and cannot therefore be said to be impliedly repealed.

Before dealing with these contentions it is necessary to refer to the rules and orders which were in force at the date when the Bar Councils Act came into force in so far as they relate to the Insolvency jurisdiction of the High Court.

The history of the legislation as regards the rights of Advocates, Attorneys and Vakils in so far as it relates to the Original Side of the High Court has been traced with great clearness in *Namberumal Chetty v. Narasimhachari*(1) where the question as to the rights of Vakils and Attorneys was raised. So far as Advocates and Attorneys are concerned the rules framed by the High Court as regards the Original Civil jurisdiction are the same as those framed as regards the Insolvency jurisdiction. The power of the High Court to frame rules in respect of the Insolvency jurisdiction is derived from the Charter Act and the Letters Patent constituting the Madras High Court.

Section 17 of the Charter Act of 1800 empowered the Supreme Court

“to approve, admit and enrol such and so many of the persons being *bona fide* practitioners of the Law in the said Court of Recorder of Madras or having been admitted Barristers in England or Ireland or having been admitted Attorneys or Solicitors in one of our Courts at Westminster or being otherwise capable according to such rules and qualifications as the said Court shall, for that purpose, make and declare, to act as

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(1) (1916) 81 M.L.J., 698.

well in the character of Advocates as of Attorneys in the said Court, which persons so approved, admitted and enrolled as aforesaid, shall be and are hereby authorized to appear and plead and act for the suitors in the said Court."

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And it declares

"that no other person whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them."

Under the Charter Act it is therefore clear that the Supreme Court had power to enrol Advocates who could be authorized by the rules both to act and plead in the Supreme Court, though as a matter of fact no such rules were made and so far as the Supreme Court was concerned, the Advocates were only empowered to plead and not to act.

The Letters Patent constituting the High Court at Madras abolished the Supreme Court and transferred its jurisdiction to the High Court. The Advocates and Attorneys who were enrolled by the Supreme Court were enrolled as Advocates of the High Court.

Clause 9 of the Letters Patent gave the High Court power

"to approve, admit and enrol such and so many Advocates, Vakils and Attorneys, as to the said High Court shall seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions."

Clause 10 gives the High Court power to frame rules for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law.

As regards Insolvency jurisdiction, clause 18 directs that the Court for the Relief of Insolvent Debtors shall be held before one of the Judges of the said High Court

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of Judicature at Madras, and the said High Court, and any such Judge thereof, shall have and exercise, within the Presidency of Madras, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India.

So far as the power to make rules empowering Vakils to appear, act and plead on the Original Side of the High Court, it has been held that such power was within the competence of the High Court, by a Full Bench as early as 1875 (*In the matter of the Petition of the Attorneys*)(1). The question was again raised, but the rules were held to have been validly framed. (See *Numbermal Chetty v. Narasimhachari*(2).)

As regards the Insolvency Court however, the rules framed by the Madras High Court did not authorize Vakils to appear in the Insolvency Court or Advocates to act.

Rules 128 and 129 of the Insolvency Rules run as follows :—

128. An Advocate may appear and plead upon any hearing in Court or in Chambers ; provided that the Taxing Officer shall not, as between party and party, allow any fee in respect of his attendance at Chambers, unless the Judge certifies that the case is a proper one for the attendance of an Advocate.

129. An attorney may appear, plead and act upon all proceedings ; provided that he shall not be allowed to appear or plead upon a hearing in Court.

So far as the Bombay High Court is concerned, rule 36 states that

“ Advocates may appear and plead for suitors on any side of this Court and in the Insolvent Court but not (except for an insolvent in the Insolvent Court or for a prisoner in the Criminal Court) unless instructed by an Attorney or in the Appellate Side of the Court by a Pleader.”

(1) (1875) I.L.R., 1 Mad., 24.

(2) (1916) 31 M.L.J., 698.

In Calcutta only Barristers enrolled as Advocates instructed by Attorneys could appear in the Insolvency jurisdiction.

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After the passing of the Presidency Towns Insolvency Act the question as to the right of Vakils to practise in the Insolvency Side was raised but a Full Bench of this Court negated the right. (See *Krishnaswami Ayyar v. Swaminatha Ayyar*(1)).

Having regard to the provisions of the Charter Act and the Letters Patent which I have already referred to, it seems to me that the High Court had power to frame rules allowing Advocates to act in the Insolvency jurisdiction though it did not do so. The Legislature has power to legislate on the matter without any necessity to repeal any enactment relating to insolvency.

I am unable to agree with the contention of Mr. Srinivasa Ayyangar that there is anything in the Indian Insolvency Act (11 and 12 Vic., Ch. 21) which curtails the power of the High Court conferred on it by the Charter Act and the Letters Patent to entitle Advocates to act as well as to plead in the Insolvent Court.

The material portion of section 3 of the Indian Insolvency Act is as follows:—

“ And every Advocate and attorney of the said Supreme Courts at Calcutta, Madras and Bombay, respectively, shall be entitled to practise in the way of his profession in the Court for the relief of insolvent debtors of that Presidency, and no other persons shall practise as Advocates or Attorneys in the said Courts for the relief of insolvent debtors.”

It is no doubt true that when the Act was passed it was only the Attorneys that were entitled to act in Court and Advocates were only entitled to plead. It should be remembered that when this Act was passed the Supreme Court which was constituted under the



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Charter Act of 1800 had under section 17 power to enrol Advocates with powers to appear, act and plead.

The Supreme Court Charter was repealed by the Letters Patent which, as I pointed out before, empowers the High Court to frame rules and the High Court as the Successor of the Supreme Court and the possessor of the powers conferred on it by the Letters Patent was in my opinion competent to enrol Advocates who could act as well as plead.

The power of the High Court as regards Vakils was affirmed in I.L.R., 1 Mad., 24 and 31 M.L.J., 698, already referred to and unless it can be shown that there is anything in the Indian Insolvency Act (11 and 12 Vic., Ch. 21) which curtails the power to frame rules permitting Advocates to act and plead on the Insolvency Side the same reasoning would apply to the rules framed under the Insolvency Act. The words "shall be entitled to practise in the way of his profession" in section 3 of the Indian Insolvency Act simply mean "shall be entitled to practise as Advocates or Attorneys as he was doing before" and does not amount to a statutory bar to Advocates acting in the Court constituted by the Act; nor does it override the powers given to the High Court under the Charter Act and the Letters Patent.

Section 121 of the Presidency Towns Insolvency Act confers no fresh right. It runs as follows:—

"Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of insolvent debtors."

All that this section says is that no fresh rights are conferred on any person by reason of the transfer of jurisdiction and it cannot be said that this Act curtailed the powers of the High Court to frame rules defining

the functions of Advocates if it was authorized to do so under the Letters Patent.

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In my view, at the date of the passing of the Bar Councils Act, the High Court had power to frame rules enabling Advocates to act and plead in the Insolvency jurisdiction though it did not exercise that power.

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There being no statutory bar to Advocates acting and pleading in the Insolvency jurisdiction, I think there is no necessity for the amendment or repeal of section 3 of the Indian Insolvency Act or section 121 of the Presidency Towns Insolvency Act before Advocates can be allowed to act. It was within the competence of the High Court to give the power by rules and it follows that the legislature can do so by an Act without the necessity of repealing anything in any previous enactment or any special reference to the Insolvency jurisdiction.

In the view I take it is unnecessary to consider the cases referred to by Mr. Srinivasa Ayyangar as regards general later Acts not controlling or affecting earlier special enactments.

The next point for consideration is whether the Bar Councils Act confers the power to act and plead on Advocates in all the jurisdictions of the High Court so far as Madras is concerned and whether rules 128 and 129 of the Insolvency Rules referred to must be taken to be no longer in force as they have been superseded by the provisions of the Bar Councils Act.

Section 2 (a) of the Bar Councils Act defines an "Advocate" as meaning an Advocate entered in the roll of Advocates of a High Court under the provisions of the Act.

Section 8 runs as follows:—

"(1) No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act.

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Provided that nothing in this sub-section shall apply to any attorney of the High Court."

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Then follow the provisions as to the persons who are to be enrolled.

Section 14 runs as follows :—

"(1) An Advocate shall be entitled as of right to practise (a) subject to the provisions of sub-section (4) of section 9, in the High Court of which he is an Advocate, and

(b) save as otherwise provided by sub-section (2) or by or under any other law for the time being in force in any other Court in British India and before any other Tribunal or person legally authorized to take evidence, and

(c) before any other authority or person before whom such Advocate is by or under the law for the time being in force entitled to practise."

Section 14(3) gives the High Courts of Bombay and Calcutta power to frame rules regulating the rights of Advocates on the Original Side.

Section 9 (1) empowers the Bar Council with the previous sanction of the High Court to make rules to regulate the admission of persons to be Advocates of the High Court.

Section 9 (4) saves the rule-making powers of the High Courts of Bombay and Calcutta as regards the practitioners on the Original Side.

Section 19 (4) which is the saving clause as regards the rules in force runs as follows :—

"When this Act has come into force in respect of any High Court, any provision of any other enactment or any order, scheme, rule, form or by-law made thereunder, which was before that date applicable to Advocates, Vakils or Pleaders entitled to practise in such High Court shall, unless such a construction is repugnant to the context or to any provision made by or under this Act, be construed as applying to Advocates of the High Court enrolled under this Act."

The Bar Councils Act by section 19 (2) repeals the Letters Patent in so far as it refers to the powers of

the High Court to enrol Advocates and Vakils. It seems to me to be clear from the provisions above referred to that the Bar Councils Act so far as Madras is concerned makes no distinction as regards the different jurisdictions of the High Court, gives the High Court no power to frame rules, so far as the Original and Insolvency Sides are concerned, to limit the functions of Advocates only to plead, and prevent them from acting, and keeps alive only such rules as the Madras High Court has already framed if they are consistent with the provisions of the Act.

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It is to be noted that while the rule-making powers of the Bombay and Calcutta High Courts, so far as the Original Side is concerned are saved, no such saving clauses are enacted so far as the Madras High Court is concerned. It was evidently thought that as the Madras Vakils were authorized to appear, act and plead on the Original Side, the Madras High Court offered a fair field for trying the experiment of unifying the Bar which was the policy underlying the Act.

The word "practise" ordinarily means "appear, act and plead", unless there is anything in the subject or context to limit its meaning. The word "practise" is used in section 4 of the Legal Practitioners Act of 1879 and it was held by JWALA PRASAD, J., in *Laurentius Ekka v. Dhuki Koeri*(1) that the word "practise" includes the right to appear, plead and act. I may in this connection refer to *Bakhtawar Singh v. Sant Lal*(2), where it was held that Advocates can act and plead unless there is anything in the rules framed by the High Court restricting their power.

I think that sections 8 and 14 of the Bar Councils Act which entitle an Advocate as of right to practise

(1) (1925) I.L.R., 4 Pat., 766.

(2) (1887) I.L.R., 9 All., 617.

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in the High Court entitle an Advocate of the Madras High Court to appear, act, and plead in all the jurisdictions of the Madras High Court. If this view is correct, it follows that any rules which cut down that right to plead alone would be repugnant to the provisions of sections 8 and 14.

I do not think it makes any difference whether the Court for the Relief of Insolvent Debtors is a separate Court or is only a part of the High Court's Original Civil Jurisdiction. If the Court is a separate Court, it will be a Court falling under clause (b) of section 14. As appeals lie to the High Court, it will be a Court subordinate to the High Court and section 4 of the Legal Practitioners Act will also apply. If Insolvency jurisdiction is part of the High Court's Original Side Jurisdiction, section 14, clause (a) will apply.

I am unable to agree with the contention of Mr. Srinivasa Ayyangar that as an advocate is allowed to practise in the High Court even if he is prevented from acting in the Insolvent Court, there is no repugnancy. I am of opinion that where an Act confers rights to a party in general terms and entitles him to perform more than one function, the cutting down of those rights by a rule would make that rule repugnant to the provisions of the Act. The following observations of WILLS, J., in *Reg v. Bird, Needes, ex parte*(1), are in point.

"I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification—the principle that evolves where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."

I may also refer to the *Municipal Corporation of the City of Toronto v. Virgo*(2).

(1) [1898] 2 Q.B., 340.

(2) [1896] A.C., 88.

I am of opinion that Advocates enrolled in the Madras High Court under the provisions of the Bar Councils Act are entitled to act and plead in the insolvency jurisdiction of the High Court.

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PAKENHAM WALSH, J.—I agree and have nothing to add.

N.R.

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*Before Sir Murray Coutts Trotter, Kt., Chief Justice,  
Mr. Justice Kumaraswami Sastri and Mr. Justice  
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RATNASABAPATHY CHETTIAR AND OTHERS, PLAINTIFFS

1928,  
November 2.

v.

DEVASIGAMONY PILLAI, DEFENDANT.\*

*Limitation Act (IX of 1908), arts. 66, 67, 116—Registered mortgage—Execution sale under decree on the mortgage—Insufficiency of sale-proceeds to meet decree amount—Claim for balance on the covenant to pay—Limitation.*

*Held*, by the Full Bench that where a mortgage deed containing a personal covenant to pay the mortgage money is registered, the article of the Limitation Act (IX of 1908) applicable to a claim, based on the personal covenant, to recover the balance due to the mortgagee after the sale of the mortgage property, is article 116 of the Act which provides a period of six years from the due date and not article 66 or 67 of the Act; *Tricomdas Cooverji Bhoja v. Gopinath Jin Thakur* (1916) I.L.R., 44 Calc., 759 (P.C.), applied; *Ganesh Lal Pandit v. Khetra Mohan Mahapatra* (1926) I.L.R., 5 Pat., 585 (P.C.) and *Ram Din v. Kalka Prasad* (1884) I.L.R., 7 All., 502 (P.C.), explained and distinguished.

CIVIL suit filed in the original civil jurisdiction of the High Court.