2025 INSC 1275

Reportable

IN THE SUPREME COURT OF INDIA
ORIGINAL APPELLATE JURISDICTION

Suo Motu Writ Petition (Criminal) No.2 of 2025

IN RE: Summoning Advocates who give legal opinion or represent parties during investigation of cases and related issues.

with

Writ Petition (Civil) No. 632 of 2025

and

Special Leave Petition (Criminal) No. 9334 of 2025

J U D G E M E N T

K. VINOD CHANDRAN, J.

"The first thing we do, let's kill all the lawyers"

Henry VI pt. II scene 2 Act IV

Often spoken with a negative connotation, the context in which the above words were spoken in William Shakespeare's historical play indicates it to be otherwise. Dick the Butcher, who spoke these words in the play; henchman of Jack Cade who was chosen to foster revolt, described by the Bard of Avon himself as *'a demagogue*

pandering to the ignorant', was not championing liberty, free thought or independent choices. The scene itself ends with a law clerk being sentenced to hang for being literate and informed in law. Emphasising the function of the lawyer as a guardian of freedom, especially in the context of the above statement *'… being made by a rebel, not a friend of liberty'(sic)* Stevens J. in his dissenting opinion in ***Walter v. Nat. Assn. of Radiation Survivors***[1] observed that the above text will reveal that *"Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government."*

The Background:

2. The above matter arises out of a reference made by a Bench of two learned Judges of this Court in a Special Leave Petition filed against a notice issued against an Advocate under Section 179 of the Bharatiya Nagarik Suraksha Sanhita, 2023[2]. Pursuant to an agreement relating to a loan and its

[1] 473 U.S. 305 (1985)
[2] for short, the BNSS

breach, an FIR was lodged at the Odhav Police Station, Ahmedabad, Gujarat under various provisions of the BNSS read with the provisions of the Gujarat Money-Lenders Act, 2011 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The accused was arrested, and the petitioner in SLP (Crl.) Diary No.33845 of 2025, an Advocate, filed a regular bail application for the accused before the learned Sessions Judge at Ahmedabad which was allowed. Subsequently, the impugned notice was issued, wherein after referring to the complaint and the accused arrayed, the Assistant Commissioner of Police, Ahmedabad, the Investigating Officer[3], directed the appearance of the Advocate within three days from the date of receipt of notice so as to *'know true details of the facts and circumstances after making your inquiry'* (*sic*). The petitioner Advocate moved the High Court which rejected the application on the ground that the petitioner did not respond to the summons and his non-cooperation resulted in the

[3] hereafter, the 'I.O.'

investigation being stalled. It was opined that there was no violation of fundamental rights, since the summons was served under Section 179 of the BNSS in the capacity of a witness by an officer conferred with the power to investigate. The learned Judges of this Court who heard the S.L.P. against the order of the High Court were of the opinion that two questions arise of utmost public importance, as to under what circumstances an investigating agency can directly issue a summons to question a counsel who is appearing for a party in a given case, especially under the rigour of Section 132 of the Bhartiya Sakshya Adhiniyam, 2023[4] corresponding to Section 126 of the Indian Evidence Act, 1872.

3. The questions which among others, that arise, as emphasised in the reference order are as follows: -

> *(i) When an individual has the association with a case only as a lawyer advising the party, could the Investigating Agency/Prosecuting Agency/Police directly summon the lawyer for questioning?*
> (ii) *Assuming that the Investigating Agency/ Prosecuting Agency/Police has a case that the role of the individual is not merely as a lawyer but something more, even then should they be directly*

[4] for short, 'the BSA'

permitted to summon or should judicial oversight be prescribed for those exceptional criterion of cases?

4. It was opined by the learned Judges that the above questions along with others that may arise, should be addressed in a comprehensive manner. The efficacy of the administration of justice itself was found to be at stake, since such interference with the capacity of the lawyers to conscientiously and fearlessly discharge their professional duties, directly impinges upon the administration of justice. It was *prima facie* observed that subjecting the counsel in a case to the beck and call of the investigating agency/prosecuting agency/police appears to be completely untenable.

5. Before us, various intervention applications were filed by individual Advocates & associations, especially by the Supreme Court Bar Association, the Supreme Court Advocates-On-Record Association and an Organisation of In-house Counsels as also the Bar Council of India. The intervention applications in one voice asserts that the subject notice issued is an unconscionable, outrageous interference

with the right to practice, conferred on the Advocates under Article 19(1)(g) and Article 21 of the Constitution of India, coupled with the provisions of the Advocates Act, 1961. Further, any interference with the obligation of non-disclosure of facts and circumstances pertaining to an alleged crime, by an Advocate representing the accused, is against the statutory protection conferred on the client. Serious concerns were also raised on the backdrop of the Enforcement Directorate (ED) having issued summons against two Senior Advocates of this Court. When the Bar rose up in unison against such illegality, the ED withdrew and issued guidelines, specifically referring to the BNSS, mandating that any summons issued under the exceptions carved out in Section 132 shall be only issued with the prior approval of the Director, ED. Even though, the said issue, died down, there is prevalence of the police and investigating agencies under the special enactments, summoning Advocates who appear for the accused taking recourse to the provisions under the BNSS, which *per se*, is illegal, since any privileged communication under Section 132 cannot be

disclosed without the consent of the client. In any event, the information, if supplied, without the express consent, not only is unworthy of use against the client by virtue also of judicial pronouncements, but the Advocate would also be exposed to professional misconduct for reason of disclosure and breach of confidence. A summons to an Advocate in the course of an investigation against a person, whom the Advocate defends; seriously interferes with the fundamental rights guaranteed under the Constitution to carry on a profession and cannot fall under any of the exceptions carved out, which again would be an infringement of the statutory obligations of non-disclosure without consent, urge the Bar.

6. We heard Mr. Vikas Singh, learned Senior Counsel & President, Supreme Court Bar Association, Mr. Atmaram N.S. Nadkarni, learned Senior Counsel instructed by Mr.Vipin Nair, President, SCAORA, learned Senior Counsel: Mr. Siddharth Luthra, Mr. Shoeb Alam and a host of Advocates who wanted to put in their mite in protection of the profession and the fraternity of lawyers. We also heard Mr. R.

Venkataramani, learned Attorney General of India and Mr. Tushar Mehta, learned Solicitor General of India for the Union of India and the State of Gujarat.

The Bar Argues:

7. We have gone through the written submissions made, which emphasises the obligation under Section 132 to be a restriction on the Advocate, the breach of which would attract a charge of professional misconduct. The protection under Section 132 to every privileged communication between a client and a lawyer is a protection afforded to the client, seeking legal assistance, and there is no corresponding statutory scheme protecting the Advocate from being coerced into a disclosure, especially by an investigating agency duly conferred with the power to summon witnesses and interrogate suspects under the various enactments.

8. It is urged on the strength of the decision in ***Jacob Mathew v. State of Punjab***[5] that professionals such as lawyers

[5] (2005) 6 SCC 1

and doctors are included in the category of persons professing some special skills which requires, any allegation of digression from ethical conduct or accusation of negligence, to be examined by a group or committee of persons having the same skills, akin to a peer review of the complained acts or omissions in the discharge of their professional duties. There is need for an independent body of such professionals, who is required to look into the aspect of existence of a liability, before any criminal proceeding is initiated, and arrest is made of the professional. In the context of the subject controversy, before even a summons is issued against a lawyer who has a statutory obligation of non-disclosure of privileged communications, the principle applies squarely.

9. Reference is also made to the guidelines issued in the case of ***Vishaka v. State of Rajasthan***[6] wherein this Court stepped in under Article 142 to provide comprehensive guidelines for dealing with allegations of sexual harassment

[6] AIR 1997 SC 3011

in workplaces, the absence of which seriously infringed the fundamental rights of the victim. The violation of fundamental rights and the absence of a statutory scheme which prompted this Court to lay down comprehensive guidelines, only till the legislature brought out suitable statutory measures to curb, alleviate and adjudicate upon such allegations, would squarely be applicable in the present case. Here too the fundamental right to practice of another group of professionals is seriously infringed, with scant respect to the privilege statutorily conferred on the communications between a client and his Advocate. Not only does the illegal acts of the investigating agency interfere with the right of the accused to set up a defence, without prejudice, but also seriously impairs the carrying on of a profession which is categorised as the noblest of all professions, jeopardising both the defence of the client and the professional integrity of the Advocate.

10. Section 132 obligates absolute confidentiality on the part of the Advocate by reason of the privilege conferred on

the communications with the client, which privilege can be waived only when there is an express consent by the client or in a given case, if the exception carved out by the proviso to Section 132 applies. The provision essentially is in the nature of a protection of the client, an accused or a litigant, but it does not offer any protection to the Advocate who may have to resist coercion, especially in the circumstances that come forth in the present case, as in a notice from the I.O, which brings in the requirement of guidelines. This raises the question on the power of the Supreme Court to bring in such guidelines, especially in the context of violation of fundamental rights and the absence of a suitable legislation, which power definitely exists as seen from the decisions in ***Jacob Mathew***[5] and ***Vishaka***[6].

11. The next issue would be the nature of the guidelines, recommending a special procedure involving the Courts and a peer-group of professionals to determine as to whether the summons in a given case is within the scope and ambit of the exceptions carved out in the proviso to Section 132. It is

opined that a mere reference to a superior officer as has been brought out by the ED would not suffice and before it is done, the legality of the summons should be examined by a Court of law or by a peer group constituted as a committee. On the constitution of such a committee, a suggestion is also made that it should be constituted at three levels, at the District, the State and the National level with the involvement respectively of the Principal District Judge, Chief Justice of the State and the Chief Justice of India. Put briefly, after consent is obtained from the superior officer, an application should be made before the concerned Magistrate with a further requirement of the consent being taken of a Committee, both of whom would have to be satisfied *prima facie,* on the basis of the materials produced by the I.O, on the issuance of such summons to an Advocate appearing for the accused/litigant in a case. It is also urged that the dominant purpose test should be applied on the standard of preponderance of probabilities to look into whether the summons referred to any privileged communication between the client and the Advocate, clearly falling within the teeth of Section 132.

The Caveat of the State:

12. On behalf of the State, both the Attorney General and the Solicitor General, very fairly, refused to take an adversarial stance since the issue affects the large body of Advocates in the Country whose voice is the voice of the victim, the accused, the marginalised and the downtrodden. While asserting that the attorney-client privilege is the fundamental principle of any legal system committed to protecting confidential communication between clients and their legal advisors, it is pointed out that there is no requirement for any guidelines since the matter is fully and squarely covered by the statutory provisions which require no elaboration. A guideline brought in would only result in disrupting the well-crafted legislative provision which has withstood the test of time in this Country, right from the time of the Indian Evidence Act, 1872.

13. It is unequivocally agreed that no Advocate can be summoned for reason only of giving a legal opinion or appearing for a party in a case. But the immunity with respect to professional communications would not absolve the liability in the event of an Advocate participating in a crime which is beyond his professional duty. The scope and ambit of Sections 132, 133 and 134 of the BSA, according to the State and the Union, will have to be decided on a case-to-case basis and there can be no overreaching guidelines which would interfere with the statutory scheme. It is pointed out that the earlier instance of the summons issued by the ED against the two Senior Advocates was nipped at the bud. The mandate issued through the circular of the Director, prohibits any casual issuance of summons without reference to Section 132 and has brought in the mandate of an approval from the Director itself. The contours of the privilege accorded under Section 132 was elaborated on the strength of decisions which provided a protection to the Advocates, only within that provided under Section 126 of the Evidence Act and Section 132 of the BSA.

14. The communications made in furtherance of any illegal purpose are expressly excluded from the privilege whether the legal advisor was a party or ignorant of the illegal object, which is in the interest of public justice. The right of the investigating agency, as conferred by the statute to investigate into a cognizable offence cannot be curtailed by a guideline issued in purported protection of Advocates under Section 132 of the BSA. No right can be claimed by an Advocate beyond that permitted under the provisions of non-disclosure. The investigating agency would be well within its right to issue summons to an Advocate, as a suspect or witness and the restriction is only insofar as the summoning of an Advocate in his professional capacity or for inquiring into the discharge of his professional duties, with respect to a particular person or a specific crime, where the lawyer represents the person or defends the accused in an alleged crime. There cannot be claimed absolute immunity by an Advocate merely by reason of his status of a legal advisor when there is any act or omission under scrutiny which would

constitute a cognizable offence as distinguished from legitimate professional conduct.

15. A separate procedure introduced by way of a guideline under Article 142, for Advocates would result in creation of a separate class which would be an artificial and unjustifiable classification, violating the mandate of Article 14. Merely for reason of a person being enrolled as an Advocate, he would not be insulated from ordinary legal process applicable to the other citizens. A professional privilege cannot be abused to obstruct the due process of law. It is vehemently asserted that there is no legislative vacuum to persuade this Court to bring in guidelines for the protection of lawyers based on solitary instances of summoning of lawyers.

16. Any guidelines issued would, in fact, be counter-productive and would interfere with the powers conferred on the investigating agency to investigate into a crime. The vacuum which was sought to be filled by invocation of the powers under Article 142, as has been done in ***D.K. Basu v.***

State of West Bengal[7] and ***Vishaka***[6], does not exist in the present case. The attorney-client privilege, as statutorily conferred has withstood the test of time and the Courts have zealously protected it, striking down any attempt to impinge upon those sacrosanct privileges which is inevitable in any justice delivery system. Once again, reiterating that there can be no interference to the attorney-client privilege which is recognised as a statutory right, it is asserted that the investigating agency also cannot be prohibited from summoning an Advocate when there is credible material available, suggesting his involvement in a criminal act.

The Role of an Advocate:

17. Decisions galore have been pointed out and the observations made therein, about the role of an Advocate and the duties discharged in protection of the rights of a client, its importance and the sanctity attached to it. Daniel Webster, a trial lawyer of repute, famously said that, *"Justice is the greatest concern of man on earth" (sic)*. F. Raymond Marks in

[7] (1997) 1 SCC 416

"The Practice of Law as a Public Utility-The Lawyer, The Public and Professional Responsibility", wrote that *"... the central function that the legal profession must perform is nothing less than the administration of justice"* (*sic*-quoted in ***Bar Council of Maharashtra v. M. V. Dabholkar Etc.***[8]). It is this concern of mankind juxtaposed with the sublime function entrusted with the fraternity of lawyers, that makes the role of lawyers profound and relevant in every walk of life and life itself. There is no greater professional calling than to uphold the rule of law in society, to bring justice equally; to the downtrodden and the famous, the marginalised and the privileged, the rich and the poor. To ensure fair treatment of every gender, colour and creed, with the extending horizons of law, to every living being and to the very earth we inhabit. To push the frontiers of equity to make society all inclusive, protecting not only the citizen but also the refugee. Enabling a life with dignity to the old, the infirm, the orphaned, the destitute and even those accused and convicted of crimes.

[8] (1975) 2 SCC 702

Apt is the observation of Alexis de Tocqueville about the profession of law that, it *"… is the only aristocratic element which can be amalgamated without violence with natural elements of democracy…I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people"* (*sic*-quoted in ***M. V. Dabholkar Etc.***[8]).

18. The role of lawyers in society and the discharge of their duties in prosecution or in defence, in establishing rights or defending against infringements, cannot at all be discounted. This is the reason why Section 126 in the Evidence Act was introduced and by Section 132, the said privilege, was retained in the BSA, protecting the communications between a lawyer and a client as sacrosanct, ensuring every opportunity as available in the legal firmament to the client the lawyer represents, and ensuring that no prejudice is caused to the accused he represents; a fundamental tenet of criminal jurisprudence. The sublime and profound role

carried out by the Advocates in civil society cannot be disputed or discounted.

19. ***M.V. Dabholkar***[8] was a case in which the Bar Council of a State challenged the setting aside of an action it took against its own members, by the Bar Council of India, in an appeal. While upholding the right of the Bar Council of the State to file an appeal as an "*aggrieved person*" Justice V.R. Krishna Iyer observed that the *"Bar is not a private guild, like that of 'barbers, butchers and candlestick-makers' but, a public institution committed to public justice and pro bono public service" (sic).* The role of an Advocate *vis-à-vis*; the client, the Courts and the Society was also amplified in ***State of U.P. and Ors. v. U.P. State Law Officers Association & Ors.***[9], in the following extract: -

> *"15. The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave his also, for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer in turn is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the*

[9] (1994) 2 SCC 204

> *court every fact or urge every proposition of law which his client wants him to do, however irrelevant it may be. He is essentially an advisor to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer's discretion to choose the facts and the points of law which he would advance. Being a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He was to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies."*

20. ***U.P. Sales Tax Service Association v. Taxation Bar Association, Agra***[10] observed that *"No doubt, an Advocate is an officer of the Court and enjoys a special status in the society"* (*sic*). The said statement was made in deprecation of the tendency of the Advocates to *"… strike work and boycott the Courts at the slightest provocation, overlooking the harm caused to the judicial system in general and the litigant public in particular and to* themselves *in the estimate of the general public"* (*sic*).

[10] (1995) 5 SCC 716

21. All the above cases dealt with professional misconduct or a digression from the essential role. We cannot but express that the observations made therein, were to provide some material for introspection, to those who deviate from the righteous path of administration of justice. The occasional black sheep who tread the uneven, muddy lanes of deceit, in purported protection of the interest of the client, which though a minority, does, sadly exist in our system. We say *'our system'* with emphasis since Judges cannot distance themselves from the fraternity of lawyers, to which they once belonged and to which they owe their present status. The provision providing protection to the privileged communications between the lawyer and the client is not to protect those deviants but to ensure that the vast majority, who are day in and day out, involved in the task of administration of justice are not victimised or bullied into making disclosures of their communications with their clients, merely for reason of having represented a client of questionable conduct or having some ill-repute or disrepute.

22. We cannot but notice, in this context, Rule 11 of Section 20 of Part VI of the Bar Council of India Rules, 1975, titled 'Standards of Professional Conduct and Etiquette' (herein after referred to as the Standards under the BCI Rules) framed under the Advocates Act, 1961 which reads as under:

> *"An Advocate is bound to accept any brief in the Courts or Tribunals or before which he proposes to practice at a fee consistent with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief."*

23. We are quite conscious of the onerous responsibility cast on a lawyer who takes up an engagement to plead or defend, on behalf of a client. There is an obligation cast on him to provide his client the maximum protection as by law established, in furtherance of the client's cause. It is hence the codified obligation, while maintaining absolute sincerity to the cause of justice, ensuring strict and absolute confidentiality with the communications made by his client regarding the cause, for which he is engaged. Sections 132 to 134 is incorporated, not only in protection of the client but

also to provide an immunity to the Advocate from making any such disclosure.

Guidelines, if Necessary:

24. A great deal of emphasis was placed on ***Jacob Mathew***[5] to bring in guidelines. Especially, since lawyers and doctors employ special skills in the discharge of their professional duties, the nuances of which would be alien to a common man or an I.O. That was a case in which two doctors, who attempted to revive a patient fighting for breath, failed, also by reason of non-availability of oxygen. Negligence was alleged resulting in a charge under Section 304-A read with Section 34 of the Indian Penal Code, 1860 (IPC). The doctors were before the Supreme Court; their prayer to quash the proceedings having failed before the jurisdictional Magistrate and the High Court. The three Judge Bench was considering the issue on a reference made from a two Judge Bench decision in ***Suresh Gupta (Dr.) v. Govt. of NCT of Delhi***[11] wherein the act of medical negligence alleged was

[11] (2004) 6 SCC 422

found to be not of a 'reckless' or 'gross' nature making the doctor criminally liable; while a tortious liability could be raised validly. The referring Bench was of the opinion that there is no requirement for the negligence or recklessness to be 'gross' which word will have to be read into Section 304-A of the IPC and that, there could be no different standards applied, insofar as negligence is concerned, to doctors and the others clothed with responsibilities; professional, civic or societal.

25. In ***Jacob Mathew***[5] the issue considered was of professional negligence resulting in a criminal liability. It was held that negligence is the breach of a duty caused by an act or omission of a professional discharging a professional duty, which would not be attempted or omitted by a reasonable man in the same profession, exercising due diligence expected of an ordinary practitioner. An act of negligence, attracting criminal liability was found to be neglect to use ordinary care or skill which constitute a breach of the essential duty enjoined upon such professional, resulting in a

perceivable damage. Drawing a distinction insofar as negligence is concerned; as a tort and as a crime, the contention that jurisprudentially no distinction can be drawn under the civil law and the criminal law was negatived. It was held that the amount of damages incurred in tort, is determinative of the extent of liability, while in criminal law what is determinative of the liability is not the amount of damages, but the degree or gravity of negligence. The degree of negligence to fasten the liability under the criminal law was held to be higher than that required in civil law. The latter, being determined on a preponderance of probability, while the former requires a higher standard, of proof beyond reasonable doubt. The dictum in ***Dr. Suresh Gupta***[11] was affirmed finding that the negligence to be established by the prosecution to bring home a criminal liability must be 'culpable' or 'gross' and not a negligence merely based upon an error of judgment.

26. In determining professional negligence, it was held that every profession embraces a range of views. What is the

standard of conduct and the competence of the one accused, is to be judged by the lowest standard that would be regarded as acceptable and not necessarily of a special skill or one of highest expertise. While in the given case, the doctors were found to have exercised due care and caution absolving them from the liability of negligence, certain guidelines were laid down especially noticing the increasing tendency to subject doctors to criminal prosecution, wherein the private complainant or the I.O would not be aware of the nuances of a therapeutic or surgical intervention made by a medical professional. It was hence stipulated that a private complaint would not be entertained unless the complainant has produced *prima facie* evidence of gross negligence in the form of a credible opinion given by another medical professional. Further, the I.O also was required to procure an independent and competent medical opinion before a charge is laid of rashness or negligence against a medical practitioner leading to his arrest, which was not to be done in a routine manner.

27. The issue dealt with by this Court in ***Jacob Mathew***[5] was a combination or intermix of tortious liability with criminal liability, in which context such guidelines were issued. In the present case we are not concerned with a professional misconduct, and the controversy is only with respect to an Advocate summoned to speak about a crime or his client, when the communications pursuant to a legal engagement is conferred with a privilege of non-disclosure under Section 132 of the BSA. In fact, the argument against such summons issued is also that an Advocate if forced to make any disclosure regarding the privileged communication with his client, would expose him to a charge of professional misconduct under Section 132, which is a protection afforded to a client. We cannot find any parallel with ***Jacob Mathew***[5] or any aid by reason only of the Advocates and Doctors being categorised as professionals with special skills. That does not, even according to that decision, confer on the Doctors, merely for reason of the status of a medical professional, any blanket immunity from criminal prosecution, when rashness or negligence is proved beyond reasonable doubt.

28. ***Vishaka***[6] was in the nature of a class action focussing attention on the societal abrasion of sexual harassment of women in the workplace. This Court invoked Article 32, considering the prevailing climate in which such instances were not uncommon leading to violation of the rights under Articles 14, 15 and 21 of the Constitution of India as also under Article 19(1)(g). The increasing awareness and emphasis on gender justice and the focussed efforts to guard against such violence, especially on the realisation of the true concept of gender equality, juxtaposed with the right to 'life and liberty' was the imminent concern. The trigger for the petition under Article 32 was the gang rape of a social worker in a village which brought to fore the travails and hazards faced by working women and the depravity to which sexual harassment can degenerate. It is to bring in safeguards by a mechanism, in the absence of legislative measures, that this Court issued guidelines in that situation, when a writ of mandamus would not be effective without suitable guidelines for prevention of such recurring phenomena, which were also

in violation of the fundamental rights of women in workplaces. The guidelines and norms were directed to be observed scrupulously in all workplaces until suitable legislation was enacted to occupy the field. There was hence a clear absence of legislation which prompted the guidelines to be brought, which were held to be binding and enforceable in law, for the protection of fundamental rights of women in workplaces and preservation of their dignity, till suitable legislation for that purpose is brought about.

29. Considering the context in which this Court issued guidelines in ***Jacob Mathew***[5] and ***Vishaka***[6], we are not convinced that the instant case brings forth a comparable, similar or identical fact situation for which no legal remedy is available. As we noticed, at the risk of repetition, ***Jacob Mathew***[5] was a case which dealt with negligence as a criminal liability particularly on the aspect of medical negligence, where the professional negligence attributed to a person had to be found existing, *prima facie*, by another professional having the same or higher competence. The

present case is not concerned with any aspect of professional negligence or professional misconduct.

30. ***Vishaka***[6] was in the nature of a class action, in the evolving social milieu of gender equality when women came out of their homes to the workplaces, wherein they faced overt and subtle sexual harassment from superiors, peers and even their subordinates; vintage hangover of a patriarchal society. Insofar as the treatment of women in workplaces, especially when there is an allegation of harassment confined to work spaces; which though could be addressed as a criminal liability, would not procure instant mitigation in a workplace. This was sought to be addressed by this Court in issuing the guidelines and norms, based on which legislation has also been brought out now, which is not in exclusion of the criminal liability fastened on the perpetrator of such harassment.

31. We do not think that the positive judicial activism that was prompted, treating the women in general and working women in particular as a class, to avoid any sought of sexual

harassment in the workplaces would, with the same gravity, be applicable in the present case nor is there a judicial vacuum requiring us to step in. ***Jacob Mathew***[5] also is not applicable to the instant controversy which does not bring forth any issue of professional negligence.

Advocate-Client Privilege:

32. In this context, we extract the relevant provisions under the BSA which is in *pari materia* with the provisions of the Indian Evidence Act which has held the field for more than a century and a half:

> ***132. Professional Communications***
> *(1) No Advocate, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his service as such Advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional service, or to disclose any advice given by him to his client in the course and for the purpose of such service:*
> ***Provided that nothing in this section shall protect from disclosure of –***
> ***(a) any such communication made in furtherance of any illegal purpose;***
> ***(b) any fact observed by any Advocate, in the course of his service as such, showing that any***

crime or fraud has been committed since the commencement of his service.

(2) It is immaterial whether the attention of such Advocate referred to in the proviso to sub-section (1), was or was not directed to such fact by or on behalf of his client.
Explanation. – The obligation stated in this section continues after the professional service has ceased.

Illustrations.
(a) A, a client, says to B, an Advocate – "I have committed forgery, and I wish you to defend me". As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.
(b) A, a client, says to B, an Advocate – "I wish to obtain possession of property by the use of a forged deed on which I request you to sue". This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.
(c) A, being charged with embezzlement, retains B, an Advocate, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his professional service. This being a fact observed by B in the course of his service, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.
(3) The provisions of this section shall apply to interpreters, and the clerks or employees of Advocates.

133. Privilege not waived by volunteering evidence. *– If any party to a suit gives evidence*

> *therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 132; and, if any party to a suit or proceeding calls any such Advocate, as a witness, he shall be deemed to have consented to such disclosure only if he questions such Advocate, on matters which, but for such question, he would not be at liberty to disclose.*
>
> ***134. Confidential communication with legal advisers.*** *– No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.*

33. The illustrations though not exhaustive, is definitely indicative of the instances when the transactions between the client and his lawyer would not come within the privilege of professional communication as has been protected under Section 132. The proviso brings forth the exceptions which are sufficiently explained in the illustrations. There cannot be urged a lacuna or absence of legislation, in protection of the lawyers' obligation of non-disclosure, which is statutorily prescribed. An Advocate cannot be coerced into revealing any information with respect to the client he represents or the

cause he is engaged to prosecute or defend, which would be in violation of Section 132. The exceptions are clear and operates only where there is (i) waiver/consent of the client. (ii) furthering of an illegal purpose or (iii) observation of a crime or fraud committed in the course of his engagement; whether it be noticed at the instance of the client or otherwise. The privilege though is conferred on the client, there is an immunity enabled to the Advocate from making any disclosure of such privileged communication, which he can seek to invoke and exercise, even in the absence of his client, which would be primarily in protection of the interests of his client. The complicity to the crime even if admitted by the accused to his lawyer, it does not fall within the genre of an 'extra-judicial confession'.

The Common Law Jurisdictions:

34. Despite the request made not to refer to foreign decisions; considering the fact that the privilege we are concerned with is prevalent in all common law jurisdictions across the world, we do not find any reason to avoid

altogether, intelligent expositions on the privilege, merely because it comes from shores, both distant and different. In ***Greenough***[12], from the United Kingdom, in the interests of justice and to properly further the cause of administration of justice, it was held:

> *"The foundation of this rule, is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection. (Though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers). But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous. From the terms in which I have stated the proposition, it is manifest that several cases*

[12] 39 E. R. 618 (1833)

may arise, which, though apparently they are exceptions, yet do in reality come within it. Thus the witness, or the defendant treated as such, and called so to discover, must have learned the matter in question only as a solicitor or counsel, and in no other way : if therefore, he were a party, and especially to a fraud (and the case may be put of his becoming informer after being engaged in a conspiracy), that is, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing; for in such a case his knowledge would not be acquired solely by his being employed professionally"(sic, pg.621).
[underlining by us for emphasis]

The above exposition succinctly puts in perspective the privilege as embodied in Section 132 of the BSA and the exceptions thereon. The privilege extends even to an Advocate-Client communication which does not necessarily arise from the engagement in a suit or prosecution; since often, in the present scenario, on legal issues, even without a pending suit or prosecution; individuals, corporates, firms and associations of all hues, conferred with a legal status, take legal opinion before acting or desisting from one, which engagement may at times be solitary, sporadic or otherwise on retainership.

35. The privilege is said to be one of the most enduring features in the legal profession of the United States. ***US v. Upjohn & Co.***[13] [reversed on other grounds in 449 US 383 (1981)] observed that *"finding the truth and achieving justice in adversary system are best served by fully informed Advocates loyal to their clients' interests (sic-at 1226)."* The Advocates unless fully apprised of the facts cannot effectively put forth the case of their client and assist the courts fully so as to ensure that the adjudicatory system functions properly. Despite the privilege having existed for over two centuries, there are criticisms based on public interest. ***Jeremy Bentham*** famously objected to the privilege as one benefitting only the guilty, since the innocent has nothing to hide and, therefore, nothing to fear from attorney disclosure. ***Jackson Teague,*** in his article *"Two Rights Collide: Determining when attorney-client privilege should yield to a defendant's right to compulsory process or confrontation"* published in the American Criminal Law Review juxtaposes

[13] 600 F.2d 1223 (6th Cir. 1979)

the privilege with the Fifth Amendment (rule against self-incrimination) and the Sixth Amendment (right to the assistance of counsel) in the following words:

> *"In this context, however, the attorney-client privilege plays a stronger role in safeguarding the adversarial system. Recognizing that a layperson often has trouble navigating the adversarial system, the Framers ratified the Sixth Amendment to ensure that criminal defendants have a right to the assistance of counsel [See Jacob D. Briggs, Gonzalez-Lopez and Its Bright-Line Rule: Result of Broad Judicial Philosophy or Context-Specific Principles?, 2007 BYU L. REV. 531, 571 (2007) (discussing the American adversarial system and need for similar resources as part of a right to counsel)]. The effectiveness of that right hinges on the client's ability to communicate freely with his attorney [See Monroe H. Freedman, Lawyer-Client Confidences and the Constitution, 90 YALE L.J. 1486, 1492 (1981) (explaining that the attorney-client privilege is necessary to ensure the adversarial system functions properly, and is "rooted in the imperative need for confidence and trust" between lawyer and client]). But a client is unable to do so if he is placed in a worse position by providing his attorney with information than he would be by remaining silent [See Michael Jay Hartman, Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases, 10 U. PA. J. CONST. L. 867, 876–77 (2008)]. If called to the stand, the client can assert the privilege against self-incrimination when asked about incriminating facts. If the attorney-client privilege is penetrable, however, and a client communicates with his attorney, the client's statements could be discovered by simply subpoenaing the attorney. The client would thus have "walked into his attorney's office unquestionably shielded with the [Fifth] Amendment's protection, and walked out with*

> *something less." [United States v. Judson, 322 F.2d 460, 466 (9th Cir. 1963)]. Before the right to counsel attaches, discovery of these statements removes all teeth from the privilege against self-incrimination. After the right to counsel attaches, it creates a constitutional dilemma [See United States v. White, 879 F.2d 1509, 1516 (7th Cir. 1989) (Will, J., concurring in part) ("Absent [the attorney-client privilege], a party is forced to choose between free communication with an attorney or complete silence based on the Fifth Amendment, a choice which one should not have to make and which the decided cases make clear one does not have to make."). For a detailed description of this dilemma, see supra Part I]."*

36. The Supreme Court of Canada has recognised *'solicitor-client privilege'* having evolved from, being treated as a mere evidentiary rule to being considered a rule of substance and now, a principle of fundamental justice. It has been held in ***Minister of National Revenue v. Duncan Thompson***[14] that ; *'… the application of confidentiality that springs from the right to solicitor-client privilege is necessary for the preservation of a lawyer-client relationship that is based on trust, which in turn is indispensable to the continued existence and effective operation of Canda's legal system. It ensures that clients are represented effectively and that the legal information required*

[14] 2016 SCC OnLine Can SC 30

for that purpose can be communicated in a full and frank manner [R. v. Gruenke, [1991] 3 S.C.R. 263]' (sic).

The Peer-review:

37. The privilege that emanates from Section 132 has thus engaged jurisdictions world over in its ramifications, considered imperative in an adversarial judicial system. Coming back to our own shores, ***D.P. Chadha v. Triyugi Narain Mishra***[15]***,*** was a case in which the professional misconduct of a lawyer was punished by the Bar Council of the State and in appeal the punishment was enhanced by the Bar Council of India. This Court extracted from the definition of "professional misconduct" given by Darling J. in *Solicitor Ex-parte the law Society, Re'*, approved by the Privy Council in ***George Frier Grahame v. Attorney General, Fiji***[16]***,*** *"… if it is shown that a solicitor in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional*

[15] (2001) 2 SCC 221
[16] AIR 1936 P.C. 224

brethren of good repute and competency then it is open to say that he is guilty of professional misconduct."

38. The question that arises is whether, *"the professional brethren of good repute and competency"* have to be associated in a summons issued to a lawyer by the Police under the BNSS in pursuance of the investigation of a crime. In resolving this vexed issue, we cannot but repeat that we are not concerned with a professional misconduct when considering the application of non-disclosure of confidential professional communications made by a client. On the contrary only the breach by an Advocate can lead to a charge of professional misconduct, with which we are not perturbed at the moment. We are herewith troubled with a coercion to make disclosure, by the investigating agencies. The contention also is that unless such attempts are thwarted, there would be breach of the privilege, resulting in an allegation of professional misconduct, which disclosure in any event cannot be used against the client, in evidence.

39. A professional misconduct of a medical professional is dealt with by the Medical Council of India, which now has been renamed as the National Medical Commission, a body of medical professionals. In ***Jacob Mathew***[5]**,** it was held by this Court that when such medical negligence involves criminal liability also, then a professional body should examine whether the negligence alleged, in addition to the tortious liability, can result in a criminal liability, leading to initiation of a criminal investigation or prosecution. Likewise, a professional misconduct of an Advocate is examined by a professional body, which is the Bar Council of India or the Bar Council of the States, regulated by a statutory procedure and providing hierarchy of authorities.

40. Not being disturbed with any aspect of professional misconduct resulting in criminal liability, we have to tackle the attempt of coercion on an Advocate to disclose the privileged communications he had with his client, which could jeopardise his client's interests, especially, without the consent of the client, which could in fact, lead to an allegation

of professional misconduct. As we noticed from Section 132, the obligation of non-disclosure would not fetter the Advocate from disclosing any communication made in furtherance of any illegal purpose or any fact coming to the notice of the Advocate, in the course of his engagement, revealing a crime or fraud committed by his client after the commencement of the engagement. The exceptions are also very clear insofar as what would fall under the immunity of a privileged communication and what would fall outside it; delineated in the illustrations.

41. An Investigating Officer or an investigating agency is not oblivious of the law. The dichotomy insofar as a medical negligence resulting in criminal liability does not, as such arise in the case of an investigation carried on under the BNSS, which is carried on by a person informed in law and the provisions of the BSA. Ignorance or absence of domain knowledge does not squarely apply in a case where the I.O summons a lawyer, the powers of which are clearly fettered by the provisions of Section 132. Though distinct, it would also be an extension of the client's constitutional right against self-

incrimination as found in Article 20(3) of the Constitution of India. When a person cannot incriminate himself, he cannot be prejudiced or incriminated by the statement of his counsel, only on the basis of the professional communications he had with his counsel, in confidence. This is why it has been said that a person cannot walk out of his counsel's office with a defaced privilege, which he had intact, when he walked into it. That too only by reason of the disclosures he made in his own interests, his defence and to further his chances in the adjudicatory process.

The Right to Legal Representation:

42. Moreover, when we look at the issue of a lawyer being summoned as a witness by the Investigating Officer or the Court, to speak about the transactions with his client, we have to also keep in mind the right of a person to legal representation, which is enshrined in the Constitution itself. The question arose as to whether a party in a suit could summon the counsel of the opposite party as a witness, before

the Kerala High Court in ***N. Yovus v. Immanuel Jose***[17]. The suit arising from a failed matrimonial proposal had reached the final stage when a petition was filed by one party seeking permission to cite the Advocate of the respondent as a witness. The Division Bench decision considering the issue, referred specifically to Rule 13 of Chapter 2 of Part VI of the Bar Council of India Rules, which requires an Advocate to decline a brief or not to appear in a case, in which he has reason to believe that he is a witness and if engaged it would be apparent that he is a witness on a material question of fact; who should not continue to appear as an Advocate, if he can retire without jeopardizing his clients interest. It was held that only if the Court after enquiry finds that examination of the Advocate as a witness is indispensable and the same would not jeopardise the interests of the party he represents, there could be summons issued which would result in disengagement of the Advocate. In that particular case, it was found that the summons was to prove a letter sent by the

[17] 1995 SCC Online Kerala 48

plaintiffs to the Advocate after the commencement of the proceedings and a compromise suggested by the Advocate. The summons was declined on the reasoning that even if something could be elicited from the exceptions contained in Section 126, it would be of little use in the case and the hardship caused to the client by depriving him of professional service of the counsel engaged by him would be far more.

43. Article 14 speaks of equality before law and equal protection of the laws and Article 21 guarantees protection of life and liberty; other than a fetter to such right being occasioned in accordance with a procedure established by law. ***M.H. Hoskot v. State of Maharashtra***[18] held that procedure established by law under Article 21 read with Article 19(1)(d) includes right of appeal and right to counsel when deprivation of life and liberty are in peril. The appellants right to be represented by a counsel, if necessary, by providing legal aid was reiterated in ***Rakesh v. State of***

[18] (1978) 3 SCC 544

Madhya Pradesh[19] ***& Sheikh Mukhtar v. State of Andhra Pradesh***[20]***.*** The rights under Article 14 and 21 encompasses within it the right to a legal practitioner. In addition, Article 22(1) makes mandatory the provision of the right to consult and to be defended by the legal practitioner of a man's choice when he is arrested. Article 39-A of the Directive Principles puts obligations on the State to secure justice and equal opportunity by providing free legal aid especially in the case of citizens denied such representation by reason of economic or other disabilities; as declared in ***Hussainara Khatoon v. State of Bihar***[21]. The said right has been stated to be one which enables provision of effective and adequate legal representation, which would be jeopardized while summoning a lawyer to be witness in a case.

<u>The privilege vis-à-vis the procedure under BNSS:</u>

44. Be that as it may, we are not satisfied that this Court could frame a guideline insofar as the procedure to be

[19] (2011) 12 SCC 513
[20] (2020) 19 SCC 178
[21] (1980) 1 SCC 98 & 108

adopted in summoning a lawyer, which would be in addition to and for all practical purposes may, in effect, be in derogation of the provisions of the BNSS. The power of the police officer to investigate a cognizable offence, as provided under Section 175, even without the order of a Magistrate, cannot be regulated by any guideline issued by us, especially when sufficient guideline is available, under Sections 132 to 134 of the BSA. A police officer issuing summons to an Advocate, under Section 179, would be cautioned by the provisions of Section 132 in not expecting any disclosure of a privileged communication. We are not in a position of absolutely no guideline being available; which prompted this Court under Article 142 to frame guidelines in ***Vishaka***[6] or in a situation of absence of expertise in corelating professional negligence with criminal liability, as existed in ***Jacob Mathew***[5]***.*** We are faced with a state of affairs where there is an absolute overreach in violation of the statutory mandate, which occurs by reason of deliberate design or abject ignorance, to correct which, there are Courts established, especially the Constitutional Courts.

45. We are also not persuaded to constitute a committee of legal professionals or enabling the summons to be issued through a Magistrate, which would be in derogation of the provisions of the BNSS. We agree that such a measure would be counter-productive insofar as the I.Os attempting to summon the Advocate appearing in a case, at the drop of the hat; if we may use that phrase, by resorting to the procedure of a duly constituted committee of legal experts or the Magistrate, in effect could frustrate the cause of justice and stifle the due administration of rule of law. This would also put in jeopardy the right of a client/accused who is actually conferred with the protection against disclosure. A committee of legal experts or even a Magistrate taking a decision, without the junction of the client/accused, who would eventually be prejudiced if a decision is taken in favour of disclosure, would be wholly inappropriate and would run counter to the basic tenets of full and effective legal representation.

The Epilogue:

46. Before we sum up, we have to notice the summons issued, challenged in SLP (Crl.) Diary No.33845 of 2025 which has been extracted in the reference order. It mentions only the crime number, the names of the accused and the provisions under which it has been registered and abruptly summons the Advocate appearing for the accused to know the true details of the facts and circumstances of the case. The facts and circumstances of a crime committed, or an FIR registered, is not to be elicited from the Advocate who represents the accused, which again is a reflection of the abject failure of the investigating agency. It is for the investigator to obtain independent evidence of the culpability of the accused. The position of trust the Advocate occupies *vis-à-vis* his client cannot be put to test by an attempt to breach the professional confidence, conferred with a solemn privilege under Section 132; which has reflections of the constitutional protection against self-incrimination. Whether the summons issued falls under any of the exceptions as provided under Section 132 has to be explicitly

stated if a summons is issued to the Advocate on any of the exceptions; which is not an empty formality and hence, when supported by reasons, amenable to judicial review.

47. Despite our conviction to the contrary, on the framing of guidelines and constituting a committee of professionals, we cannot but express our anguish in the investigating agencies summoning Advocates appearing in a case, in furtherance of the investigation of the said case. Though, the Magistrate is conferred with the power to monitor the investigation as has been held in ***Sakiri Vasu v. State of Uttar Pradesh***[22] reaffirmed in ***Vinubhai Haribhai Malaviya v. State of Gujarat***[23], it does not extend to interfering with the power conferred on a police officer to summon a witness under Section 179 of BNSS. However, the provisions of Section 528 of the BNSS provides sufficient safeguards to the Advocates against whom a summons is issued under the BNSS.

[22] (2008) 2 SCC 409
[23] (2019) SCC 1

48. We find the summons issued in the instant case to be illegal and against the provisions of Section 132 insofar as the Advocate has been summoned to know the true details of the facts and circumstances of the case in which he appears for the accused. We are surprised that the High Court, being a Constitutional Court, exercising the jurisdiction under Section 528 of the BNSS refused to interfere with the same. We find the reasons stated; of the Advocate having not responded to the summons and the investigation being stalled, to dismiss the petition, to be flawed & erroneous. It is also in abdication of the inherent powers conferred on the High Court, which the blatant breach of the rule against non-disclosure projects. The breach is not only of the evidentiary rule, which many jurisdictions accept as fundamental to the adversary adjudicatory scheme, but, in the Indian context, project infringement of fundamental rights; guaranteed against self-incrimination and effective representation of Counsel.

49. On a conspectus of the issues raised, as deliberated upon, we answer the first of the two questions referred to us

by a Co-ordinate Bench of this Court, with an emphatic 'NO'. The investigating agency/prosecuting agency/the police cannot directly summon a lawyer appearing in a case to elicit the details of the case, unless there is something, the I.O has knowledge of, which falls under the exceptions, in which case it has to be specifically mentioned in the summons, which the lawyer summoned can challenge under Section 528 of the BNSS.

50. We also make it clear that any such summons issued as against a lawyer by an I.O has to be with the approval and satisfaction of the hierarchical Superior, not below the rank of a Superintendent of Police which satisfaction has to be recorded in writing and should mention the facts leading to the exception under Section 132, for which the summons is issued.

51. Answering question No.2, we are of the opinion that sufficient judicial oversight is prescribed under Section 528 of the BNSS. Oliver Wendell Holmes, J. in ***Panhandle Oil***

Company v. State of Mississippi[24] referred to a quote of the Chief Justice John Marshall that ..“***the power to tax is the power to destroy***[25]***”.*** Finding that the said proposition no more holds good, when it is recognised that distinction of law are distinction of degree, it was observed so, ..“*if the States had any power, it would assume that they have all power, and the necessary alternate was to deny it all together. But this Court which so often has defeated the attempt to tax in certain ways, can defeat an attempt to discriminate or otherwise go far without wholly abolishing the power to tax.* ***The power to tax is not the power to destroy while this Court sits***”.

52. Drawing a corollary, the power to summon, conferred on an Investigating Officer under Section 179 read with Section 175 of the BNSS; when such summons is directed against an Advocate in a case where he is appearing for a party, is not an absolute or a blanket power to be exercised, without looking at the provisions of Section 132 of the BSA. We cannot deny the power altogether or place fetters on it by

[24] (1928) 277 US 218
[25] McCulloch v. Maryland, 17 U.S. 316 (1819)

framing guidelines, especially when there are limits and exceptions to the privilege conferred on confidential professional communications between a Client and an Advocate. If there is an overreach, the Constitutional Courts could always be approached as has been done in the present case. Borrowing a phrase from the above extract, we cannot but say that the power to summon under Section 175 & 179 is not the power to interfere with the privileged communications between a lawyer and client, as long as the Constitutional Courts sit, in this Country. We know the inaction of a High Court has resulted in the Suo-Motu initiation, which we are sure is not the norm.

53. We have already noticed from ***Greenough***[12] that the confidentiality of the professional communications is not confined to transactions with an Advocate engaged in a case but also extends to legal advice taken, at a solitary instance, sporadically, on a periodic basis or even under a regular retainership. We fully agree with the above proposition, one of the earliest in time referred by us, which we respectfully

accept as the correct exposition of the privilege, continued incessantly under the 1872 Act, probably inspired by and infused with the principle expounded in 1833, in ***Greenough***[12]***.***

Production of Documents & Digital Devices:

54. One ancillary issue which has been agitated is the question of seizure of documents and in the present scenario of advancing technology; the seizure of digital equipment. Insofar as documents are concerned, the position may be slightly different, especially when the Court or the I.O has the power to summon it and direct production of the same from the client, if it were in his possession. The Court and the I.O are empowered to direct production of a document by Section 94 of Chapter VII of the BNSS. Section 94 empowers both the Court or an officer in-charge of a police station to issue summons or a written order in the physical form or in electronic form, requiring the production of the document or thing which is believed to be in the possession of a party to produce it at the time or place stated in the summons or order.

However, we have to specifically notice sub-section (3) of Section 94 which protects documents under Sections 129 and 130 of the BSA and the Bankers' Books Evidence Act, 189; but does not afford such protection to Section 132.

55. ***Gangaram v. Habib-Ullah***[26] is one of the earliest cases where this issue was raised before the High Court of Allahabad. Pursuant to a complaint, at the stage of evidence, the accused sought production of an earlier complaint by the *Mukhtar,* who was representing the complainant, who claimed the privilege of non-disclosure of confidential professional communications. It was held that the prayer made was not for disclosure of any communication made in the course of or for the purpose of his engagement as a legal adviser. The provision; Section 126, it was held, does not refer to production of documents in the custody of a legal adviser but prohibits any disclosure about the contents of the document, the legal adviser has become acquainted with in the course and for the purpose of his engagement. Nor was

[26] 1935 SCC OnLine All: 310

the *Mukhtar* called upon to reveal any legal advice he had given the client. Finding also that the prayer for production did not fall under any of the exceptions of Section 126 it was all the same held that the protection available under Section 126 does not apply to production of documents.

56. The production of documents was dealt with under Section 166 of the Evidence Act under which a person summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection; which objection to its production and the admissibility, being decided by the court. The provision also enables the court to inspect the document unless it refers to matters of State, and take other evidence to enable determination of its admissibility. It was categorically held that in that case the *Mukhtar* was not at all justified in refusing to produce the document as it was a criminal case in which the procedure was governed by Section 94 of the Cr.P.C., 1973. Section 91 of the Cr.P.C, as it existed then, empowered the court to issue summons to produce a document if it was

found necessary and sub-section (3) exempted only documents which were protected under Sections 123 and 124 of the Evidence Act, 1872. This is in *pari materia* with Section 94 of the BNSS. The principle applies in civil cases too and specifically Order XVI Rule 7 of the Civil Procedure Code, 1908, was noticed. When the client who has possession of a document cannot refuse to produce a document, subject only to his objection being decided by the court and cannot claim the privilege under Section 126, there is no question of a privilege being claimed by a lawyer who has been given possession of that document by the client. The Madras High Court followed ***Gangaram***[26] in ***The Public Prosecutor, Madras v. M.S. Menoki of Calicut***[27].

57. Later, ***Chandubhai Jethabhai Desai v. The State and Another***[28], considered a similar case and followed the same principle looking at Section 94 of the Cr. P.C. and Section 126 of the Evidence Act. The decision in ***Gangaram***[26] was also approved in ***'Matter of Great Public Importance Touching***

[27] AIR 1939 Mad 914
[28] AIR 1962 Guj 290

upon the Independence of Judiciary'[29] by a three-Judge Bench of this Court.

58. Any summons issued by an officer in-charge of a Police Station to a lawyer to produce documents, relatable to his client, can only be for production before Court of the said document which shall be perused, for the purpose of deciding on the objections raised against the direction to produce and determine its admissibility, after hearing the witness who produces it and any objection raised by the client under Section 132 of the BSA, which decision shall be by the Court and not by the officer. In examining any digital equipment so produced, the Court shall ensure the presence of the lawyer and his client as also any person, the lawyer or client desires to accompany them, who is conversant in digital technology. We specifically bring in this requirement with regard to production of digital device in Court since the digital device so produced by a lawyer may contain not only

[29] (2019) 19 SCC 405

the material required by the Court or the officer, but also other material in relation to his other clients.

The In-house Counsel:

59. Now we come to yet another ancillary issue as to whether an In-house counsel in the employment of a corporate entity would be covered under the privilege offered by Section 132 of BSA. A society called the General Counsels Association of India; members of which are the General Counsels and Legal Advisors of prominent companies, have filed an intervention application asserting their rights under Section 132 and 134. It is also claimed, based on Rule 49 of Chapter 2 Part VI of the Bar Council of India Rules, 'Standards of Professional Conduct and Etiquette' mandating the restriction in practising for persons in the rolls of the Bar Council who are in a regular employment; that, but for pleading and appearing in Courts they carry on the very same duties as legal advisors. At first blush though the contention seems attractive we cannot but observe that the fact of their regular employment with full salaries takes them

away from the definition of an Advocate as defined under the Advocates Act 1961, which has been incorporated in Section 132 of the BSA.

60. Section 126 as was available in the Indian Evidence Act referred to *"barrister, attorney, pleader or vakil"* as professionals who would be entitled to claim non-disclosure of professional communications, which is a privilege conferred on their client. Section 126 took into account the different categories of professionals who practice law and appear in Courts when the Indian Evidence Act was enacted in the year 1872. With the coming into force of the Advocates Act, 1961, specifically enacted to amend and consolidate the law relating to legal practitioners, an Advocate was defined under Section 2(a) as a person who is entered in any roll as provided under the provisions of that Act. Section 29 provides that there shall be only one class of persons entitled to practise law as a profession, i.e.: Advocates. Section 30 of the Act provides an Advocate whose name is entered in the State Roll, the right to practice throughout the territories of India in

all Courts, before any Tribunal or any person legally authorised to take evidence or an authority. Section 33 is a restriction on any other person to practice law in Courts or before authorities unless he is enrolled as an Advocate under the Act.

61. The advent of the Advocates Act, 1961, the decisions on this aspect and the amendments brought into Rule 49 of the Bar Council of India Rules prescribing the *'Standards of Professional Conduct and Etiquette'* for Advocates was elaborately considered by a Constitution Bench in ***Rejanish K.V. v. K. Deepa***[30]:

> *"…**136.** Rule 49 of the Bar Council of India Rules as originally framed, reads as follows:*
>
> *"An advocate shall not be a full-time salaried employee of any person, Government, firm, corporation or concern, so long as he continues to practise and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment.*
>
> *Nothing in this rule shall apply to a law officer of the Central Government or of a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his*

[30] 2025 SCC OnLine SC 2196

State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full-time salaried employee.

Law Officer for the purpose of this Rule means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in Courts on behalf of his employer."

137. *As already referred to hereinabove, in Sushma Suri[(1999) 1 SCC 330] , the question arose as to whether the word "Advocate" in Article 233(2) includes a law officer of the Central or State Government, public corporation or of a body corporate, who is enrolled as an advocate under exception to Rule 49, who is practicing before Courts or Tribunal for his employer. A three-Judge Bench held positively, permitting a Public Prosecutor and Government Counsel who is on the rolls of the Bar Council, as entitled to practice under the Act, who would also answer the description of an Advocate under Article 233(2) of the Act.*

138. *The very same question arose in a different context in Satish Kumar Sharma v. Bar Council of H.P.[(2001) 2 SCC 365]. The appellant therein was appointed as Assistant (Legal) by the Himachal Pradesh State Electricity Board, who later enrolled with the State Bar Council at the expense of the Board. After his appointment, the appellant therein continued in the Board as a regular employee, was given promotions with change in designations and was also appearing for the Board in the Courts. The certificate of enrolment issued in the year 1984 was withdrawn by the Bar Council of the State in the year 1996 after due notice and opportunity of hearing. Looking at the nature of the duties of the appellant who was a full-time salaried employee,*

it was found that his work was not mainly or exclusively to act or plead in Courts and he had to attend to many more duties, which were quite substantial and predominant. The appellant therein was also found to be amenable to disciplinary jurisdiction of his employer and mere occasional appearances in some Courts on behalf of the employer could not bring the employer within the meaning of "Law Officer" under paragraph 3 of Rule 49 was the finding. The decision in Sushma Suri (supra) was specifically noticed and distinguished on the ground that in that case the court was concerned with the definition of the word "Advocate" as appearing in Article 233(2), which was held to include a law officer of the Central or State Government who is enrolled as an advocate falling under exception to Rule 49. It was found so in paragraph 20 of Satish Kumar Sharma (supra):

*"**20.** As stated in the above para the test indicated is whether a person is engaged to act or plead in a court of law as an Advocate and not whether such person is engaged on terms of salary or payment by remuneration. The essence is as to what such Law Officer engaged by the Government does."*

***139.** Satish Kumar Sharma, however, was found to be not coming within the exception under Rule 49 especially when there was no rule framed by the State Bar Council entitling law officers to enrol as an Advocate even if they were full time employees. The contention that after such a long time his certificate of enrolment could not have been cancelled was negated on the finding that even at the threshold, he was not entitled to be enrolled under Rule 49. On the same premise an alternative contention that he may be permitted to resign and retain his enrolment from the date on which the*

certificate was issued was also negated. Finding no reason to maintain his seniority on the rolls of the State Bar Council, on the basis of an enrolment certificate which at its very issuance was barred, the claim was rejected.

140. *We have to specifically notice that both these decisions were taken based on Rule 49 as it existed then. The exceptions provided by paragraphs 2 and 3 have now been removed and have been substituted with the following:*

"That as Supreme Court has struck down the appearance by Law Officers in Court even on behalf of their employers the Judgment will operate in the case of all Law Officers. Even if they were allowed to appear on behalf of their employers all such Law Officers who are till now appearing on behalf of their employers shall not be allowed to appear as advocates. The State Bar Council should also ensure that those Law Officers who have been allowed to practice on behalf of their employers will cease to practice. It is made clear that those Law Officers who after joining services obtained enrolment by reason of the enabling provision cannot practice even on behalf of their employers.

That the Bar Council of India is of the view that if the said Officer is a whole time employee drawing regular salary, he will not be entitled to be enrolled as an advocate. If the terms of employment show that he is not in full time employment he can be enrolled."

141. *As of now, an employee cannot get enrolled in the rolls of the State Bar Council without giving up his employment. A law graduate who is enrolled as an Advocate on taking up regular employment as full time salaried employee is obliged to intimate the fact to the Bar Council in*

which he is enrolled and would then seize to practice as an Advocate so long as he continues such employment. Failure to make such intimation can result in his name being struck off from the Rolls. Reading Sections 29, 30 and 33 of the Advocates Act, 1961 together with Rule 49 of the Bar Council of India Rules, an employee, even if he is in the Rolls of the State Bar Council, as long as he remains a fully salaried employee, on intimation of the regular employment would be prohibited from carrying on practice of law as an Advocate."

62. Whether, in his employment, an In-house Counsel advises his employer on legal affairs would not bring an In-house counsel, a fully salaried employee, within the definition of an Advocate which would also not enable him to claim the privilege with respect to communications with his employer as available under Section 126, but could definitely take up other pleas, which we are not required to look into at this stage.

63. In this context, we also have to notice the decision of this Court in ***Bar Council of India v. A.K. Balaji***[31], which considered the issue as to whether foreign law

[31] (2018) 5 SCC 379

firms/companies or foreign lawyers were entitled to practice law in India. This court considered the decision of the Madras High Court in ***A.K. Balaji v. Union of India***[32] and that of the High Court of Bombay in ***Lawyers Collective v. Bar Council of India***[33]. The High Court of Bombay held that foreign law firms are not entitled to carry on litigious and non-litigious practice in India, since both are covered under the ambit of Advocates Act, 1961. The Madras High Court while agreeing with the view, distinguished it as being applicable only to foreign law firms attempting to establish liaison offices in India to render legal assistance in any litigious and non-litigious matters. However, it was held that a foreign lawyer or a firm who is visiting India for a temporary period on a *"fly-in and fly-out"* basis will be entitled to carry on all ancillary legal work except practice in a Court of Law.

64. This Court upheld the view of the High Court of Bombay that practice of law includes litigation as well as work in non-litigious matters including: giving of opinions, drafting,

[32] 2012 SCC OnLine Mad 723
[33] 2009 SCC OnLine Bom 2028

participation in conferences and involving in legal discussions. That the regulatory mechanism for conduct of Advocates applies to non-litigious work was declared unequivocally. Insofar as visit of a foreign lawyer on a *'fly-in and fly-out*' basis, it was held that though a casual visit for giving advice may not be covered by the definition of practice, determination of whether it was a casual visit or not would depend upon the facts in a given situation; to regulate which the Bar Council of India or the Union of India would be at liberty to make appropriate rules.

65. We have to also notice the judgment of the European Court of Justice (Grand Chamber) in ***Akzo Noble Limited v. European Commission***[31]. That was a case in which the officials of the European Commission tasked with the investigation at the applicant's premises took copies of considerable number of documents, upon which the representatives of the applicant raised the issue of protection of confidentiality of the communication between themselves

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and their lawyers. A joint examination of the documents was made, two of which were e-mails exchanged between the General Manager of the applicant and the Co-ordinator for Competition Law; the latter though enrolled as an Advocate of the Netherland's Bar, at the material time was a member of the applicant's legal department, employed on a permanent basis. The role of the Co-ordinator was akin to an In-house counsel and the Court found against the privilege claimed on the following points, which we extract hereunder with approval:

> *"The benefit of legal professional privilege with respect to communications between lawyers and their clients is subject to two cumulative conditions. First, the exchange with the lawyers must be connected to the client's rights of defence and, second, the exchange must emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.*
>
> *It follows that the requirement of independence means that there should exist no employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with In-house lawyers.*
>
> *The concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but*

also negatively, by the absence of an employment relationship. An In-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence of his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an In-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

An In-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.

Furthermore, under the terms of his contract of employment, an In-house lawyer may be required to carry out other tasks which may have an effect on the commercial policy of the undertaking and which cannot but reinforce the close ties between the lawyer and his employer.

It follows that, because both of an In-house lawyer's economic dependence and of the close ties with his employer, he does not enjoy a level of professional independence comparable to that of an external lawyer.

In-house lawyers being in a fundamentally different position from that of external lawyers, so that their respective circumstances are not comparable, no breach of the principle of equal treatment results from the different treatment of those professionals with respect to legal professional privilege.

Even assuming that the consultation of In-house lawyers employed by the undertaking or group were to be covered by the right to obtain legal advice and representation, that would not exclude the application, where In-house lawyers are involved, of certain restrictions and rules relating to the exercise of the profession without that being regarded as adversely affecting the rights of the defence.

Finally, the fact that, in the course of an investigation by the Commission, legal professional privilege is limited to exchanges with external lawyers in no way undermines the principle of legal certainty."

66. We are in respectful agreement with the above propositions, which squarely apply insofar as In-house counsel, who are taken away from the definition of an Advocate, practising law independently whether it be in litigation or non-litigious matters, as distinguished from a full-time salaried employment. An In-house counsel though is engaged in the job of advising his employer on questions of law would even then be influenced by the commercial and business strategies pursued by his employer and would always be beholden to his employer and obliged to protect their interest.

The Way Forward;

67. On a broad conspectus of the Client-Advocate privilege as codified in Section 132 to 134 of the BSA; though we are not persuaded to lay down any guidelines, which we believe are sufficiently available on an interpretation of the provisions itself, which also restrains us from constituting a committee of legal professionals, we issue the following directions; to ensure that the privilege is not impinged upon by valiant investigators or overzealous parties to a litigation, purely on the basis of the interpretation of the evidentiary rules codified :

> ***1. Section 132 is a privilege conferred on the client, obliging an Advocate not to disclose any professional communications, made in confidence, which privilege, in the absence of the client can be invoked by the Advocate on behalf of the client.***
>
> ***1.1 The Investigating Officers in a criminal case or a Station House Officer conducting a preliminary inquiry in a cognizable offence shall not issue a summons to an Advocate who***

represents the accused to know the details of the case, unless it is covered under any of the exceptions under Section 132.

1.2 When a summons is so issued to an Advocate, under any of the exceptions, it shall explicitly specify the facts on which the exception is sought to be relied upon, which shall also be with the consent of the superior Officer not below the rank of a Superintendent of Police who shall record his satisfaction as to the exception in writing, before the summons is issued.

1.3 A summons so issued shall be subject to judicial review at the instance of the Advocate or the client under Section 528 of the BNSS.

1.4 The Advocate on whom there is an obligation of non-disclosure as per Section 132 of the BSA shall be one who is engaged in a litigation or in a non-litigious or a pre-litigation matter.

2. Production of documents in the possession of the Advocate or the client will not be covered under the privilege conferred by Section 132, either in a civil case or a criminal case.

2.1 In a criminal case, the production of a document directed by a Court or an Officer shall be complied with by production before the Court under Section 94 of the BNSS; being regulated also by Section 165 of the BSA.

2.2 In a civil case, the production of a document shall be regulated by Section 165 of BSA and Order XVI Rule 7 of the Civil Procedure Code.

2.3 On production of such document, it shall be upon the Court to decide on any objection filed with respect to the order to produce, and the admissibility of the document, after hearing the Advocate and the party whom the Advocate represents.

3. The production of a digital device under Section 94 of the BNSS if directed by an Investigating Officer, the direction shall only be to produce it before the Jurisdictional Court.

3.1 On production of the digital device by the Advocate before the Court; the Court shall issue notice to the party with respect to whom the details are sought to be discovered from the digital device and hear the party and the Advocate on any objection regarding the

production of the digital device, discovery from it and the admissibility of that discovered.

3.2 If the objections are overruled by the Court, then the digital device shall be opened only in the presence of the party and the Advocate, who will be enabled due assistance of a person with expertise in digital technology, of their choice.

3.3 While examining the digital device, care shall be taken by the Court not to impair the confidentiality with respect to the other clients of the Advocate and the discovery shall be confined to that sought by the Investigating Officer, if it is found to be permissible and admissible.

4. In-house counsel will not be entitled to the privilege under Section 132 since they are not Advocates practicing in Courts as spoken of in the BSA.

4.1 The In-house counsel, however, would be entitled to the protection under Section 134 insofar as any communication made to the legal advisor of his employer, which however, cannot be claimed for the communications

between the employer and the In-house counsel.

68. With the above directions, we dispose of the Suo Motu case, setting aside the summons issued in the SLP (Crl.) No. 9334 of 2025 and cautioning gallant Investigating Officers from transgressing impulsively, the privilege under Section 132, which could result in violating the statutory provision and more importantly result in the infringement of the fundamental rights guaranteed to the person whom the Advocate represents, by the Constitution of India.

.....CJI.
(B. R. Gavai)

..... J.
(K. Vinod Chandran)

..... J.
(N.V. Anjaria)

New Delhi;
October 31, 2025.