

Non-reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) Nos. 18386-18387 of 2007

The Bar Council of Maharashtra & Goa ... Petitioners

Versus

Manubhai Paragji Vashi & Ors. ... Respondents

WITH

SPECIAL LEAVE PETITION NOS.18388-18389 OF 2007

Patil Rajiv Laxmna ... Petitioner

Versus

Manubhai Paragji Vashi & Ors. ... Respondents

ORDER

A. K. PATNAIK, J.

These two Special Leave Petitions under Article 136 of the Constitution are against the common judgments dated 13.12.2006, 04.06.2007 and 21.06.2007 of the Bombay High Court in Writ Petition Nos. 903 of 2004 and 1781 of 2004 (for short 'the impugned

judgment') and relate to elections to the Bar Council of Maharashtra and Goa.

2. The facts very briefly are that for elections to the Bar Council of Maharashtra and Goa (for short 'the State Bar Council'), Electoral Roll was prepared in which the names of the Advocates on the roll of the State Bar Council who had not paid the subscription as per Rule 40, Chapter -II, Part VI of the Rules were deleted from the Electoral Roll. The names of these Advocates had to be deleted from the Electoral Roll because Rule 6(h) of the Bar Council of Maharashtra and Goa Rules (for short 'the State Bar Council Rules') provided that the name of an Advocate appearing in the State Bar Council Roll shall not be on the Electoral Roll if he has not paid the subscription under Rule 40, Chapter - II, Part VI of the Rules and obtained receipt from the State Bar Council. Respondent No.1, who was earlier a member of the State Bar Council, filed Writ Petition No. 903 of 2004 before the High Court on 31.12.2003 praying that all the Advocates on the Roll of the State Bar Council be allowed to cast their votes and contest the elections without being disqualified for non-payment of the

amounts as per Rule 40, Chapter - II, Part VI of the Rules. While the Writ Petition was pending, elections to the State Bar Council were held and the result of the elections was declared on 04.03.2004. Respondent Nos. 1 and 7 to 30 were declared elected to the State Bar Council and the State Bar Council was constituted for a fresh term of five years. Respondent No.1 amended the Writ Petition No. 903 of 2004 and prayed for striking down Rule 6(h) of the State Bar Council Rules as *ultra vires* the powers of the State Bar Council. Under Rule 31 of the State Bar Council Rules, it was provided that a voter shall be entitled to mark his preferences to all the candidates appearing in the voting paper and Rule 32 (g) of the State Bar Council Rules provided that a voting paper shall be invalid in which preferences to less than ten candidates are communicated. Respondent No.1 also challenged these provisions in Rules 31 and 32 and prayed for the deletion of the provision for communicating a minimum of ten preferences in the voting paper. On 07.06.2004, some other Advocates filed Writ Petition No. 1781 of 2004 seeking similar reliefs. In both

the Writ Petitions a prayer was made for setting aside the election to the State Bar Council held on 04.03.2004.

3. After the replies were filed by the State Bar Council as well as the Bar Council of India, the Division Bench of the High Court heard the matter and the learned Judges delivered two separate judgments on 13.12.2006. While one learned Judge, Anoop V. Mohta, J. held Rules 6(h) and 32(g) of the State Bar Council Rules valid, the other learned Judge, F.I. Rebello, J. held Rules 6(h) and 32(g) as *ultra vires* the powers of the State Bar Council. The matter was referred to a third learned Judge, D.K. Deshmukh, J., who on 04.06.2007 agreed with F.I. Rebello, J. and held that Rules 6(h) and 32(g) are *ultra vires* the powers of the State Bar Council. Rebello and Deshmukh, JJ., have held that under Section 49(1)(a) of the Advocates Act, 1961, (for short 'the Act') it is the Bar Council of India which has the power to make Rules prescribing the conditions subject to which an Advocate may be entitled to vote at an election to the State Bar Council, including qualification or disqualification of voters, and under Section 15 of the Act a State Bar Council has only the power to make rules for election of the

members of the State Bar Council and for preparation and revision of Electoral Rolls and that Rules 6(h) and 32(g) of the State Bar Council Rules are not rules relating to the preparation and revision of Electoral Rules, but rules laying down the conditions subject to which an Advocate would be entitled to vote at an election of the State Bar Council, including the qualification and disqualification of voters, and therefore the State Bar Council had by making Rules 6(h) and 32(g) of the State Bar Council Rules exceeded its powers and encroached on the power of the Bar Council of India. By the impugned common order dated 21.06.2007, the High Court allowed the Writ Petitions in terms of the judgment of Rebello, J. declaring Rules 6(h) and 32(g) of the State Bar Council Rules as *ultra vires* Section 49(1)(a) of the Act and directed the State Bar Council to have counted the votes which were declared invalid counted on the ground that voters had not cast ten preference votes.

4. Mr. U.U. Lalit, learned senior counsel for the petitioner, submitted that Rule 6(1)(h) of the State Bar Council Rules provides that the name of an Advocate in the State Bar Council Roll shall not be on the Electoral Roll if he

has not paid the subscription under Rule 40, Chapter – II, Part VI of the Rules and obtained receipt from the State Bar Council, is really a rule made by the State Bar Council in relation to election of the members of the State Bar Council and relating to preparation of Electoral Roll and was therefore within the powers of the State Bar Council under Section 15(1) of the Act. He further submitted that Rule 32(g) of the State Bar Council Rules which provided that a voting paper shall be invalid in which the preferences to less than ten candidates are communicated, is a rule relating to the validity of a ballot paper and was also within the powers of the State Bar Council under Section 15(1) of the Act to make rules in relation to election of its members. He submitted that the High Court therefore was not right in coming to the conclusion that Rules 6(1)(h) and 32(g) of the State Bar Council Rules are beyond the powers of the State Bar Council and were within the powers of the Bar Council of India. He further submitted that in any case the State Bar Council Rules made by the State Bar Council including Rules 6 and 32 were approved by the Bar Council of India under Section 15(3) of the Act. He cited the judgments of

this Court in *Km. Shradha Devi v. Krishna Chandra Pant and Others* [(1982) 3 SCC 389 (II)] and *Ananga Uday Singh Deo v. Ranga Nath Mishra and Others* [(2002) 1 SCC 499] in which the system of proportional representation by single transferable vote has been discussed and explained.

5. In reply, Mr. Colin Gonsalves, learned senior counsel appearing for the respondents, submitted that in exercise of powers under Section 49(1)(a) of the Act the Bar Council of India has in Rule 1, Chapter – I, Part III of the Bar Council of India Rules, 1975, provided that every Advocate whose name is on the Electoral Roll of the State Bar Council shall be entitled to vote at an election. He submitted that this valuable right given to an advocate whose name is on the Electoral Roll of the State Bar Council to vote at an election of the State Bar Council cannot be taken away by the State Bar Council by providing that the vote cast by an Advocate will not be counted and will be held invalid if the Advocate has not communicated at least ten preferences in the ballot paper. He submitted that Rule 32(g) of the State Bar Council Rules made by the State Bar Council is therefore in direct conflict with Rule I, Chapter I, Part III of the Bar

Council of India Rules, 1975, made by the Bar Council of India in exercise of its powers under Section 49((1)(a) of the Act. He submitted that this Court has taken a view in the case of *Lily Thomas v. Speaker, Lok Sabha* [(1993) 4 SCC 234] that voting means formal expression of will or opinion by the person entitled to exercise the right and this right will not only include the right in favour or against the motion or resolution, but also the right to remain neutral. He submitted that when an Advocate votes for even one candidate and does not communicate his preferences for any other candidate on the ground that according to his opinion none other candidate was suitable for being elected as a member of the State Bar Council, his vote cannot be discarded. He relied on the decision of this Court in *Shradha Devi v. Krishna Chandra Pant and Others* (supra) in support of his submission that every elector has one vote and indicating other preferences is optional for the elector and if he has not communicated other preferences his ballot paper cannot be rejected as invalid. He submitted that in *Bar Council of Delhi and Others v. Surjeet Singh and Others* [(1980) 4 SCC 211] this Court has held that mere approval

of the Bar Council of India could neither validate or otherwise *ultra vires* a rule, nor have the effect of making up a rule made by the Bar Council of India itself. He submitted that the approval of the Bar Council of India to Rule 32(g) of the State Bar Council Rules will therefore not make the rule valid.

6. The relevant provisions of Section 15 and Section 49 of the Act are extracted hereinbelow:

15. Power to make rules.—

(1)

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the election of members of the Bar Council by secret ballot including the conditions subject to which persons can exercise the right to vote by postal ballot, the preparation and revision of electoral rolls and the manner in which the result of election shall be published;

.....

(3) No rules made under this section by a State Bar Council shall have effect unless they have been approved by the Bar Council of India.

49. General power of the Bar Council of India to make rules.—

(1) The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe—

(a) the conditions subject to which an advocate may be entitled to vote at an election to the State Bar Council including the qualifications or disqualifications of voters, and the manner in which an electoral roll of voters may be prepared and revised by a State Bar Council;

Rules 6(h), 31 and 32 of the State Bar Council Rules are extracted hereinbelow:

“6. The name of an Advocate appearing in the Bar Council Roll shall not be on the Electoral Roll, if on information received or otherwise obtained by the Bar Council that :-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)

(h) If he has not paid the subscription under Rule 40, Chapter – II, Part VI of the Rules and obtained receipt from the State Bar Council.

31. Method of Voting : - (1) Voter shall be entitled to mark his preferences to all the candidates appearing in the voting paper in the form mentioned hereinbelow and such preferences shall not be less than to ten candidates.

32. Voting papers when invalid:- A voting paper shall be invalid in which:-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)

(g) Preference to less than ten candidates are communicated.”

7. It will be clear from the language of Section 49(1)(a) of the Act that the Bar Council of India has the power to make rules prescribing the conditions subject to which an Advocate may be entitled to vote at an election to the State Bar Council, including the qualification or disqualification of voters, and the manner in which the Electoral Roll of voters may be prepared and revised by the State Bar Council. In exercise of its power the Bar Council of India has made rules in Part III, Chapter – I of the Bar Council of India Rules, 1975. Rule (1) and 2(h) of these rules are quoted hereinbelow:

“1. Every advocate whose name is on the electoral roll of the State Council shall be entitled to vote at an election.

2. The name of an advocate appearing in the state roll shall not be on the electoral roll, if on information received or obtained by the State

Bar Council concerned on the basis of which it is satisfied that-

x x x x x x x x x x x x x x x

(h) if he has not paid the subscription under Rule 40 Chapter-II, Part VI of the Rules and obtained receipt from the State Bar Council;”

8. The language of Rule (1) is clear that every Advocate whose name is on the Electoral Roll of the State Council shall be entitled to vote at an election. Rule 2(h), however, states that the name of an Advocate appearing in the State Roll shall not be on the Electoral Roll if he has not paid the subscription under Rule 40, Chapter – II, Part VI of the Rules and obtained receipt from the State bar Council. The language of Rule 2(h) is therefore verbatim the same as Rule 6(h) of the State Bar Council Rules made by the State Bar Council and lays down a condition subject to which an Advocate will be entitled to vote inasmuch as it provides that he will be entitled to vote provided he has paid his subscription. The State Bar Council could not have made such a provision in Rule 6(h) of the State Bar Council Rules in exercise of its powers under Section 15 of the Act and such a provision could only be made by Bar Council of India

under Section 49(1)(a) of the Act. The High Court was, therefore, right in holding that Rule 6(h) of the State Bar Council Rules was *ultra vires* Section 49(1)(a) of the Act. However, as Rule 2(h) of the Bar Council of India Rules makes exactly the same provision, names of the Advocates who had not paid the subscription had to be deleted from the Electoral Roll.

9. Regarding Rule 32(g) of the State Bar Council Rules made by the State Bar Council, it is clear from Rule 32(g) that by the said rule a vote cast by an Advocate is rendered invalid if he has indicated in the ballot paper less than ten preferences. The effect of this rule is that an Advocate whose name is on the Electoral Roll of the State Bar Council and is entitled to vote at an election under Rule 1, Chapter – I, Part III of the Bar Council of India Rules, 1975, will not be able to cast his vote in favour of even a single candidate to whom he may have communicated his first preference vote. In other words, Rule 32(g) has the effect of taking away the right conferred on an Advocate whose name is on the Electoral Roll of the State Bar Council to vote at an election under Rule 1, Chapter – I, Part III of the Bar Council of

India Rules, 1975, made under Section 49((1)(a) of the Act. To say, as is said in Rule 32(g), that the vote of an Advocate whose name is on the Electoral Roll will not be accepted is to lay down that he can vote provided he indicates a minimum of ten preferences in the ballot paper. Rule 32(g), therefore, is not a rule relating to validity of ballot paper but a rule relating to a condition subject to which an Advocate can vote and was beyond the powers of the State Bar Council under Section 15(2)(a) of the Act. In *Shradha Devi v. Krishna Chandra Pant and Others* (supra), this Court held:

“12.....It, therefore, necessarily follows that when voting is in accordance with the proportional representation by means of the single transferable vote it is obligatory to cast the first preference vote for ensuring the validity of the ballot-paper and the first preference vote must be so cast as not to leave any one in doubt about it. The remaining preferences are optional with the elector. He may or may not exercise his franchise for the remaining preferences. If he chooses not to exercise remaining preferences the ballot-paper cannot be rejected as invalid for failure to exercise the remaining preferences.....”

10. Once we hold that Rules 6(h) and 32(g) of the State Bar Council Rules are *ultra vires* the Act, the fact that Bar Council of India has approved the two provisions made by the State Bar Council under Section 15(3) of the Act will not validate Rules 6(h) and 32(g) of the State Bar Council Rules. In *Bar Council of Delhi and Others v. Surjeet Singh and Others* (supra), this Court has observed:

“8-A.....But the approval of the Bar Council of India can make the rule made by the State Bar Council valid and effective only if the rule made is within the competence of the State Bar Council, otherwise not. Mere approval by the Bar Council of India to a rule *ultra vires* the State Bar Council cannot make the rule valid. Nor has it the effect of a rule made by the Bar Council of India. Making a rule by the Bar Council of India and giving approval to a rule made by the State Bar Council are two distinct and different things. One cannot take the place of the other.”

11. For the aforesaid reasons, we are not inclined to entertain these Special Leave Petitions and we accordingly dismiss the same. There shall be no order as to costs.

.....J.
(R. V. Raveendran)

New Delhi,
October 13, 2011.

.....J.
(A. K. Patnaik)