

Manubhai P. Vashi Vs Bar Council of Maharashtra and Goa and others

Court: Bombay High Court

Date of Decision: June 4, 2007

Acts Referred: Advocates Act, 1961 " Section 10B, 15, 15(1), 15(1)(2)(a), 15(2)
Constitution of India, 1950 " Article 80, 80(4)
Government of India Act, 1915 " Section 108

Citation: (2007) 4 ALLMR 439 : (2007) 4 BomCR 3 : (2007) 109 BOMLR 1183 : (2007) 4 MhLj 641

Hon'ble Judges: F.I. Rebello, J; D.K. Deshmukh, J; Anoop Mohta, J

Bench: Full Bench

Advocate: M.P. Vashi in W.P. No. 903 of 2004, Petitioner in person in W.P. No. 1781 of 2004, for the Appellant; Y.S. Jahagirdar, instructed by Atul Damle, For respondent No. 1, Nitin Jamdar, For respondent No. 5, A.A. Kumbhakoni instructed by Onkar Warange, For respondent No. 9, Anand Kulkarni, For respondent Nos. 17, 23 and 29, Sachin Punde, For respondent Nos. 6, 14, 16, Dushyant Purekar, For respondent Nos. 15, 27, Rutuja Ambekar, For respondent No. 11 in W.P. No. 903 of 2004, Nitin Jamdar, For respondent No. 1, Y.S. Jahagirdar instructed by Atul Jamdar, in W.P. No. 1781 of 2004, for the Respondent

Judgement

F.I. Rebello, J.
Heard forthwith.

For the purpose of deciding the controversy the facts in Writ Petition No. 903 of 2004 are being set out.

2. The petitioner is a practicing Advocate. By the present petition, the petitioner has prayed that all the Advocates on the roll of the Bar Council of

Maharashtra and Goa - respondent No. 1, be allowed to cast their votes and contest the elections without being disqualified for non-payment of

the amounts as per Rule 40 of Chapter II of Part-VI, Standards of Professional Conduct and Etiquette of the Bar Council of India Rules. The

other relief was a direction to the Members of the Bar Council at the time the petition was filed, to restrain them from distributing Law Books to

the Bar Associations from the Bar Council Funds as elections had been declared. During the pendency of the petition the elections were held and a

new Committee has been elected. Pursuant to the results declared on 4th March, 2004, the respondent Nos. 6 to 29 and the petitioner were

declared as elected. By an amendment they were added as party respondents. Consequently, the added prayer clause, is to set aside the elections

to the Bar Council of Maharashtra and Goa declared on 4th March, 2004 and to direct holding of fresh elections by providing booths at all the

Courts in Mumbai and allowing all the Advocates on the roll of the Bar Council, to vote in the fresh elections. By yet another amendment, a relief is

sought that Sub Rules (h) and (i) incorporated in Rule 6 of "The Bar Council of Maharashtra and Goa Election Rules, 1968" (hereinafter referred

to as "the Election Rules") be ordered to be struck down, being illegal and to delete the words "and such preferences shall not less than to 10

candidates" appearing under the head "Method of Voting" in Sub-Rule (1) of Rule 31. The correct Rule is Rule 32(g) and the correct language of

the rule is "preferences to less than 10 candidates are indicated.

3. The petitioner had earlier been elected as a Member of the Bar Council and continued to hold the post until the Managing Committee of the Bar

Council was dissolved by order dated 5th September, 2003 by the Supreme Court of India. Pursuant to the elections, the petitioner has also been

declared elected and is presently a member of the committee. The elections to 25 posts of Managing Committee are held every five years. The

petitioner has alleged mal-practices which were noticed in the past. Details of various orders passed including the orders of the Hon'ble Supreme

Court in the SLP are set out in the petition. The petition was filed after the preliminary electoral roll was prepared and published on 3rd

November, 2003. The petitioner refers to Rule 40 of the Rules framed by the Bar Council of India, by which those who have not made

contribution to the Advocate's Welfare Fund (Medical Aid Scheme) are not allowed to cast their votes. As a consequence, it is pointed out, that

out of 75,000 Advocates on the rolls of the first respondent, about 30,000 Advocates stood disqualified by virtue of non-payment. There are

various averments in respect of improper fees which we need not advert to in detail.

4. By an interim order this Court directed the concerned Members of the Bar Council to return the books purchased for distribution to the Bar

Council within ten days from the date of order, if the books had not already been distributed. Subsequent to the holding of the elections and

election of new Managing Committee, the said order was vacated and respondent No. 1 council was allowed to distribute the books to the various

Bar Associations.

5. Rule 32 of the Elections Rules makes it mandatory for every voter to cast a minimum of ten preference votes in order that the ballot paper be

treated as valid. It has been averred that u/s 3(2) of the Advocates Act, elections are to be held in accordance with the system of proportional

representation by means of a single transferable vote from amongst advocates on the electoral roll of the State Bar Council. The relevant portion of

Rule 32 reads as under :-

Rule 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.

It is the case of the petitioner that this Rule is ultra vires the provisions of section 3(2)(b) of the Advocates Act, 1961 which hereinafter shall be

referred to as the ""Advocates Act"".

6. The other contention which has been raised is to the validity of Rule 6(h) and (i) of the Election Rules which reads as under :-

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. (i) he has

incurred any disqualification mentioned in the Act or the Rules made thereunder.

Explanation : If an Advocate who has incurred any disqualification as referred to in Rule 6 and does not furnish details about it as required in the

notice under Rule 8 of these Rules within the time specified shall be deemed to have committed an act of other misconduct as referred to in section

35(1) of the Act.

It is submitted on behalf of the petitioner that Rules 6(h) and (i) are Rules pertaining to disqualification and consequently could not have been made

by the State Bar Council, but only by the Bar Council of India.

7. The other grievances of the petitioner is that in the Districts and Talukas in the rest of Maharashtra, polling booths are provided irrespective as

to whether the voters strength was 50 or 100. In the case of Mumbai, however, the same was not done initially and only one booth was provided

at University Convocation Hall, Fort, Mumbai. On a petition being filed by the petitioner herein, a learned Bench of this Court directed that two

additional booths, one at Kurla and another at Bandra, be provided but on the condition that the voters should exercise option in advance, to vote

at Kurla and Bandra polling booths. As a result, about 400 voters cast their votes at Bandra and 300 voters exercised their option at Kurla. The

voting percentage in Mumbai was only 20% whereas the voting percentage outside Mumbai was 85%. The petitioner by means of a chart has

sought to demonstrate the number of first preference votes obtained by candidates in Mumbai and candidates outside Mumbai. It is not necessary

for us to reproduce the figures. Those figures indicate that in areas outside Mumbai, where the polling booths were provided at the Taluka and

District Court levels, more number of candidates have secured, larger number of first preference votes, vis-a-vis the candidates from Mumbai.

8. On behalf of the Bar Council of Maharashtra and Goa various affidavits have been filed, challenging the locus of the petitioner, more so, when

the petitioner was very much a party to the Rules, more specifically Rule 40. The electoral roll, it is contended, has already been finalised and the

election process had been set in motion and as such this Court, ought not to entertain the petition in the exercise of its extraordinary jurisdiction.

Names of advocates were not included in the electoral roll as they had not paid the contribution in terms of Rule 40 of the Bar Council of India

Rules, and as contained in Rule 6(h) of the Election Rules framed and gazetted on 2nd August, 2001. Before publishing the electoral roll, Notices

were issued to the defaulter members asking them to make payment as required by Rule 40 of the Rules of the Bar Council of India. It is on

account of the failure of the advocates to pay the fees that the names of such candidates were not included in the electoral roll.

Subsequent to the amendment of the petition an additional affidavit was filed on 6th September, 2004. It affidavit was filed on 6th September,

2004. It is submitted that considering section 15 of the Advocates Act read with section 6(g) of the said Act, it is the State Bar Council that has to

provide for election of its members.

9. On behalf of the Bar Council of India, Mr. S. Radhakrishna, Secretary, has filed an affidavit. It is pointed out that under Sub-Rule (h) of Rule 2

in Part-3, Chapter-I of the Rules framed by the Bar Council of India, it is prescribed that unless the subscription amount is paid upto date, those

who have not paid their subscriptions, their names shall not be included in the Electoral Roll. Thus, it was within the competence of the State Bar

Council, considering Rule 40 of the Rules of Bar Council of India, to exclude defaulters from the electoral roll.
Reference is made to Rule 2(h) of

Part-III of Chapter-I of the Rules of Bar Council of India which reads as under :-

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...

(a).....

(b).....

(c)

(d).....

(e) ...

(f).....

(g).....

(h) if he has not paid the subscription under Rule 40, Chapter-II, Part-6 of the Rules and obtained receipt from the State Bar Council,

(i) he has incurred any disqualification mentioned in the Act or the Rules made thereunder." ar Council, (i) he has incurred any disqualification

mentioned in the Act or the Rules made thereunder.

The said Rule has been upheld by the Supreme Court in the case of Bar Council of India vs. Omprakash Faiji and others decided on 2nd

December, 1997.

10. From the averments and the arguments advanced, two issues of law and a subsidiary issue regarding setting up of polling booths remain for

consideration. The two issues of law which are required to be considered may be now formulated :-

(i) Are Rule 6(h) and (i) of the State Election Rules invalid, inasmuch as they are Rules pertaining to disqualification and as such could only have

been made by the Bar Council of India in exercise of the powers conferred on the Bar Council of India u/s 49(1)(a) of the Advocates Act, 1961.

The Rule made by the State Bar Council even if it has been approved by the Bar Council of India subsequently under powers vested in it u/s 15(3)

would be of no consequences,

(ii) Rule 32 of the State Election Rules which provides that voting paper shall be invalidated on which at voting paper shall be invalidated on which

preferences to less than ten candidates are indicated, in fact, is a rule of disqualification of the candidate and as such would not fall within the rule

making power of the State Bar Council u/s 15 but would be a power of the Bar Council of India u/s 49 and/or in the alternative such a rule would

be ultra vires section 3(2)(b) of the Advocates Act, 1961.

11. We may now deal, with the first contention that Rules 6(h) and (i) of the Election Rules disqualifying an Advocate from having his name

included in the electoral roll is invalid. Learned Counsel for the petitioner had relied on the judgment of the Supreme Court in Bar Council of Delhi

and Others Vs. Surjeet Singh and Others, to further contend that mere approval by the Bar Council of India to a rule which is beyond the rule

making power of the State Bar Council, cannot make the rule valid nor has it the effect of a rule being made by the Bar Council of India. Framing a

rule by the Bar Council of India and granting approval to a rule made by the State Bar Council are two distinct and different things and one cannot

take the place of the other. Rule 6(h) considered in the context of Rule 40 of the Rules made by the Bar Council of India and section 49(1)(a) of

the Advocates Act, 1961, would be ultra vires and consequently would have to be struck down. The mere fact that the rule has been approved by

the Bar Council of India would be of no consequence as a rule made beyond the competence of the subordinate legislative authority would be still

born and cannot be breathed life into, by another body in exercise of the power of approving rules, which could only be validly made by the Bar

Council of India. In our opinion, however, this issue need not detain us as on behalf of the Bar Council of India their Learned Counsel has drawn

our attention to Part-III, Chapter-I of the Bar Council of India Rules and more specifically to sub-rule 2(h) which we have earlier reproduced. It is

clear therefrom that the Bar Council of India itself has provided a rule that the name of an advocate appearing in the State Roll, shall not be on the

electoral roll if such Advocate has not paid the subscription, under Rule 40, Chapter-II, Part-6 of the Rules of the Bar Council of India and

obtained receipt from the State Bar Council. It is clear, therefore, that what would govern the preparation of the electoral roll by the State Bar

Council, is the rule made by the Bar Council of India. In terms of this rule an advocate whose name appears on the roll of the Bar Council, has not

paid the subscription as set out in Rule 2(h), that name cannot be included in the electoral roll.

Rule 6(h) of the Election Rules, merely reflects, what is set out in Rule 2(h) of Part-3, Chapter-I of the Rules made by the Bar Council of India. It

cannot therefore, be said that the electoral roll as prepared by the State Bar Council is without the authority of law and/or is illegal. Rule 6(i) of the

Election Rules merely sets out that the name of an advocate would not be included in the electoral roll if such an advocate has incurred any of the

disqualifications mentioned under the Act or the Rules made thereunder. It cannot be said that this Rule is ultra vires section 49(1)(a) as the rule

only reflects a measure of guidance in preparing the election roll, which is within the competence of the State Bar Council considering section 3(4)

of the Advocates Act. That first issue question is, therefore, answered accordingly.

As Rule 6(h) is therefore beyond the rule making power of the State Bar Council and is consequently ultra vires section 49(1)(a). Such declaration,

however, would really not affect the outcome of the election held to the Bar Council of Maharashtra and Goa.

12. The second issue may now be considered and on which there has been a considerable debate. On behalf of the petitioners it is submitted that

though Rule 32 speaks as to when a voting paper is to be treated as invalid, Rule 32(g) in fact disqualifies an elector whose name is included in the

electoral roll and who participate in voting but who choose not to exercise his preference for another nine candidates. In other words, the ballot

paper of such an voter on account of the rule is being treated as invalid. The voter under Rule 32(g) must exercise his preference, for at least ten

candidates out of the twenty five candidates who have to be elected, to have his ballot paper declared as valid. The submission is that in fact this is

a rule pertaining to disqualification though purportedly framed as a rule for rejecting ballot paper and/or in the alternative that such voter

considering section 3(4) does not satisfy the conditions for voting and consequently stand disqualified. Once the name of a candidate appears on

the electoral roll, is it open to the State Bar Council to make a further rule for rejecting the ballot paper on the ground that such an elector had not

cast ten preference votes. Such a rule prima facie would be ultra vires section 3(2)(b) read with section 3(4). The system of preference votes

requires that for a vote to be valid, the elector has to cast his first preference. All other preference votes are immaterial. It is the choice of the

elector as to how many additional preference votes such elector would cast. Once the elector has cast the first preference vote, his vote is valid

and cannot be rejected. Any rule to the contrary if can be made, can only be made by the Bar Council of India u/s 3(4) of the Advocates Act.

On the other hand, on behalf of Bar Council of Maharashtra and Goa and the contesting respondents, it is submitted by the Learned Counsel that

Rule 32(g) is not a rule pertaining to the disqualification, but a rule for rejecting a ballot paper. It is submitted that neither section 15 nor section 49

of the Advocates Act, would be applicable and what would be applicable would be section 6(g) of the Advocates Act, which confers power on

the State Bar Council to provide for election of its members. Similarly, it is submitted that Bar Council of India can make Rules to provide for

election of its members u/s 7(k) of the Advocates Act. Rule 32 as framed in exercise of the powers conferred on the State Bar Council u/s 6(g),

cannot be said to be ultra vires the power of the State Bar Council nor can it be said to be ultra vires section 3(2)(b) of the Advocates Act.

On behalf of the Bar Council of India the Learned Counsel submits that in the absence of instructions of the Bar Council of India on this aspect, it

is not possible for him to address the Court on this point. Learned Counsel for the petitioner have referred to several judgments which would be

adverted to in the course of our discussion to the extent necessary.

13. The Advocates Act u/s 3(2)(b) provides for holding elections, under a system of proportional representation. The relevant portion of the

section reads as under :-

Section 3(2)(b) :- In the case of a State Bar Council with an electorate not exceeding five thousand, fifteen members, in the case of a State Bar

Council with an electorate exceeding five thousand but not exceeding ten thousand, twenty members, and in the case of the State Bar Council with

an electorate exceeding members, and in the case of the State Bar Council with an electorate exceeding ten thousand, twenty-five members,

elected in accordance with the system of proportional representation by means of the single transferable vote from amongst advocates on the

electoral roll of the State Bar Council.

We may omit the proviso as it is not required for our discussion.

The next relevant part is sub-section (4) of section 3 which reads as under:-

Section 3(4) :- An advocate shall be disqualified from voting at an election under sub-section (2) or for being chosen as, and for being, a member

of State Bar Council, unless he possesses such qualifications or satisfies such conditions as may be prescribed in this behalf by the Bar Council of

India, and subject to any such rules that may be made, an electoral roll shall be prepared and revised from time to time by each State Bar Council.

Rule 3(1) of the Election Rules, framed by the Bar Council of Maharashtra and Goa, defines an original vote to mean in relation to any candidate, a

vote on the voting paper on which his first preference is recorded for such candidate. Rule 3(1) defines first preference to mean the figure "1" or

1st or "one" or "first" or "I" set opposite the name of a candidate; "Second Preference" means figure "2" or "2nd" or "two" or "second" or "II" set

opposite the name of a candidate and "Third Preference" means the figure "3" or "3rd" or "three" or "third" or "III" set opposite the name of a

candidate and so on." Election by proportional representation is also found in The Representation of the People Act, 1951 for elections to the

Legislative Council as also to the Rajya Sabha.

14. Before the issue is answered, it would be better to understand the concept of proportional representation. Gainful reference for that purpose

may be made to the judgment in *Surendra Pal Ratawal Vs. Shamim Ahmad*, . A learned Single Judge of the Delhi High Court was considering the

issue of ""Proportional Representation"" and has traversed its history. The principle of ""proportional representation"" was formulated in the middle of

Nineteenth Century, by C.C.G. Andrae in Denmark and Thomas Hare and John Stuart Mill in Britain. Since then several methods for applying it

have been devised, the best known are the single-transferable vote method and the list system. All forms of proportional representation necessitate

multi-member constituencies. Under the single-transfer-vote method, voters number the names of candidate on the ballot paper in order of

preference; that is, (1) before the first choice, (2) before the second, and so on. The election is based on a quota determined under the Droop

formula, named after its deviser, the Belgian H. R. Droop. The total number of valid votes cast, is divided by the number of seats to be filled plus

one, and one is added to the result. Thus, for example if the number of seats to be filled is nine and the total votes cast is 2,00,000, the latter figure

is divided by ten and one added to the quotient 20,000, giving a quota of 20,001. Any candidate who obtains the quota on the basis of the first

preference votes is declared elected. When a quota is exceeded, all the votes of a successful candidate are transferred to the second preferences.

Any surplus amongst subsequently successful candidates is similarly transferred and so on, if necessary. If any seats are still vacant the candidate

with the least votes is eliminated, and all his ballots transferred to second preferences until all seats are filled by candidates obtaining a quota.

15. The Supreme Court had an occasion to consider the issue of proportional representation in the case of *Km. Shradha Devi Vs. Krishna*

Chandra Pant and Others, under the context of Representation of the People Act, 1951 and the Conduct of Election Rules, 1961. The issue

before the Supreme Court was that in cases of preference votes, when can the ballot paper be said to be invalid? In the course of the discussion

the Apex Court in para 12 observed as under :-

But while exercising the preferences it is obligatory in order to render the ballot paper valid to give first preference vote. It is optional for the

elector to exercise or not to exercise his remaining preferences. This must be so in the very nature of things because this system of voting was

devised to provide minority representation.

Further the Apex Court then observed as under :-

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.

From the above judgment, which was rendered in the context of Rule 73(2) of the Conduct of Election Rules, 1961, the Supreme Court held that

for the ballot paper to be valid it was incumbent on the voter, to cast his first preference vote. In the absence of so casting, the ballot paper would

be declared invalid if the figure (1) is not marked. Consequently, considering Rule 73, the Supreme Court further held that what is material for the

elector, is to cast his first preference vote and insofar as exercising his franchise to the remaining preferences, it was not obligatory. In other words,

it is the choice of the elector to cast his second preference vote or further preference votes.

16. The argument may now be tested, as to whether the State Bar Council, considering that one of its function is to provide for election of its

members, could frame the Rule u/s 15 or u/s 6(g). Section 15(1) is an enabling power in the Bar Council to make Rules to carry out the purposes

of Chapter-II. Section 15(2) provides that a State Bar Council can make Rules to provide for election of members of the Bar Council by secret

ballot including conditions subject to which persons can exercise their right to vote by postal ballot, preparing and revision of electoral roll and the

manner in which the result of the election shall be published. This would indicate that a State Bar Council can lay down the procedure for holding

the secret ballot for the election of its members. It would thus appear, that it is the State Bar Council that can lay down the procedure. Section 15,

however, would have to be read with the other provisions of the Act so that the Act is harmoniously construed. Section 6(g) confers a power on

the State Bar Council to make rules for election of its members. The test in such cases, normally is whether the general power has to give way to

the specific power.

17. The Bar Council of India has been conferred, as a part of its functions, to make rules for the election of its members u/s 7(k). Insofar as the

power to make rules, the power conferred u/s 49, is in respect of Act and not in respect of any Chapter under the Advocates Act, 1961. The

power to make Rule includes, 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 the voters and the manner in which an electoral roll of the voters may be prepared and revised by a State Bar

Council.

Provisions of section 49(1)(a) to the extent relevant are reproduced hereinbelow :-

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;

Section 49(1)(a), therefore, confers a power on the Bar Council of India to impose conditions by which an Advocate may be entitled to vote at an

election to the State Bar Council and this includes laying down the qualification or disqualification of the voters as also the manner in which the

electoral roll of the voters may be prepared. On a plain construction or a literal reading of section 49(1)(a), it is apparent that the power, to impose

conditions subject to which an advocate may cast his vote at an election to the State Bar Council election, is exclusively with that of the Bar

Council of India. Once there is a specific power u/s 49(1)(a), then section 6(g) read with section 15 of the Advocates Act will have to be confined

to make Rules under that Chapter and secondly such rules cannot be against the express language of section 49(1)(a). We may now refer to the

judgment in Bar Council of Delhi vs. Surjit Singh (supra). The Supreme Court in the context of construing the power under sections 15, 3(4) and

49 observed as under :-

.... It is true that the power to make rules conferred by section 15 is both for the Bar Council of India as also for the Bar Council of a State. But

no provision of section 15 can override the specific provision made in section 3(4) and section 49(1)(a) of the Act...

Construing section 3(4) the Apex Court observed as under :-

On the plain reading of this sub-section it is manifest that under the Act qualifications and conditions entitling an Advocate to vote at an election or

for being chosen as a member of the State Bar Council has to be prescribed by the Bar Council of India. The State Bar Council has no such

power. The power of the State Bar Council is merely to prepare and revise from time to time the electoral roll subject to the rules made by the Bar

Council of India concerning the qualifications and conditions aforesaid.

Proceeding further in the context of examining the power conferred u/s 15 the Apex Court observed as under :-

The State Bar Council can frame rules for the preparation and revision of electoral rolls u/s 15(2)(a). That would be in conformity with the latter

part of sub-section (4) of section 3 also. But in the garb of making a rule for the preparation and revision of the electoral rolls it cannot prescribe

disqualifications, qualifications or conditions subject to which an advocate whose name occurs in the State roll can find place in the electoral roll

resulting in his deprivation of his right to vote at the election....

18. Section 3(4) as can be seen, provides that an advocate shall be disqualified from voting at an election under sub-section (2) or for being

chosen as a member of the State Bar Council, unless he possesses such qualifications or satisfies such conditions as may be prescribed in this

behalf by the Bar Council of India, and subject to any such rules that will be made, an electoral roll shall be made and revised from time to time by

the State Bar Council.

On a proper construction of the various sections and the respective powers conferred on the Bar Council of India and the State Bar Council, it is

apparent that the preparation of an electoral roll is of the State Bar Council. That electoral roll, however, has to be prepared, considering the rules

made by the Bar Council of India in the matter of qualifications and disqualifications and such other conditions as laid down either under the

Advocates Act or by Rules made by Bar Council of India. The State Bar Council cannot impose conditions as to qualifications or disqualifications.

That is wholly outside their rule making power. The second aspect of the matter is that the conditions subject to which an advocate may be entitled

to vote, is again a specific power conferred on the Bar Council of India by section 49(1)(a) and that is so held by the Supreme Court in *Surjeet*

Singh's case (*supra*). Consequently, what follows is that after the electoral roll is prepared by the State Bar Council in terms of the rules framed by

the Bar Council of India, if there be a further condition, subject to which an advocate may be entitled to vote, then such conditions can be imposed

only by the Bar Council of India. In the instant case, Rule 32(g) is a condition for an advocate, to cast his vote in order that it be treated as valid.

Though the rule does not bar an advocate from voting, none the less, the voting paper is to be treated as invalid, if the elector give his preference to

less than ten candidates. This would clearly amount to imposing a condition on the elector to cast his vote. In other words, even though the elector

casts his first preference votes to make the vote legal, his failure to give preferences to nine other candidates would result in the rejection of the

ballot paper inasmuch as the ballot paper would be treated as invalid. It is clear, therefore, that Rule 32(g) though coming under the heading as to

when the voting paper becomes invalid, for all purposes, is a condition for an advocate to exercise his right to vote. Rule 32(g), therefore, would

be clearly ultra vires section 49(1)(a) of the Advocates Act.

19. Having said so let the other limb of the argument may be considered, as to whether Rule 32(g) would be ultra vires section 3(2)(b) read with

section 3(4) of the Advocates Act. In the earlier part of the discussion we have noted that election to the State Bar Council has to be held by a

system of proportional representation by means of single transferable vote. The concept of proportional representation and single transferable vote

would mean that for the vote to be valid it is incumbent on the elector to cast his first preference vote. Once the elector casts his first preference

vote, then such a vote is legal and it is to be counted for election of members, irrespective of, as to whether the voter casts the second preference

or other preference votes. In *Shradhadevi's* case (supra), adverting to the provisions of The Representation of the Peoples Act, the Apex Court

while construing the provisions of the rules under that Act, held that while exercising preferences, it is obligatory in order to render the ballot paper

valid to give first preference vote. It is optional for the voter to exercise or not to exercise remaining preferences. The remaining preferences are

optional for the voter. He may or may not exercise his franchise for the remaining preferences. Such a reading of section 3(2)(b) would mean that it

is the choice of the elector after having cast his first preference vote to exercise his right to cast his second preference vote or in the case like

elections to the Bar Council of Maharashtra and Goa where 25 members have to be elected the remaining preference votes. The right to vote is an

exercise by the voter to decide his preference. That preference would be the suitability of the voter, local or regional considerations or such other

factors which may weigh with such voter. The decision not to cast the second, third or other preference votes may be, because such voter is

unaware of the credentials of the other candidates or in his opinion the elector does not find them to be worthy of consideration to be on the

Managing Committee of the Bar Council or such other consideration. Is it then open to the State Bar Council purporting to make a rule in the

exercise of the powers u/s 6(k) or section 15 to impose a condition in the nature of Rule 32(g)? It has been held earlier that such a power does not

vest in the State Bar Council. Even assuming it is held that there is such a power, then to that extent it would be inconsistent with the concept of

proportional representation by means of a single transferable vote. To insist that such a voter must cast a minimum of ten votes, is to ask the voter

to cast his preference votes to candidates who in such voter's opinion are unworthy of being members of the State Bar Council. The concept of

election is a choice to the voters to select a candidate who in their opinion is worthy of their trust and confidence. More so, in an educated class of

voters like Advocates. This is irrespective of what is alleged by the petitioner about the illegal influences that are sought to be brought in at the time

of voting. If such practices are adopted, all that can be said is, that such unfair practice ought to be deprecated. Apart from that, on a reading of

section 3(4), it is clear that the disqualification of any voter under sub-section (2) can only be prescribed by the Bar Council of India. Therefore, in

the matter of exercising the right to vote in accordance with the system of proportional representation, it is the Bar Council of India in exercise of its

power u/s 3(4) read with section 49(1)(a) which alone will have the right to make the rules for disqualification. Rule 32(g) under the circumstances

made by the Bar Council of Maharashtra and Goa is ultra vires section 3(2)(b) read with section 4, read with section 49(1)(a) of the Advocates

Act and consequently null and void. Whether such a rule in fact could be made by the Bar Council of India as that is not in issue and need not be

examined.

20. A faint argument was advanced on behalf of the respondents that the petitioner himself was a party to the making of the rules and as such he is

estopped from challenging the validity of these rules. Firstly, there can be no estoppel against law. The mere fact that the petitioner was a member

of Managing Committee which made the rules, is irrelevant while contesting the legality of the rules. In Bar Council of Delhi vs. Surjeet Singh's

case (supra), the elections were challenged after the election was held. The Supreme Court negated such a challenge, by holding that merely

because the petitioner took part in the election by standing as candidate or by exercise of his right of franchise, he cannot be estopped from

challenging the whole election when the election was illegal and void. Even if the challenge to the election is after it is held, it could not be said that

such a petitioner is guilty of laches and must be prohibited on that count, as long as the elections are held under rules which were void. In that case

the Supreme Court held that the entire electoral roll was null and void because of the invalidity of the impugned proviso. In our opinion, therefore,

that contention must be rejected.

21. The petitioners have also drawn our attention to the rules for providing ballot booths or polling stations in the city of Mumbai. The petitioners

contend, that the procedure for providing polling stations insofar as Mumbai District is concerned, is unfair and arbitrary. It is pointed out that Rule

15 provides that the voting shall be by personal ballot at the seat of the High Court, District Court and Taluka Court as shall be decided by the Bar

Council. By an explanation it is provided that if there is no Court at the Taluka, the voter from the said Taluka shall vote at the place of the Court

which has jurisdiction over the said Taluka or at such place as may be directed by the Secretary. There is a proviso which sets out that insofar as

Mumbai City is concerned, elections shall be held at such place as the Council/Secretary deems fit and proper. It is pointed out that there was only

one place provided for the voters in Mumbai to cast their votes and pursuant to the petition filed in this Court, two other polling stations were

provided subject to such directions. If in the rest of the State if the ballot is to be cast, even though there may be Benches of the High Court at the

District and at Taluka level Courts in those districts, still voting is permitted at District and Taluka Courts. We see no reason as to why the same

procedure should not be adopted insofar as the City of Mumbai is concerned. The voters in the city of Mumbai ought to have an equal right as

voters as in other parts of the State of Maharashtra and Goa to exercise their franchise. The proviso which deprives the voter from exercising his

right of vote other than the seat of the High Court, District Courts and Taluka Courts, would be void. The proviso properly read is to provide for

additional voting places like in the city Mumbai, where there may be more than one Court within the District or Taluka. These Election Rules were

notified in 2001 during the term of the last Managing Committee of the Bar Council.

It is not necessary to strike down the rule, considering that the rule can be read down. The Bar Council of Maharashtra and Goa therefore, to read

the proviso to mean to make arrangements for polling booths, at every place where there be a Court and if there be sufficient number of voters on

the same pattern where polling booths are provided in the rest of the State to set up polling booth in such places.

22. That leaves the issue as to whether the entire election be set aside or an order be passed, that those ballot papers which were rejected on the

ground that the voters had not cast ten preference votes, should be counted and/or not to interfere with the election to the managing committee

considering that it has completed more than two years of its term and the challenge to the rule was made after the elections were held. The

Supreme Court has held, that the power to declare that a judgment would apply prospectively is only of the Supreme Court and such a power is

not conferred on the High Court. Considering that Rule 32(g) has been held to be invalid, then the issue is whether to direct that the votes which

have been rejected ought to be counted. The effect of this may be to affect the results already notified. The challenge to Rule 32(g) was not made

before the elections were held or when the petition was first filed. The votes were rejected in terms of the rules as they stood. The petitioners

original prayers were to allow all the voters to cast their votes without considering Rule 40 of the Bar Council of India Rules. There was no

challenge to the vires of Rule 32(g). That has only been brought up by an amendment after the results were declared. In these circumstances the

question is whether we should order a recount considering the judgment in Bar Council of Delhi vs. Surjeet Singh's case (supra). In that case the

entire electoral roll was set aside and consequently the election. In the instant case, there is no challenge to the validity of the electoral roll. The

issue is of counting of about three thousand ballot papers, pursuant to Rule 32(g) being held to be invalid. In our opinion, it is not necessary to set

aside the entire election and order de-novo elections. The choice is to either direct counting of the votes which were rejected on the ground that

the preference votes had not been indicated or considering that the challenge to the rule was after the results were declared not to interfere with the

electoral process. No doubt Rule 44 provides the procedure of challenging the election of a candidate. The election petition has to be filed within

15 days. That only would mean that challenging the election of an individual candidate or may be of all the candidates, but not on account of the

rule being declared invalid, which is beyond the competence of the Election, Tribunal.

23. Considering the judgment of the Supreme Court in Bar Council of Delhi vs. Surjeet Singh (supra) and as the rejected votes in respect of Rule

32(g) being declared invalid are substantial, justice would require that the rejected votes to be counted, more so, after it has held that the rule be

invalid. In the light of that, we direct respondent No. 1 to also count the ballot papers which were rejected on the ground that the voters had not

cast ten preference votes. Till such time as the counting process is complete, the present Managing Committee will continue in office. In the event

on recounting of votes any other candidate gets more votes than those votes secured by respondents 6 to 29 and the petitioner herein, in terms of

the preference votes cast, then to that extent those candidates will be declared to be elected and those amongst respondents 6 to 29 and the

petitioner who secured less votes, their elections will stand set aside. The new Managing Committee as constituted pursuant to the direction will

hold the office for the unfilled portion of the term for which it was elected.

24. For the aforesaid reasons, the answers to the questions are as under :-

(A) Rule 6(h) is invalid being ultra vires section 49(1)(a) of the Advocates Act;

(B) Rule 32(g) is ultra vires section 3(2) read with section 3(4) read with section 49(1)(a) of the Advocates Act;

(C) The Bar Council of Maharashtra and Goa for future elections to provide polling booths apart from what is being promptly provided in the city

of Mumbai also at other Courts in Mumbai where there are minimum number of voters in terms of the procedure as followed by the Bar Council

outside Mumbai;

(D) Respondent No. 1 to get counted the votes from the ballot papers which were declared invalid on the ground that the voters had not cast ten

preference votes. The entire process to be completed within eight weeks. On such counting, if any other candidate gets more votes than

respondents 6 to 29 and petitioner, then such candidate to be declared to be elected and proportionally those from amongst the present Managing

Committee who were earlier declared elected, will give way to the newly elected candidates. Till such time the exercise is complete, the present

Managing Committee to function as the Managing Committee. The term of the Committee after declaration of the results will be the same as of the

present Managing Committee.

Rule made absolute accordingly in both the Writ Petitions. There shall be no order as to costs.

Per Anoop V. Mohta, J.

I have had the privilege to read the Judgment and the views expressed by learned Brother F. I. Rebello, J. and

with utmost respect, I disagree with the views and the conclusions expressed on the issue of declaring Rule 6(h), 32(g) of the Bar Council of

Maharashtra and Goa Election Rules (for short, "Election Rules") ultra vires to sections 3(2)(b), 3(4) and 49(1) (a) of the Advocates Act, 1961

(for short, "the Advocates Act").

2. The events which led to filing of the present writ petition and as necessary, are as under :

The petitioner is a practicing Advocate and an elected member of the State Bar Council of Maharashtra (State Bar Council). The last elections of

the State Bar Council held on 4th March, 2004 and gazetted on 23rd April, 2004. The petitioner has challenged the validity of Election Rules 6 (h)

(i), 32(g) and the said election in which he himself got elected for a five year term.

3. The relevant sections under which Election Rules are framed vide sections 3(2)(b), 3(4), 3(5), 6(1)(g), 10B, 15(1), 15(2) (a) and (d), 15(3) and

49(1) (a) (ab) and (ac) of the Advocates Act, are as under :

3. State Bar Councils. - (1).....

(2) A State Bar Council shall consist of the following members, namely :-

(b) In the case of a State Bar Council with an electorate not exceeding five thousand, fifteen members, in the case of a State Bar Council with an

electorate exceeding five thousand but not exceeding ten thousand, twenty members, and in the case of the State Bar Council with an electorate

exceeding ten thousand, twenty-five members, elected in accordance with the system of proportional representation by means of the single

transferable vote from amongst advocates on the electoral roll of the State Bar Council.

(4) An Advocate shall be disqualified from voting at an election under sub-section (2) or for being chosen as, and for being, a member of State Bar

Council, unless he possesses such qualifications or satisfies such conditions as may be prescribed in this behalf by the Bar Council of India, and

subject to any such rules that may be made, an electoral roll shall be prepared and revised from time to time by each State Bar Council.

(5) Nothing in the proviso to sub-section (2) shall affect the term of office of any member elected before the commencement of the Advocates

(Amendment) Act, 1964 (21 of 1964), but every election after such commencement shall be held in accordance with the provisions of the rules

made by the Bar Council of India to give effect to the said proviso.

6. Functions of State Bar Councils. - (1) The functions of a State Bar Council shall be -

(g) to provide for the election of its members;

(h) to perform all other functions conferred on it by or under this Act.

15. Power to make rules. - (1) A Bar Council may make rules to carry out the purposes of this Chapter.

(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.

(ab) qualifications for membership of a Bar Council and the disqualifications for such membership.

(ac) the time within which and the manner in which effect may be given to the proviso to sub-section (2) of section (3).

The concerned Election Rules are as under :

Rule 3. Interpretation. - In these Rules, unless the context otherwise requires. -

(1) "First preference" means the figure "1" or "1st" or "one" or "first" or "I" set opposite the name of a candidate;

"Second Preference" means

figure "2" or "2nd" or "two" or "second" or "II" set opposite the name of a candidate and "Third preference" means the figure "3" or "3rd" or

"three" or "third" or "III" set opposite the name of a candidate and so on.

(t) "Transfer Vote" in relation to any candidate means a vote the value or part of the value of which is credited to such candidate and which is

derived from a voting paper on which a second or a subsequent preference is recorded for such candidate;

(w) "Voter" means an Advocate of Bar Council of Maharashtra and Goa and whose name is entered on the Final Electoral roll of the Council.

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.

(1) he has incurred any disqualification mentioned in the Act or the Rules made thereunder.

Explanation : If an Advocate who has incurred any disqualification as referred to in Rule 6 and does not furnish details about it as required in the

notice under Rule 8 of these Rules within the time specified shall be deemed to have committed an act of other misconduct as referred to in section

35(1) of the Act.

15. Method of election. - (i) Election to the Bar Council shall be by the single transferable vote by and amongst the voters in the electoral roll in

accordance with these rules.

(ii) The voting shall be by personal ballot at the seat of the High Court, District Court and Taluka Court as shall be decided by the Bar Council.

Explanation. - (1) If there is no Court at the Taluka, the voters from such taluka shall vote at the place of the Court which has jurisdiction over such

taluka or at such place as may be, directed by the Secretary : Provided that, where a voter ordinarily practices beyond the territories of the States

of Maharashtra and Goa, he shall vote at such place within the States of Maharashtra and Goa as may be intimated by him and where a polling

booth is provided, at least 120 days before the date of election : Provided further that as far as City of Mumbai is concerned, election shall be held

at such place as the Council/Secretary deems fit and proper.

(2) An Advocate shall be deemed ordinarily to practice at the place which is given in his address in the electoral roll.

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 10 candidates.

(2) A voter giving his vote -

(a) shall place on his voting paper the figure "1" or "1st" or "First" or "I" in the space opposite the name of the candidate whom he chooses for his

first preference and;

(b) May in addition place on his voting paper the figure "" or "2nd" or "two" or "second" or "II" or figures "2" or "2nd" or "two" or "second" or

"II" and "3" or "3rd" or "three" or "third" or "III" and "4" or "4th" or "four" or "fourth" or "IV" and so on, in the space opposite the names of the

other candidates in the order of his preference.

As per Rule 24, there are instructions circulated for the guidance of voters which gives the detail of the number of members to be elected i.e. 25.

The voting should be by the single transferable preference vote. A schedule is also provided with an illustration of the procedure as to the counting

of votes with many more needed details.

4. Admittedly, on 14th August, 2003 a notification declaring the elections of the Bar Council of Maharashtra was published and gazetted on 21st

August, 2003, as the Hon"ble Supreme Court, in SLP No. 11841 of 2003 filed by one Advocate Mr. Parihar, on 5th September, 2003 passed an

order dissolving the earlier State Bar Council. A Special Committee consisting of respondents 2, 3 and 4 took over the administration of the State

Bar Council accordingly. The preliminary electoral roll was prepared and published on 3rd November, 2003. The intimations were circulated to

the District and Taluka Bar Associations.

5. The petitioner has filed the present petition on 31st December, 2003, initially on the ground of distribution of the law books to the Bar

Associations from the Bar Council's funds even after declaration of the elections an,; to allow the Advocates on the roll to cast their votes and

contest election without disqualifying them on account of the non-payment of the amount as per Rule 40 of the Bar Council of India Rules (BCI

Rules). The challenge is also raised that BCI Rule 40, be struck down as contrary to the provisions of the Advocates Act. The prayer has been

made to provide polling booths at all Taluka and District Place. He had also prayed for ad-interim reliefs also but there was no stay of the election

process.

6. The election took place on 4th March, 2004 and was gazetted on 24th April, 2004. The petitioner and respondents 6 to 29 have been elected

as members of the State Bar Council for a five-year term.

7. By an order dated 2nd April, 2004 the petitioner's amendment was allowed. The elected members as respondents 6 to 29 have been

impleaded. By a second amendment order dated 10th May, 2004, the petitioner has raised a challenge to sub-rules (h) and (i) of Rule 6 and

prayed to set aside the election held by the State Bar Council held on 4th March, 2004.

8. By an order dated 25th October, 2004 Rule has been issued in this petition. Respondent No. 1 has filed affidavits in reply to the challenge

raised by the petitioner, from time to time, on 19th January, 2004, 19th April 2004, 1st July, 2004 and 6th September, 2004. Respondent No: 5

has also filed an affidavit in reply on 31st August, 2004.

9. The issue about the distribution of the law books by some of the ex-members of the State Bar Council as agitated by some of the Bar Members

including the petitioner, during the period from 7th September, 2003 to 8th January, 2004, was resolved and settled by the order of this Court

dated 20th April, 2006.

10. The issue that it is within the competence of the State Bar Council to consider Rule 40 of BCI Rules to exclude defaulters from the Electoral

Rolls as Rule 2(h) of Part III of Chapter I of the Rules of Bar Council of India has been upheld by the Supreme Court in the case of Bar Council of

India vs. Omprakash Faiji and ors. decided on 2nd December, 1997. In view of above, I am dealing only with other main issues.

11. Some Advocates who are practicing mainly in the city of Bombay, have filed another Writ Petition No. 1781 of 2004, dated 7th June, 2004.

They have challenged the validity and legality of Rule 6(h) and (i) of the State Bar Council and 2(h) and 2(i) incorporated by a Resolution in Part

III Chapter I of the Bar Council of India Rules (Bar Council Rules) and part of Rule 3, regarding a mandate of marking minimum ten preferences.

They have also challenged the election of same respondents 7 to 31, who have been elected in the elections. As the challenges are the same, both

the petitions have been admitted on 25th October, 2004. The respondents stand in these two matters being same, both the petitions heard together

by the consent of the parties.

12. The Learned Counsel appearing for the petitioner has strongly relied on Bar Council of Delhi and Others Vs. Surjeet Singh and Others, and

mainly contended that the whole election was bad and, therefore, be set aside, as those Election Rules are ultra vires to sections 3(2), 3(4) read

with section 49(1)(a) of the Advocates Act and; therefore, mere approval of such Rules by the BCI cannot make the said Rules valid. The

principle of estoppel does not apply, only because the petitioner had participated in the election and got elected. He has further relied on Km.

Shradha Devi Vs. Krishna Chandra Pant and Others, and contended that improper rejection of the valid votes based on the above Rules affected

the whole election. Therefore, Near about 3000 votes were declared invalid on the ground that the voters failed to mark minimum 10 preference

votes, in pursuance to the said Rules. He has prayed for recounting and direction to reconsider those 3000 votes and to declare the result

accordingly. He has further contended that these Rules are against a principle of free and fair election and specially against a system of proportional

representation by means of the single transferable votes, as contemplated under sections 3(2)(b), 3(2)(4) and 49(1)(a) of the Advocates Act.

13. The Learned Counsel for the petitioner has further relied on Ananga Uday Singh Deo Vs. Ranga Nath Mishra and Others, to explain the

system of proportional representation by single transferable vote based on the Representation of People Act, 1951. He has also relied on Ravi

Kiran Jain and Others Vs. Bar Council of U.P. and Others, in reference to section 15 of the Advocates Act and the Rules for preparation of

electoral roll and disqualification etc. He has also cited the cases; Bar Council of Kerala Vs. Thankappan Pillai, ; C.D. Sekkizhar Vs. Secretary,

Bar Council, Madras and Others, ; Young Lawyers" Association Vs. Bihar State Bar Council and Others, and Bar Council of Delhi Vs. Bar

Council of India, in reference to section 15 and 3(3) of the Advocates Act concerning Rule making power of the Bar Council. The petitioner has

also cited the case of Jayrajbhai J. Patel vs. Anilbhai N. Patel and ors., (2006) 8 SCC 200 to support his case that a judicial review is possible, if

there is abuse or misuse of power, even in the matter of election.

14. All of the Learned Counsel for the respondents resisted the prayers of the petitioners on all counts, except providing more Election booths as

prayed for by the petitioners. They have accepted the principle of law declared in those cases. They submitted that above cited authorities are

distinct and distinguishable on facts and circumstances.

15. After considering the facts and circumstances of the case as referred above, I am constrained to express my dissent insofar as the validity of

Rule 6(h) and Rule 32(g) of the Election Rules, mainly on the following reasons :

16. Admittedly, the Election Rules has been lastly amended sometime in the year 2000. The Election Rules have been published from time to time,

since 1st January 1991 with amendments and subject to the approval of The Bar Council of India, by Resolution dated 8th and 9th February,

1997 and September, 2000. The fact that State Bar Council's Election is an election of elite members of the legal profession cannot be

overlooked. The advocate-members are fully aware of the Election procedure as enumerated in the Rules. The petitioners are also fully aware of

these Rules which have been published prior to the declaration of date of the election. As noted, the election was declared on 14th August, 2003

and it was gazetted in the Maharashtra Government Gazettee, on 1st August, 2003. As per the Election Rules, after the notice of election the

notification specifies the date for nomination, the date of scrutiny, the date of withdrawal of the candidature, date of polling, the date and place and

time for counting votes, the minimum number of seats that should be filled from amongst the Advocates. The copies of election notice were put up

on the Notice Boards of the headquarters of the Bar Council and sent to The Bar Associations, the Advocate General and also to the Official

Gazettee of the State of Maharashtra. The said Rules enumerated the method of preparation of final electoral rolls. The Advocates were aware of

the method of Election. An Advocate whose name was entered on the final electoral roll of the State Bar Council, was entitled to vote, as per the

Election Rules which include, marking of the preferences. The rules of qualification and/or disqualification were also published. It was made very

clear that voters should mark minimum ten preferences as provided in Rules 31(1), 32(g).

17. Section 3(2)(b) deals with the necessity to elect 25 members in the case of the State Bar Council with an electorate exceeding ten thousand.

The said 25 members are required to be elected in accordance with the system of proportional representation by means of the single transferable

vote from amongst Advocates on the electoral roll of the State Bar Council. The said Election Rules which are in existence since 1991-1997 or at

least prior to the date of the declaration of the results of the election in question elaborate the scheme of election. These Election Rules itself

enumerate the basic clauses which deals with the Electoral roll, first preference means, surplus value of votes, transfer of votes, method of election,

form of voting papers, procedure for persons voting for other person, method of voting, voting papers when invalid, appointment of polling agents

and more other related aspects. These Election Rules specifically deal with the ascertainment of quota and the candidates with quota to be elected

as contemplated u/s 3(2) of the Act. These Rules also deal with the transfer of surplus votes and exclusion of candidates and filling last vacancies.

It also provides the determination of result and publication thereof. These Rules, therefore, are in aid to achieve the object of the sections.

18. Apart from this, the requirement of giving minimum first preference vote as laid down in *Km. Shradha Devi Vs. Krishna Chandra Pant* and

Others, in no way affected by these Rules. The minimum requirement of first preference vote in the system of proportional representation by means

of the single transferable vote is also in no way breached by Rules 31 and 32(g) of the Election Rules. The object of these rules in this election is to

provide the candidates/representatives, an effective minimum quota. This system of proportional representation by single transferable vote is

effective if more than one candidate are need to be elected. The requirement to indicate his multiple preferences by placing figures 1, and 3 in order

of preference is an essential requirement. But if voters fail to exercise this option of giving their multiple preferences, it frustrates the purpose and

object of section 3(2)(b) and of such election. Merely because the insistence by these Rules of marking minimum ten votes, that itself cannot be the

reason to declare those Rules ultra vires to the sections 3(2)(b) and/or 3(2)(4) and/or 49(1)(ab) of the Advocates Act.

19. The sections under which these Election Rules have been framed provide ample power to the State Bar Council to provide elections and its

methodology. It also provides to perform all other incidental and consequential functions conferred on it by or under this Act, as contemplated u/s

6 of the Advocates Act. The Election Rules as framed, in my opinion, are within the purview and power of the State Bar Council to control and

regulate the election. *Khargram Panchayat Samiti and anr. vs. State of West Bengal*, (1987) 3 SCC 8. These Rules are not ultra vires to any of the

sections. The proposition put forth by the petitioner is not acceptable. It goes against the scheme and purpose of the sections and the election in

question.

20. The petitioners have not challenged the whole Election Rules. The challenge is only to the insistence of marking of minimum ten preferences as

a method of voting. The basic principle of casting first preference by the voters, if not breached, in the facts and circumstances of the case, there is

no reason to declare these Rules ultra vires to the sections.

21. Respondent No. 1 has given the justification in support of the rules in paragraphs (iv) and (v) of affidavit dated 6th September, 2004, which

are as under:

(iv) With further reference to grounds-S, T and U, I say that the petitioner was the member when the said rule was gazetted and the petitioner had

not given challenge at relevant time and now, therefore, the petitioner has no legal right to challenge the same. I say that by amending Rule 31, no

substantial change has been made in the earlier rule and the amendment only provides that voters must give ten preferences. I say that all the ballot

papers clearly indicate that every voter must give minimum ten preferences, otherwise, his vote cannot be considered as valid. I say that in spite of

such clear notices, if the voters have not given ten preference, then it is their mistake for which Bar Council cannot be held responsible.

(v) I say that at the time of amending rules, the Members of the Bar Council discussed the issue at length and with a view to have effective

implementation, preferential voting resolved that each voter should give at least ten preferences on ballot paper. I say that preferential voting is

considered to be the best of the democratic methods of election and because of the amendment for the first time, all the twenty five Members were

declared to be "ELECTED", as each of them earned minimum required quota of votes. I say that in earlier elections, few members were declared

to be "ELECTED" and rest of them were declared as "DEEMED TO BE ELECTED", because many of them were unable to complete minimum

quota of votes, but were near about the required quota. The present system of preferential voting has given best of the results and it cannot be said

to have caused prejudice the rights of voters.

I am inclined to accept the submission of the respondents.

22. Respondent No. 1 being an expert body and after considering earlier experience of such elections decided to amend the Rules in question on

the foundation of the democratic methods of election, in my view, such policy decision cannot be said to be arbitrary or contrary to the provisions

of the Act and/or any democratic set up. Considering the provisions of section 3(2) (b) and further the need of electing 25 members amongst the

voters which are more than ten thousand. This system gives at least required or minimum quota of votes cannot be said to be unfair, unreasonable

and/or in a breach of the provisions of the Act. There is no prohibition and/or bar created under the Advocates Act and/or Bar Council of India

Rules, which restricts the power of State Bar Council to adopt such method of elections of insistence of minimum ten preferences.

23. Assuming for a moment that there is some substance in the argument made by the petitioner that by these Rules, the State Bar Council is

compelling the voters put more than one vote against the candidates or in favour of the candidate, though he may not be interested or may not be

aware of the background of the said candidate, however, in view of the need of election of 25 members, this method, enable respondent No. 1 to

have sufficient quota, which according to me is neither illegal nor prohibited in the circumstances of the case.

24. The voters right to cast vote is a freedom which is distinct from right to vote. A voter's right to vote without fear or favour is also an essential

foundation of a free and fair election. However, one cannot overlook that a right to vote or contest the election is always regulated and governed

by the Statute and the related Rules, Regulations. In the present case, if the Election Rules has provided a particular mode for voting and

accordingly circulated and published the Rules in advance, it is difficult to accept the contention of the petitioner that these Rules are unjust or

affects the free and fair election of the State Bar Council. In this process of election there is no breach of secrecy of any votes. The Election Rules

and procedure declared and announced are transparent and clear. By these Election Rules, the State Bar Council, as there is no specific bar, in its

wisdom decided and adopted the election procedure which is under challenge. The reasons as recorded in the affidavit given by the State Bar

Council for taking such policy decision, in my opinion cannot be faulted with.

25. The election system in a democratic set up always need changes, based on the existing circumstances. It is difficult to fix and frame a straight

jacket formula or yardstick for any election. The policy decision therefore as taken by the State Bar Council and amended the Rules, by giving full

opportunity and notice to the voters like advocates, is within the framework of section 3(2)(b) or 49 and other related sections.

26. The Supreme Court in *Kuldip Nayar Vs. Union of India (UOI) and Others*, has, while considering the various facets of existing system of

secret ballots for the election of Upper House/Rajya Sabha, accepted even the "open ballot" to the "secret ballot".

27. The adopted method of marking of minimum ten preferences, in my opinion, cannot be said to be unjust, arbitrary or ultravires section 3(2)(b)

or 49(1)(a) or (ab). These rules are in no way frustrate the object and purpose of above sections of the Advocates Act.

28. The Apex Court in *Kum. Shradha Devi (supra)* while dealing with the provisions of the Representation of People Act, 1951, Rule 73(2) of the

Conduct of Election Rules, 1961 held that a voter must cast his first preference vote. The choice of the voter to cast his second preference vote or

further preference vote was optional. However, in the present case, the Election Rules has made it mandatory for the voters to mark minimum ten

preferences votes. As noted, in this multifaceted elections, as it is difficult to have a straight jacket formula and as the policy decision taken by the

State Bar Council, specific Rules have been framed under the Statute, such Rule therefore cannot be said to be bad in law. It is settled that the

Elections are governed by the Statutes and Rules made thereunder. The Election Rules provide a method of voting which has been approved by

the Bar Council of India. A voter at the time of voting need to comply with the mandatory requirements as announced.

29. The State Bar Council has rightly declared near about more than 3000 votes as invalid, as the voters failed to cast minimum ten votes.

Considering the Act and the Election Rules framed, those voters were not disqualified before casting their votes. As noted, an Advocate on the

Electoral roll of the State Bar Council is entitled to vote in the State Bar Council Election. All those voters whose votes were declared invalid were

not disqualified till they cast ten votes as per the Rules. Such voters cannot be said to be disqualified as contemplated under the provisions of

Advocates Act. The submission of the petitioner that these Rules made the rule of disqualification is not correct. The submission that the Bar

Council of India can only make Rules for qualification or disqualification for membership of a Bar Council and, therefore, the State Bar Council has

no jurisdiction to make such Rules is also not tenable. In my opinion, merely because some of the vote? declared invalid that itself is no

disqualification for membership of a Bar Council as those voters knowing fully the method of voting, failed to cast their vote according to the duly

published Election Rules. The qualification and/or disqualification for membership or voters came into picture only after casting a vote by

Advocate/member whose name appeared in the Electoral Roll of the voters as contemplated u/s 49(1)(a) and (ab). Therefore, the Rules as framed

in no way said to be the Rules of disqualification of voters framed by the State Bar Council against the provisions of section 49 and/or exceeded its

jurisdiction as submitted. The State Bar Council has power and authority to make appropriate Election Rules and to adopt the appropriate method

of voting and procedure of such election as contemplated u/s 6(1)(g) and (h) and section 15(1)(2)(a). Rule 6(h) and (i) and 32(g), in my opinion,

are not rules pertaining to disqualification and, therefore, these Rules are not in breach of sections 3(2)(b), 3(4), 15(3) or section 49(1)(a).

30. It is the function of the Bar Council of India to exercise general supervision and control over the State Bar Council. Section 49 provides for

general power of the Bar Council of India to make rules which includes ""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"". The Election Rules as framed in no way is in breach of section 49(1)(a) or 6(g) read with section 15

of the Advocates Act. The ratio in the case of Bar Council of India vs. Surjeet Singh (supra) is therefore in no way assist the petitioner to support

his submission that the State Bar Council by these Rules disqualify the advocate/voters and, therefore, these Rules are in contravention of above

sections. These Rules are in conformity with the sections and the Election Rules in no way prescribe disqualification to an Advocate being treated

as valid voter. All Advocates whose names appear in the Electoral Roll were qualified to vote in this election. There was no such bar or

disqualification created by these Rules by which such Advocates were declared disqualified to be voters in the present election. If voter fails to

vote as per the declared method of voting, there is nothing wrong that the State Bar Council, at the relevant time, treated those votes invalid. In my

view, therefore, the contentions and submissions even of the principle of estoppel and "acquiescence" as made by the petitioner are not accepted

and reliefs as prayed cannot be granted. The other authorities cited are of no assistance to the petitioners in view of above circumstances, as facts

are distinct and distinguishable. There is no misuse or abuse of power exercised by the State Bar Council. There is no reason to interfere with the

Election Rules and the election results.

31. Section 15(3) provides that no rule made under this section by the State Bar Council shall have effect unless they have approved by the Bar

Council of India. Admittedly, these Election Rules have been approved by the Bar Council of India. As noted, these Election Rules are within the

framework and within the power of the State Bar Council and as the Bar Council of India has granted the approval to the said Rules, in my

opinion, no fault can be found in adopting this method of approval, being in practice since many years. The approval itself means that a State Bar

Council has a power to make various Rules which include the Election Rules. These Rules as falls within the ambit of section 6 read with section 15

and section 49(1)(a)(ab) read with section 3(2)(b) as referred above, the Election Rules having been approved, it is difficult to accept the

contention of the petitioner that these Rules are bad and ultra vires to the sections.

32. However, I am in agreement with the view expressed by learned Brother F. I. Rebello, J. insofar as the direction to the Bar Council of

Maharashtra and Goa for the future election to provide polling Booths where there are minimum number of voters in terms of the procedure as

followed by the Bar Council outside Mumbai.

33. With the above observation, all reliefs as prayed by the petitioner are rejected. Rule discharged. Writ Petition No. 903/2004 is dismissed.

34. Writ Petition No. 1781 of 2004 is also dismissed, for the above reasons. Rule discharged.

Both the writ petitions are dismissed accordingly.

No costs.

D. K. Deshmukh, J.

on difference of opinion between F. I. Rebello and Anoop Mohta, JJ.) :- These two writ petitions have been placed

before me pursuant to the order made by the Hon"ble the Chief Justice. These Petitions were filed basically challenging Rule 6(h) and 6(i) of the

Rules framed by the Bar Council of Maharashtra and Goa, as also Rule 32(h) of the Election Rules framed by the Bar Council of Maharashtra and

Goa and the elections to the Bar Council of Maharashtra and Goa held on the basis of these Rules in the year 2004. These two petitions came for

final hearing before the Division Bench consisting of Hon"ble Mr. Justice F. I. Rebello and the Hon"ble Mr. Justice A. V. Mohta. The two learned

Judges presiding over the Division Bench delivered two separate judgments. The Hon"ble Mr. Justice F. I. Rebello held that Rule 6(h) and (i) of

the Election Rules framed by the Bar Council of Maharashtra and Goa (hereinafter referred to as the State Election Rules) is invalid. He further

held that, however, invalidity of that rule does not affect in any way the result of the election because the Bar Council of India has also framed a

rule to the same effect. Hon"ble Mr. Justice A. V. Mohta has held that Rule 6(h) of the State Election Rules is valid.

2. The Hon"ble Mr. Justice F. I. Rebello has held that Rule 32(g) of the State Election Rules is invalid, as a consequence he has directed

recounting of votes which were declared invalid because of Rule 32(g) of the State Election Rules. The Hon"ble Mr. Justice A. V. Mohta,

however, has held that Rule 32(g) of the State Election Rules is valid, as a consequence he has dismissed the petition.

3. The Division Bench by order dated 10-4-2007 held that difference of opinion amongst them is on the following two points :-

(i) Is Rule 6(h) of the Election Rules invalid being ultra vires section 49(1) of the Advocates Act?

(ii) Is Rule 32(g) of the State Election Rules ultra vires section 3(2)(b) read with section 3(4), read with section 49(1)(a) of the Advocates Act?

4. I have heard the petitioners. I have also heard the Learned Counsel appearing for the State Bar Council as also the Learned Counsel appearing

for the Bar Council of India. I have also heard the Learned Counsel appearing for the other respondents.

5. Mr. M. P. Vashi, the petitioner in one of the petition appearing in person contended that apart from the two points on which the two learned

Judges sitting in the Division Bench have differed, there are other points involved, which also call for decision. However, considering the provisions

of Clause 36 of the Letters Patent that option is not open to me. Clause 36 of the Letter Patent reads as under:-

Clause 36 : Single Judges and Division Courts :- and we do hereby declare that any function which is hereby directed to be performed by the said

High Court of judicature at Madras, Bombay, Fort William in Bengal in the exercise of its original or appellate jurisdiction may be performed by

any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of section 108 of the Government of India

Act, 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on

any point, such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority, but if the Judges should be

equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other

Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first

heard it.

6. Perusal of the above clause shows that when there is difference of opinion amongst the members of a Division Bench, they state the point upon

which they differ and then the case is referred to a third Judge to hear the parties on that point and it is only that point on which the Members of the

Division Bench have differed, on which opinion is to be expressed by the third Judge to whom the case is referred. Therefore, I have to express

my opinion only on the two points on which the two learned Judges sitting in the Division Bench have differed.

7. Now, first the question that is to be considered is whether the Rule 6(h) of the Election Rules is invalid. Rule 6(h) of the Election Rules reads as

under:-

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:-

(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.

Rule 40 found in Chapter II, Part VI of the Rules framed by the Bar Council of India reads as under :-

40. Every Advocate borne on the rolls of the State Bar Council shall pay to the State Bar Council shall pay to the State Bar Council a sum of Rs.

90/- every third year commencing from 1st April, 1993 along with a statement of particulars as given in the form set out at the end of these Rules,

the first payment to be made on or before 1st April, 1993 or such extended time as notified by the Bar Council of India or the concerned State

Bar Council.

Provided further however that an advocate shall be at liberty to pay in lieu of the payment of liberty to pay in lieu of the payment of Rs. 90/- every

three years a consolidated amount of Rs. 300/-. This will be a life time payment to be kept in the fixed deposit by the concerned State Bar Council

and interest to be used for the purpose of this rule. However, payment made by the concerned Advocate before this consolidated payment shall be

exclusive of it and no credit shall be given for payment, but those advocates who have paid consolidated amount of Rs. 200/- only as a

consolidated amount, Rs. 100/- will be required to pay.

Perusal of the above rule shows that an advocate on the rolls of the State Bar Council has to pay subscription. Thus, Rule 6(h) of the State

Election Rules lays down that if an advocate commits default in paying subscription then his name is not be included in the Electoral Roll. Thus, this

rule creates a disqualification in so far as entitlement of an advocate to have his name included in the Electoral Roll, is concerned. Insofar as

qualification for voting at the election of the Bar Council is concerned, it is sub-section (4) of section 3 of the Advocate Act, which makes the

provision. It reads as under :-

3(4) An Advocate shall be disqualified from voting at an election under sub-section (2) or for being chosen as, and for being, a member of State

Bar Council, unless he possesses such qualifications or satisfies such conditions as may be prescribed in this behalf by the Bar Council of India,

and subject to any such rules that may be made, an electoral roll shall be prepared and revised from time to time by each State Bar Council.

Thus, an advocate is qualified for voting at the Election of the Bar Council, unless he is disqualified by any Rules framed by the Bar Council of

India. In other words, every person whose name is entered in the Roll of Advocates maintained by the Bar Council is entitled to vote at the

election of the Bar Council, unless he is disqualified from being a voter by the Rules framed by the Bar Council of India. The provision further

shows that an Electoral Roll is to be prepared and revised from time to time by the State Bar Council subject to the Rules that may be framed by

the Bar Council of India. Thus, sub-section (4) of section 3 vests legislative competence in the Bar Council of India to frame Rules laying down

qualification and conditions which the advocate has to satisfy before he becomes entitled to have his name included in the Electoral Roll. Section

49 of the Advocates Act deals with the rule making power of the Bar Council of India. Clause (a) of sub-rule (1) of Rule 49 is relevant for the

present purpose. It reads as under :-

49(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;

Combined reading of sub-section (4) of section 3 and section 49(1)(a) shows that under the Act the only body which is competent to make a Rule

prescribing conditions subject to which an advocate is entitled to vote at the election of the State Bar Council is the Bar Council of India.

8. The Supreme Court in its judgment in the case of Bar Council of Delhi and Others Vs. Surjeet Singh and Others, , has considered this position

of law. Following observations made in paragraph 8 of that judgment, in my opinion, are relevant. They read as under :-

8. In order to determine the point at issue we shall now read some relevant provisions of the Advocates Act section 3 provides for the constitution

of the State Bar Council, sub-section (4) of which says :-

(4) An Advocate shall be disqualified from voting at an election under sub-section (2) or for being chosen as, and for being, a member of a State

Bar Council, unless he possesses such qualifications or satisfies such conditions as may be prescribed in this behalf by the Bar Council of India,

and subject to any such rules that may be made, an electoral roll shall be prepared and revised from time to time by each State Bar Council.

On a plain reading of this sub-section it is manifest that under the Act the qualifications and conditions entitling an advocate to vote at an election or

for being chosen as a member of the State Bar Council has to be prescribed by the Bar Council of India. The State Bar Council has no such

power. The power of the State Bar Council is merely to prepare and revise from time to time the electoral roll subject to the rules made by the Bar

Council of India concerning the qualifications and conditions aforesaid. This interpretation of section 3(4) of the Act finds ample support from the

very special and specific provision contained in section 49(1)(a) providing for the general power of the Bar Council of India in these terms :-

49. (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;

Great reliance was placed on behalf of the appellants on the concurrent power of the State Bar Council and the Bar Council of India engrafted in

section 15 of the Advocates Act. It is true that the power to make rules conferred by section 15 is both for the Bar Council of India as also for the

Bar Council of a State. But no provision of section 15 can override the specific provision made in section 3(4) and section 49(1)(a) of the Act.

Sub-section (1) of section 15 says -

A Bar Council may make rules to carry out the purposes of this Chapter"" which means chapter II including section 3. But the power to prescribe

qualifications and conditions entitling an advocate to vote at an election being that of the Bar Council of India section 15(1) cannot be interpreted

to confer power on the State Bar Council to make rules regarding the qualifications and conditions aforesaid. The relevant words of sub-section

(2)(a) of section 15 are the following :-

In particular, and without prejudice to the generality of the foregoing power, such rules may provide for :-

(a).....the preparation and revision of electoral rolls and the manner in which the results of election shall be published.

The State Bar Council can frame rules for the preparation and revision of electoral rolls u/s 15(2)(a). That would be in conformity with the latter

part of sub-section (4) of section 3 also. But in the garb of making a rule for the preparation and revision of the electoral rolls it cannot prescribe

disqualifications, qualifications or conditions subject to which an advocate whose name occurs in the State roll resulting in his deprivation of his

right to vote at the election.

9. Perusal of the above quoted observations from the judgment of the Supreme Court shows that the Supreme Court has clearly laid it down as a

law by the Supreme Court that under the Advocates Act the qualification and conditions entitling an Advocate to vote at an election of the State

Bar Council has to be prescribed by the Bar Council of India. The State Bar Council has no such powers. Thus, the State Bar Council clearly has

no legislative competence to frame a Rule which has the effect of disqualifying an advocate from voting at an election of the State Bar Council. Rule

6(h) has the effect of disqualifying an advocate from voting at the election if he fails to pay the subscription, which he is required to pay under Rule

40 of Chapter II of Part VI of the rules framed by the Bar Council of India. The Rule, thus, incorporates a condition which has to be satisfied by

an advocate before he becomes entitled to vote at an election of the State Bar Council, and therefore, the State Bar Council has no legislative

competence to make such a Rule. Rule 6(h), therefore, is clearly beyond the legislative competence of the State Bar Council.

10. Even if such a power is assumed to exist in the State Bar Council, there can be no debate that the power to frame Rules in this regard clearly

vests in the Bar Council of India. Even if it is assumed, as is being argued on behalf of the State Bar Council, that such a power concurrently vests

also in the State Bar Council then also, in my opinion, as the Bar Council of India in exercise of its power has already framed Rule 2(h) in Part III

Chapter I of its Rules, which provides that the name of an advocate appearing in the State roll shall not be included in the electoral roll, if he has

not paid the subscription under Rule 40 Chapter II Part VI of the Rules and obtained a receipt from the State Bar Council. The State Bar Council

will not have the power to frame either the Rule with this rule or a Rule contrary to that rule, because the powers to frame rule in this regard stands

exhausted by one of the two bodies competent to frame such a rule having already exercised that power and framed the rule. Hence, insofar as

first point is concerned, I am in respectful agreement with the opinion expressed by Justice Mr. F. I. Rebello, insofar as invalidity of Rule 6(h) of

the State Election Rules is concerned.

11. So far as Rule 32(g) of the State Election Rules is concerned, it provides that voting papers shall be invalid in which preference to less than 10

candidates are indicated. Rule 32(g) is in fact a consequence of sub-rule (1) of Rule 31. Sub-rule (1) of Rule 31 reads as under :-

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 10 candidates.

12. The consequence of Rule 31(1) and Rule 32(g) of the State Election Rules is that if a voter indicates less than 10 preferences on his ballot

paper, then his ballot paper becomes invalid. Justice Shri F. I. Rebello in his judgment has held that this Rule is invalid because it is contrary to the

provisions of section 3(2)(b) of the Advocates Act as also section 49. Justice Shri A. V. Mohta has held that the provision is valid. In my opinion,

the basic provision relevant in this regard is contained in sub-section (2)(b) of section 3. It reads as under :-

3(2)(b) in the case of State Bar Council with an electorate not exceeding five thousand, fifteen members, in the case of a State Bar Council with an

electorate exceeding five thousand but not exceeding ten thousand, twenty members, and in the case of the State Bar Council with an electorate

exceeding ten thousand, twenty-five members, elected in accordance with the system of proportional representation by means of the single

transferable vote from amongst advocates on the electoral roll of the State Bar Council (emphasis supplied).

Thus, this provision provides for election of members of the State Bar Council in accordance with the system of proportional representation by

means of the single transferable vote. The same phrase occurs in sub-Article (4) of Article 80 of the Constitution of India. Sub-Article (4) of

Article 80 reads as under :-

The representation of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in

accordance with the system of proportional representation by means of single transferable vote.

13. The Supreme Court in its judgment in the case of *Km. Shradha Devi Vs. Krishna Chandra Pant and Others*, , has considered the meaning of

the term "proportional representation by means of single transferable vote." The Supreme Court in paragraph 12 of that judgment has observed

thus :

The Returning Officer while counting votes at election by Assembly members has to bear in mind the implication of voting in accordance with the

proportional representation by means of the single transferable vote. What is obligatory in this system of voting is that every elector must exercise

his first preference vote. Rule 3,7-A(1) specifies that every elector has one vote only irrespective of the number of seats to be filled in at such

election. Rest are preferences.

In its judgment in the case of Shradha Devi, the Supreme Court was considering the provision of sub-Article (4) of Article 80 of the Constitution,

which provides for election of members of Rajya Sabha. The Supreme Court by the above quoted observations has clearly held that it is obligatory

for a voter who is voting under this system namely "system of proportional representation by means of single transferable vote" that he must

exercise his first preference vote. The Supreme Court then observes in the same paragraph, that in this system of voting for validity of a vote first

preference vote has to be cast, it is thereafter that the elector can indicate his other preferences. It is optional for the elector to exercise or not to

exercise his other preferences. The Supreme Court has then observed "This must be so in the very nature of things because this system of voting

was devised to provide minority representation." The Supreme Court has observed that this advanced system of proportional representation by

means of single transferable vote was devised to avoid the monolithic political pocket borough of votes. The Supreme Court then observes "The

very expression "proportional representation" is onomatopoeia in the sense it shows that various interests especially the minority groups can secure

representation by this more advanced method of franchise." Then the Supreme Court observes "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." The Supreme Court has then observed

Therefore, the vote is only one and even if there is more than one seat to be filled in, subsequent preferences may be indicated by the elector and

it is optional with him not to exercise preferences outside his only one vote which he must cast by indicating unambiguously his first preference.

What then follows? If there is one vote at such an election and the preferences are as many as there are seats chronologically to be indicated and

failure to exercise preferences subsequent to first preference would not invalidate the ballot paper, it must follow as a corollary that if the elector

has committed some error exercising his preferences lower down the ladder the whole of the ballot paper cannot be rejected as invalid.

14. Insofar as this judgment is concerned, the only submission made on behalf of the respondent was that by this judgment the Supreme Court has

construed the provisions of Rule 37-A and Rule 73(2) of the Election Rules. A provision similar to those Rules is not to be found in the Rules

which are under consideration and therefore, the observations made by the Supreme Court in relation to the meaning of the system cannot be said

to be ratio of the judgment of the Supreme Court. In my opinion, the submission is not well founded. In the Conduct of Election Rules, provisions

have made to give effect to what is contained in sub-Article (4) of Article 80 of the Constitution. In other words, in the Conduct of Election Rules,

provision has been made to give effect to the system of proportional representation by means of single transferable vote. The Supreme Court in the

judgment was considering the Rules that have been framed in relation to the election of a member of Rajya Sabha. The Constitution, as observed

above, provides that election of a member of Rajya Sabha shall be held in accordance with the system of proportional representation by means of

a single transferrable vote. Obviously therefore, the Rules included in the Conduct of Election Rules in relation to the election to Rajya Sabha will

be Rules made to make detail provision for implementing the system adopted in Article 80(4) of the Constitution for those elections. The Supreme

Court has found that the provisions in the Conduct Election Rules are in consonance with the system of proportional representation by means of

single transferable vote. In my opinion, basically the Supreme Court was explaining what "the system of proportional representation by means of

single transferable vote" means and the Supreme Court has found that the system of proportional representation by means of the single transferable

vote means that a voter who is casting his vote under this system is obliged to exercise his first preference vote and it is optional for him to exercise

his remaining preferences. In other words, a voter voting under this system in order that his vote is rendered valid has to cast his first preference

vote, once he casts his first preferential vote is valid even though he does not indicate other preferences that may be available to him.

15. Rule 31(i) quoted above as also Rule 32(g) has the effect of making it compulsory for every voters to cast his first preference vote and then

compulsorily to indicate nine other preferences. This obligation cast on voters by sub-rule (1) of section 31 is contrary to the system of

proportional representation by means of single transferable vote which is mandated by section 3(2)(b) of the Advocates Act and therefore, in my

opinion, Rules 31(1) and 32(g) are contrary to the provisions of section 3(2)(b) and therefore invalid.

16. So far as the judgment of Justice Mr. F. I. Rebello is concerned, he has found Rule 32(g) to be invalid also because it imposes a condition in

relation to the validity of a vote and therefore according to the learned Judge the Rule is beyond the competence of the State Bar Council. I am in

respectful agreement with the reasons that have been given by Justice Mr. F. I. Rebello in his judgment for recording this finding and therefore I do

not propose to repeat them.

17. I, thus, find that the opinion expressed by Justice Mr. F. I. Rebello in relation to the validity of Rule 6(h) of the Election Rules as also to the

validity of Rule 32(g) of the State Election Rules is correct. I am in respectful agreement with the view taken by Justice Mr. F. I. Rebello in relation

to both the points.

Parties to act on the copy of this order duly authenticated by Associate/Private Secretary as true copy. Certified copy expedited.