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THE HIGH COURT OF DELHI AT NEW DELHI

CW No. 6526/2003

Judgment Pronounced on: 14<sup>th</sup> May, 2004.

Abhay Kumar Varma

.....Petitioner

- versus

Bar Council of Delhi & Others

.....Respondents

with

CW No. 5419/2003

Jaya Bhaskaran Ravi

Petitioner

versus

Bar Council of Delhi & Others

.....Respondents

with

CW No. 6222/2003

Mahesh Kumar Tiwari & Others

.....Petitioners

- versus

Bar Council of Delhi & Others

.....Respondents

with

CW No. 6576/2003

Shri Jatan Singh

.....Petitioner

Versus

cw6526/2003

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file and no page is missing.

Bar Council of Delhi & Others

.....Respondents

with

CW No. 6223/2003

Abhay Kumar Verma

.....Petitioner

- versus

Bar Council of Delhi & Others

.....Respondents

Advocates who appeared in this case:

For Petitioners

:Mr Sanjay Jain with Mr Sunil Agarwal, Ms Karishma and Mr. Ravi  
Birbal in CWP 6526/03, 6576/03  
Mr R.M. Bagai in CW 6223/03.  
Mr V. Sudhir in CW 5419/03.  
Mr Neeraj Goyal with Mr. B.B. Raval in CW 6222/03.  
Mr P.N. Misra Sr Advocate with Mr Jatan Singh for petitioner in  
CW 6576/03.  
Mr Naushad Ahmed Khan for the Intervenor.

For Respondents

:Mr Sanjiv Sachdeva for Bar Council of India  
Mr S.P. Kalra Sr. Advocate with Mr Manoj Goel and Ms Ruchi  
Kapur for Bar Council of Delhi.

**CORAM:-**

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

} yes

**BADAR DURREZ AHMED, J**

1. All the five writ petitions pertain to the elections to the Bar Council of Delhi for which polling was held on two dates being 29.9.2003 and

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30.9.2003 where the venue of the polling was the High Court of Delhi and Tees Hazari Complex respectively. The counting process of the votes polled on the aforesaid two dates began on 2.10.2003 and continued upto 4.10.2003. The first round of counting was concluded in the afternoon on 4.10.2003. However, in the subsequent round, allegations were made by some candidates that some of the ballot papers had been defaced. The allegations led to disputes and ultimately it emerged as a law and order problem and the Returning Officer had to suspend counting of votes in the evening of 4.10.2003. There was no counting on 5.10.2003. The Supervisory Committee appointed by a Division Bench of this Court in LPA 610/2003 prior to the polling had discussions with the Returning Officer but, the Returning Officer resigned on 6.10.2003 and submitted his report to the said Supervisory Committee. The ballot papers have been sealed and placed within the premises of this Court. Since then counting has not resumed.

2. The prayer in Abhay Kumar Verma (CW 6526/2003) is that directions be issued for the resumption of counting. In CW 5419/2003, a petition which had been filed prior to the holding of the poll, the grievance is that the electoral roll is faulty and ought to be revised before a poll is held on the basis thereof. In CW 6222/2003 the challenge is to the extension of the term of the Bar Council of Delhi. This extension was granted on 23.2.2003 but with effect from 1.4.2003. The contention of the petitioner in that writ petition is that the extension was bad as it was beyond time and, therefore, there existed no Bar Council of Delhi thereafter and the entire electoral process which was

conducted by the Bar Council of Delhi would be non-est. In CW 6576/2003 a similar allegation has been made and it is prayed that a Special Committee be appointed in place of the Bar Council of Delhi to revise the electoral rolls and to hold elections after such revision. Lastly, in CW 6223/2003, a similar prayer had been made and the prayer is for the stay of elections on 29.9.2003 and 30.9.2003 on the ground that the extension granted to Bar Council of Delhi was invalid and, therefore, the entire electoral process continued by the Bar Council of Delhi thereafter was bad.

3. From the aforesaid, it becomes clear that in one petition (CW 6526/2003) the prayer is for resumption of counting and completing the electoral process. In all the other petitions the prayers are for halting this process and declaring it to be a nullity on essentially two grounds - (a) that the electoral rolls are faulty and large numbers of names have been excluded therefrom; and (b) the extension of the term of the Bar Council of Delhi was bad and, therefore, the entire electoral process conducted by the Bar Council of Delhi after such extension was a nullity.

4. Earlier in CWP Nos. 6188 and 6179/2003 I had occasion to deal with the entire aspect of these very Bar Council Elections. Those petitions were disposed of by judgment dated 25.9.2003 reported in **Bar Council of Delhi v. Shri Adish C. Aggarwala: 107 (2003) DLT 355.** In those petitions, an order dated 20.9.2003 passed by one Shri Adish C. Aggarwala purporting to be

the Vice-Chairman of the Bar Council of India in purported exercise of powers under Section 48-B of the Advocates Act, 1961, was in issue. By the said order dated 20.9.2003 the electoral process which was in full swing then was brought to a grinding halt. In that case the order dated 20.9.2003 staying the election was set aside. Since some of the issues which are raised in the present five writ petitions particularly with regard to the alleged defects in the electoral roll and have been considered in the decision reported in Bar Council of Delhi (supra), it would be pertinent to set out the facts as narrated in the said judgment i.e. *Bar Council of Delhi (supra)*. The previous Bar Council of Delhi was constituted on 31.3.1998 for a five year term ending on 31.3.2003. On 13.1.2003, with a view to hold the elections to the next Bar Council of Delhi, the present Bar Council of Delhi wrote a letter to the Bar Council of India asking for extension under Section 8 of the Advocates Act, 1961 to enable it to complete the electoral process. The Bar Council of India on 23.2.2003 held a meeting in this regard and passed a resolution extending the time of the Bar Council of Delhi by another six months with effect from 1.4.2003. In other words, the term of the Bar Council of Delhi was extended up to 30.9.2003. The factum of holding of the meeting and the passing of the said resolution was communicated to the Bar Council of Delhi by a letter dated 4.3.2003.

5. In the meanwhile, on 25.1.2001, the Bar Council of Delhi had issued a notification notifying that all Advocates on the State Roll of the State

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Bar Council of Delhi would be entitled to vote if their names appeared on the electoral roll to be prepared for the forthcoming election and that the schedule would be notified separately. In accordance with Rules 2 and 3 of Chapter I (Part-III) of the Bar Council of India Rules, it was indicated that all Advocates were required to furnish a declaration to the effect that they had not incurred any disqualification referred to in Clauses (a) to (i) of Rule 2 and it also made it clear that the declaration forms were available in the office of the Bar Council of Delhi as also at the places of the various Bar Associations of Delhi. It also made it clear that the last date for acceptance of such declarations was 20.3.2003 and it indicated that if the declarations were not received by that date the name of the Advocate would not be included in the electoral roll under preparation. The last date for submission of these declarations was extended on 27.4.2003 upto 19.5.2003. Thousands of Advocates responded to this notification and submitted their declarations. On the basis of this, the Bar Council of Delhi prepared the preliminary electoral roll on 29.5.2003 and issued letters to the Bar Associations as well as the Bar Council of India with regard to the same. The Bar Associations were also requested to put up the notice dated 29.5.2003 on their notice boards so that all Advocates were informed about the preliminary electoral roll. The notice that was required to be brought to the knowledge of all the Advocates was as under:

“NOTICE

In terms of Rule 4(2) of Chapter-I, Part-III of the Bar Council of India Rules, the preliminary electoral roll containing the names of all Advocates required to be included under these rules for the forthcoming elections of the Members of Bar Council of Delhi is

being put up and notified to all the Advocates. The relevant floppies of the roll are sent to various Bar Associations of Delhi for further notification. Advocates may check their names, addresses, etc. in the said list and mistake, if any, may be got corrected before the final roll.

Issued and put up on the notice board of the Bar Council on 29<sup>th</sup> May, 2003.

Sd/- Surya Prakash  
Khatri  
Hony. Secretary"

6. On 12.6.2003, the Bar Council of Delhi wrote a letter to the Bar Council of India informing it regarding the notices and the invitation of declarations as well as the preparation of the preliminary electoral roll. It further informed the Bar Council of India that the final roll would be published in accordance with the Rules and that Shri S.K. Mendiratta, Consultant to the Chief Election Commission of India who was also associated with the Bar Council of Delhi had been appointed as Returning Officer for the forthcoming election.

7. On 17.7.2003, after objections etc. which had been received in the meanwhile had been taken care of, the final electoral roll was published and the following notice was issued:-

**"NOTICE**

It is hereby notified that Bar Council of Delhi has prepared final electoral roll containing the names of all the Advocates required to be included under the rules contained in Chapter-I, Part-III of Bar Council of India Rules.

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This notice is being published in terms of Rule 5 of Chapter-I, Part-III of Bar Council of India Rules. Necessary intimation of the said publication is also being sent to Bar Associations for further publication in terms of this rule.

Sd/-  
Surya Prakash Khatri  
Hony. Secretary."

8. Thereafter, on 28.7.2003, the schedule of election was notified. Nominations were to be submitted between 14.8.2003 and 21.8.2003 (inclusive). Scrutiny was fixed for 22.8.2003. Withdrawal of candidature could be done by 28.8.2003 and the list of candidates remaining in the fray was to be notified on 29.8.2003. The date of actual poll was set at 19.9.2003.

9. On 19.8.2003 the Bar Council of India, upon certain representations being made, passed an order in purported exercise of powers under Section 48-B of the Advocates Act, 1961 and thereby stayed the entire election to the Bar Council of Delhi. The reasons, apparently, were that there were some irregularities in the electoral rolls and that approximately 14,000 persons had been omitted from the electoral roll who were otherwise allegedly eligible to vote. However, the stay order was short-lived as the Bar Council of India itself vacated the stay on 24.8.2003. As a result of which the election process resumed.

10. Because of the interruption caused in the electoral process, the schedule of the election was modified and on 25.8.2003 it was notified that the



nominations would be accepted upto 28.8.2003. Scrutiny would be done on 29.8.2003. The last date of withdrawal would be 5.9.2003 and the date of poll had been fixed for 30.9.2003.

11. In the meanwhile, a writ petition being CWP No. 5200/2003 had been filed by certain persons requesting the Court to issue a direction that the polling be done at different venues on account of the congestion at the Tees Hazari Court complex. I had occasion to deal with that petition and I decided the matter on 26.8.2003 wherein I held that no interference was called for in the present election although the grievances raised by the petitioner were genuine. The matter went up before a Division Bench of this Court in LPA No. 610/2003 and the Division Bench, after considering the difficulties that were being faced by the voters and after noting that the order that they were about to pass was not an interference with the electoral process but rather a facilitation of the same in view of the dictum of the Supreme Court in the case of Election Commission of India v. Ashok Kumar & Others: AIR 2000 SC 2979, directed that the polling should be done in two different venues on two different dates i.e. 29.9.2003 and 30.9.2003 on the basis of the same electoral roll. The directions that were given are as under:-

“ Accordingly, we dispose off this appeal with the following directions:

1. On 29.9.2003 Polling Arrangement shall be made at High Court of Delhi where advocates will be permitted to exercise their voting rights. Those who do not exercise their vote on 29.9.2003 will be permitted to exercise their

voting right on 30.9.2003 at Tis Hazari.

2. The Bar Council shall issue corrigendum to the aforesaid effect and wide publicity shall be given by issuing public notice in the newspaper (s), as well as on the notice boards of all the Bar Associations. Notice would be circulated along with cause list of High Court (and Supreme Court, if possible). At the same time it will be the duty of the Bar Council to see that on the notice board of the Bar Council, notice to this effect is displayed.

3. The Committee of the following members is constituted to supervise election process:-

- (a) Mr. R.K.Anand, Senior Advocate
- (b) Mr. K.K.Sud, Additional Solicitor General
- (c) Mr. Raj Birbal, Senior Advocate
- (d) Mr. A.S.Chandhiok, Senior Advocate
- (e) Mr. H.R.Banga, Advocate.

We make it clear that the aforesaid changes in the election scheduled are made, keeping in view the grievances of the members of Bar and after hearing them by the Court by means of this order.

Direct Service permitted ( Dasti )

Sd/-  
Chief Justice  
Sd/

A.K.Sikri, Judge

September 04, 2003"

12. Before giving the aforesaid directions, the Division Bench considered the question of interference with matters relating to elections and in this context considered the decision of the Supreme Court in the case of **Election Commission of India v. Ashok Kumar** (*supra*). It would be relevant to note the discussion of the Division Bench on this aspect of the matter as it would have a material bearing on the decision of the writ petitions at hand. The

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Division Bench observed as under:-

“ We may state at this stage that we are conscious of our limitations in interfering with matters relating to elections. In order to remind us of our limited jurisdiction, Mr. V.P. Singh even drew our attention to the judgment of Apex Court in the case of Election Commission of India through Secretary V. Ashok Kumar and others AIR 2000 S.C. 2979 and particularly para 32 thereof, which reads:-

32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-

- 1) If an election, (the term 'election' being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.
- 2). Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.
- 3). Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.
- 4). Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or

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rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

- 5). The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the Court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.'

We may at this stage state that there is no intention on our part in interfering with the election process and once the election process is set in motion, it should be conducted as scheduled. We are also aware that the election process should be completed by 30.9.2003. In fact what we intend to do does not amount to "Calling in question an election" but rather it would facilitate the proper completion of the election."

From the above it is clear that the very election which is the subject matter of the present petitions was being considered by the Division Bench and the Division Bench categorically held that they had no intention to interfere with the electoral process and that once the electoral process is set in motion it should be conducted as scheduled.

13. Returning to the facts, the matter did not rest there. Certain disputes arose between certain Members of the Bar Council of Delhi on account

of the fact that on 22.8.2003 the Bar Council of Delhi, by a resolution, disqualified the said Shri Adish C. Aggarwala and another from holding office as Members of the Bar Council of Delhi on account of the fact that they were deemed to have vacated their office on their failure to attend three consecutive meetings under Section 10(B) of the Advocates Act, 1961. A notification to this effect was brought out on 26.8.2003 by the Government of NCT which was to be published in Delhi Gazette. It was also notified that Shri Adish C. Aggarwala on being deemed to have vacated the office as Member of Bar Council of Delhi had also ceased to be a Member of Bar Council of India and in the vacancy so caused, one Shri Jatan Singh, Member, Bar Council of Delhi had unanimously been elected as Member, Bar Council of India in place of Shri Adish C. Aggarwala with immediate effect. There is, however, also a letter purportedly from the Bar Council of India dated 27.8.2003 addressed to the Bar Council of Delhi to the effect that the process of election of the nominee Member of Bar Council of Delhi in the Bar Council of India was not valid and as such the election of Shri Jatan Singh cannot be taken cognizance of and that Bar Council of Delhi ought to follow the procedure in this regard.

14. The Resolution dated 22.8.2003 and the Notification of 26.8.2003, *inter alia*, became the subject matter of yet another writ petition filed by Mr. Adish C. Aggarwala being CWP 5484/2003 which is pending before this Court and, accordingly, I refrain from making any comments with regard to the disputes therein. While the electoral process was in full swing and polling was

to be held on 29.9.2003 and 30.9.2003 as directed by the Division Bench, as aforesaid, Mr. Adish C. Aggarwala acting as Vice Chairman of the Bar Council of India, passed the order dated 20.9.2003 staying the electoral process once again. The question before me in *Bar Council of Delhi (supra)* was whether the impugned order dated 20.9.2003 could be sustained in law at all and whether this Court in judicial review under Article 226, ought not to set it aside? After considering all the arguments advanced on behalf of the parties, the impugned order dated 20.9.2003 was set aside by the judgment dated 25.9.2003 in *Bar Council of Delhi (supra)*. While considering the propriety of passing the order dated 20.9.2003, it was observed as under:-

“17. Coming now to the most important aspect of the case and that is the propriety of passing such an order. Although, the order has been passed, *inter alia*, taking the ground of purported disqualification of the 14,000 voters on account of non-furnishing of declarations, it appears to me that this is only an ostensible reason. Had it been a genuine reason, what prevented the Bar Council of India from taking action earlier. The question that remains unanswered is, if the Bar Council of India had acted genuinely, then why did it vacate its first stay order which it passed on 19<sup>th</sup> August, 2003 on the very same ground? The reply attempted by the learned counsel for the Bar Council of India is that the complainant at that time had withdrawn his complaint. That is a very feeble explanation, if at all. Once a matter is brought to the notice of the Bar Council of India and it has initiated action under Section 48-B, whether the complainant withdraws his complaint or not, the information had reached the Bar Council of India and it ought to have taken or continued to take action in that regard. That it did not do so, could be indicative of the fact that the Bar Council of India felt that the complaint was frivolous or had little truth in it. Possibly, other factors weighed with them while vacating the stay earlier granted. It must also be remembered that the electoral process has chugged along since 25.01.2003 when the requirement for declarations was first notified. The preliminary electoral roll was notified on 29.05.2003.

Correction of mistakes etc., could have been done thereafter also. The final roll was notified on 17.07.2003. All these processes were within the knowledge of the Bar Council of India as well as all the Advocates on the State Bar Roll. Being aware of these circumstances, perhaps, the Bar Council of India withdrew the stay of 19.08.2003.

18. Then, again, on the same fact situation, another complaint was filed. Mr. Aggarwala, who had by then been disqualified and his matter before the Division Bench was pending, exercised jurisdiction purporting to be the Vice Chairman of the Bar Council of India and purportedly acting on behalf of the Bar Council of India took up the case and issued the impugned stay order on 20.09.2003.

19. It appears that Mr. Aggarwala was irked by the decision of the Bar Council of Delhi in disqualifying him as a member thereof. Furthermore, where his very position as Vice-Chairman of the Bar Council of India was itself in question, he ought not to have, under rules of propriety, passed such an order. That he did pass such an order, raises serious doubts on the legitimacy of such an order and cannot be sustained under judicial scrutiny. It might have been a different matter had the impugned order been passed by the Chairman. But this is not so. Mr Aggarwala clothing himself as a valiant knight in shining armour, as it were, handed out the impugned stay order dated 20.09.2003 in an attempt to bring the entire electoral process to a screeching halt. Ostensibly, the order was passed on the basis of an apparently laudable object. In reality, it does not give of a scent of fair play. It reeks of bias. One is left to ponder on the questions--Would Mr Aggarwala have passed such an order had he not been disqualified by the Bar Council of Delhi? Was it not part of a personal vendetta? Was it not to settle scores? When such questions arise the order cannot be sustained."

Finally, on the concept of holding elections and holding them in time and as per schedule the following observations, which I reiterate, were made:-

"20. There is yet another matter which needs to be disposed of before I part with this case. Elections are the bedrock of democracy. Whether it is the legislative elections or elections to municipal bodies or local bodies or to bodies like Bar Councils, elections are the essence of democracy. If no election is held, there can be no democracy. Holding of

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an election is of the essence. There are two facets to an election. First, is the holding of an election in time and the second, is the maintaining of the purity of election. As was observed by the Supreme Court in the case of A.K.M. Hasan Uzzaman & Ors v. Union of India & Ors: (1982) 2 SCC 218, the Court's interference with the electoral process was inversely related to the imminence of the date of election. The more imminent such date, the greater ought to be the reluctance to interfere. The second aspect is the purity of the election. While the purity of the electoral process can be tested and is, indeed, often decided not only by way of election petitions but by way of writ petitions also, the same can, however, only be tested if the elections are held. Time is unidirectional. An election not held at the scheduled time cannot later be held at that time. However, an election irregularly held can be corrected later. In this particular case, it is peremptory to hold the elections latest by 30<sup>th</sup> September, 2003 in view of the fact that extended term of the Bar Council of Delhi expires on that date. The Bar Council of India is well aware of that because, it is the Bar Council of India which extended that term. So, Elections must be held before that date otherwise the present Bar Council becomes defunct and there would be no Bar Council of Delhi after that date."

15. Thereafter, polling as directed by the Division Bench was held on 29.9.2003 at the Delhi High Court and on 30.9.2003 at the Tees Hazari Courts. Counting of the votes commenced on 2.10.2003. Counting continued till 4.10.2003 when after the completion of the first round and declaration of tally of that round, in the evening of 4.10.2003 when counting in the second round was in progress, allegations with regard to defacement of some ballot papers were leveled and which ultimately led to some ugly scenes culminating in the Returning Officer suspending the counting to prevent a serious law and order situation. Counting remains suspended and on 6.10.2003 the Returning Officer tendered his resignation to the Supervisory Committee. Thereafter, as



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mentioned hereinabove, no further steps have been taken in the electoral process and the matters are pending before this Court. As the term of the Bar Council of Delhi had expired on 30.9.2003 the Bar Council of India appointed a Special Committee in exercise of its powers under Section 8-A of the Advocates Act, 1961. As indicated above the Special Committee is to discharge all the functions of the State Bar Council till the new Council is constituted.

16. As indicated above, in LPA 610/2003 a Division Bench of this Court had, while fixing the dates of poll as 29.9.2003 and 30.9.2003, also appointed a Supervisory Committee of five persons to supervise the election process. The said Supervisory Committee prepared a report on 6.10.2003 and filed the same in LPA 610/2003. The said Report of the Supervisory Committee is as under:-

**" REPORT OF THE MEMBERS OF THE  
COMMITTEE APPOINTED BY THIS HON'BLE COURT.**

**May it please Your Lordships,**

In terms of the order dated 4<sup>th</sup> September, 2003, in the above appeal the polling for Bar Council of Delhi elections took place on 29<sup>th</sup> and 30<sup>th</sup> of September, 2003. During the polling, 13 complaints had been received against the total voting of over 13,000. Mr. S.K. Mendiratta was the Returning Officer. Since 1<sup>st</sup> October, 2003 was a working day for this Hon'ble Court and was last day before the vacations, the Hon'ble Court held proceedings till late evening, the counting process began on 2<sup>nd</sup> October, 2003. The counting continued till 4<sup>th</sup> October, 2003, except for some interval for tea or lunch, etc. The first round of counting was concluded on 4<sup>th</sup> October, 2003 in the afternoon. On conclusion of the first round, the total tally of votes, viz. Polled by each candidate was announced by the Returning Officer. No objection was raised by any one.

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The Returning Officer, however, had to suspend the counting on 4<sup>th</sup> October, 2003 at late evening in view of the allegations made by some candidates that some ballots were defaced. There was also law and order problem resulting in suspension of counting.

Mr. Mendiratta has submitted his Report to the Committee, the original whereof is being submitted to this Hon'ble Court along with all Annexures enclosed thereto. Also enclosed herewith is a copy of the FIR No. 436/3 dated 5<sup>th</sup> October, 2003, P.S. Tilak Marg under Sections 464, 465 and 466 IPC, wherein the allegations have been made against the Returning Officer among others, lodged by some candidates.

The Returning Officer has since resigned. We tried to persuade the Returning Officer but he declined our request in view of the allegations made against him personally touching his impartiality and integrity. There is no provision under the Election Rules by which a new Returning Officer can be appointed by the Committee appointed by this Hon'ble Court. The keys submitted by the Returning Officer of the sealed storage Room are enclosed herewith.

The perusal of the annexures annexed with his report has also revealed that allegations have also been made against the Supervisory Committee appointed by this Hon'ble Court.

In view of the above, the present Report is being submitted to this Hon'ble Court for appropriate directions and order with a prayer that the members of the Supervisory Committee appointed by this Hon'ble Court may kindly be relieved of the honour bestowed on them by this Hon'ble Court.

It is prayed accordingly.

6 October, 2003.

Sd/- R.K. Anand Sd/- K.K. Sud Sd/- A.S.Chandhiok

Raj Birbal Sd/- H.R. Banga.”  
(Presently out of India)

17. The Report of the Returning Officer dated 6.10.2003 whereby he also tendered his resignation is as under:-

"From:

S.K. Mendiratta  
Returning Officer for the  
Elections to the Bar Council of Delhi, 2003

To

The Supervisory Committee,  
Election to the Bar Council of Delhi, 2003

Subject: **REPORT On the Counting of Votes Conducted on 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> October, 2003.**

The poll for the above election to the Bar Council of Delhi was conducted on 29<sup>th</sup> September, 2003 in Delhi High Court premises and on 30<sup>th</sup> September, 2003 in the Tis Hazari Court premises. The poll was conducted in 23 polling stations provided in each premises where the voters were assigned according to their serial numbers (alphabetically) in the electoral roll. According to the ballot paper accounts of these polling stations, 13,589 ballot papers were issued to electors on 29<sup>th</sup> and 30<sup>th</sup> September, 2003.

The counting was scheduled to start on 1<sup>st</sup> October, 2003 from 10 a.m. Onwards. The counting arrangements were made on the ground floor of the High Court premises where the clients, general public and the advocates sit during the normal working hours of the court. As all the Hon'ble courts were working on that day, it was decided by the Supervisory Committee in consultation with me and candidates that the counting may be started sometime in the afternoon when the courts rise for the day. However, as that was the last working day for the courts before the Dushehra vacation, many of the courts were functioning till up to the normal closing hours of 4.30 p.m. and, therefore, the counting could not be commenced even in the afternoon. Therefore, it was decided, with the consent of almost all the candidates, that the counting may be started, not on the 1<sup>st</sup> October, but on the 2<sup>nd</sup> October, 2003 at 9.00 a.m. and all candidates present were informed accordingly.

As scheduled, the counting process started at 9.00

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a.m. on 2<sup>nd</sup> October 2003. All candidates and their agents were seated across the wire-mesh barrier from where they could watch the entire proceedings and, on the request of some of the candidates on the previous evening, even the videography arrangements were made whereby all the proceedings taking place in the counting hall were videographed and shown on a big screen placed in the hall as well as in the lawn where the candidates and their representatives were seated.

At the outset, everyone was informed that 77 ballot boxes had been used for taking the poll-46 on 29.9.2003 and 31 on 30.9.2003. First of all, the ballot boxes of polling station numbers 1 to 8 were opened on the counting tables whereby everyone could see the ballot boxes being opened and the ballot papers being taken out of the ballot boxes. The ballot papers so taken out of the ballot boxes were counted for numbers. In the second phase, the ballot boxes of the next eight polling stations, i.e., from 9 to 16 were opened and the ballot papers contained therein taken out and counted for numbers. Lastly, the ballot boxes of the remaining seven polling stations 17 to 23 were also likewise opened and the ballot papers taken out and counted for numbers. The total number of ballot papers so taken out of all the 77 boxes was 13,577, which was found to be 12 short of the ballot papers actually issued during the poll on 29<sup>th</sup> and 30<sup>th</sup> September, 2003. This presumably happened because some of the voters after getting the ballot papers did not drop their ballot papers into the ballot boxes which is quite a common phenomenon in all elections.

As a next step, all the 13,577 ballot papers were scrutinized individually to ascertain which of the papers had been validly marked for the first preference in favour of various candidates. It may be apt to mention here that as per the decision of the Hon'ble Supreme Court in *Km Shradha Devi vs K.C. Pant* (AIR 1982 SC 1569), in the course of counting of votes in elections held in accordance with the system of proportional representation by means of a single transferable vote, the ballot papers are to be scrutinized initially only for the first preference to ascertain their validity or otherwise and if any subsequent preference is not validly marked, that ballot paper becomes exhausted as per the rules when the question of its transfer on the basis of that invalid marking arises. On conducting the individual scrutiny of the aforesaid 13,577 ballot papers, 295 ballot papers were considered to be of doubtful validity for various reasons, like, no markings, figure 1 placed against more than one candidate, the markings not

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made in accordance with rule 24 of the Bar Council Elections Rules, certain corrections on the ballot paper made which were authenticated by the voters concerned with their signature on the ballot papers, etc. These doubtful ballot papers were kept separately for examination of the Supervisory Committee. The remaining 13,282 ballot papers were then distributed as per the first preference mark thereon among the 146 candidates. This process of distribution of ballot papers candidate-wise started at about 4.30 in the evening of 2.10.2003 and continued till about 3.30 a.m. on the 4.10.2003 (with some breaks for dinner, breakfast, lunch, dinner, etc. on the nights of 2<sup>nd</sup> and 3<sup>rd</sup> October, 2003). For keeping these ballot papers in the respective folders of 146 candidates, 73 counting personnel were seated on the counting tables, each handling the folders of two candidates, as per the previous practice.

At the end of the first round, i.e., distribution of ballot papers among 146 candidates on the basis of the first preference marked thereon, the quota was tentatively worked out to be 51,085 votes as per the rules, i.e.,  $(13282 \times 100 / 26) + 1$ . None of the candidates had secured the quota to be declared elected on the basis of the first round of counting. As the next process was to exclude the candidates lowest on the poll as per the rules, it was decided that further process would be started after some break, i.e., at 9.00 a.m. on 4.10.2003. Before adjourning the proceedings at 3.30 a.m. as aforesaid, the tentative tally of the votes polled by each candidate was announced, but it was made very clear to all the candidates and their representatives present that it was only a tentative tally and each and every bundle of ballot papers of every candidate would be further scrutinized and verified to ensure that no ballot paper has been wrongly included in the bundles of ballot papers of some other candidate before the next stage of counting of votes by exclusion of candidates was taken up at 9 a.m.

At the time of the aforesaid adjournment of counting proceedings, I wanted to keep all the ballot papers (kept separately in the respective folders of candidates) in some trunks and to seal them but only two trunks were available at that time and the ballot papers of only about one-third of the candidates could be placed in those trunks. As no additional trunk could be obtained at that unearthly hour, it was decided that the ballot papers of the remaining candidates kept in their respective folders may remain on the counting tables and the counting hall may be closed after getting it vacated completely.

At about 5 a.m. in the morning, everyone, i.e., all counting staff as well as all candidates and their representatives were sent out of the counting premises and the doors of the counting hall where the actual counting of votes was being done and the hall where the candidates and their representatives were seated were closed and by the caretaker/security staff of the Delhi High Court and police personnel were posted outside the doors to ensure that no one entered the entire counting premises till I would come back at 9 a.m.

I came back to the counting premises exactly at 9 a.m. and the doors of the counting premises were opened in my presence which before that were completely empty. By that time, Shri A.S. Chandhiok, Shri Raj Birbal, Shri K.K. Sud and Shri H.S. Banga, members of the Supervisory Committee had also arrived. They examined all the doubtful ballot papers and agreed that they should be rejected. Further, in their presence, each and every bundle of ballot papers in respect of each of the 146 candidates was rechecked and verified so as to ensure that no ballot paper had been wrongly placed in the bundle of a candidate for whom it was not marked as the first preference. In that process, a few ballot papers were in fact found inadvertently misplaced in some wrong bundles. This mistake was corrected and many of the bundles were then test checked by Mr. Banga and Mr Birbal also personally. After complete satisfaction that no ballot paper had been wrongly placed in the bundles of ballot papers for a candidate for whom that was not to be accounted for, the final tally was announced candidate-wise and also the quota.

Then, the process of exclusion of candidates lowest on the poll started around 2 p.m. on 4.10.2003. This process of exclusion of candidates lowest on the poll continued till about 8.30 p.m. very smoothly by which time 30 candidates lowest on the poll had been excluded from the poll. No objection of any kind from any quarter was raised up to that stage of counting. Thereafter, the 31<sup>st</sup> exclusion of the candidate No.110 Shri Raj Kumar Bhartiya, was taken up. He had 17 ballot papers which were originally marked to him as the first preference. All his 17 ballot papers were then taken up for transfer to the continuing candidates as per the second preference marked thereon. In the process of such transfer of the ballot papers of candidate No. 110 - Shri Raj Kumar Bhartiya, six ballot papers were transferred to candidate No. 104 - Shri Vijender Singh Mann. Thereafter, the transfer of votes of the 32<sup>nd</sup> excluded candidate No. 112 was taken up. At this stage, some of the

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candidates represented to me to check up the transferred votes of Shri Raj Kumar Bhartiya, particularly the six ballot papers transferred to Shri Mann (No. 104), as they alleged that the second preference marked thereon had been tampered with in that the original markings of second preference were changed to 12, 21, 22, etc. by addition of some figures thereto, and the second preference had been manipulated by someone. On the receipt of such complaint, I examined all the ballot papers of Shri Raj Kumar Bhartiya transferred to different candidates. On verification of the six ballot papers transferred to candidate No.104, I observed that preference No.2 on at least 4 of those six ballot papers was marked with a different ink and seemed to be in different hand from the original marking of other preferences on those ballot papers and there also appeared some fudging in different ink and different hand on the mark 2 to look like 12, 21, 22, etc. On demand of the candidates, I showed those ballot papers to the persons who had raised the objection and on their further demand to give my reaction of the aforesaid verification, I confirmed my observation to them that the preference No.2 on the said four ballot papers appeared, to my mind, to have been defaced within the meaning of rule 23(2) of the Bar Council Elections Rules. This led to great uproar in the counting hall and many of the candidates desired the counting to be suspended.

I saw reason in their protest and fearing that any continuance of the counting process at that stage might result in some law and order problem and damage to the polled ballot papers, I thought it advisable to suspend the counting forthwith. Accordingly, I made that announcement and informed the candidates that all the ballot papers of all the candidates would be duly sealed in trunks and kept in the storage room where the other record of the poll taken on 29<sup>th</sup> and 30<sup>th</sup> September 2003 was kept, i.e., the room specially allocated by the High Court for the purpose. This announcement of suspension of counting process was made by me at about 9.30 p.m. on 4.10.2003. As sufficient number of steel trunks was not available at that time, the representatives of the Bar Council were asked to make immediate purchase of additional steel trunks from the market. With great efforts, the Bar Council representatives were able to provide me with four additional steel trunks purchased from the market with the locks at about 11 p.m. Thereafter, all the ballot papers of the continuing candidates duly kept in their respective folders were placed inside in three trunks and the rejected ballot papers were kept separately in the fourth steel trunk. Apart from the above, the packet of the ballot papers

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transferred from candidate No.110 - Shri Raj Kumar Bhartiya to candidate No.104 - Shri Mann was also separately sealed in a cloth. As some of the candidates wanted to affix their own seals on the cloth sealed cover and also on the sealed trunks containing the ballot papers, I permitted four of their representatives to put their own seals. Accordingly, All the aforesaid four sealed trunks containing the ballot papers and the said sealed cover were further sealed by the four representatives, namely, Shri R.P. Vats, Shri Arun Kumar Renu, Shri Mohd. Pracha and Shri Mahavir Prasad. Thereafter, these four sealed still trunks were moved from the counting hall to the storage room in the High Court premises in the presence of the aforesaid four candidates and also many other candidates who desired to be present there. The door of the storage room was locked by me at about 1 a.m. on 5.10.2003 and the said four candidates also affixed their own seals on that lock. The complaints received by me about the counting are annexed hereto as Annexure A (Collectively).

During all the above process, I had kept informed the members of the Supervisory Committee and Shri R.K. Anand and Shri Raj Birbal personally spoke to me and agreed with me that the counting should be suspended and all the record should be transferred to the storage room. Next morning, the Supervisory Committee met in the counting hall at about 12 noon and I apprised them personally orally about the developments on the last night. They desired to see the ballot papers in question so as to come to any further decision in the matter. However, as the candidates who had affixed their seals on the lock of the storage room were not present there, it was decided that the storage room may be opened on 6.10.2003 at 9 a.m and the said candidates should be informed about the opening of the room at the said hour.

Again, on 6.10.2003, the special Committee met at 9 a.m. in the counting hall where S/Shri R.K. Anand, A.S. Chandiok and K.K. Sud were present. The Bar Council representatives informed (Annexure B) that they had duly informed the aforementioned four candidates who had put their seals on the lock of the storage room but none of them was present at that time.

Meanwhile, on the previous night (5.10.2003) at about 9.20 p.m., four candidates came to my residence and handed over a written representation (Annexure A) to me signed by 23 candidates. In that representation, they had stated



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that they had lost faith in me and found me not acting in an impartial manner and having not ensured free and fair poll and counting. Alongwith that representation, they also annexed a copy of the complaint which they had made to the Bar Council of India and also a copy of the complaint they had made to the police authorities alleging that the ballot papers had been forged and tampered with in connivance with the police authorities, the security authorities of the Delhi High Court, some of the candidates and including the counting staff. In that representation, it was further mentioned that a petition was being filed before the Delhi High Court and that further counting proceedings should be taken up till a direction was received from the High Court or the Bar Council of India or I hear anything further from all the candidates in the election fray. This representation was placed by me before the Supervisory Committee at the meeting held today (6.10.2003) at 9 a.m.

I deny vehemently each and every allegation which has been made in the representation and the complaints to the Bar Council or police against me or against any of the counting staff or officials involved in the counting process of having connived at or conspired with any of the candidates or with the police or with the security authorities of the Delhi High Court so as to tamper with the ballot papers during the counting process. The counting was done in the most transparent manner in the counting hall in the presence of all the candidates and their representatives who were keeping a hawkish eye on the movement of each and every ballot paper in the counting hall and the whole counting process was being videographed and showed on the screen in the counting premises as well as in the lawn. All the distributions and transfers being made were being publicly announced on the microphone which were being heard not only in the counting premises but even outside the premises and in the entire High Court premises. None of counting staff was permitted to take any pen with them and they were supplied with pencils to do their job on the counting tables. It is quite unfortunate that allegations of such serious nature have been made against me and my counting staff and the police and security personnel which are totally baseless and frivolous. I am sure that if any defacement of ballot papers was done, either intentionally with some design or by coercion, that must have been done at the stage of polling before the ballot papers were inserted into the ballot boxes by the voters concerned, as many candidates and their supporters were seen crowding the voting premises and the polling had to be

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suspended on many occasions to have that premises cleared.

However, in view of the lack of confidence and faith expressed by so many candidates in me, I am not interested in further continuing as the Returning officer for the aforesaid election and I hereby tender my resignation from the office of the returning officer and beg to be relieved of the responsibilities of that office forthwith. The key of the storage room in which the entire records of the poll and counting process, including all ballot papers, are placed is also being hereby handed over to the Committee.

I express my gratitude to the Supervisory Committee for their effective supervision and their advice and cooperation at all times in the performance of my duties.

Yours faithfully,

sd/-S.K. Mendiratta  
Returning Officer

6 October, 2003."

18. From the above Report, it appears that the complaint of defacement was with regard to six ballot papers of Shri Raj Kumar Bhartiya transferred to different candidates. The Returning Officer found that in four of those six ballot papers the preference No. 2 was marked with different ink and seemed to be in different hand from the original markings of other preferences on those ballot papers and there also appeared some fudging in different ink and different hand on the mark 2 to look like 12, 21, 22. etc. It is further clear that on demand of the candidates, the Returning Officer showed those ballot papers to the persons who had raised the objection and on their further demand to give a reaction, the Returning Officer confirmed that the preference No. 2 on the said four ballot papers appeared, to the Returning Officer, to have been defaced within the

meaning of Rule 23 (2) of the Bar Council Elections Rules. According to the Returning Officer this led to a great uproar in the counting hall and many of the candidates desired the counting to be suspended. Seeing reason in their protest and fearing that any continuance of the counting process at that stage might result in some law and order problem and damage to the polled ballot papers, the Returning Officer thought it advisable to suspend the counting forthwith. Thereafter, the ballot papers were duly sealed in trunks and kept in the storage room where the other record of the polls taken on 29.9.2003 and 30.9.2003 was kept, i.e. the room specially allocated by the High Court for this purpose. The suspension of counting process was announced at about 9.30 p.m. on 4.10.2003. Steel trunks were procured at about 11 p.m. All the ballot papers of the continuing candidates duly kept in their respective folders were placed inside in three trunks and the rejected ballot papers were kept separately in the fourth steel trunk. Apart from the above, the packet of the ballot papers transferred from candidate No. 110 - Shri Raj Kumar Bhartiya to candidate No. 104 - Shri Mann was also separately sealed in a cloth. As some of the candidates wanted to affix their own seals on the cloth sealed cover and also on the sealed trunks containing the ballot papers, the Returning Officer permitted four of their representatives to put their own seals. It appears that counting remained suspended throughout 5.10.2003 and, at about 9.20 p.m. on 5.10.2003, four candidates went to the residence of Returning Officer and handed over a representation signed by 23 candidates. They had stated that they had lost faith in him and found him not acting in an impartial manner and having not ensured

a free and fair poll and counting. The Returning Officer has clearly and vehemently denied each and every allegation which has been made in the representation and complaint to the Bar Council or the police against him. It is his contention that the counting was done in a most transparent manner in the counting hall in the presence of all the candidates and their representatives and the whole counting process was being videographed and shown on the screen in the counting premises as well as in the lawn. In the opinion of the Returning Officer the defacement of the ballot papers was not done during counting as none of the counting staff was permitted to take any pen with them and they were supplied with pencils to do their job on the counting tables. In the Returning Officer's opinion, if any defacement of the ballot papers was done, either intentionally with some design or by coercion, that must have been done at the stage of polling before the ballot papers were inserted into the ballot boxes by the voters concerned. In any event, the Returning Officer expressing anguish at the loss of faith and confidence in him thought it fit to resign as a Returning Officer. It, therefore, becomes clear that there was no disputes whatsoever with regard to the counting of votes till the first round was over and the tallies of the first round were announced. It is only when the second round of counting was in progress that defacement in four ballot papers was noticed. The Returning Officer was prima facie of the view that there was defacement in the four ballot papers. However, this issue could clearly be dealt with under the provisions of the Act and Rules for conducting Bar Council Elections. It did not mean that the entire electoral process had to be brought to a grinding halt or

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enable candidates and others to demand a re-poll. There are provisions which specifically take care of such situation and if any person is aggrieved it is always open to him to challenge the election after the results are declared. The defacement of four ballot papers is not such a ground on which the entire election can be a nullity. This will become clear from the provisions of relevant Rules which are discussed hereinbelow.

19. It would be pertinent at this stage to refer to relevant statutory provisions and rules. Section 3 (1)(f) of the Advocates Act, 1961 mandates that there shall be a Bar Council for the Union Territory of Delhi to be known as the Bar Council of Delhi. Sub Section (2) of Section 3 prescribes the constitution of the State Bar Council. In the first instance, the Additional Solicitor General of India shall be an ex-officio member and the other members are 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 exact number of members would depend on the size of the electorate. If there were more than 10,000 voters in the electoral roll, the number of elected members would be 25. If there were more than 5000 but not exceeding 10,000 advocates on the electoral roll then the strength would be of 20 members and in cases where the electorate did not exceed 5000, it would be 15 members. In the case of Delhi, the electorate exceeded 10,000 and, therefore, 25 members were to be elected.

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20. Sub-Section (4) of Section 3 of the Advocates Act, 1961 makes it clear that an advocate shall be disqualified from voting unless he possesses such qualification or satisfies such conditions as may be prescribed in this behalf by the Bar Council of India. It has further provided that, 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. Section 5 indicates that every Bar Council shall be a body corporate having perpetual succession and a common seal. Section 6 of the Advocates Act, 1961 lists the functions of a State Bar Council. These functions, inter alia, include:-

- (a) to admit persons as advocates on its roll;
- (b) to prepare and maintain such roll;
- (g) to provide for the election of its members.

Section 7 prescribes the functions of the Bar Council of India which includes the exercising of general supervision and control over State Bar Councils. The term of office of members of the State Bar Council is stipulated in Section 8 and such term is to be of five years. The Proviso to Section 8 indicates that where a State Bar Council fails to provide for the election of its members before the expiry of the said term, the Bar Council of India may, by order, for reasons to be recorded in writing, extend the said term for a period not exceeding six months. In terms of Section 8-A the Bar Council of India is empowered to constitute a Special Committee in the absence of an election before the expiry of the term or extended term as the case may be. The Special Committee is to comprise of the ex-officio member referred to in Section 3(2) of the Act to be the Chairman. In the case of Delhi, the ex-officio member is

the Additional Solicitor General of India and he has to act as the Chairman of the Special Committee if so appointed by the Bar Council of India. Two other members of the Special Committee are to be nominated by the Bar Council of India from amongst advocates on the Electoral Roll of the State Bar Council. The Special Committee so appointed is empowered, under Section 8-A of the said Advocates Act, "to discharge the functions of the State Bar Council until the Bar Council is constituted under this Act." Sub-Section (2) of Section 8-A categorically provides that on the constitution of the Special Committee and until the State Bar Council is constituted all properties and assets vesting in the State Bar Councils shall vest in the special committee; all rights, liabilities and obligations of the State Bar Council, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the special committee; and all proceedings pending before the State Bar Council in respect of any disciplinary matter or otherwise shall stand transferred to the special committee. In other words, the Special Committee steps into the shoes of the State Bar Council till the same is constituted after an election. This ensures that if the term of the State Bar Council expires there is no hiatus created in the work and functions till the new Bar Council is constituted. By virtue of Sub-Section (3) of Section 8-A of the said Act, the Special Committee shall, in accordance with such directions as the Bar Council of India may give to it in this behalf, hold elections to the State Bar Council within a period of six months from the date of its constitution under sub-section (1), and where, for any reasons the special committee is not in a position to conduct election within

the said period of six months, the Bar Council of India may, for reasons to be recorded by it in writing, extend the said period.

21. Section 14 of the Advocates Act, 1961 provides that no election of a member to a Bar Council shall be called in question on the ground merely that due notice thereof has not been given to any person entitled to vote thereat, if notice of the date has not less than thirty days before that date, been published in the Official Gazette. Section 15 enables the Bar Council to make Rules which may, inter alia 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 results of election shall be published;”

“(d) the manner in which and the authority by which doubts and disputes as to the validity of an election to the Bar Council or to the office of the Chairman or vice-Chairman shall be finally decided.”

Section 17 stipulates that every State Bar Council shall prepare and maintain a roll of advocates. By virtue of Section 19 of the Advocates Act, 1961 the authenticated copy of such roll of advocates shall be sent to the Bar Council of India. Section 24 prescribes the conditions which have to be fulfilled before a person is qualified to be admitted as an advocate on a State Roll. Section 26-A empowers the State Bar Council to remove from the state roll the name of any advocate who is dead or from whom a request has been received to that effect. Section 48-B provides that for the proper and efficient discharge of the functions of a State Bar Council or any committee thereof, the Bar Council of



India may, in the exercise of its powers of general supervision and control, give such directions to the State Bar Council or any committee thereof as may appear to it to be necessary, and the State Bar Council or the committee shall comply with such directions. Sub-Section (2) provides that where a State Bar Council is unable to perform its functions for any reason whatsoever, the Bar Council of India may, without prejudice to the generality of the foregoing power, give such directions to the ex officio member thereof as may appear to it to be necessary and such directions shall have effect, notwithstanding anything contained in the rules made by the State Bar Council. Section 49 provides for a general power for the Bar Council of India to make Rules which may include the conditions subject to which an advocate may entitle 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 voters may be prepared and revised by a State Bar Council.

22. I now examine the relevant Rules framed by the Bar Council of India. Part III of Bar Council of India Rules (hereinafter referred to as 'the BCI Rules') pertains to "certain matters relating to State Council." Chapter I thereof deals with "electoral roll, disqualification of membership and vacation of office." Rule 1 under this Chapter prescribes that every advocate whose name is on the electoral roll of the State Council shall be entitled to vote at an election. Rule 2 provides that 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) his name has at any time been removed;
- (b) he has been suspended from practice, provided that, his disqualification shall operate only for a period of five years from the date of the expiry of the period of suspension;
- (c) he is an undischarged insolvent;
- (d) he has been found guilty of an election offence in regard to an election to the State Council by an election tribunal, provided however, that such disqualification shall not operate beyond the election next following after such finding has been made;
- (e) he is convicted by a competent court for an offence involving moral turpitude, provided that this disqualification shall cease to have effect after a period of two years has elapsed since his release;
- (f) he is in full-time service or is in such part-time business or other vocation not permitted in the case of practising advocates by the rules either of the State Council concerned or the Council;
- (g) he has intimated voluntary suspension of practice and has not given intimation of resumption of practice;
- (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 2 and does not furnish details about it as required in the notice under rule 4 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.”

Rule 3 provides that subject to the provisions of rule 2, the name of every

\* Sub-clause (h)(i) of Rule 2 came into force w.e.f. August 1997 vide Resolution No. 10/97

advocate entered in the State Roll shall be entered in the electoral roll of the State Council. Rule 4 is pertinent and, therefore, it set out in its entirety:-

"4. (1) In preparing the electoral roll, unless the State Bar Council concerned is already maintaining a list of advocates who are entitled to be voters in terms of Rule 2 of these Rules, at least 150 days before the date of election, shall publish notice issued by the Secretary of the State Bar Council concerned in prescribed form in the official gazette and in two or more local newspapers, one English and the other in a local language, as may be decided by the State Bar Council, asking each of the advocates on the roll of the concerned State Bar Council to intimate the State Bar Council within the time to be specified in the said notice or within such extended time as may be given/allowed by the State Bar Council for reasons to be recorded, as to whether he has incurred any disqualification mentioned in Rule 2 of these rules and quote rule 2 of these rules in the said notice.

(2) A preliminary electoral roll containing the names of all advocates whose names are required to be included under these rules shall be put up on the notice board of the State Council within 120 clear days before the expiry of the term of the members of the said State Council necessitating the election (and relevant portion thereof shall be sent to such Bar Associations as the Secretary considers fit).

Provided that the Bar Councils whose term of office already expired or shall expire within 120 days from the date of commencement of these rules shall, as far as possible, publish the electoral roll forthwith and fix the elections for a date after not less than 120 clear days from the date of publication of the electoral rolls.

(3). Before final publication of the electoral Roll, a State Bar Council may, if satisfied, on an application made by any particular advocate giving sufficient reasons, allow his name to be included in the electoral roll in question, and on such inclusion the advocate concerned shall be entitled to take part in the election."

The form of notice prescribed under Rule 4 is as under:

**" Form of notice under rule 4**

It is hereby notified that for the purpose of preparing

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final electoral roll in accordance with rules 2 and 3 of chapter I, Part III of the rules framed by the Bar Council of India under Sections 3(4), 10B, 15(2)(a), 49 (1)(a) and (ab) of the Advocates Act, 1961, for the next election of members to this Council, the particulars as to any of the disqualifications as referred to in clauses (a) to (i) of rule 2 shall be furnished by an advocate who has incurred them to the State Council within the time specified in the notice issued under rule 4 (Herein below to reproduce Rule 2 with Explanation).

DATED THE

SECRETARY

Number on the State Roll:

1. Name of the advocate as on the roll:  
(in block letters)
2. (a) Address of the advocates  
(as on the State roll)  
(b) Present address
- 3.(a) Have you incurred any of the disqualifications mentioned in rule 2 of Chapter I, Part III of the rules of the Bar Council of India?
4. Are you a member of any Bar Association?
5. Where do you intend to cast your vote?  
(If you are not a voter entitled to vote by postal ballot)

I hereby declare and affirm that the foregoing statements are true to my knowledge and I have not concealed anything thereto.

Date

.....  
Signature in full."

23. Part IX of the BCI Rules pertains to "general principles to be followed by State Bar Councils and Bar Council of India, rules for Supervision and Control by the Bar Council of India." The Rules contained in this Part

have been framed under Section 49 (1)(a), (i) and (j) of the Advocates Act, 1961. Rules 1 to 5 under this Part IX pertain to election. Rule 5 clearly stipulates that "all election disputes shall be decided by tribunals constituted by the State Councils."

24. Now, I move on to the Bar Council of Delhi Rules. The Bar Council of Delhi Rules (hereinafter referred to as "the BCD Rules") were originally framed in 1963 and have been amended from time to time. Rule B (viii) of Chapter I defines the word "Tribunal" to mean the Tribunal appointed under the rules to decide election disputes. Chapter II of the BCD Rules relates to "Election to the Bar Council" and comprises of Rules made under Section 15 (2) (a) and (d) of the Advocates Act, 1961. Rule 3 (j) of this Chapter defines "Electoral Roll" to mean and include the roll containing the names of the Advocates prepared in accordance with the rules of the Bar Council of India in Part III, Chapter I. These are the Rules which have been referred to above. Rule 3 (p) defines "Returning Officer" to mean the person appointed by the Bar Council as such to conduct an election. Rule 23 of Chapter II of the BCD Rules prescribes the method of voting. Sub Rule (1) thereof provides that a voter in giving his vote shall place on his voting paper the figure '1' in the space opposite the name of the candidate whom he chooses for his first preference and may in addition place on his voting paper the figure '2' or the figures '2' and '3' and '4' and so on, in the space opposite the names of the other candidates in the order of his preference. Sub-Rule (2) and (3), which are a vital importance in the context of the present writ petitions, read as under:-

"(2) A voting paper shall not be signed by a voter, and in the event of any erasures, obliterations or alterations in the voting paper or of the voting paper purporting to have been signed by the voter, the voting paper shall be deemed to have been defaced and no votes purporting to have been given thereby shall be taken into account for the purposes of the election.

(3) The decision of the Additional Solicitor General whether a voting paper has or has not been defaced shall be final."

Rule 24 sets out the situations under which a voting paper is to be held to be invalid and reads as under:-

"24. Voting Papers when invalid: A voting paper shall be invalid on which:

- (a) the figure '1' is not marked; or
- (b) the figure '1' is set opposite the name of more than one candidate or is so placed as to render it doubtful to which candidate it is intended to apply; or
- (c) the figure '1' and some other figures are set opposite the name of the same candidate; or
- (d) there is any mark in writing by which the voter can be identified;
- (e) the preference are indicated in words as 'ONE' 'TWO' etc.
- (f) the marking on the voting paper is not in the international form of Indian numerals."

Rule 33 deals with the determination of result and publication thereof. On the publication of the list in the official gazette in the manner prescribed in the said Rule, the persons whose names appear in the list shall be deemed to have declared as elected and the members of the Bar Council shall be deemed to have been elected on the date of publication of their names in the official gazette. Rule 34 deals with the disputes as to the validity of elections. Sub-Rule (1) provides that any voter may contest the validity of the election of a

candidate declared to have been elected to the Bar Council by a petition signed by him and supported by an affidavit and delivered to the Secretary personally or sent by registered post so as to reach him within 15 days from the date of publication of the results of the election. Sub-Rule (4) provides that all disputes arising under the above sub-rules shall be decided by a tribunal to be known as an Election Tribunal comprising 3 advocates whose names are on the State Roll and who are of not less than 10 years' standing. Sub-Rule (6) stipulates that the Election Tribunal shall have the powers to dismiss a petition; to order recount; to declare any candidate to have been duly elected on a recount; to set aside the election of the candidate who either by himself or through any other person acting with his consent is guilty of corrupt practices. Sub-Rule (8) of Rule 34 provides that no petition shall lie on the ground that any nomination paper was wrongly rejected or the name of any voter was wrongly included in or omitted from the electoral roll or any error or irregularity which is not of a substantial character. By virtue of Sub-Rule (9) of Rule 34, the voting papers and other records relating to the elections shall not be destroyed until the expiry of the time fixed for filing of any petition under clause 1 of this Rule and Sub-Rule (10) provides that where a petition or petitions have been filed under sub-rule (1) no such voting papers or records shall be destroyed till all the election petitions are finally disposed of. Sub-Rule (35) provides that except as otherwise provided in these rules the Secretary shall be incharge of the conduct of the election and it explained further that the Secretary shall mean a person appointed as Secretary under

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Section 7 of the Act, or any other person appointed by the Bar Council to perform the duties of the Secretary under these rules. Rules 86 and 87 appearing in Chapter VII of the Bar Council of Delhi Rules provide that the Council shall constitute a Tribunal of three members elected from amongst advocates on its rolls who are not its members to decide disputes arising from or in regard to any election or elections and the Tribunal after hearing the evidence of the parties concerned and holding such other enquiry as it deems fit, shall decide the dispute and its decision shall be final.

25. From a survey of all the statutory Provisions and Rules, it is quite clear that if there is any dispute with regard to defacement of voting papers the same is to be resolved by the Additional Solicitor General in terms of Rule 23 (3) of the BCD Rules. Where the validity of an election is disputed the same is to be questioned by way of a petition under Rule 34 of the BCD Rules and that has to be decided by the Tribunal whose decision is to be final. Therefore, insofar as the question of defacement of the voting papers is concerned, the same can be resolved by reference to the provisions of the Rules and the Act. It does not call for a situation for stoppage or annulment of the electoral process. Whatever the disputes, they can be resolved within the framework of the applicable Rules and the Act. There is a clear remedy available to any person aggrieved by the alleged defacement of voting papers. Therefore, it does appear that the counting process must continued and the electoral process must be taken to its logical conclusion.





26. Mr Sanjay Jain, arguing in favour of the resumption of the counting, submitted that the electoral process once set in motion should not be interfered and that the entire process ending in the declaration of the result must be allowed to be run through. If there is any grievance with a particular election the same can be made the subject matter of an election petition in terms of the Rules and the Act to be decided by the Tribunal set up under the Rules and in case there is any matter which is not provided for by the Act or the Rules, an aggrieved party can always approach the High Court invoking the jurisdiction under Article 226 of the Constitution. However, the appropriate stage for filing an election petition under the Rules and Act or a writ petition under Article 226 is only after the election has concluded, the terminal point being the declaration of the result. In support of this contention Mr Sanjay Jain referred to several decisions of the Supreme Court and other High Courts. The first of the decisions referred to by Mr Jain was that of the Supreme Court in N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. And Others: AIR (39) 1952 SC 64. In this decision a Constitution Bench of the Supreme Court was, inter alia, considering the scope and meaning of the word "election" as used in Article 329 (b) of the Constitution of India. Article 329 (b) stipulates that, notwithstanding anything in the Constitution, no election to either House of Parliament or to the House on either House of the Legislature of the State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. In the

case of *Ponnuswami* (*supra*) the appellant's nomination paper for election to the Madras Legislative Assembly from the Namakkal Constituency in Salem district had been rejected at the time of scrutiny by the Returning Officer. The appellant moved the High Court under Article 226 of the Constitution praying for a writ of certiorari to quash the order of the Returning Officer rejecting his nomination paper and to direct the Returning Officer to include his name in the list of valid nominations to be published. The High Court dismissed the appellant's application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329 (b) of the Constitution. The appellant's case was that the High Court had the power to interfere under Article 226 and that in the facts situation Article 329(b) was not applicable. Inasmuch as, in view of the appellant, questioning something which had happened before a candidate was declared elected was not the same thing as questioning an election. In this context the word "election" as used in Article 329 (b) of the Constitution came up for consideration. In paragraph 7 of the said decision *Ponnuswami* (*supra*) the Supreme Court observed that the word "election" had acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected. After considering arguments on the scope of the word "election", the Supreme Court observed as under:

" 9. The question now arises whether the law of elections in this country contemplates that there should be two attacks on the matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court."

The Court finally summed up its conclusions as under:

" 16. The conclusions which I have arrived at may be summed up briefly as follows:

(1). Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to "anything which does not affect the election;" and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress."

27. Mr Jain next referred to a Division Bench decision of the Patna High Court in the case of Pasupati Nath Singh v. N.K. Singh and others: AIR

1968 *Patna 49* which, applying the decision of Supreme Court in *Ponnuswami (supra)*, held that until the process of election is concluded the High Court cannot exercise jurisdiction either under Article 226 or 227 of the Constitution. Next, the Division Bench decision of the Rajasthan High Court in the case of *Dhabai Sua Lal Yadav v. Indira Nehru Gandhi and others: AIR 1979 Rajasthan 130* was referred to. This decision reiterated the position that by virtue of Article 329 there was a blanket prohibition for interfering during the process of election as an election can only be challenged in the manner and before the authorities provided by law by an election petition, after the result was announced. In the case of *The Election Commission of India v. Shivaji and others: AIR 1988 SC 61*, the Supreme Court following its earlier decision in *Ponnuswami's case (supra)* came to the conclusion that the validity of an electoral process can be challenged only after the election was over. The Supreme Court held that:

"Hence even if there was any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the elections has to wait till the election is over and institute a petition in accordance with S.81 of the Act calling in question the election of the successful candidate within forty-five days from the date of election of the returned candidate but not earlier than the date of election."

Mr Jain also referred to the decision of the Supreme Court in *Km. Shradha Devi v. Krishna Chandra Pant and Others: AIR 1982 SC 1569*. This decision was referred to for the purposes of showing under what condition a ballot paper is to be rejected in a system of voting in accordance with the proportional

representation by means of single transferable vote. This decision is an authority on the proposition that where the first preference is not indicated in the voting paper in such a system of voting, then the voting paper has to be rejected. On the other hand, if the first preference is clear and unequivocal then the voting paper cannot be rejected notwithstanding that there is some error in a subsequent preference. In such a situation, the ballot paper would not be invalid but would be partially valid and the Supreme Court in the said case observed that "this is not a startling proposition but is the logical outcome of the system of voting."

28. In S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra and others: AIR 1980 SC 1362, the Supreme Court in paragraph 49 thereof held as under:-

"What was said before this Court was and we would accept it as a limited concession that the four ballot papers show over-writings and difference in ink or different instruments used, it would unquestionably establish that what these four ballot papers purported to be at the time of counting were not the ballot papers in their original condition when the four voters exercised their franchise. In such a situation it was the bounden duty of the returning officer at the counting as per the second proviso to sub-rule (2) of Rule 56 to ascertain the intention of the voter by finding out for whom the vote was cast and add the vote for the candidate for whom it was meant to be. Proviso to sub-rule (2) shows that the ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once, if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked. Shorn of tampering, the intention of each voter was clearly indicated and if the gloss of tampering was removed the returning officer would have no difficulty in ascertaining the intention of the voters and after so ascertaining the intention count the vote accordingly. It is not open to him to take an easy escape route as was contended in this case

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that once tampering is shown, the ballot paper should be rejected as invalid."

From the above it is clear that this was a case where four ballot papers had overwriting and difference in ink and different instruments were used. A situation remarkably similar to the alleged defaced four voting papers in the present election. In the case before the Supreme Court, the Court came to the conclusion that the tampering with the ballot paper could easily be ascertained and when the extent of tampering was removed the Returning Officer could have no difficulty in ascertaining the intention of the voters and accordingly the Returning Officer ought to have counted the vote accordingly after so ascertaining the intention. The Court observed that it was not open to Returning Officer to take an easy escape route as was contended in this case that once tampering is shown, the ballot paper should be rejected as invalid. It is only the Court, in an election petition, which would have to undertake this exercise. This decision has been cited by Mr Jain to show that even where there was tampering with the ballot papers the Returning Officer was empowered to determine and ascertain the intention of the voters. In the present case, the question of defacement in any case is left to the decision of the Additional Solicitor General in terms of Rule 23 (3) of Chapter II of the Bar Council of Delhi Rules as indicated above. There is a clear provision for such an eventuality and, therefore, it is not open to any person aggrieved to contend that once there is defacement and that too of only four voting papers the entire election ought to be annulled or countermanded.

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29. Mr Jain heavily relied upon the decision of the Supreme Court in the case of Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Another v. State of Maharashtra and Others: (2001) 8 SCC 509, wherein the Supreme Court categorically held as under:-

“12. In view of our finding that preparation of the electoral roll being an intermediate stage in the process of election of the Managing Committee of a specified society and the election process having been set in motion, it is well settled that the High Court should not stay the continuation of the election process even though there may be some alleged illegality or breach of rules while preparing the electoral roll. It is not disputed that the election in question has already been held and the result thereof has been stayed by an order of this Court, and once the result of the election is declared, it would be open to the appellants to challenge the election of the returned candidate, if aggrieved, by means of an election petition before the Election Tribunal.

13. In that view of the matter, we are in agreement with the view taken by the High Court that the appellants having an alternative remedy, the writ petition deserved dismissal.

14. For the aforesaid reasons, we do not find any merit in the appeal. The appeal is, accordingly, dismissed. There shall be no order as to costs.”

In this decision the Supreme Court also considered the case of Bar Council of Delhi & another v. Surjeet Singh and others: (1980) 4 SCC 211 (a decision heavily relied upon by the petitioners in the writ petitions which challenged the electoral roll and the polling held on the basis thereof) and held the same to be inapplicable to the facts and circumstances of the case inasmuch as that was a case where the validity of the Act and the Rules was in challenge and the Tribunal being a creature of the Act and the Rules, it was not open for it to decide the same. In the case of Sant Sadguru (supra), there was no challenge

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to the validity of the Act or Rules and, therefore, the decision of the Supreme Court in the case of *Bar Council of India and Others v. Surjeet Singh (supra)* was held not applicable. In the present writ petition, the position is similar, inasmuch as there is no challenge to the validity of the Act or the Rules made thereunder and, therefore, as will be discussed in detail below the decision in the case of *Bar Council of India v. Surjeet Singh (supra)* will have no applicability to the present writ petitions also. In *Sant Sadguru (supra)* it is important to note, the Supreme Court was not considering the provisions of the Representation of People Act, 1951 in the context of Article 329 (b) of the Constitution but was concerned with the general principles applicable to elections and preparation of electoral rolls. *Sant Sadguru (supra)* was not a judgment under Article 329 (b) of the Constitution but one rendered in terms of the provisions contained under the Maharashtra Cooperative Societies Act, 1960. The facts of the case before the Supreme Court were that the term of the elected Managing Committee of the Society was due to expire in 1999. The Collector took steps for preparation of the electoral roll of the Society. A programme to that effect was announced. On 4.6.1999 the provisional electoral roll was published. Publications were notified till 14.6.1999 and the electoral roll was to be finalised and published on 2.7.1999. However, on account of the rainy season the State Government passed an order under the Act staying the elections in the Cooperative Society. It was indicated in the order that where nomination papers had not been filed the elections would stand postponed till 30.9.1999. It appears that some representations were made to the



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State Government to exempt the Society from the order dated 8.6.1999 pursuant to which the Government of Maharashtra issued a Notification dated 30.6.1999 making out a special case in favour of the Society and deleted its name from the notification dated 8.6.1999. As a result of which, the election of the Society, which had earlier been postponed, was now required to take place. As a consequence, the final electoral roll of the members of the society was published on 2.7.1999 and on 21.10.1999 the election schedule was drawn up. At this stage, the petitioners therein filed a petition under Article 226 of the Constitution before the High Court against the impugned order dated 21.10.1999. The writ petition was dismissed by the High Court and an appeal was filed before the Supreme Court by means of a Special Leave Petition. It was contended on behalf of the appellants that the electoral roll being the substratum of the election for constituting the Managing Committee and the same having not been prepared and finalised in accordance with the mandatory Rules, no election can be held on such electoral roll and the same is liable to be set aside. The counsel appearing for the respondents however raised an objection regarding the maintainability of the writ petition on the ground that since the election process had already commenced and inasmuch as election had already taken place, the appellants had an alternative remedy to file an election petition under Section 144T of the Act before the Tribunal. It was further urged that the High Court had rightly declined to entertain the writ petition under Article 226 of the Constitution and, therefore, the Court was not required to go into the merits of the appeal. It was further reiterated by the

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appellants before the Supreme Court that the preparation of the voters list, not being part of the election process, the Election Tribunal was not competent to go into the validity or otherwise of an electoral roll in an election petition. Therefore, the only remedy available to the appellants was to file a writ petition under Article 226 of the Constitution. On the basis of the arguments raised by counsel for the parties the questions that came up for consideration before the Supreme Court in the case of *Sant Sadguru (supra)* were (1) whether the preparation of the electoral roll for electing members to the Managing Committee of a specified society under the provisions of the Act and the Rules framed thereunder is an intermediate stage in the process of election? and (2) if the answer to the first question is in the affirmative, whether the High Court should interfere with the preparation of an electoral roll in a petition under Article 226 of the Constitution or decline to interfere in the matter leaving the parties to get the matter adjudicated by the Tribunal by filing an election petition after declaration of result of the election? After considering all the arguments and counter arguments and several decisions, the Supreme Court came to the conclusion that the Section 144-X of the Maharashtra Cooperative Societies Act, 1960 itself contemplated that various stages of election shall also include preparation of the list of voters. The Supreme Court observed that once the statute provides that the preparation of the voters' list shall be part of the election process, there is no reason to hold that the preparation of the electoral roll is not an intermediate stage in the process of the elections of a specified society. The Rules framed for election of specified societies is a

complete code in itself providing for the entire process of election beginning from the stage of preparation of the provisional voters' list, decision on the objections by the Collector, finalisation of electoral rolls, holding of election and declaration of result of the election. The Court observed that the preparation of voters' list must be held to be part of the election process for constituting the Managing Committee of a specified society. It is in this context that the decision of the Supreme Court in *Sant Sadguru (supra)* would apply squarely to the facts and circumstances of the present writ petitions.

30. Mr Sanjay Jain further referred to the decision of the Supreme Court in the case of *Babu Verghese and others v. Bar Council of Kerala and others* : AIR 1999 SC 1281, to demonstrate that where there was a question with regard to extension of term of the State Bar Council, it was always amenable to judicial review by way of a writ petition under Article 226 of the Constitution but, after the elections had been held. In *Babu Verghese (supra)* the Supreme Court held that the term of the Bar Council of Kerala had expired on 27.1.1997 and they had ceased to be members with effect from that date, and that their term could not be legally revived with retrospective effect as was sought to be done on 8.2.1997 when it adopted the resolution for extension of the term by six months. The Court held that the Kerala Bar Council had ceased to have any jurisdiction and could not hold fresh elections which would be held only by the Special Committee appointed by the BCI. Accordingly, the Supreme Court allowed the writ petition and directed the Special Committee to



hold fresh elections for constituting a new Kerala Bar Council in accordance with law. It further directed that till the election was held the Special Committee as provided under Section 8-A would discharge the function of the State Bar Council with all other consequences provided thereunder. In the present case, I find that the extension of the term of the Bar Council of Delhi was not done *ex post facto* and was not to operate retrospectively, the Bar Council of India had, before the expiry of the five year term passed the resolution for extension the term of the Bar Council of Delhi by another six months. Therefore, it cannot be held that the extension granted to the Bar Council of Delhi was not in accordance with law. The decision reported in *Babu Verghese (supra)* would therefore not be applicable to the facts of the present case. However, it is clearly indicated that even the election conducted by a State Bar Council where its tenure was under a cloud could be challenged after the election process was over by way of a writ petition. The question in the present writ petitions is whether this Court can interfere with the election process before the results are declared. Declining to interfere at this stage does not mean that after the results are declared the petitioners would be barred from raising the issues. The trend of decisions of the Supreme Court as indicated above seems to suggest quite clearly that the Courts are to adopt a "hands-off" policy during the election process. However, after the electoral process is over and the results have been declared the election of a candidate can be challenged by way of an election petition as provided by the Act and the Rules. Where there is no provision for challenge of an election on a particular ground then it

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is always open to an aggrieved person, be he or she an elector or a candidate, to challenge the election on such ground invoking the extraordinary jurisdiction of the High Court under Articles 226 of the Constitution.

31. Mr. Jain next referred to the decision of the Supreme Court in the case of Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and Others: AIR 1978 SC 851. This case was also in the backdrop of the Representation of People Act, 1951 and Article 329 (b) of the Constitution. In particular Mr Jain referred to the following conclusion of the Supreme Court in paragraph 91 thereof:-

“3 . The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post election stage and procedure as predicated in Article 329 (b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do other things necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.”

These conclusions although made in the context of Article 329(b) and the Representation of People Act, 1951 are also applicable generally to election law as the principles have been extended by virtue of the decision referred to in Sant Sadguru (supra).

30. The next case referred to was of the Bar Council of India v. Om

**Prakash Faizi and Others** (Civil Appeal Nos. 8464-8465/1997) whereby the Supreme Court gave directions with regard to Bar Council of Delhi in 1997.

One of the directions was as under:-

“4. For the purpose of preparation of the final roll it will be necessary for the Advocates borne on the roll of the Bar Council of Delhi to pay the subscription prescribed under Rule 40 of the Bar Council of India Rules. The Notification of the Bar Council of Delhi dated October 14, 1997 stating that the payment of the said amount is not a condition for being entitled to vote in the elections will not be operative.”

This clearly stipulates that non-payment of subscription prescribed under Rule 40 of the Bar Council of India Rules would be a bar to a person otherwise entitled to vote in the elections for the Bar Council of Delhi. The decision of the Supreme Court in the case of **Election Commission of India through Secretary v. Ashok Kumar and others**: AIR 2000 SC 2977 was pressed into service to demonstrate the parameters within which the Courts could interfere in election matters under Article 226 of the Constitution. Paragraph 32 of the said decision summarizes the conclusion:-

“ 32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-

1) If an election, (the term 'election' being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

2). Any decision sought and rendered will not amount to “calling in question an election” if it subserves the progress of the election and

facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

3). Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4). Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

5). The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the Court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

33. The next case that needs to be considered is that of Bar Council of Delhi and another v. Surjeet Singh and others: AIR 1980 SC 1612. This decision has been strongly relied upon by the petitioner in CW 5419/2003 and in other petitions where the prayers are for halting the counting process and for annulment of the election on the basis of the alleged faulty electoral Rolls. It is stated that in the present case a declaration under Rule 4 was sought by the Bar

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Council of Delhi and the consequences of non-filing of the declaration was that the advocate's name although appearing in the said roll would not be included in the electoral roll. It was contended that this very question came up for consideration in *Surjeet Singh's* case (*supra*). Surjeet Singh was an advocate and was a member of Delhi Bar Council before the election held in the year 1978. A proviso was added to Rule 3(j) of the Bar Council of Delhi Election Rules, 1968, in the year 1978. In accordance with that proviso a copy of the declaration form was sent on 14.6.1978 to the advocates whose names found place in the State roll of Advocates asking them to return the declaration form duly filled up and signed within the specified period. A publication to this effect was also made in some newspapers. The last extended date for the submission of the declaration forms was 14.9.1978 and the electoral roll was finally published on 16.9.1978 excluding the names of about 2000 advocates who had failed to submit such declaration forms. On the basis of the electoral roll so prepared, according to the programme of election, the election of members of the Bar Council of Delhi was held on 17.11.1978. The total number of advocates on the Advocates roll was 5000 and odd out of which the names of about 3000 and odd only were included in the electoral roll in accordance with the proviso to Rule 3(j) of the Election Rules of the Bar Council of Delhi, the results of the election were declared on 19.11.1978. The names of the 15 persons who were declared elected were published in the Gazette on 22.11.1978. Thereafter on 24.1.1979 a writ petition was filed in the High Court challenging the whole election by attacking the validity of the

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proviso to Rule 3(j). The High Court allowed the writ petition and set aside election to the Bar Council of Delhi held on 17.11.1978 on the ground that so far as the qualifications to be possessed by and the conditions to be satisfied by an advocate being brought on the electoral roll are concerned, it was only the Bar Council of India that was competent to make the Rules under Section 3(4) and Section 49(1)(a) and that the State Bar Council had no power to make a Rule on this subject. It therefore, held that Rule 3(j) of the Bar Council of Delhi Election Rules, 1968 was in excess of the Rule making power of Bar Council of Delhi.

34. The facts of the present case are distinguishable because the declaration sought and the Rule with regard to qualifications in the present writ petitions are those framed by the Bar Council of India and not by the Bar Council of Delhi as was the case in *Surjeet Singh's case (supra)*. What was in challenge in *Surjeet Singh's case (supra)* was the proviso to Rule 3(j) of the Delhi Bar Council Election Rules, which reads as under:-

“Provided the the Electoral Roll shall not include the name of such Advocate who fails to file in the office of the Bar Council, on or before such date (not being earlier than 30 days of the date of notification) as may be notified by the Bar Council in such manner as may be considered proper by it from time to time, or within 45 days of the putting up of the preliminary Electoral Roll under R. 4 (1) of Chap.I of Part III of the Bar Council of India Rules, a declaration containing the name, address and number of the Advocate on the State Roll and to the effect that:-

- (a) He is an advocate ordinarily practising in the Union Territory of Delhi and that his principal place of practice is within Union Territory of Delhi;
- (b) He is not an undischarged insolvent;

(c) He has never been convicted by any court for an offence involving moral turpitude;

or

A period of two years has elapsed since his release after being convicted of an offence involving moral turpitude; (In case of conviction particulars of such conviction should be given).

(d) He is not in full-time service or business or in any such part-time business or other vacation as is not permitted in the case of practising Advocates by the rules of the Bar Council; and

(e) He has not been suspended from practice and on the failure to file the declaration or on filing of incomplete or incorrect declaration in any respect, it shall be presumed that the name of such Advocate is not to be entered on the Electoral Roll in accordance with R. 3 of Chap. I of Part III of the Bar Council of India Rules."

35. The Bar Council of India Rules as amended upto 31.1.2001 were placed before me to show the changes made in Part III Chapter I of the Bar Council of India Rules through time. The Rules that were in contemplation in *Surjeet Singh's case (supra)* were as indicated at pages 1615 and 1616 of the aforesaid decision. Then came the Rules as amended upto 31.1.1982 followed by Rules as amended upto 31.7.1995 and lastly Rules as amended upto 31.1.2001. It is clear that Rule 1 of Chapter I of Part III of BCI Rules remained the same in all the four situations, i.e. prior to *Surjeet Singh's case (supra)* and as amended upto 1982, 1995 and 2001. Rule 1 clearly stipulates that every advocate whose name is on the Electoral Roll of the State Council shall be entitled to vote at an election. Rule 2 has changed. What was Rule 2 in *Surjeet Singh's case (supra)* has become Rule 3 in the subsequent amended version and what was Rule 3 has in *Surjeet Singh's case (supra)* has evolved into Rule 2 in

the subsequent amendment. It is pertinent to note that in the amendment of 1982, Rule 2 stipulates that the name of an advocate appearing in the State Roll shall not be on the Electoral Roll, if on information furnished by the advocate concerned in terms of Rule 4 or information received or obtained by the State Bar Council it was found that his name has at any time been removed etc. Rule 4 was introduced which clearly provided for the furnishing of information in the prescribed form within a specified time and non-furnishing of such declaration would amount to his being disentitled to take part in the election in question. This is clear from the following words appearing in Rule 4(1) of the Rules as amended upto 31.1.1982:

“ By the said notice the Secretary shall also inform the advocates concerned that unless informations required by the said notice in question is received by the State Bar Council in the prescribed form or form exactly similar thereto, within the specified time or within the extended time as stated herein above, his name shall not be included in the Electoral Roll and he shall not be entitled to take part in the election in question.”

The 1995 amendment however adding an explanation to Rule 2 to the following effect:-

“ Explanation:

If an advocate who has incurred any disqualification as referred to in Rule 2 and does not furnish details about it as required in the notice under Rule 4 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.”

In the amendment upto 31.1.2001 sub-clauses (h) and (j) have been added to Rule 2. The sub-clauses read as under:-

“ (h) if he has not paid the subscription under Rule 40 Chapter-II

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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."

It is pertinent to note that the Rule 4 whereby provision for filing a declaration form has been made was not there in the BCI Rules when *Surjeet Singh's case* (*supra*) was considered by the Supreme Court. On the contrary the declaration was provided for in the BCD Rules which the Supreme Court struck down holding that it was only for the Bar Council of India to provide such rules and it was wholly in excess of the powers of the Bar Council of Delhi to make such a provision. It is further pertinent to note that the explanation to Rule 2 which has been added in the subsequent amendment does not in any way take away the effect of Rule 4 but is only in addition thereto whereby giving of a false declaration has been made culpable having penal consequences.

36. In *Surjeet Singh's case* (*supra*) the Supreme Court observed as under:

"In the instant case the electoral roll was prepared on the basis of a rule which has been found to be void and ultra vires. That being so, even though the contesting respondents came to challenge the election after it was held, they could do so because of the gravity of the infraction of the law in the preparation of the electoral roll."

The Court noted the observations of Krishna Iyer J. in *K.K. Srivastava v.*

*Bhupendra Kumar Jain:* AIR 1977 SC 1703 to the following effect:

"One of them which is relevant for the present case is that where there is an appropriate or equally efficacious remedy the Court should keep its hands off. This is more particularly so where the

dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms.”

But he added:-

“ While we need not in this case go to the extent of stating that if there are exceptional or extraordinary circumstances the Court should still refuse to entertain a writ petition.”

Finally the view expressed in K.K. Shrivastava's case is:-

“There is no foundation whatever for thinking that where the challenge is to an “entire election” then the writ jurisdiction springs into action. On the other hand the circumstances of this case convince us that exercise of the power under Art. 226 may be described as mis-exercise.”

After noting the aforesaid observations the Supreme Court in *Surjeet Singh's case (supra)* observed as under:-

“ We may add that the view expressed by some of the High Courts in the cases referred to above that merely because the whole election has been challenged by a writ petition, the petition would be maintainable in spite of there being an alternative remedy being available, so widely put, may not be quite correct and especially after the recent amendment of Art. 226 of the Constitution. If the alternative remedy fully covers the challenge to the election then that remedy and that remedy alone must be resorted to even though it involves the challenge of the election of all the successful candidates. But if the nature and the ground of the challenge of the whole election are such that the alternative remedy is no remedy in the eye of law to cover the challenge or, in any event, is not adequate and efficacious remedy, then the remedy of writ petition to challenge the whole election is still available. In the present case we have pointed out above that the Election Tribunal would have found itself incompetent to declare the proviso to R. 3 (3) of the Delhi Bar Council Election Rules ultra vires and that being so the alternative remedy provided in R. 34 (8) was no remedy at all.”

*Surjeet Singh's case (supra)* therefore was entertained because the vires of a Rule of the Delhi Bar Council Election Rules was under challenge and the

Court came to the conclusion that the alternative remedy provided under Rule 34 (8) was no remedy at all as the election Tribunal would have found itself incompetent to declare the said Rules as ultra vires. It is in this context that the writ petition was allowed and the offending rule was struck down. The aforesaid observations of the Supreme Court at the same time makes it clear that if there is an alternative remedy which fully covered the challenge to the election then that remedy alone must be resorted to. In the present case the vires of any Rule or statutory provision is not under challenge. What is stated is that the Bar Council of Delhi has acted contrary to the provisions contained in the Rules and the Act. Therefore, I feel that the decision in *Surjeet Singh's case (supra)* will be of no use to those parties who challenge the preparation of the electoral rolls. The decision in the case of *Sant Sadguru (supra)* more aptly covers the fact situation obtaining in the present case.

37. Mr Jain then referred to the decision of a Division Bench of the Allahabad High Court in the case of *High Court Bar Association, Allahabad and another etc. v. Bar Council of U.P., Allahabad and another etc.: 1987 All.L.J. 1519*. That decision was rendered in the context of two writ petitions challenging the general election of the Bar Council of Uttar Pradesh which was held in pursuance of directions of the Allahabad High Court and of the Supreme Court. A similar controversy with regard to the declaration under Rule 4 came up for consideration. The learned counsel Mr Jain drew my attention to paragraph 18 of the judgment in *High Court Bar Association (supra)* which

reads as under:-

" 18. In connection with this argument it will be of great use to look into an order passed by the Supreme Court in the case of Bar Council of India v. Paramjit Singh Goraya and another (supra). In the aforesaid case the statutory term of Punjab and Haryana Bar Council had come to an end in 1980. The Supreme Court passed the following order in this case:

**"ORDER**

Special leave is granted. Filing of statements of case and security dispensed with.

On the expiry of the statutory term the election to the Punjab and Haryana Bar Council had become due in 1980 and by one or other process the election process has been held up with the result that the old Bar Council is functioning. That is not a desirable situation and the democratic process must not be thwarted. In view of this position, we direct that the Secretary of the Punjab and Haryana State Bar Council shall proceed to compile a fresh electoral roll in compliance with R. 4(1) and (2) of the Rules framed by the Bar Council of India under the Advocates Act, 1961. He must issue an appropriate notice as envisaged under R. 4 (1) and also R. 4(2) and complete this process within a period of 150 days as required by the Rules. The Secretary shall commence the work according to the directions contained herein from 18<sup>th</sup> Oct. 1982. As soon as the electoral roll, both provisional and final, is ready, the same must be published as prescribed by the Rules and the pendency of the appeal will not come in the way of holding the election according to the Rules. We make it clear that pursuant to this order a fresh notice will be issued for entering the name in the electoral roll and if any eligible Advocate does not send the prescribed form his name will not be included in the electoral roll and he will not be entitled to make any grievance. We stay that part of the order of the High Court by which the High Court has prescribed a schedule for holding the election" (Emphasis provided)"

In the case before the Supreme Court also the earlier election to the Bar Council must have been in accordance with the electoral rolls prepared under the unamended Rules of the Bar Council of India. The Supreme Court ordered preparation of fresh electoral rolls in



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accordance with amended R. 4(1) and (2) of the Bar Council of India Rules, and also observed that the Advocates who did not send the prescribed form, their names will not be included in the electoral rolls and he will not be entitled to make any grievance."

According to him, and, it is rightly contended, that the Supreme Court put a stamp of approval on the provisions of Rule 4(1) and (2) of the Bar Council of India Rules as amended and particularly to the requirement that if any eligible advocate does not send the prescribed form his name would not be included in the electoral roll and would not be entitled to make any grievance. In this context, the Division Bench of the Allahabad High Court came to the following conclusion:-

"In our opinion, even the provisions of R. 2 of the Bar Council of India Rules give power to the concerned Bar Council to prepare an electoral roll after following the procedure laid down in R.4. The argument raised by the learned counsel for the petitioner that all the Advocates whose names are entered in the State Roll should be allowed to vote at the ensuing general election is against the scheme of the Act and the Rules inasmuch as under the Act and the Rules framed by the Bar Council of India two rolls have to be maintained i.e. State Roll and Electoral Roll. Only those Advocates whose name appears in the Electoral Roll are entitled to vote and contest in the election. The preparation of the Electoral Roll in accordance with R. 4(1) and (2) of the Bar Council of India Rules is perfectly valid and the Advocates who have not sent information in prescribed form have been rightly excluded from the Electoral Roll."

A reading of paragraph 21 of the said decision would indicate that that was a case where the polling was disturbed and the election had to be postponed by the Returning Officer. In that case also the Returning Officer intimated the Court about his resignation. However, on persuasion of certain advocates and the Chairman of the Bar Council and in pursuance to the request made by the



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Court the resignation was withdrawn and another date was fixed. But, on this date also, despite elaborate arrangements, certain elements created trouble, ballot papers were snatched away and the Returning Officer finally tendered his resignation which was accepted. Subsequently, another person was appointed as Returning Officer and under the direction of the Court the elections were rescheduled. Paragraph 21 of the said Allahabad High Court decision makes interesting reading in the context of the facts situation which obtains in the present writ petitions:-

“ 21. Under the interim order of this court the elections have been held on 9<sup>th</sup> and 10<sup>th</sup> July 87 in the entire State except at Allahabad. It is unfortunate that on 9<sup>th</sup> and 10<sup>th</sup> July, 1987 the polling had to be adjourned because certain advocates took away the ballot papers and created such a situation that the election at Allahabad had to be postponed by the Returning Officer. Shri J.M.L. Sinha Returning Officer intimated this court about his resignation. However, on persuasion by certain Advocates and the Chairman of the Bar Council and in pursuance of the request made by this court the resignation was withdrawn and another date was fixed. On this date also despite elaborate arrangements being made by the Returning Officer, certain elements created trouble, forced their entry into the polling room, forcibly snatched away a large number of ballot papers which were torn into pieces, election at Allahabad was again postponed. Shri J.M.L. Sinha intimated this court that his resignation from his assignment as Returning Officer is final and the court in these extraordinary circumstances had to accept his resignation and appointed Sri B.C. Jauhari ex. Judge of this court as the Returning Officer, with the consent of the parties. The elections are now being held on 10<sup>th</sup> and 11<sup>th</sup> Sept. 1987.”

In the Allahabad case the Court finally directed that the Returning Officer of the Court would conclude to election in accordance with the observations made in the decision in accordance with the law at the earliest. They also directed that the District Authorities will render assistance to the Returning Officer as

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required by him so that the counting of votes may also finish at the earliest peacefully and the Returning Officer will be entitled to regulate the procedure and entry to the place of counting in such a manner so as to eliminate any possibility of disturbances during the counting process.

38. Mr P.N. Misra, learned senior counsel who appeared for the petitioners in CW 5419/2003 and CW 6576/2003 argued that the poll which was conducted on 29.9.2003 and 30.9.2003 would clearly be contrary to the provisions of the BCI Rules and it was based on an electoral roll which was not in accordance with the Rules. As such, there is no option left but to direct a re-poll on the basis of a proper electoral roll. In particular he contended that, while Rule 1 of Chapter I of Part III of BCI Rules speaks of an electoral roll, Rule 2 brings out the distinction between the electoral roll and the State roll. It is his contention that normally all those advocates whose names appears in the State Roll should also appear in the electoral roll unless disqualified in terms of Rule 2. His submission is that the non-furnishing of the declaration required under Rule 4 of the Bar Council of India Rules would, in view of the explanation only entails penal consequences in the form of misconduct under Section 35(1) of the said Act and would not ipso facto entail exclusion from the electoral roll. He further submitted that the non-furnishing of the declaration in terms of Rule 4 is sought to be made disqualification in itself which is not there in Rule 2. Mr Misra placed strong reliance in the decision in *Surjeet Singh's case (supra)*. He contended that proviso to Rule 2(j) of BCD

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Rules, 1968 required a similar declaration and the High Court on a writ petition set aside the said provision as being ultra vires. The decision of the High Court was upheld by the Supreme Court in *Surjeet Singh's case (supra)*. But, as discussed above, this was done as the State Bar Council had no power to prescribe qualification or disqualification and that was within the exclusive domain of the Bar Council of India. Accordingly, the proviso added to Clause (j) of Rule 3 was held to be ultra vires. The Supreme Court in *Surjeet Singh's case (supra)* clearly held that:-

"The State Bar Council can frame rules for the preparation and revision of electoral rolls under S. 15 (2) (a). That would be in conformity with the latter part of sub-sec. (4) of S. 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. In the instant case under the impugned proviso failure on the part of an advocate to submit the required declaration within the specified time entitles the State Bar Council to exclude his name from the electoral roll. Such a thing was squarely covered by the exclusive power conferred on the Bar Council of India under Ss. 3 (4) and 49 (1) (a) of the Advocates Act. The State Bar Council had no such power."

The Supreme Court held that the introduction of the impugned proviso in Rule 3(j) of the Delhi Bar Council Election Rules was not approved by the Bar Council of India. Any rule made by the State Bar Council cannot have effect unless it is approved by the Bar Council of India.

39. Mr Mishra also relied upon the observations contained in paragraph 11 of the said decision to the effect that a voter could come to the

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High Court earlier even before the election was held and merely because he came to challenge the election after it was held it cannot be said that he was guilty of any laches and must be non-suited only on that account. Therefore, it was submitted by Mr Misra that similarly the writ petition challenging the entire electoral roll and the electoral process was maintainable even during the intermediate stage when the election process was underway. He further submitted that the decisions which related to non-interference in electoral process are entirely based on the bar contained in Article 329(b) of the Constitution. I am not in agreement with the submissions of Mr Misra. First of all, there is no challenge to the vires of any provision in the present proceedings. Secondly, Rule 4 as it exists in Chapter I of Part III of Bar Council of India Rules was not there on the Rule Book when *Surjeet Singh's case (supra)* was decided. Thirdly, a provision similar to Rule 4 of the BCI Rules had been incorporated in the BCD Rules which was clearly beyond its powers. Had the same Rules been made and passed by the Bar Council of India the same could not have been the subject matter of challenge. This is clear from the afore-mentioned observations of the Supreme Court that "such a thing was normally covered by the exclusive power conferred by the Bar Council of India under Section 3(4) and 49(1)(a) of the Advocates Act. The State Bar Council has no such power." The action that was sought to be taken of excluding the names of such advocates from the electoral roll in the present case is based on an interpretation of Rule 4 of the Bar Council of India Rules and is not based on any such Rule made by the Bar Council of Delhi. Fourthly,

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while it is true that in most cases where non-interference in the electoral process has been reiterated the context has been that of the Representation of People Act, 1951 and the bar contained in Article 329(b) of the Constitution of India, it is also true that the decision in the case of *Sant Sadguru (supra)* makes it more than clear that such a proposition has become a part of the general law relating to elections. Moreover, it is to be seen that the Division Bench in LPA 610/2003 (*supra*) in the matter of this very election applied the principles enunciated by the Supreme Court in *Election Commission of India v. Ashok Kumar (supra)* and categorically held as under:-

“We may at this stage state that there is no intention in interfering in the election process and once the election process is set in motion, it should be conducted as scheduled.”

This clearly stipulates that in the context of the present elections itself there is a directive of the Division Bench of this Court to continue the electoral process and take it to its logical conclusion. It is also clear that the observations of the Supreme Court in *Ashok Kumar's case (supra)* were made applicable to the elections to the Bar Council of Delhi. Therefore, the submissions of Mr. Misra are untenable.

40. A reference was also made to the decision in the case of *R.M. Bagai v. Union of India and Others: 53 (1994) DLT 273 (DB)*. In particular, Mr Kalra, learned senior counsel placed reliance on paragraph 14 thereof which read as under:-

“ 14. The learned counsel for the respondents has vehemently argued that this writ petition should not be entertained as the election process has already commenced. He has placed reliance on *Mohinder Singh Gill & Another v. The Chief Election*

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Commissioner, New Delhi and Others, AIR 1978 SC 851. This judgment is not applicable to the facts of the present case because the present petition has been filed even before the notifications were issued calling for the general elections to the Municipal Corporation of Delhi. There is still ample time available with the respondents to complete the elections to the Municipal Corporation of Delhi in accordance with the spirit of the Constitution."

On the basis of the aforesaid observations made by the Division Bench of this Court, it was contended that the writ petition would surely be maintainable for challenging an election on the basis of the alleged faulty electoral roll. I am unable to agree with the learned counsel on this aspect. The above cited quotation itself makes it clear that the petition had been filed even before the notifications were issued calling for the general election to the Municipal Corporation of Delhi. In other words, the writ petition had been filed prior to the commencement of the election process. Furthermore, the Division Bench of this Court entertained the writ petition on the additional ground that there was still ample time available with the respondents to complete the elections to the Municipal Corporation of Delhi in accordance with the spirit of the Constitution. None of these situations are available in the present case. The writ petitions have been filed and are being considered at the intermediate stage when the election process is underway. Secondly, it was imperative that the poll be conducted on or before 30<sup>th</sup> September, 2003 in view of the fact that on that day the extended term of the Bar Council of Delhi was to expire. It is further important to note that the poll was conducted on 29.9.2003 and 30.9.2003 on the specific directions of the Division Bench of this Court issued on 4.9.2003 in LPA 610/2003. The case of *R.M. Bagai (supra)* is, therefore, of

no use to the counsel who contended that the writ petition ought to be entertained and the entire electoral process be set at naught.

41. It was further contended by Mr. P.N. Misra that the decision of the *High Court Bar Association, Allahabad (supra)* is not applicable. I have already discussed this decision in detail and found that the same would be applicable to the facts and circumstances of the present case. In fact, it bears a striking resemblance to the fact situation, at least, insofar as the conduct of the poll and the resignation of the Returning Officer is concerned.

42. It was next contended by Mr Misra that on 30.7.2003 the election schedule was originally notified. On 25.8.2003 this schedule was modified. The date of the poll was mentioned as 30.9.2003 and, therefore, Rule 6 of Chapter II of the Bar Council of Delhi Rules was violated as the notice for election must be made not less than 45 clear days before the date of election. Therefore, according to Mr Misra the second notification was in violation of said Rule 6 and the entire election had to be annulled and a fresh election was required to be held following the provision of Rule 6. This argument is prima facie also not tenable. The schedule was originally notified on 25.8.2003 and the date of polling was ultimately set at 30.9.2003 which was further modified by the Division Bench to two days i.e. on 29.9.2003 and 30.9.2003. There is a gap of more than 45 days between the first notification and the final date notified for polling. The modification of 25.8.2003 was brought about because of intervening circumstances whereunder the Bar Council of India by its order

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dated 19.8.2003 had first stayed the election proceedings and subsequently withdrew the stay on 24.8.2003. It was this action on the part of the Bar Council of India which necessitated the modification in the election time table as scheduled earlier vide notification dated 28.7.2003. It was the same election which was notified on 30.7.2003 which was ultimately conducted on 29.9.2003 and 30.9.2003. Be that as it may, the challenge to this being a challenge to the election is clearly one which would be available to a person aggrieved even after the election process is complete and the results are declared. On this issue a writ petition would not be maintainable at this stage.

43. It was then contended by Mr Misra that when the Division Bench had passed the orders in LPA 610/2003 on 4.9.2003 the final list had been published. However, a supplementary list of 492 advocates was alleged to have been added on 8.9.2003. This, according to Mr Misra, is in clear contravention of the Rule 5 of the Bar Council of India Rules contained in Chapter I Part 3 which provided that the final electoral roll should be published not earlier than 75 days and not later than 60 days prior to the date of election and revision was permissible only under Rule 6. Therefore, according to Mr Misra a supplementary voters list was bad in law and this vitiated the entire election. Whether Mr Misra is right or wrong in so contending cannot be made the subject matter of a writ petition at this stage. This issue would be available to a person aggrieved after the election process is over and the result is declared. At this intermediate stage a writ petition on this issue cannot be entertained as



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already indicated above.

44. Mr V. Sudheer who had also made some submissions in CW 5419/2003 placed total reliance on the decision of the Supreme Court in *Surjeet Singh's case (supra)*. This aspect has already been dealt with by me hereinabove and needs no repetition.

45. In CW 6526/2003 arguments were also advanced by Mr. Naushad Khan, advocate on behalf of the interveners Mr. Bhadana and Ms Poonam Parashar. At the outset Mr. Naushad Khan submitted that his arguments were directed against the resumption of counting of the votes and he prayed for a dismissal of the writ petition. In the alternative he submitted that since there was alleged defacement of the voting papers the evidence be directed to be preserved to enable the aggrieved persons to file election petitions challenging the election if the need arose. Mr Khan's submissions were directed mainly towards the question of maintainability of the writ petition requiring the continuance and resumption of counting. He submitted that no prejudice would be caused if the entire election was counter mounded and re-polling was ordered. He further submitted that a number of representations had been made to the Returning Officer which had not been disposed of by the Returning Officer and, in point of fact, there was no reference to them in the Returning Officer's report. He further submitted that the principle of non-interference with the election process was entirely based on the Representation of People Act, 1851 and the bar contained in Article 329 (b) of the Constitution. These aspects have already been considered above and I have held that the principles

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of non-interference are clearly applicable to the State Bar Council Election and, particularly so, because of the specific views taken by a Division Bench of this Court in LPA 610/2003 in respect of this very election which is the subject matter of the present petitions. He further adopted Mr Misra's arguments which have already been dealt with hereinabove.

46. All the other contentions of the interveners were directed towards the conduct of the Returning Officer in counting of the said votes. It was also urged that the alternative remedy was not available as the election Tribunal has no jurisdiction to try cases of the present nature and the election Tribunal was only clothed with powers to try disputes qua individuals and not the entire election. Accordingly, it was submitted that a case was made out for re-poll which could be much cheaper than holding the entire election. This would facilitate and not impede the election process and would be in keeping with the decision of the Supreme Court in *Ashok Kumar's case* (supra). He also relied upon the decision of the Supreme Court in *Shradha Devi's case* (supra). I need not go into the issues with regard to the conduct of the counting by the Returning Officer. This is so because there is no Returning Officer at present and the Returning Officer who had previously been appointed has resigned. Whether the reasons cited by him are true or false, is not a question that is to be decided in these proceedings. The fact of the matter is that counting commenced and was suspended and the Returning Officer has resigned and gone. If counting is to be resumed it will have to resume afresh and will have to be conducted by a freshly appointed Returning Officer. All the allegations

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made by the interveners with regard to the conduct of the counting of votes would be washed aside as the entire process of counting would be taken up anew. These submissions are, therefore, not tenable.

47. Mr. Bagai, the learned counsel who appeared for the petitioner in CW 6223/2003 referred to the *Bar Council of Delhi decision* (*supra*): 107 (2003) DLT 355 and in particular paragraph 20 thereof. Thereafter, he submitted the proposition that the jurisdiction of the election Tribunal under the Bar Council of India Rules and the Bar Council of Delhi Rules is quite narrow and cannot take care of a dispute of the present nature where the entire election is tainted. Therefore, a writ petition would be maintainable to challenge such an election. This aspect of the matter has already been dealt with by me above. It was made clear in *Ponnuswami' case* (*supra*) by the Supreme Court that there can be two attacks to an election. One during the election process and the other after the election has been held. In so far as the former is concerned the Courts have to exercise restraint and wait till the election process is over. It does not mean that an election can only be challenged by way of petition before the Tribunal. Certainly, if the cases are covered within the jurisdiction of the Tribunal, the remedy would be to approach the Tribunal. However, where the nature of the case is such that the Tribunal would not have jurisdiction to entertain it, it would always be open to an aggrieved party to approach the High Court seeking invocation of the jurisdiction under Article 226 of the Constitution. But, such a writ petition would be maintainable only after the election process is over.

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48. The next proposition advanced by Mr Bagai is that the preparation of the electoral roll itself is under question and this is the *sine qua non* of the election and, therefore, the Courts should interfere. He referred to the decision in *R.M. Bagai's case (supra)*. This aspect has already been dealt above and it has been held by me that the right to file writ petition is not in dispute. The question is the timing thereof. As indicated above such a writ petition can only be filed if (a) there is no remedy provided in the Act or the Rules and (b) the election process is over. A writ petition cannot be entertained at the intermediate stage. Further Mr. Bagai adopted the arguments of Mr Misra which have already been dealt hereinabove. Mr Bagai also submitted that some of the advocates including the petitioners in CW 6223/2003 went to the office of the Bar Council of Delhi to file the nomination papers. However, their nomination papers were not accepted due to the stay order passed by the Bar Council of India on 19.8.2003. When the petitioners visited the office of the Bar Council of Delhi on 29.8.2003 they were informed that the Bar Council of India had revoked its stay order on 24.8.2003 and the last day of filing of the nomination was 28.8.2003 and that their nomination could not now be accepted as the time for accepting nomination was over. The petitioners alleged that on these grounds that they were prevented from contesting the elections. This is also a ground sought to be made out for setting aside the entire election process. As I have already indicated above, such a grievance cannot be made a ground for stultifying the election process. If the petitioners are right in what they say, they may file an appropriate petition before the appropriate forum after the

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election process is over and the results are declared. Non-acceptance of nomination papers of some persons cannot be made a ground for setting aside the entire election process at this stage.

49. Mr Khosla, the learned counsel who appeared in Abhay Verma's case (CW No. 6526/2003) in opposition of the petition, apart from raising the issues already taken up by other counsel and which have been discussed above, took the issue that the petition ought to be rejected as necessary parties have not been made parties and all the other candidates ought to have been impleaded. The second point that was urged by him was that when there was tampering of votes counting could be stopped and re-poll could be ordered keeping in mind the analogy of Section 64A of the Representation of People Act, 1951. He further submitted that the Tribunal would not be in a position to adjudicate such disputes and in particular as the Returning Officer has left/resigned. It is this Court alone under Article 226 which has to decide as to whether such an election can at all be held. The other contentions are with regard to the alleged conduct of the Returning Officer. Insofar as the first contention is concerned, the petitioner has clearly stated in CW 6526/2003 that he was aggrieved by the stoppage of the counting of votes. This stoppage was brought about by the Returning Officer on whom various allegations were leveled and who in order to prevent a law and order situation suspended the counting of votes and, thereafter, being unable to resolve the crises resigned as a Returning Officer. The Bar Council of Delhi has been made a party as well as the Secretary and the Returning Officer. These are the necessary parties responsible for conduct

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of the elections. The petitioner is not seeking any relief against other candidates and is only interested in directions to be issued to the Respondent No.3 (Returning Officer) to count votes and declare the results. It is also prayed in the petition that writ be issued against respondents 1 and 2 (Bar Council of Delhi and Secretary Bar Council of Delhi respectively) to appoint a new Returning Officer to complete the counting process and declare the result of the elections. The term of the Bar Council of Delhi has expired. However, Section 5 of the Advocates Act, 1961 provides that every Bar Council shall be a body corporate having perpetual succession and a common seal, with power to acquire and hold property, both movable and immovable, and to contract, and may by the name by which it is known sue and be sued. Thus, the Bar Council of Delhi has been properly joined as a party. It has in these proceedings being represented by the Special Committee appointed by the Bar Council of India under the provision of Section 8-A of the Advocates Act, 1961. Therefore, the contention of learned counsel Mr Khosla is not tenable. As regards the issue of tampering of votes and that a re-poll ought to be ordered, it is clear that polling on 29.9.2003 and 30.9.2003 was done and completed in a peaceful manner. Counting had also progressed without any complaints till after the first round of counting of the first preference votes was over. Thus, clearly no case for re-poll could be made out. In fact, the allegations are with respect to the counting process and submissions in this regard have already been considered hereinabove.

50. In view of the aforesaid discussions, it is clear that the writ petitions

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challenging the election at the intermediate stage are not maintainable and the election process is required to be completed forthwith. If any person is aggrieved by the results it is always open to him to file an election petition if the law permits and otherwise to approach this Court by way of a writ petition. In the result CW 5419/2003, CW 6222/2003, CW 6223/2003 and CW 6576/2003 are dismissed. CW 6526/2003 is allowed as it does not challenge the election and, in fact, ~~is~~ seeking a direction for resumption of counting, is towards facilitating the election process. It is directed that the Special Committee which is functioning in place of the Bar Council of Delhi shall immediately appoint a Returning Officer to take up the process of counting afresh and to complete the said process without any break. The entire process of counting and declaration of result be completed not later than three weeks from today.

51. The writ petitions are disposed of accordingly. No order as to costs.

*Badar Durrez Ahmed*

BADAR DURREZ AHMED, J.

May 14, 2004

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