

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 26th April, 2011
% Judgment Pronounced on: 9th May, 2011

+1. W.P.(C) 5198/2010

DEVENDRA KUMAR Petitioner
Through: Mr. Sunil Mittal, Advocate.

versus

GOVT. OF NCT OF DELHI AND ORS. Respondents
Through: Mr.Nazmi Waziri, Advocate for
Respondent No.1
Mr.Sanjeev Sachdeva with Mr.
Sanjeet Ranjan and Mr. P. Mehta,
Advocates for Respondent No.2
Mr. Rakesh Tikku, Sr. Advocate
with Mr. Mrityunjay Kumar,
Advocate for Respondent No.3
Mr. Aman Lekhi, Sr. Advocate
with Mr. Mohit Gupta, Mr.
Rupinder Pal Singh and Mr. M.A.
Hashmi, Advocates for Respondent
No.4 with Respondent No.4 in
person.
Mr. S.P. Kalra, Sr. Advocate with
Mr. Mahavir Singh, Advocate for
applicant in CM No.4239/2011.

2. W.P.(C) 1985/2011

VIJENDER SINGH MANN Petitioner
Through: Mr. S.P. Kalra, Sr. Advocate with
Mr. Mahavir Singh, Advocate.

versus

GOVT. OF NCT OF DELHI AND ORS. Respondents
Through: Mr.Nazmi Waziri, Advocate for
Respondent No.1

Mr.Sanjeev Sachdeva with Mr.
Sanjeet Ranjan and Mr. P. Mehta,
Advocates for Respondent No.2
Mr. Rakesh Tikku, Sr. Advocate
with Mr. Mrityunjay Kumar,
Advocate for Respondent No.3
Mr. Aman Lekhi, Sr. Advocate
with Mr. Mohit Gupta, Mr.
Rupinder Pal Singh and Mr. M.A.
Hashmi, Advocates for Respondent
No.4 with Respondent No.4 in
person.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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

DIPAK MISRA, CJ

In these two writ petitions, the controversy involved being common although the nature of challenge is from different spectrums, namely, one involving the interpretation of Rule 31(A) of the Bar Council of Delhi Election Rules, 1968 (for short 'the Rules), while the other challenging the constitutional validity of Rule 31(A)(ii) of the said Rules, they were heard together and are being disposed of by a singular order. For the sake of convenience, we shall first advert to the facts in W.P.(C) No.1985/2011 where the assail is to the constitutional validity of the Rules and state the facts as they are common to both the cases and

thereafter proceed to dwell upon the challenge to the action on the foundation of the interpretation placed upon by the learned counsel for the parties.

2. Presently to the commonality of the factual score and the grounds of attack in the backdrop of the constitutional validity of the Rule in question. The petitioner is a practising Advocate enrolled with the Bar Council of Delhi and had secured maximum number of first preference votes amongst the unsuccessful candidates in the election that was held on 1st and 2nd December, 2009 for electing the members of the Bar Council of Delhi. His name featured at serial no.27 of the final list just second to the 25th candidate who was declared elected to the Bar Council of Delhi by the Election Committee.

3. As a casual vacancy occurred, the petitioner submitted a representation on 11th August, 2010 to the Bar Council of Delhi for co-opting him as a member. As there was no response, the petitioner knocked at the doors of this Court. The writ court in W.P.(C) No.5198/2010 [Devender Kumar vs. State (NCT) of Delhi] only directed that the Bar Council of Delhi should also consider the representation submitted by the petitioner at the time of co-option.

4. As set forth, the Bar Council of Delhi in its meeting held on 21.1.2011 resolved to co-opt Mr. Aman Sareen, the respondent no.4

herein, as a member of the Delhi Bar Council and the representation of the petitioner was rejected.

5. It is apt to note here that the petitioner while praying for declaring the Rule in question to be violative of Article 14 of the Constitution of India has also prayed for issue of a writ of mandamus commanding the respondents to co-opt him as a member of the Bar Council of Delhi as his name featured at serial no.20 in the list of first preference votes and at serial no.27 in the final list.

6. We have heard Mr. S.P. Kalra, learned senior counsel and Mr. Sunil Mittal, learned counsel on behalf of the petitioners, Mr. Nazmi Waziri, learned counsel for the respondent No.1, Mr. Sanjeev Sachdeva, learned counsel for the respondent no.2, Mr. Rakesh Tikku, learned senior counsel for the respondent no.3 and Mr. Aman Lekhi, learned senior counsel for the respondent no.4.

7. Mr. Kalra, learned senior counsel for the petitioner, has raised the following contentions:

(a) Rule 31(A)(ii) of the Rules runs counter to the provisions of the Advocates Act, 1961 (for brevity 'the Act') and is in transgression of the spirit of the Act as there is provision for co-option in the parent statute and hence, it deserves to be declared as unconstitutional.

- (b) The Rule creates an artificial and irrational distinction between the two categories of vacancies, namely, a vacancy caused when an election is set aside by the competent tribunal and a vacancy arising out of the death or resignation of a member. There is no intelligible differentia for treating the two classes of vacancies in a separate manner and there is no objective to be achieved by such distinction. Thus, the Rule invites the frown of Article 14 of the Constitution.
- (c) There is no rationale to fill up the vacancy in case there is a verdict against a candidate who was elected, by a candidate who has secured the maximum first preference votes amongst the unsuccessful candidates and not to follow the same procedure in case of death or retirement and to fill it up by co-option.
- (d) The concept of co-option is contrary to the will of the electorate inasmuch as a person who falls short of being elected by few votes is not chosen when the vacancy arises because of death or resignation but someone is imposed upon the lawyers' community at large by the existing members of the Bar Council. The will of the electorate is the conceptual essentiality in a democratic set up but when co-option takes place, the said basic facet gets atrophied which is absolutely illegal.

- (e) The objectives sought to be achieved by the Bar Council of States and Union Territories under the Act are in the realm of regulation, control and discipline and, therefore, it is necessary and obligatory to choose an advocate who has faced the election and not elected because of small margin so that there would be proper representation but the said purpose is nullified by taking recourse to co-option by a group of elected members.
 - (f) By introducing the concept of co-option, unfettered and unbridled power has been given to the rest of the members which not only violates the spirit of the Act but also contravenes the basic spirit of Article 14 of the Constitution which shuns any kind of unfettered discretion.
8. The learned counsel appearing for the respondents, combatting the aforesaid contentions, have canvassed the following proponentes:
- (a) There is no specific pleading how the Rule violates any of the provisions enshrined under the Act and in the absence of pleadings, the said ground does not deserve to be adverted to and in any case, the Rule in question does not contravene any of the provisions of the Act.
 - (b) The contention relating to the artificial classification without any rationale or intelligible differentia is devoid of any substance as the

nature of vacancies are absolutely different.

- (c) The basic purpose of the Rule is to avoid a re-election and, therefore, the Rules have been made for co-option under certain circumstances and inclusion of the next man in certain other circumstances and, therefore, it does not invite the wrath of equality clause.
- (d) The principle of co-option is an accepted method prevalent in associations and statutory bodies and when there is a set of Rules which is in consonance with the Act governing the field, the contention that the Rule introduces unreasonableness or arbitrariness does not merit consideration.

9. Before we proceed to deal with the respective contentions, we think it apposite to refer to certain authorities with regard to the nature of pleadings which are necessitous for the purpose of assailing a statutory provision as constitutionally invalid.

10. A Division Bench of this Court in WP(C) No.8663/2008 [*Smt. Sunita Bugga v. Director of Education and others*] decided on 30.7.2010 has held thus:

“10. It is well settled in law that a person who assails the constitutional validity of an Act or a notification must specifically set forth the grounds for such challenge. In this context, we may refer with profit to certain decisions in the field.

11. In *State of Uttar Pradesh v. Kartaar Singh*, AIR 1964 SC 1135, while dealing with the constitutional validity of Rule 5 of the Food Adulteration Rules, 1955, their Lordships opined as follows:-

“(15).....if the rule has to be struck down as imposing unreasonable or discriminatory standards, it could not be done merely on any a priori reasoning but only as a result of materials placed before the Court by way of scientific analysis. It is obvious that this can be done only when the party invoking the protection of Art. 14 makes averments with details to sustain such a plea and leads evidence to establish his allegations. That where a party seeks to impeach the validity of a rule made by a competent authority on the ground that the rules offend Art. 14 the burden is on him to plead and prove the infirmity is too well established to need elaboration.”

12. In *State of Andhra Pradesh and another v. K. Jayaraman and others*, AIR 1975 SC 633, it has been stated thus:-

“3. It is clear that, if there had been an averment, on behalf of the petitioners, that the rule was invalid for violating Articles 14 and 16 of the Constitution, relevant facts showing how it was discriminatory ought to have been set out.”

13. In *Union of India v. E.I.D. Parry (India) Ltd.*, AIR 2000 SC 831, a two Judge Bench of the Apex Court has expressed thus:-

“There was no pleading that the Rule upon which the reliance was placed by the respondent was ultra vires the Railways Act, 1890. In the absence of the pleading to that effect, the trial Court did not frame any issue

on that question. The High Court of its own proceeded to consider the validity of the Rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law...”

14. In *State of Haryana v. State of Punjab & another*, (2004) 12 SCC 673, a two Judge Bench of the Apex Court has expressed thus:-

“82..... It is well established that constitutional invalidity (presumably that is what Punjab means when it uses the word “unsustainable”) of a statutory provision can be made either on the basis of legislative incompetence or because the statute is otherwise violative of the provisions of the Constitution. Neither the reason for the particular enactment nor the fact that the reason for the legislation has become redundant, would justify the striking down of the legislation or for holding that a statute or statutory provision is ultra vires. Yet these are the grounds pleaded in sub-paragraphs (i), (iv), (v), (vi) and (vii) to declare Section 14 invalid. Furthermore, merely saying that a particular provision is legislatively incompetent [ground (ii)] or discriminatory [ground (iii)] will not do. At least prima facie acceptable grounds in support have to be pleaded to sustain the challenge. In the absence of any such pleading the challenge to the constitutional validity of a statute or statutory provision is liable to be rejected in limine.”

11. In *Virendra Singh Choudhary v. Union of India & ors.*, AIR

2007 Madhya Pradesh 26, it has been observed that:

“The next spectrum of assail relates to violation of Articles 14, 16, 19 and 21 of the Constitution of India. As far as Articles 16, 19 and 21 are concerned, we are afraid, we may state here that there is no assertion how the provisions offend those provisions of the Constitution. It is well settled in law that a person who assails a provision to be ultra vires must plead the same in proper perspective.”

12. We have referred to the said authorities as we find that in this petition, there is really no pleading as to how the Rule violates the provisions of the Act or violates Article 14 of the Constitution. In spite of the absence of pleading, we still intend to advert to the provisions of the Act and the nature of the Rule in question.

13. The Act was enacted to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils in States and an apex body the Bar Council of India. Section 2(d) defines “Bar Council” to mean a Bar Council constituted under the Act. Section 2(e) defines “Bar Council of India” to mean the Bar Council constituted under Section 4 for the territories to which the Act extends. Section 2(m) defines the “State Bar Council” to mean a Bar Council constituted under Section 3. Section 3(2) provides who shall constitute the members. Section 3(2)(b) which deals with election reads as under:

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

an electorate exceeding five thousand but not exceeding ten thousand, twenty members, and in the case of a State Bar Council with an electorate exceeding ten thousand, twenty-five members, elected in accordance with the system of proportional representation by means of the single transferable vote from amongst advocates on the electoral roll of the State Bar Council.

Provided that as nearly as possible one-half of such elected members shall, subject to any rules that may be made by the Bar Council of India be persons who have for at least ten years been advocates on a State roll, and in computing the said period of ten years in relation to such person, there shall be included any period during which the person has been an advocate enrolled under the Indian Bar Councils Act, 1926.”

14. Section 15 of the Act confers on a Bar Council the power to frame rules to carry out the purposes of Chapter II which deals with Bar Council. Sections 15(2)(a) and (2)(f) read as follows:

“(2)(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;

X X X X

(2)(f) the filling of casual vacancies in the Bar Council”

15. In this context, we may also reproduce with profit Rule (2)(d) which is as follows:

“(2)(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.”

16. On a perusal of the aforesaid provisions, it is quite vivid that the Bar Councils have been conferred with the power to stipulate / provide the manner and the authority which will decide the disputes as to the validity of election to the Bar Council or to the office of the Chairman or Vice-Chairman and further how to fill up any casual vacancy in the Bar Council.

17. Presently, we shall proceed to reproduce the Rules that have been framed by the Bar Council of Delhi. In this regard, Rule 31(A) is reproduced below:

“31.(A) Filling of last Vacancies.

(i) In case of the verdict of the Tribunal being that a candidate was not validly elected, the vacancy thus caused shall be filled in by the candidate who secured the maximum First Preference Votes amongst the unsuccessful candidates.

(ii) Any vacancy caused in the Council because of the resignation, death or retirement, in any manner, of a member before his term of office has come to an end, shall be treated as casual vacancy and shall be filled in by co-option.

(iii) A member co-opted to fill a casual vacancy shall serve for the remainder of his predecessor's term of office.”

18. If we understand the Rules on the anvil of the conferment of power by the Act, we do not perceive that there is any kind of transgression of the Act or attempt to travel beyond the scope of the Act. It needs no special emphasis to state that if a Rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a Rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a Rule must be in accord with the parent statute, as it cannot travel beyond it. In this context, we may refer with profit to the decision in ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav***, AIR 1988 SC 876 wherein it has been held as follows:-

“.....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.”

19. In ***Additional District Magistrate (Rev.), Delhi Administration v. Shri Ram***, AIR 2000 SC 2143, it has been ruled that it is a well recognized principle that conferment of rule making power by an Act does not enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith

or repugnant thereto.

20. In the present case, as we find that the Act confers the power, it can be stated with certitude that there is no transgression or supplanting and, hence, the submission raised on that score deserves to be repelled and we do so.

21. The second limb of submission is that the Rule invites the vice of discrimination as there is irrational distinction between the two categories of vacancies and, therefore, it invites the frown of Article 14. It is urged that there is no intelligible differentia for such classification.

22. It is well settled in law that Article 14 is not averse to classification but there must be intelligible differentia to show that the classification is valid. The doctrine of classification is fundamentally based on a classification with reason and circumstances dealing with one set of facts and the situation or circumstances relating to different set of facts. In this context, we may refer to certain authorities how the facet of classification has been understood by the Apex Court. In *Madhya Pradesh Ration Vikreta Sangh Society and Others versus State of Madhya Pradesh and Another*, (1981) 4 SCC 535, the issue raised before the Apex Court was whether preference given to cooperative societies under the Madhya Pradesh Foodstuffs (Civil Supplies Public Distribution) Scheme 1981 replacing the earlier scheme of running such fair price shop was violative

of Article 14 of the Constitution of India. While dealing with the concept of equality before law, the Apex Court opined thus:

“8. The wider concept of equality before the law and the equal protection of laws is that there shall be equality among equals. Even among equals there can be unequal treatment based on an intelligible differentia having a rational relation to the objects sought to be achieved. Consumers’ cooperative societies form a distinct class by themselves. Benefits and concessions granted to them ultimately benefit persons of small means and promote social justice in accordance with the directive principles. There is an intelligible differentia between the retail dealers who are nothing but traders and consumers’ cooperative societies.....”

23. In *National Council for Teacher Education and Others versus Shri Shyam Shiksha Prashikshan Sansthan and Others*, 2011 (2)

SCALE 59, the Apex Court has opined thus:

“16. Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question. In re the Special Courts Bill, 1978 (1979) 1 SCC 380, Chandrachud, C.J., speaking for majority of the Court adverted to large number of judicial precedents involving interpretation of Article 14 and culled out several propositions including the following:

“(2) The State, in the exercise of its governmental power, has of necessity to

make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no

doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.”

24. In *Transport and Dock Workers Union and Others versus Mumbai Port Trust and Another*, 2011 AIR SCW 220, it has been stated thus:

“21. It has been repeatedly held by this Court that Article 14 does not prohibit reasonable classification for the purpose of legislation or for the purposes of adoption of a policy of the legislature or the executive, provided the policy takes care to reasonably classify persons for achieving the purpose of the policy and it deals equally with all persons belonging to a well defined class. It is not open to the charge of denial of equal protection on the ground that the new policy does not apply to other persons. In order, however, to pass the test of permissible classification, as has been laid down by the Supreme Court in the catena of its decisions, two conditions must be fulfilled; (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that the differentia must have a rational relation to the object ought to be achieved by the statute in question, vide *Gopi Chand v. Delhi Administration*, AIR 1959 SC 609 (see also Basu’s ‘Shorter Constitution of India, fourteenth edition 2009 page 81).

22. Thus the classification would not violate the equality provision contained in Article 14 of the Constitution if it has a rational or reasonable basis.”

25. In this context, we may also profitably produce a passage from *Priyambada Debi versus State of Orissa and Another*, AIR 1993 ORISSA 99:

“5. a classification made by a statute which is under-inclusive, in the sense that while giving benefit some persons who are similarly situated are left out, would be tolerated more by the Courts than one which is over-inclusive (i.e., including not only those who are similarly situated but others

who are not so situated), as a legislative authority acting within its field is not bound to extend its regulation to all cases which it might possibly reach; and a legislature is free to recognize the degrees of necessities and it may confine the provision to those classes of cases where the need seems to be clearest. (See paragraphs 54 and 60 of *State of Gujarat v. Ambica Mills*, AIR 1974 SC 1300, and paragraph 12 of *Shankar Birmiwala v. Union of India*, AIR 1982 Raj 187 (FB).”

26. In *Ram Krishna Dalmia and Ors. v. Shri Justice S.R. Tendolkar and Ors.*, AIR 1958 SC 538, the Apex Court laid down many a principle pertaining to class legislation and also the presumption of constitutionality. Looking at the role of a court while dealing with the presumption of constitutionality, the two principles which are relevant for the present purpose are reproduced below:

“(e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.”

27. In the case at hand, the submission of the learned counsel for the petitioner is that though vacancy for a member occurs, yet two different modes have been provided for filling up the same without any fathomable and acceptable reason and hence, it is discriminatory. It is further submitted that the Rule creates a classification in respect of the vacancies putting them in two compartments though the genus is 'vacancy' and there is no justification for such classification. On a first blush, the aforesaid submission may look quite attractive but on a keener scrutiny, the same has to pale into insignificance. As far as the first category of vacancy is concerned, there is a challenge to the election of an elected candidate before the tribunal and when the tribunal gives a verdict that the candidate was not validly elected, the said vacancy is to be filled up by the candidate who secures the maximum first preference votes amongst the unsuccessful candidates. Thus, the vacancy is caused only after the election of the elected candidate is declared invalid. The election of the elected candidate is the subject matter of dispute and his election is declared as bad / void / illegal. The right to contest an election in any field is basically a statutory right and is controlled by the statute. The reason for providing such a provision is that the candidate who has been declared elected faces a verdict that he

was not validly elected and the vacancy thus caused is of a different nature. True it is, it is a vacancy, nonetheless, the vacancy has a different character. The elected candidate is eliminated from the list of elected candidates. Once there is elimination, the person who secured the maximum first preference votes amongst the unsuccessful candidates is declared elected. Causation of such a vacancy is different from the other category of vacancy which is a casual vacancy occurring because of death, resignation or retirement of a member.

28. The term ‘casual’ has its own connotation. In Black’s Law Dictionary, ‘casual’ has been defined thus:

“Occurring without regularity; occasional; impermanent, as employment for irregular periods.

Happening or coming to pass without design and without being foreseen or expected; unforeseen; uncertain; unpremeditated.”

29. In Chambers 21st Century Dictionary, the word has been defined to mean happening by chance. Thus understood, there is a rationale which is in the compartment of intelligible differentia. Thus, it is possible to treat the two vacancies separately and prescribe different modes for filling of the vacancies. The first one, as we have stated, arises because of disqualification of an elected candidate and the second one, due to resignation, death or retirement of an elected member but before the term

is over. The purpose in both the Rules 31(A)(i) and (ii) is to avoid a fresh election. In the first one, a right is conferred on a candidate on the basis of reasonable criterion which is based on the obtaining of maximum first preference votes. In the second-one, the right has been conferred on the elected members of the Council to fill up the vacancy by co-option. Thus, the distinction is discernible on the prism of reason and hence, it does not invite the frown of discrimination as enshrined under the equality clause of Article 14 of the Constitution.

30. The next plank of submission fundamentally pertains to the conferment of unfettered and unbridled power on the members of the Bar Council, the electoral body, to co-opt a member ignoring the will of the lawyers community at large. We may state here with profit that though we have enumerated the submissions in detail, yet the rest of the submissions will fall under this compartment. It is settled in law that the right to vote or contest in an election is not a fundamental right but a statutory right which has to conform to the organic law and the fountain of all laws, the Constitution of India. The said rights can be restricted on the constitutional parameters.

31. In the case at hand, the Rule provides for co-option. It does not provide for a fresh election. The core issue would be whether every member of the lawyer community should be allowed to vote or the voting

should be restricted and constricted to the elected members. Appositely appreciated, the Rule has a sacrosanct purpose. As has been indicated earlier, it avoids need to hold a fresh election as there should not be another election to fill up casual vacancies, when the term of the Council has not expired. It is expected of the said body to co-opt a person through a democratic process. The Rule instead of full electorate voting again, confers the power on the electoral college to co-opt a member. When there is a statutory body and such power is conferred, it is difficult to hold that unfettered, unbridled and uncanalized power is conferred on them. The Bar Council is a body corporate. It functions in a democratic manner. In a contingency of this nature when the elected body has been given the power, such conferment of power cannot be said to be arbitrary. Merely saying that the same may or should have been conferred on all the voters does not stand to reason. Hence, we are disposed to think that the submission in this regard is unacceptable and accordingly, we repel the same.

32. In view of our aforesaid analysis, we conclude and hold that the Rule 31(A)(ii) is constitutionally valid and not hit by any of the limbs of Article 14 of the Constitution of India.

33. Presently, we shall proceed to deal with whether the method adopted by the members of the Bar Council while exercising the power of

co-option is unjustified and vulnerable. Mr. Mittal, learned counsel for the petitioner in W.P.(C) NO.5198/2010, has submitted that even in the matter of co-option, adequate publicity has to be given so that the members can submit their applications for co-option. It is his further submission that the Bar Council did not keep in view the direction given in paragraph 15 of W.P. No.5198/2010 decided on 4.8.2010. The said paragraph reads as under:

“This court would like the BCD itself, in the first instance, to consider what should be the norms or rules that are required to be followed / framed for considering who should be eligible for being co-opted as a member to fill up a casual vacancy in the BCD.”

34. It is also urged by him that only the names of the persons who had contested the election and faced the electorate at large can be considered for co-option.

35. In this context, we may first appreciate the term ‘co-opt’ which means to elect an additional member by the votes of the existing members. Black’s Law Dictionary defines the term ‘co-optation’ as follows:

“a concurring choice; the election, by the members of a close corporation, of a person to fill a vacancy”

36. In *Revenue Divisional Officer v. Pushpam & Ors.*, AIR 1976

Madras 252, the learned Chief Justice, while considering the co-option

of a woman member to a Panchayat under the provisions of the Tamil Nadu Panchayats Act (XXXV of 1958), construed the word ‘co-option’ in the following manner:

“When it speaks of panchayat's entitlement to co-opt, to our mind, it at once implies the consensus of the members in their entirety, or of the majority of those members, which is ascertained by a process of vote taking. That is what precisely the word "co-option" means ordinarily. For instance the Concise Oxford Dictionary says that co-opt means elect in to a body by votes of existing members. The word is derived from opt which means choose and the choice necessarily involves ascertaining the wishes of each of the members of the panchayat already elected into the body politic.”

37. In view of the meaning conferred on the word, in the case of election, by the members of a body corporate, of a person to fill up a vacancy, the choice is given to the electoral body to co-opt a member. Rule 7 of the Rules provides about the candidate who cannot seek election unless his name is in the electoral roll. It is appropriate to reproduce Rules 7 and 7A for the sake of completeness:

7. Candidates: No person shall be entitled to seek election unless his name is in the election roll.

7(A) No advocate shall be entered on the Electoral Roll if an information obtained by the Bar Council.

(a) he has at any time been removed or

suspended from practice; provided that this disqualification shall operate only for a period of five years from the date of removal or the expiry of the period of suspension.

(b) he has been suspended from practice, provided that this disqualification shall operate only for a period of five years from the date 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 of the Council;

(g) he has intimated voluntary suspension of practice and has not given intimation of resumption of practice.”

38. In this context, it may be stated that co-option and nomination of a member in a democratic set up is not a new phenomenon. Article 171 of the Constitution provides for nomination of members having special knowledge or practical experience in certain fields such as literature,

science, cooperative movement and social science. Thus, in the said Article, there is a specific criterion stipulated for nomination. In the case at hand, as we perceive, the only qualification for nomination has to be that the person is entitled to be elected as per Rules. No special or other qualification is necessary.

39. When co-option takes place, only a person who is eligible and not disqualified to be a candidate in an election can be considered for co-option. It is not necessary or stipulated that he / she should have been an unsuccessful candidate in the last election. If he is ineligible under Rules 7 and 7A of the Rules, he cannot be co-opted. The submission of Mr. Mittal that the next person who has faced the election has to be considered for co-option, we are disposed to think, is not in the scheme of things and, hence, we are unable to accept the same. The other submission that there should have been wide publicity is only to be noted to be rejected for the simple reason that the concept of co-option, as understood in law does not require or prescribe any such requirement. It is the obligation of the electoral college or the Council to see that they co-opt a member who is eligible in law to be elected otherwise. Who should be co-opted as long as he meets the eligibility norm is for the voters to decide. It is the voters' wisdom that prevails and is accepted. In the scheme of co-option, there is no question of any kind of propagation.

The law only mandates that the body or electoral college should either unanimously co-opt a member or do it by majority of votes that being the warrant of law. Thus, the submission raised by the learned counsel for the petitioner is misconceived.

40. At this juncture, we may note that in the earlier writ petition, the learned Single Judge had directed the Bar Council of Delhi to consider the norms or rules that are required to be followed / framed for considering the eligibility of a person for being co-opted as a member to fill up a casual vacancy in the Council. Certain correspondences have been brought on record to show that suggestions were given by certain members that the next to the last elected person should be co-opted due to the demise of late K.K. Sareen, the elected member. A notice was circulated for the following purposes:

“(i) To consider the procedure to be followed / adopted by Delhi Bar Council in the matter of co-option to fill up any casual vacancy;

(ii) To discuss and determine the eligibility criterion for choosing a person for co-option to fill up any casual vacancy;

(iii) To discuss and consider the representation dated 19.07.2010 of Sh. Devendra Kumar Sharma (Copy enclosed) regarding his co-option to fill up the casual vacancy occurred due to the said demise of Sh. K.K. Sareen; and

(iv) To fill the casual vacancy occurred due to the said demise of Sh.K.K. Sareen.”

41. The proceeding that took place has been brought on record which we think apt to reproduce in toto:

“Minutes of the meeting of Bar Council of Delhi held in the office of the Council at 1-F, Lawyers’ Chamber, Delhi High Court, New Delhi on 21.01.2011.

The present meeting was called to consider the representation made by Sh.Vijender Singh Mann regarding his request for co-option, and also for making compliance of the order dated 04.08.2010 and 04.10.2011 of Hon’ble High Court of Delhi, as passed in the Writ Petition titled Devendra Kumar Vs. the State, being Writ Petition No.5198/2010.

The aforesaid orders were circulated amongst the Hon’ble members and they were requested to give their views on the same. The matter was discussed and debated thoroughly in the Council’s meeting, and as a result of the said discussion, three options had emerged.

The first option was to follow the past precedents as regards the procedure of cooption of a member to fill up the casual vacancy. It is on record that in the immediate past, the co-option of a members to the Council was done the basis of the majority decision of the Council, and as such any advocate who was otherwise eligible to be elected as a member of Bar Council of Delhi in terms of the relevant rules, could be co-opted as a members, provided the majority of the members of the Council were to vote in his/her favour. This norm was followed in the past in the case of Sh. Sunil Mittal, Advocate, Sh.Rakesh Sherawat, Advocate and Sh.R.K. Kochar, Advocate all of whom were co-opted in the past by adopting the aforesaid norm. Thus, there are precedents of following the

said norm regarding the co-option of a member to fill up the casual vacancy.

The second option which emerged was having a specific rules to be made and incorporated in this existing rule providing for a co-option of the candidate who contested the election and who was next to the person last elected as a member of the Bar Council. Earlier a representation was also made in this regard by Sh. D.K. Sharma, Advocate who was also heard earlier by the Council.

The third option was to have a specific rule whereby the candidate who had secured maximum number of first preference voters next to the least person so elected as a member of the council in the last election could be co-opted.

The majority of the members consisting of Chairman Rakehs Tikku, Sh. Nitin Hlawat, Hony. Secretary, Sh. O.P. Faizi, Ms. Sarla Kaushik, Sh. Ramesh Gupta, Sh. Ved Prakash Sharma, Sh. Rakesh Kochar, Sh. Vijay Kumar Sondhi, Sh. Puneet Mittal, Sh. Amit Sharma, Sh. Abhay Kumar Verma and Sh. Rajesh Mishra, supported the first option i.e. to follow the past precedents and co-opt an advocate as a member by adopting the norm of co-option on the basis of recommendations of the majority of the members of the Council. Thus, majority of the members voted for the above option. The said course of action would fall within the scope and ambit of clause 15 of the aforesaid judgment dt. 04.08.2010, wherein the Hon'ble Court had itself directed that "BCD itself in the first instance, to consider what should be the norms or rules that are required to be followed / framed for considering who should be eligible for being co-opted as a member to fill up a casual vacancy in the BCD."

According, the aforesaid majority of members of the Council have recommended that the Council

should follow the norm of recommending the name of an eligible advocate to be co-opted as a member. In this view of the said decision / recommendation of the majority of the members, the latter who options were not accepted by the majority of the members of the Council. Accordingly, the representation of Sh. D.K. Sharma and Sh. Vijender Mann were turned down.

Besides the aforesaid members, the other members of the Council who also supported the said option included S/Sh. Surya Prakash Khatri, K.K. Manan, R.S. Goswami, Rakesh Sherawat, Murari Tiwari. However, the other members namely Jaibir Singh Nagar, Vice Chairman, Sh. R.S. Chauhan, Ms. Rana Parween Siddiqui, Sh. Rajiv Khosla and Sh. Jagdev, were not in agreement with the following of the aforesaid option.

According the name of Sh.Aman Sareen, Advocate was proposed by Sh. Puneet Mittal and seconded by Sh. Rajesh Mishra, and the majority of the members present and voting, approved of the same.

Considering the recommendation of the majority of the members as mentioned above, the following resolution was passed:

“Resolved that Mr.Aman Sareen, S/o Late Sh.K.K. Sareen, Advocate, be and is hereby co-opted as a member of the Bar Council of Delhi to fill up the casual vacancy which had arisen on account of untimely demise of the former Chairman Late Sh. K.K. Sareen, and consequently, his name be forwarded to the Govt. of NCT of Delhi for issuing appropriate notification in that regard at the earliest, and the Hony. Secretary of the Council is requested to sign and forward necessary documents, letters etc. in that regard for the concerned authorities.”

A copy of these minutes may also be filed before the Hon'ble High Court in the aforesaid pending Writ Petition.

No other agenda was discussed and the meeting ended with a vote of thanks to the Chair.”

[Underlining is ours]

42. From the aforesaid factual depiction, it is clear as crystal that the respondent no.4, Sh. Aman Sareen, was co-opted on the basis of the majority of votes cast by the members present. Hence, we perceive no illegality in the method of co-option.
43. Ex consequenti, we conclude and hold as follows:
- (a) Rule 31(A)(ii) is constitutionally valid and neither hit by Article 14 of the Constitution of India nor does it run counter to or contravene any of the provisions of the Advocates Act, 1961.
 - (b) The method of co-option is a permissible mode for filling up the casual vacancy.
 - (c) The submission that even for the purpose of co-option there has to be involvement of the larger body is unacceptable.
 - (d) The only qualification for a member to be co-opted is that he should satisfy the criteria enumerated under Rules 7 and 7A of the Bar Council of Delhi Election Rules, 1968.
 - (e) As the respondent no.4, Sh. Aman Sareen, has secured the majority

of votes of the members voting, there is no illegality in his co-option as that is the method of co-option which is permissible in law.

44. In the result, both the writ petitions, being sans substratum, stand dismissed without any order as to costs.

CHIEF JUSTICE

MAY 9, 2011
dk

SANJIV KHANNA, J