

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.21100 of 2021

(Through hybrid mode)

Chinmay Mohanty and another ***Petitioners***

Mr.Asok Mohanty, Senior Advocate

Mr. G.M.Rath, Advocate

-versus-

Bar Council of India and another ***Opposite Parties***

Mr. Amit Prasad Bose, Advocate (for O.P. no.1)

Mr.Amitav Das, Advocate (for O.P. no.2)

CORAM: JUSTICE ARINDAM SINHA

ORDER

04.01.2022

Order No.

10.

1. Two persons have joined as petitioners. Petitioner no.1 claims to be former Chairman of Odisha State Bar Council and petitioner no.2, three times elected member of Odisha State Bar Council. Mr. Mohanty, learned senior advocate appears on their behalf. He submits, election has not been held in the State Bar Council. He draws attention to paragraph 3F of the petition, where there is clear averment that the State Bar Council (O.P. no.2) conducted its last Council Election in year 2014 and tenure of the members expired on 5th May, 2019. There is further statement that the State Bar Council had by letter dated 27th January, 2019 written to Bar Council of India (O.P. no.1) for extension of the term under section 8 in Advocates Act, 1961.

2. He relies on following judgments of the Supreme Court.

(i) **Lakshmi Charan Sen vs. A.K.M. Hassan Uzzaman**, reported in **(1985) 4 SCC 689**, particularly paragraphs 18, 20 and 21.

He submits, this judgment consisting of majority view of four learned Judges, including those expressed in paragraphs relied upon, clearly declares the law regarding the rule relied upon for verification of electoral roll causing elections to the State Bar Council to be pended as creating a vacuum. Election laws abhor a vacuum. There cannot be arrest of the process of election.

(ii) **Kishansing Tomar vs. Municipal Corporation of the City of Ahmedabad**, reported in **(2006) 8 SCC 352**.

He submits, this also is a Constitution Bench judgment of the Supreme Court where the views expressed are unanimous. He relies on paragraphs 19 to 22. Paragraph 20 is reproduced below.

“20. The majority opinion in Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman held that the fact that certain claims and objections are not finally disposed of while preparing the electoral rolls or even assuming that they are not filed in accordance with law cannot arrest the process of election to the legislature. The election has to be held on the basis of the electoral rolls which are in force on the last date for making nomination. It is true that the Election Commission shall take steps to prepare the electoral rolls by following due process of law, but

that too, should be done timely and in no circumstances, it shall be delayed so as to cause gross violation of the mandatory provisions contained in Article 243-U of the Constitution.”

(iii) **Union of India v. S.Srinivasan**, reported in (2012) 7 SCC 683.

Mr. Mohanty relies on paragraph 21, quoted below.

“21. At this stage, it is apposite to state about the rule-making powers of a delegating authority. 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.”

3. Mr. Das, learned advocate appears on behalf of opposite party no.2. He, on behalf of his client has filed memorandum dated 3rd January, 2022 pursuant to direction in order dated 16th December, 2021. In this connection paragraphs 3 and 4 in said order dated 16th December, 2021 are reproduced below.

“3. Mr. Das, learned advocate appears on behalf of the State Bar Council and draws attention to proceedings in 16 Special Committee meeting held on 22nd November, 2021, disclosed by way of compliance affidavit affirmed on 3rd December, 2021. He relies on following in the resolution:-

*“However, it has been **unanimously resolved to conduct the Election to the***

State Bar Council after completion of the time frame indicated under Rule 18, 19, 20, 23 of Chapter-VI of Verification Rules, 2015 read with Part-III, Chapter-I of Bar Council of India Rules.”

4. State Bar Council is required to give dates, of commencement of the time frame indicated and its expiry.”

4. Mr. Das submits, annexed to the memo are official gazette dated 13th January, 2015 notifying Bar Council of India Certificate and Place of Practice (Verification) Rules, 2015 and list of dates of commencement of time frame and its expiry, for holding elections to the State Bar Council. He draws attention to rule 23, which provides, inter alia, as follows:

“23. Updating of the electoral rolls of the State bar Council for the purposes of elections:

xx xx No State Bar Council shall undertake to prepare electoral roll or to conduct elections to the State Bar Councils unless the process of verification of Certificate of Practice and of identification of non-practicing advocates is completed under these Rules by publication of their names under Rule 20.4.

xx xx”

He submits, it is in terms of rule 20 that the list of dates of commencement and time frame have been given. Minimum time to complete the verification process will require 519 days. As such projected time frame expires on 4th January, 2023. He however submits, efforts shall be made to complete the process

by November, 2022. On query from Court he submits, last extension had from Bar Council of India under section 8 expired in November, 2021. Further extensions will be necessary for the purpose of verification and till before its completion, the rules will not allow for holding of elections. On further query from Court, Mr. Das draws attention to paragraph 8 in the preliminary counter filed by his client regarding statements made in paragraph 3F in the petition. Said paragraph 8 is quoted below.

“8. That in reply to para-3E and 3F, it is humbly submitted at the cost of repetition that in consonance with section-8 of the Advocates’ Act, the Orissa State Bar Council in its meeting dtd. 27.01.2019 under additional Agenda-1 resolved that the Bar Council of India may be requested to extend the present term of the elected members for a period not exceeding six months as per proviso to section 8 of advocates’ Act, 1961. Copy of Resolution dtd. 27.01.2019 is filed herewith as Annexure-B/2.”

5. Mr. Bose, learned advocate appears on behalf of opposite party no.1 and submits, it was found that electoral rolls of State Bar Councils consist of persons ineligible to vote. That is why the exercise undertaken, to clear the electoral rolls, of those enrolled but who are not practicing advocates. This exercise required making of the rules by his client, in exercise of powers, inter alia, as in clauses (ag) (ah) and (i) of section 49. Necessarily the provision had to be included pending the elections till the electoral rolls are settled as verified. His client cannot be faulted for having undertaken the exercise. Power

under section 8 has been duly exercised in the circumstances and needs to be further exercised.

6. Fact situation emerging from record of submissions above are clearly similar to those dealt with in paragraphs 18 and 21 of **Lakshmi Charan Sen** (supra). Said paragraphs are reproduced below.

“18. Section 21(3) of the Act of 1950 confers upon the Election Commission the power to direct a special revision of the electoral roll. The proviso to that sub-section also says that until the completion of the special revision so directed, the electoral roll for the time being in force shall continue to be in force. That proves the point that election laws abhor a vacuum. Insofar as the electoral rolls are concerned, there is never a moment in the life of a political community when some electoral roll or the other is not in force.

21. As a result of this discussion, it must follow that the fact that certain claims and objections are not finally disposed of, even assuming that they are filed in accordance with law, cannot arrest the process of election to the Legislature. The election has to be held on the basis of the electoral roll which is in force on the last date for making nominations.”

Above quoted paragraphs were part of the majority view. Sub-section (3) in section 21 of Representation of the People Act, 1950 was under consideration. The proviso says that until the completion of special revision, the electoral roll for the time being in force shall continue to be in force. The proviso in rule 23 is however a departure from said proviso inasmuch as, it bars State Bar Councils from, inter alia, conducting elections

unless the process of verification of certificate of practice and of identification of non-practicing advocates is completed under the rules by publication of their names under rule 20.4. This has been relied upon by the opposite parties in continuing to pend elections, which are long overdue.

7. Section 7 provides for functions of Bar Council of India. Section 15 gives power to Bar Council of India to make rules to carry out purposes of the chapter. General power of Bar Council of India to make rules stands provided under section 49. Obviously the 2015 rules were made by Bar Council of India in exercise of power under section 49. Undoubtedly, there was necessity for verification of electoral rolls as well as conduct of elections to the State Bar Council. Here, it would be useful to reproduce section 8 in Advocates Act, 1961.

“8. Term of office of members of State Bar Council.—The term of office of an elected member of a State Bar Council (other than an elected member thereof referred to in section 54) shall be five years from the date of publication of the result of his election:

Provided 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.”

Also reproduced below is sub-section (3) in section 8-A.

“(3) The Special Committee constituted under sub-section (1) shall, in accordance with such directions as the

Bar Council of India may give to it in this behalf, hold election 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 reason 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.”

It appears from proviso under section 8 that Bar Council of India may by order, for reasons to be recorded in writing, extend the term for a period not exceeding six months. In facts of the present case, it is doubtful whether sub-section (3) under section 8-A can at all be relied upon by opposite parties. This is simply because it is nobody's case that the special committee has undertaken the exercise to conduct elections, giving rise to a situation where Bar Council of India may deliberate whether there should be extension of time to complete the election. Therefore, Bar Council of India could only extend the period for six months beyond May, 2019.

8. It appears from **Lakshmi Charan Sen** (supra) that Parliament while legislating the Act of 1950, provided for continuation of existing electoral roll, while revision thereof was in process. The Bar Council of India, however, appears to have put a bar in conducting elections, till completing verification by the rules. This creates a vacuum but as declared in **Lakshmi Charan Sen** (supra), election laws abhor a vacuum. This Court is convinced that election must be held by the State Bar Council and Bar Council of India is not empowered to have extended the period under section 8 beyond six months on expiry of May 2019.

9. The writ petition succeeds. Rule 23 cannot be read as barring holding of elections against the mandate in section 8. **S.Srinivasan** (supra) is clearly applicable here. Opposite party no.2 will conduct election on the basis of existing electoral roll within six weeks from date of communication of this order.

10. The writ petition is disposed of.

(Arindam Sinha)
Judge

RKS

