

(2017) 05 KL CK 0010
In the High Court Of Kerala
Case No : 21661 of 2016

Adv. P.B. Saharsranaman

APPELLANT

Vs

The Kerala High Court

RESPONDENT

Date of Decision : 22-05-2017

Acts Referred:

[3998](#) Constitution of India, [3998-226](#) Article 226 -
Power of High Courts to Issue certain writs

[52](#) Advocates Act, 1961, [52-16](#) Section 16(2) - Senior
and other advocates

Citation : (2017) 05 KL CK 0010

Hon'ble Judges : Dama Seshadri Naidu

Bench : SINGLE BENCH

Advocate : P. Ravindran, T.S. Harikumar, V.R. Rajesh, N.N. Sugunapalan, S. Sujin, C.S. Dias

Final Decision : Dismissed

Judgement

Introduction :

1. A learned lawyer longs for recognition; he seeks a favour from the judges before whom he pleads daily-designation as a Senior Advocate. The judges, cautious as they are, remain reluctant to confer the favour. They deliberate the issue and calibrate the counsel. They decide that time has not yet come for the lawyer to make the mark, to get the grade, and to earn the distinction. The judges reckon conferring is not for mere asking; it must be earned. So, they refuse. Ruffled, the lawyer questions: he files this writ petition. Is the lawyer impatient, imprudent, impudent, or justly insistent? Facts: 2. P.B. Saharsranaman ("PBSN"), the petitioner, a practicing lawyer, has a standing of 33 years at the Bar. On 29.8.2014, he gave his "consent" to be designated as a senior advocate. The High Court of Kerala considered PBSN's "consent" along with nine other proposals in a Full-Court meeting held on 19.8.2015. Eventually, on 30th September 2015, the Court informed the lawyer that he had failed to secure the votes of two-third judges "present" in the meeting, as required under Rule 6 of

the Rules framed under Section 16(2) of the Advocates Act. 3. Aggrieved, PBSN initially approached the Supreme Court by filing WP (C) No.135 of 2016. Later, he withdrew that writ petition with liberty to move this Court, as seen from the Ext.P10 order of the Supreme Court. Thus, the issue about how an advocate should be designated as a Senior Counsel is before us. Submissions: The Petitioner's: 4. Sri P. Ravindran, the learned Senior Counsel, has submitted that Section 16 of the Advocates Act ("the Act"), dealing with matters such as designating an advocate as a senior counsel, delegates no power to the High Court to frame rules. According to him, only Section 34 of the Act empowers the High Court to make rules: to lay down the conditions, subject to which an advocate may practise in the High Court and the courts subordinate to it. Therefore, the rules framed under Section 16, he contends, are ultra vires. 5. In the alternative, Sri Ravindran submits that the rules framed under Section 16(2) of the Act were misconstrued by the High Court. In elaboration, he emphasizes the expression "consider" in Rule 6: The Chief Justice and other Judges should actively deliberate the merits of the counsel applied. The proposal to designate any advocate as a senior counsel, he argues, shall be treated as rejected only if fewer than two-thirds of the judges "present and voting" "actively" refuse to endorse that proposal. 6. Drawing my attention to the absence of expression "voting" in Rule 6, Sri Ravindran has asserted that the judges' mere presence is not sufficient, and any abstention does not amount to either affirmation or negation of a proposal-the counsel's merit to be designated. 7. In elaboration, Sri Ravindran would contend that a "handful" of judges cast their ballots without indicating their preference; that is, without marking their ballots with either choice: Yes or No. In other words, when there are two columns-Yes and No-against each advocate's name, those judges marked neither "yes" nor "no". So, casting an unmarked ballot is nothing but an abstention, a non-participation. 8. Sri Ravindran has also submitted that despite PBSN's applying under the Right to Information Act to ascertain how many judges abstained from casting their vote, he was only met with a stoic reply: The records had been destroyed. In that context, he has drawn my attention to the Kerala High Court Office Manual, 2015. 9. On how Rule 6 is to be interpreted, Sri Ravindran has taken me through the analogous rules of the High Courts of Delhi, Gujarat, Chhattisgarh, and Karnataka, as well as the Supreme Court. Eventually, he has asserted that the judge's mere presence in the meeting does not amount to his participating in the deliberations. In the end, Sri Ravindran has summed up his submissions that the High Court has grossly erred in its rejecting PBSN's application for designation. High Court's: 10. Sri N.N. Sugunapalan, the learned Senior Counsel appearing for the High Court of Kerala, has submitted, first, that it is only a privilege to be conferred by the High Court, and it cannot be wrenched or exacted. Second, the very concept of "senior designation" expects graceful conduct from the counsel applied. And litigating on a privilege is unconscionable and unheard of, too. 11. PBSN, in terms of Rule 2 of the Rules, while applying, expressly undertook that his application was under Section 16 of the Act and the regnant Rules, argues Sri Sugunapalan. So, PBSN is estopped from questioning the validity of either the

Section 16 or Rule 6. He has also submitted that all the judges present participated in the deliberations. But some judges-of unascertainable number-chose to leave their ballots blank. It can, therefore, be concluded that they did not vote in any applicant's favour. That means, according to Sri Sugunapalan, they did not assent to designating any advocate. 12. On how to interpret Rule 6, Sri Sugunapalan would have us conclude that unlike the Rules of other High Courts, Rule 6, here, is explicit in employing only one expression "present". Any effort to read "vote" to mean "present and vote" would amount to judicial legislation because interpolation in the name of interpretation is impermissible. 13. As to the High Court's destroying the records, Sri Sugunapalan has, first, contended that only the ballot papers were destroyed given their sensitivity; the rest of the record has been preserved. He has also pointed out that through Ext. P12, dated 14.12.2015, PBSN requested the Chief Justice to preserve the records for three months to enable him to approach the Supreme Court. The High Court, instead, waited for about six months. According to Sri Sugunapalan, the High Court's Administrative Committee took a decision on 9.6.2016 to destroy the ballot papers. And PBSN filed this writ petition only on 27.6.2016. 14. Sri Sugunapalan has also drawn my attention to Ext.P14 to hammer home his contention that the High Court has had a consistent practise of destroying ballot papers whenever it deems their destruction appropriate. A case in point is the destruction of the ballot papers of a full-court meeting held on 29.7.2010. The records were destroyed on the same day. 15. In the end, Sri Sugunapalan has submitted that PBSN, viewed from any perspective, does not have a justiciable right, especially, under Article 226 of the Constitution. Therefore, the writ petition deserves to be dismissed in limine. To support his submissions, he has relied on these decisions : *Nalinakhya Bysack v. Shyam Sunder Halder and others* AIR 1953 SC 148, *Veerabhadraiah v. The Union of India and others* ILR 2016 Karnataka 595, *Basant Kumar Choudhary v. Union of India and others* (2005) 53 (1) BLJR 788, *Tamaskar v. High Court of Chhattisgarh and others* AIR 2006 Chattisgarh 153, *Democratic Bar Association Allahabad and others v. High Court of Judicature at Allahabad and another* AIR 2000 Allahabad 300 FB, and *Raghupathy v. High Court of Karnataka and others* (2015) 4 SCC 540. Petitioner's Reply: 16. In reply, Sri Ravindran has submitted that designating an advocate as a senior is not a privilege; on the contrary, it is a statutory right duly recognised under the Advocates Act. He has further submitted that PBSN has impugned neither Section 16 of the Act nor Rule 6 of the Rules. But he has, instead, impugned the interpretative gloss or spin put by the High Court on Rule 6. 17. In elaboration, Sri Ravindran has contended that if we interpreted Rule 6 to mean that a judge's abstention also amounts a "negative vote," it would fall foul of section 16(2) of the Act. It is trite to conclude, according to him, that interpreting a rule-a piece of subordinate legislation-at variance with the parent statute-the principal legislation-is impermissible. Eventually, Sri Ravindran has drawn my attention to Ext.P-9 representation submitted by PBSN to the Chief Justice; he contends that he has so far not received any reply in response. 18. But Sri Ravindran has submitted that the High Court's counter affidavit reveals

that PBSN's Ext.P9 representation stood disposed of through the Full Court's Ext.R1(5) proceedings. But the fact remains, he asserts, that the High Court summarily rejected PBSN's request, despite his specifically raising an issue about abstention by some Judges. 19. To support his contentions, Sri Ravindran has relied on Lily Thomas(Ms.) Advocate v. Speaker, Lok Sabha and another 1993(4) SCC 234, People's Union for Civil Liberties & another v. Union of India and another 2013(10) SCC 1, In Re : Kirloskar Electric Co. Ltd. (2003) 116 CC 413, Arvind Mills Ltd., v. State, (2003 (4) GLR 2968). He has also drawn my attention to Shackleton on The Law and Practise of Meetings Sweet & Maxwell, 13th Ed. to contend that abstention cannot be treated as a negative vote. I must add here: Sri Sugunapalan for the High Court, too, relied on Shackleton-for a contrary proposition. 20. Heard Sri P. Ravindran, the learned counsel for the petitioner and Sri N.N. Sugunapalan, the learned Senior Counsel appearing for the respondent, besides perusing the record. Issues: 21. Section 16 (2) of the Act, read with Rule 6 of the Rules, prescribes how an advocate can be designated as a Senior Counsel. To be designated, the advocate must secure two-third votes of the judges "present at such meeting". The petitioner applied but failed to secure the majority vote. In that context, the following questions fall for consideration : 1. Does the High Court have the power delegated to it to frame the Rules prescribing the procedural norms for designating advocates as Seniors? 2. Has the High Court violated the Kerala Destruction of Records Rules, 1966, by not preserving the ballots cast by the judges? 3. To reckon two-third votes, should the judges who abstained from voting be excluded? Discussion: Statutory Scheme: (a) The Advocates Act: 22. We may begin with the Advocates Act, 1961 ("the Act"). The recommendations of the All India Bar Committee made in 1953, and those of the Law Commission on the judicial-administration reforms legislatively manifested as the Act 25 of 1961. It replaces the Indian Bar Councils Act, 1926, as well as all other laws on the subject, and concerns the standards to be maintained at the bar and in the legal education, too. Its Statement of Objects and Reasons (SOR), among other things, highlights the legislative focus on integrating the Bar into a single class of legal practitioners known as Advocates; the prescription of a uniform qualification for the admission of persons to be Advocates; and the division of Advocates into Senior Advocates and other Advocates based on merit. 23. As a prelude, I may reiterate what the Supreme Court has eloquently expressed in Bar Council of Maharashtra v. M.V. Dabholkar AIR 1975 SC 2092 : The chief function of lawyers is the administration of justice. The Bar is not a private guild, like that of "barbers, butchers and candlestick-makers" but, by bold contract, a public institution committed to public justice and pro bono public service. The grant of a monopoly licence to practise law is based on three assumptions: (1) there is a socially useful function for the lawyer to perform. (2) A lawyer is a professional person who will perform that function and (3) His performance as a professional person is regulated by himself and more formally, by the profession as a whole. The central function that the legal profession must perform is nothing less than the administration of justice. The Advocates Act creates an all India Bar with only one class of legal

practitioners, namely, advocates, who, of course, are classified as Senior Advocates and other Advocates, further avers the Supreme Court in *The Indian Council of Legal Aid and Advice v. Bar Council of India* AIR 1995 SC 691. 24. As asserted in the SOR, Section 16 of the Act classifies advocates into two: senior advocates and other advocates. Subsection (2) sets out how the "other advocates" could become "senior advocates": an advocate may, with his consent, be designated as a senior advocate if the Supreme Court or a High Court is of the opinion that by virtue of his ability, standing at the Bar, or special knowledge or experience in law, the advocate deserves that distinction. 25. Under Section 23, a senior advocate has a right of preaudience in a Court of law. Section 34 (1) of the Act empowers the High Court to make rules laying down the conditions subject to which an advocate may practise in the High Court and the courts subordinate to it. The Bar Council of India, as mandated in Section 49 (ae), can make rules governing how the seniority among advocates may be determined. I reckon "seniority" here is used only in the temporal sense, but not in the titular sense as employed in Section 16 of the Act. Under Section 49 (1) (g) of the Act, the Bar Council of India may make rules prescribing the restrictions in the matter of practise to which senior advocates shall be subject. (b) Rules Framed Under Section 16 (2) of the Act: 26. The High Court of Kerala framed the Rules under Section 16(2) of the Act ("the Rules"). Rule 1 prescribes that the High Court may designate an Advocate as Senior Advocate if that Advocate by virtue of the ability and standing at the Bar deserves such distinction. The explanation appended to Rule 1 explains "standing at the Bar": the position of eminence attained by an Advocate at the Bar by virtue of his seniority, legal acumen and high ethical standards maintained by him, both inside and outside the Court. Rule 2 prescribes the different modes of entertaining the proposal. 27. Pithily put, Rule 2 authorizes three modes of "sponsorship" for an advocate to be designated as a Senior: (i) by the Chief Justice or any of the Judges of the High Court: (ii) by any two senior advocates; and (iii) by an application made by the advocate desiring to be designated as such. If an Advocate is to be considered other than on his own application, the Court must have the concerned Advocate's consent along with the proposal. 28. Rule 3 imposes the age cap: the Advocate to be designated as a Senior Counsel must have completed 45 years of age and actually practised as Advocate for not less than 15 years. In reckoning 15 years, the service rendered by the Advocate as a Judicial Officer will also be considered. Indeed, Rule 4 takes care of the financial aspects of the proposal: the Advocates to be designated should be an Income Tax Assessee for the ten preceding years, and his annual gross income from the profession should be about Rs. 2,00,000/- in the last three years. Rule 5 speaks of the details the application should contain. Rule 6, the fulcrum of our discussion, needs to be quoted verbatim as much turns on it: Rule 6: The proposal for the designation shall be considered at a meeting of the Hon'ble the Chief Justice and the other Judges of the High Court. Such proposal shall be considered as accepted only if not less than two-third of the total number of Judges present at such meeting decide in favour of accepting the application, by

secret ballot. (emphasis added) 29. Rule 7 restrains an unsuccessful applicant from applying for designation for the next two years. Rule 8 prescribes the procedure from undoing the designation already conferred, if a Senior Counsel has violated any or all of the provisions of the Rules prescribed by the Bar Council of India under sub-Section 3 of Section 16 of the Advocates Act, 1961.

30. PBSN has laid down much emphasis on the expression employed in Rule 6 of the Rules: The proposal shall be considered as accepted only if not less than two-third of the total number of the Judges "present" at such meeting decide in favour of accepting the application, by secret ballot. The pivotal expressions in Rule 6 of Rules are these: "Judges present" and "by secret ballot". To have a comparative analysis of the method adopted by other High Courts and the Supreme Court, PBSN has placed on record the Rules from other jurisdictions as well.

(c) The Rules of Other High Courts: (i) Bombay High Court: 31. Rule 5(e) of the Bombay High Court Rules states that the Full Court will accept the proposal "if not less than two-thirds of the Judges "present and voting" at the meeting are in favour of the acceptance of the proposal". In clause (f), it also specifies that a Judge may abstain from participating in the proceedings regarding one or more proposals. Then "abstention will be excluded from consideration while determining whether not less than two-third of the Judges present are in favour of the proposal". The Bombay High Court, too, in clause (g) mandates that the voting will be by secret ballot. (ii) The Delhi High Court: 32. Rule 5 of the Delhi High Court Rules prescribes the procedure for designating an Advocate as a Senior Advocate other than by suo motu designation. Clause (ii) mandates that "if the proposal is approved by a two-third majority of the total ballot cast, irrespective of the Judge casting ballot being present or not in the Full Court meeting, where at least two-third of the total strength of the sitting Judges have cast their ballot, the Advocate concerned shall stand designated as Senior Advocate. While calculating the two-third number of Judges, "the ballot not cast or left blank shall not be counted," and fraction shall be ignored and only whole number shall be considered." (iii) Gujarat High Court: 33. Rule 6 of the Gujarat High Court Rules deals with how the High Court should consider the proposal: Subject to clause (iv) of Rule 6(a), while [the Court] calculating the proportion of two-thirds, only the votes cast as "Yes" or "No" will be counted. "If a Judge abstains/defers from voting for a particular candidate or candidates, the abstained/deferred vote/votes shall not be counted" for calculating the two-thirds required for that candidate. The ballot papers, against each name, will have four columns indicating "Yes", "No", "Deferred" and "Abstained" and when the agenda is taken up for consideration, the discussion concluded, each Judge will cast the ballot in a box separately kept or circulated. (iv) The High Court of Chhattisgarh: 34. The Full Court may consider and decide the recommendations of the Committee "by a two-third majority of the working strength" of the Judges by voting through secret ballot. (v) The Karnataka High Court: 35. The Chief Justice and Judges may "by a simple majority of the Judges present" at the Full Court meeting designate such an Advocate as a Senior Advocate, if in their opinion, by his ability, experience, and standing at the Bar, he deserves such a distinction.

(vi) The Supreme Court: 36. The designation of Senior Advocates flows from Order IV, Rule 2 of the Supreme Court Rules, 2013, which have been framed under Article 145 of the Constitution. The criteria for designation are further supplemented by "various decisions and resolutions adopted" by the Hon'ble Chief Justice of India and the Hon'ble companion Judges forming the Full Court. The Supreme Court, in fact, has framed no rules under Section 16 (2) of the Act. 37. When advocates apply to have the senior designation conferred on them, the list of advocates applied would be circulated simultaneously to the Hon'ble Chief Justice of India and to all the Hon'ble Judges. Only the cases of those Advocates in whose case at least five Judges have indicated that their cases deserve consideration may be put up before the Full Court. This condition will, however, not apply to the retired High Court Judges and the Chief Justices whose cases will be straight away included in the list to go before the Full Court for consideration. The Rules provide for a different procedure about the Advocate General of a State. 38. The Full Court may consider the case of any advocate having less than 20 years standing at the Bar but of extra-ordinary merit, if at least seven Hon'ble Judges opine that the matter be so considered. The views of the Hon'ble Judges for this purpose be ascertained by circulation on receipt of such an application. Once an advocate's request for designation is rejected, he or she cannot renew the request for the next three years. 39. It serves well to quote the stand taken by the Supreme Court in Writ Petition (Civil) No.454 of 2015, pending as on 10.05.2017 before it: the decision of the Full Court of the Supreme Court to confer or not to confer Senior designation on any advocate is a decision taken on its administrative side. And that decision cannot be a subject of judicial review. (d) The Kerala Destruction of Records Rules, 1966: 40. The Government framed these Rules exercising its powers under Section 2 (2) (a) of the Kerala Destruction of Records Act, 1961. These Rules do apply to the High Court as well. The Rules classified the Court's records, registers, books, and the like in the appendices annexed to the Rules. They prescribe different periods for different records. In tune with the Act and the Rules, the High Court has framed the guidelines in its "The Kerala High Court Office Manual, 2015" on how to preserve and destroy the records. 41. Chapter X of the Manual deals with the "closing of files and sending them to the administrative records section." Clause 135 of that Chapter provides for different kinds of disposals. The disposals have these classes: R, T, D, L, N, and F. As to files "containing orders, decisions, or instructions which should be retained for at least ten years should be closed in "D" series. D - denotes Decade." Further, files dealing with matters of routine nature or with unimportant subjects and which can be destroyed after three years should be closed as "L" disposal. L - denotes Lodge. 42. PBSN contends that the records relating to the designation process must fall under D series, or, at least, under L series: to be preserved for a decade or for three years, in the alternative. Issue No.1: Does the High Court have the power delegated to it to frame the Rules prescribing the procedural norms for designating advocates as Seniors? 43. PBSN, initially, contended that the High Court has no rule making power under Section 16 (2) of the Act. Later, during arguments, he seemed to

have given up that plea. He has, instead, contended that the High Court's interpretive spin on Section 16 goes awry. It is too well established to be contradicted that the subordinate legislation may not be a substantial source of power unless the supreme legislation delegates in express terms to that effect. The delegated legislation is primarily a procedural aid, say, to the executive to enforce or fructify the legislative mandate. 44. Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers, observes H.W.R. Wade et al., in their celebrated treatise *Administrative Law*, 14 H.W.R. Wade & C.F. Forsyth, *Administrative Law* (New York: Oxford UP, 10th Ed. 2009) 731. But, in reality, it is no more difficult to justify it in theory than it is possible to do without it in practise. There is only a hazy borderline, according to the learned authors, between legislation and administration, and the assumption that they are two fundamentally different forms of powers is misleading. There are some obvious general differences. But the idea that a clean division can be made (as it can be more readily in the case of the judicial power) is a legacy from an older era of political theory. It is easy to see that legislative power, they further observe, is the power to lay down the law for people in general, whereas administrative power is the power to lay down the law for them or apply the law to them, in some particular situation. 45. Bernard Schwartz in his *Administrative Law*, Bernard Schwartz, *Administrative Law* (USA: Aspen Law & Business, 3rd Ed., 1991) 42 observes: Legislative and judicial powers, as we have emphasized, have become the chief weapons in the administrative armory. The constitutional purist may claim that this sort of authority exercised by the administrator is, at most, only quasi-legislative or quasi-judicial in nature. To soften a legal term by a "'quasi'" is a time-honored lawyer's device. Yet, in this case, it has become wholly illogical thus to grant the fact of administrative power and still to deny the name. 46. Ubiquitous as it is, and unavoidable as an evil it may have been, the subordinate legislation cannot stultify the supreme legislation. It is, at best, a step-in-aid, but not an obstruction to impede a clear legislative mandate. Its presence may compel the administrator to adhere to the standards it has professed through those rules, but its absence hardly amounts to a hindrance. 47. In *Surinder Singh v. Central Government* (1986) 4 SCC 667 at page 673, the Supreme Court has held that where a statute confers powers on an authority to do certain acts or exercise power regarding certain matters, subject to rules, exercising power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words, the framing of the rules is not a condition precedent for the authority to exercise power expressly and unconditionally conferred by the statute. The expression "subject to the rules" only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised under these rules. But if no rules are framed, there is no void; and the authority is not precluded from exercising power conferred by the statute. 48. Here, true, Section 16 does not in so many words delegate any rule-making power to the High Court. But Section 34 (1) is loud and clear. So long as the rule-making

power inheres in a High Court, the invocation of, perhaps, a wrong provision does not vitiate the rule-making process, nor does it denude the High Court its power it has otherwise enjoyed under another provision. In the alternative, I may observe that it is not sine qua non that rules are mandatory to make Section 16 of the Act operative. For one, the Supreme Court has never framed rules on how to confer the Senior designation. 49. To conclude, I may observe that the polemics about the High Court's rule-making powers, its source, and its sustenance avail themselves of nothing substantial. So, the issue renders itself irrelevant and does not call for a definitive finding. Issue No.2: Has the High Court violated the Kerala Destruction of Records Rules, 1966, by not preserving the ballots cast by the judges? 50. On 19th August 2015, the Full Court considered the issue of designating certain advocates as Seniors. Indeed, on 14th December 2015, PBSN wrote to the Chief Justice that he intended to approach the Supreme Court of India "challenging the manner in which the votes are counted." In that context, PBSN requested the Chief Justice to "keep in safe custody the entire records," relating to the Full Court meeting held on 19th August 2015, "for a further period of three months." 51. As seen from the record, PBSN filed Writ Petition (Civil) No.135 of 2016. On 8th March 2016 he withdrew the writ petition with liberty to move the High Court "for appropriate relief." On 9th June 2016 the Full Court took a decision to destroy the ballot papers of 19th August 2015. And they were destroyed soon thereafter. Later, on 27th June 2016, PBSN filed this writ petition. Is Ballot a Record? 52. It is. But the question is, what sort of record is that? Lexically, a "ballot", as defined by the Black's Law Dictionary Black's Law Dictionary, (9th Ed.), is an instrument, such as a paper or ball, used for casting a vote. The term, as a word of art, also refers to the system of choosing officers by a recorded vote, such as by marking a paper. 53. "Record", as a noun, is a documentary account of past events, usually designed to memorialize those events. It is also information inscribed on a tangible medium or that, having been stored in an electronic or another medium, retrievable in perceivable form. The Black's Law Dictionary Id. terms the "Minutes" a record or report. As to the types of record, the same lexicon enlists as records the official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any), and tangible exhibits, (in legal parlance) the clerk's record, or bundle, or docket. Should the ballot Papers conform to the same Rules as to their Preservation? 54. No. Constitutional democracy's cardinal virtue is a citizen's right to exercise his franchise freely and fearlessly, and with an assured guarantee that his preference is not disclosed unless the public policy demands and dictates. True, the exalted democratic process involving the legislative bodies-say, the Parliament or the Assemblies-may not have any parallels with a matter of mundane nature, if I may say so, of designating an advocate as a Senior. But, all the same, a judge's right to vote, and his choice being kept a secret, too, are not negotiable. 55. Judges, too, are human; they have their preferences and predilections. All advocates are the officers of the court, and they are, indeed, a vital cog in the wheel of justice. The judges have their judicial journey smooth when the court

atmosphere is congenial, and the advocates cooperate: the justice delivery system stands benefited, not the judge himself, though. So, the judge is also averse to be abrasive and prefers never to be abusive. His functions are sacrosanct and shun parochial preferences. The justice delivery system modulates the procedural mechanism to ensure that the judge gets the best cooperation from the bar and the best assist him at least, in the matters involving intricate questions of law. Thus came into existence the system of designating a chosen few as the Senior Counsel. 56. As the Bar's cooperation is sine qua non for the justice delivery system's smooth functioning, no judge prefers-and it is inadvisable, too-to express his choices in the open on who should be conferred the designation. Preferring some, inevitably, leads to excluding many. The choice may be purely on merit, but those who miss out cannot help having misgivings about their exclusion. For an advocate ranks himself by what he feels capable of doing, while a judge ranks the advocate by what that advocate has already done. So, no judge prefers to make his choices open. Hence the secret ballot. 57. To sum up, I may say a judge is entitled to secrecy as to his choices; his choices can be revealed only with his consent; and the systemic subtleties insist on secrecy, so must it be public policy. A ballot paper, therefore, though a document, it is a document subjected to secrecy. That said, I must conclude that the ballot papers' destruction is the choice of the judges, the Full Court. And the Kerala Destruction of Records Act, or the Rules, or the Guidelines in the Kerala High Court Office Manual, 2015, do not apply to a ballot paper-a document sui generis. 58. On facts, too, PBSN requested the Chief Justice to preserve "all the records" for three months; they were, in fact, preserved close to six months. Further, to this day, the High Court has preserved every other record connected with the meeting held on 19th June 2015, except the ballot papers. In other words, what was destroyed were only the ballot papers, not the entire record. If we further observe, as a matter of consistent practise, the High Court has been destroying the ballot papers without much delay. In its pleadings, the High Court has provided certain instances; for one, the High Court destroyed the ballot papers of a full-court meeting held on 29.7.2010-on the same day. Issue No.3: To reckon two-third votes, should the judges who abstained from voting be excluded? An Anglo-Saxon Relic: (a) Barrister: 59. Excluding the solicitors, in the English Legal System, the barristers constitute the Bar. Advocacy is the main function of barristers, and "much of their time will be spent in court or preparing for it." Not all qualified barristers work as advocates at the Bar. Like solicitors, some are employed by law centres and other advice agencies, Government departments or private industry, and some teach. Some go into these jobs after practising at the Bar for a time, others never practise at the Bar, Catherine Elliott & Frances Quinn, English Legal System, (Pears/Longman, 10th Ed.) p.187. (b) Queen's Counsel (QC): 60. After ten years in practise, a barrister may apply to become a Queen's Counsel, or King's Counsel if the Sovereign is the King. The QC is sometimes called a silk, as he wears gowns made of silk). This usually means QCs will be offered higher-paid cases and need do less preliminary paperwork. The average annual earnings

of a QC are &#pound; 270,000, with a small group earning over &#pound;1 million a year. Not all barristers attempt or manage to become QCs-those that do not are called juniors, even up to retirement age. Juniors may assist QCs in big cases, as well as working alone, 20 Id, p.190. 61. Elliott et al., observe with a touch of irony, that the future of the QC system was put in doubt when the Office of Fair Trading in 2001 suggested the system was merely a means of artificially raising the price of a barrister's services. The Bar Council counter-argued that, actually, the system was an important quality mark which directs the client to experienced, specialist lawyers where required. QC Designation: 62. In the past the appointment process for QCs was similar to that for senior judges, including the system of secret soundings, and with civil servants, a Cabinet Minister and the Queen all involved. In 2003 the appointment process was suspended, following criticism of the QC system. Appointments were recommenced in 2004 but relying on a new appointment process. The Government is no longer involved. Instead, responsibility for appointments has been placed in the hands of the two professional bodies: the Bar Council and the Law Society. They select candidates based on merit, following an open competition. The secret soundings system has been abolished and replaced by structured references from judges, lawyers and clients who have seen the candidate in action Id, p.191. Approximately 10% of barristers are QCs, and each year 20 to 30% of those who apply are appointed, Royal Commission on Legal Services Report, as quoted in "A Comparative Study of British Barristers and American Legal Practise and Education" by Marilyn J. Berger (<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1152&context=njilb>) accessed on 11.05.2017. In the USA: 63. Licensed attorneys in the United States are permitted to handle virtually any legal matter that a client hires them to handle. The breadth of attorneys' authority in the United States contrasts with the organization of legal professions in some other countries. In Great Britain, for example, there is a traditional division within the legal profession between solicitors, who advise clients and prepare legal documents, and barristers, who present cases in court. Despite their authority to handle any area of law, U.S. lawyers usually specialize in specific tasks or legal subjects. Their specializations usually result from the needs of their employers or from the demands of their clients, Timothy L. Hall, ed., *The US Legal System*, (California: Salem Press, Inc., 2004, Vol.1) 60-61. 64. The terms "lawyer," "attorney," "attorney-at-law," "counselor," and "counselor-at-law" are used generally for their elegance rather than for any difference in meaning: they mean only one thing-an Advocate. Besides the classes of lawyers specializing in various branches of law, the U.S. Legal System has no analogous position to the Queen's Counsel. 65. On the need for specialization in the legal profession, E. Allan Farnsworth in his *An Introduction to the Legal System of the United States* E. Allan Farnsworth, *An Introduction to the Legal System of the United States*, ed. Steve Sheppard (New York: Oxford UP, 2010) 31, observes that the breadth of vision required of the today's attorney is enormous. He quotes an American judge: "The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable . . . His duty to

society as well as to his client involves many relevant social, economic, political, and philosophical considerations." Often the challenge cannot be met by one person alone. The complexity of American law and the flexible and malleable character of American business organisations make increasingly necessary a specialised knowledge of many fields as well as a substantial library. India: 66. The Indian Legal System has been, substantially, modelled after the English Legal System. We can say a designated Senior Counsel is akin to the Queen's Counsel. Supposedly the best and the brilliant-academically, professionally, ethically-get the grade, get designated. We have seen the reservations expressed by the Office of Fair Trading of the UK in 2001 about "artificially raising the price of a Barrister's services." India does not lag; the concern expressed in the UK also applies on all fours here in India, too. Litigation is expensive. But, may be, justice at any cost-at last. 67. Corporatized, the profession gaily mocks at the appendix-like loosely hanging vestigial tail, a triangular pouch, the lawyers still have to their gowns. Apocryphally, it was a pouch, rather a pocket, behind the advocate's left shoulder for the satisfied client to drop whatever money he was pleased to offer for the services he had received. It was kept behind so that the counsel would not know who deposited and how much, lest he should have proclivity towards the client paying more. 68. But rhetoric is not reality, cautions Kaleeswaram Raj in *Rethinking Judicial Reforms*, Kaleeswaram Raj, *Rethinking Judicial Reforms* (New Delhi: Universal Law Publishing, 2017). Observing that quality advocacy is an expensive commodity in the legal market, he invokes Krishna Iyyer J. to bemoan the profession's elitist character. On a contested claim that the Supreme Court is too far away from the common man, given the profession's corporate character; the learned author further observes that "the alienation is not due to geographical or institutional reasons alone. Lawyering, by and large, has become a big industry. The distinction between the profession and the trade is often blurred. The pity, however, is that it often lacks even the fairness of trade. Id. The Designation - the Procedural Nitty Gritty: 69. Section 16 is cryptic. It specifies that there can be two classes of advocates: senior advocates and other advocates. On an advocate's consent, he may be designated as a senior advocate. The designation must be by virtue of the advocate's ability, standing at the Bar, or special knowledge or experience in law. These qualities-not merely physical, academic qualifications-must be to the satisfaction of the Supreme Court or the High Court, the designating authority. 70. The Rules made under this provision supply flesh and blood; they animate the selection process. Rule 6, as observed earlier, is the talisman. Much turns on it. 71. To be designated as a Senior, an advocate of the Kerala High Court needs, as per the Rule 6, "not less than two-third of the total number of Judges present at such meeting." Now we will examine how "two-thirds" is to be reckoned and what "the total number of judges present at such meeting" connotes. 72. Sri P. Ravindran, the learned Senior Counsel, took pains to place before the Court the Rules of many other High Court and the Supreme Court, too. To begin with, the Bombay High Court employs the expression not less than two-thirds of the Judges "present and voting." The Delhi High Court makes it explicit that the

proposal must be approved by "a two-third majority of the total ballot cast." More explicit is the clarification that while the Court's calculating the two-third number of Judges, "the ballot not cast or left blank shall not be counted," and fraction shall be ignored. And only whole number shall be considered. So, the Delhi High Court's provision admits of no ambiguity. The Gujarat High Court, too, follows the Delhi High Court's method: only the votes cast as "Yes" or "No" will be counted. "If a Judge abstains/defers from voting for a particular candidate or candidates, the abstained/deferred vote/votes shall not be counted." 73. The High Court of Chhattisgarh needs "two-third majority of the working strength" of the Judges. The Karnataka High Court, on the other hand, needs a "simple majority of the Judges present" at the Full Court meeting. It is, I may say, analogous to the Kerala High Court's provision save the percentage of majority-two-thirds instead of simple. From the material provided by the PBSN's counsel, I could not ascertain the method reckoning the ballot by the Supreme Court. 74. So, the issue boils down to this: Two-thirds of whom-the judges present, or present and voting, or those who actually expressed their choice; that is, excluding those abstained? Precedential Position: 75. In *Lily Thomas v. Speaker, Lok Sabha*, the issue concerns the motion of impeachment of a sitting Supreme Court judge. Certain members of Parliament abstained from voting. The petitioner contended that as per Article 124 (4) of the Constitution, the abstention amounts to deemed support to the motion. Article 124 (4) mandates that the motion should be supported by a majority of the total members of the House and by a majority of not less than two-thirds members of that House present and voting. The Supreme Court has held that Article 124 (4) does not exclude neutrality or abstaining from voting. The expression "not less than two-thirds of the members present and voting" in the Article implies that the Motion shall be carried only if the requisite numbers expressed their opinion by casting a vote to support the Motion. One may be present and yet not voting. In other words, a right of this nature implies a right to remain neutral as well. 76. Relying on *Lily Thomas*, the High Court of Gujarat in *In re: Arvind Mills Ltd.*, (2002 111 Comp Cas 118 Guj), has held that a bare attempt to vote by depositing blank ballot containing any writing is not effective and cannot be included in the total count. Only those ballots that express voters preference can be counted. The requirement contemplates only two preferences: one affirmative and the other negative. To adopt any other rule would be to say that three ballots were contemplated-one affirmative, one negative, and another neither affirmative nor negative but forming a new class into which all ballots void for any reason must go. 77. The mechanism of negative voting serves a very fundamental and essential part of a vibrant democracy. Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Holding thus, the Supreme Court in *People's Union for Civil Liberties v. Union of India*, (2013) 10 SCC 1 further observes that protecting the elector's identity and affording him secrecy are, therefore, integral to free and fair elections. There can be no arbitrary distinction between the voter who casts his vote and the one who does

not. This NOTA (None Of The Above) case may not have much relevance here.

78. The ground for a no-confidence motion is not justiciable. And it is a matter for consideration only by the Body before which the motion is moved. In *Chathukutty v. Kalpetta Municipality*, 2009(4) KLT 303 this Court has held that a motion of no-confidence does not necessarily depend upon the abilities, capabilities, or qualities of the person against whom it is moved. That is part of political process. Support to a particular person may depend upon various factors; sometimes even unreasonable in the common man's view. A no-confidence motion, the Court holds, does not depend on anything other than the support that it may gather on being moved.

79. A president of a Municipal Board faced a no-confidence motion. The total number of members is 15. The motion should be supported, as per the statute, by a majority of "more than one-half of the total number of the members" of the Board. Eight supported the motion. The question is, does it amount to more than a half? A Full Bench of the High Court of Allahabad in *Wahid Ullah Khan v. District Magistrate*, AIR 1993 ALL 249 FB) has held that "eight would be a majority vote in a total number of fifteen and in case eight persons voted in favour of no confidence motion then that number would be a majority of more than one-half of the total number of members of the Board."

80. Section 391 (2) of the Companies Act requires that a scheme of compromise or arrangement must be approved by majority of creditors/members representing three-fourths in value of the creditors or class of creditors present and voting either in person or where proxies are allowed, by proxy. The voting must be either in the affirmative or in the negative: "yes" or "no" on the ballot paper. While interpreting the expression "present and voting", the High Court of Karnataka in *In Re: Kirloskar Electric Co. Ltd.*, [2003] 116 Com Cas 413 (Kar), has held that a member present and voting may remain neutral, indifferent, unbiased, or impartial-not engaged on either side. One is not supposed to write anything except putting "yes" or "no" either in favour of or against the proposition. A vote cast without indicating the mind of the voter either for or against the resolution is no voting at all. So, in construing whether a resolution is passed by three-fourths majority present and voting, what is to be considered in calculating the majority is not the number of persons present and voting, but the number of valid votes polled in such meeting. The number of valid votes includes only votes indicating the mind of the voter for or against the resolution.

81. *Kirloskar Electric Co. Ltd.*, has emphatically observed that by "voting", the mind, intention, preference of the voter must be clearly expressed. There should be no ambiguity and scope for interpretation. It should be clear, unqualified and pointing. In this context, a voter who is not present at the meeting, who is present and not voting, present and voting by casting a blank ballot, and casting a ballot with conditions and stipulations, all stand on the same footing. It is no "voting" in the eye of law. So, the proper construction to be placed in calculating whether any resolution is passed by a three-fourths majority present and voting necessarily mean three-fourths of the valid votes.

82. A Division Bench of this Court in *Hotel Indraprastha v. Somasekharan Nair* KILR 2015 (4) Kerala 695 has reiterated the proposition expounded in *In re: Kirloskar Electric Co. Ltd.*

83. In a

public interest litigation-T.N. Raghupathy v. High Court of Karnataka, (2015) 4 SCC 540 the petitioner, first, approached a High Court for a mandamus: new norms to designate advocates as senior counsel must be framed strictly in consonance with Section 16 (2) of the Act. The High Court dismissed the writ petition holding that the petitioner lacks standing. On appeal, the Supreme Court has held that the new norms, if to be framed, lie in the realm of the High Court's rule making power. It set aside the impugned order and requested the High Court to entertain the PIL. 84. In Nalinakhya Bysack, the Supreme Court has held that the marginal note cannot control the meaning of the body of the section if the language employed is clear and unambiguous. If the language of the section is clear then it may be that there is an accidental slip in the marginal note rather than that the marginal note is correct and the accidental slip is in the body of the section itself. I do not see much in this case turning on that proposition. 85. In Democratic Bar Association, a Full Bench of the High Court of Allahabad has repelled the contention that the High Court does not have the power to frame rules to regulate the process of designating advocates as senior counsel. The High Court can frame rules, according to the Full Bench, under Section 34(1) read with Section 16(2) of the Act. 86. In Basant Kumar Choudhary, the petitioner contested the classification of the lawyers as irrational and that the classification has no nexus with the object of the Act. According to him, Section 16 provides no guidelines and the powers conferred upon the Judges of the High Court and the Supreme Court are absolutely unguided and unbridled. As the honour of distinction, according to him, is to be conferred by only the Sovereign, its exercise by the judges violates the basic structure of the Constitution. 87. The petitioner, in fact, contended that the Legislature is better suited to confer the distinction. A Division Bench of the Patna High Court has repelled the petitioner's contentions. In that context, a Division Bench of the Patna High Court has observed that a distinction is not to be offered like the cakes or at the drop of a hat, nor can it be purchased in the markets. The distinction is to be conferred "upon the best out of the rest." It has felt that the Legislature, or the Bar Councils, or, for that matter, the Bar Associations are ill-suited to do this job: it leads to many imponderables and impracticalities. The Judges of the High Courts and the Supreme Court, the Bench opines, are best suited to assess the advocates' performance and to confer the distinction, on select advocates. 88. In V.G. Tamaskar, the petitioner wanted the designations conferred on a few advocates quashed. He has, among other things, contended that the advocates designated as senior counsel have not been adhering to the norms fixed by the Bar Council of India. A Division Bench of the Chhattisgarh High Court disagreed. But it has acknowledged that the process has some grey areas. So it has directed the High Court to frame rules within a time-frame. Summation: 89. All the precedents cited at the Bar follow a predictable, uniform pattern: "present and voting" excludes the abstentions. "Of the total strength" includes the abstentions, and treats those abstentions as negative votes. As I have already observed, some High Court-for example, the High Courts of Delhi and Gujarat-specify the consequences of abstentions. 90. We may examine how

legislative houses and other representative bodies reckon the process of ascertaining the majority. In *Shackleton on the Law and Practise of Meetings* Madeleine Cordes, et al., Gen. Edtrs., *Shackleton on the Law and Practise of Meetings*, (London, Sweet & Maxwell, 13th Ed., 2014) 187, Chapter 15 deals with the Members' Meetings and Resolutions. The commentary observes that "abstainers will not count; in other words, if an ordinary resolution is put to the vote and six vote in favour, five vote against, and 12 abstain, the resolution is carried." It further holds that "in general, the wording of the notice relating to an ordinary resolution does not call for the exacting standards of accuracy which are required for a special resolution." 91. In *Robert's Rules of Order*, Robert McConnell Production, *Robert's Rules of Order, Simplified and Applied* (Indianapolis, 2nd Ed., 2001) 115 the question is, do abstention votes count? The commentary observes that the phrase "abstention votes" is an oxymoron, an abstention being a refusal to vote. To abstain means to refrain from voting, and, as a consequence, there can be no such thing as an "abstention vote." *Robert's* further holds that in the usual situation, where either a majority vote or a two-thirds vote is required, abstentions have absolutely no effect on the outcome of the vote since what is required is either a majority or two-thirds of the votes cast. On the other hand, if the vote required is, *Robert's* elucidates, a majority or two-thirds of the members present, or a majority or two-thirds of the entire membership, an abstention will have the same effect as a "no" vote. Even in such a case, however, an abstention is not a vote. 92. Rule 6 of the Rules mandates that the proposal will be considered as accepted only if "not less than two-third of the total number of Judges present at such meeting" decide in favour of accepting the application. That means it is a case of "by majority of those present." Let us illustrate this scenario: 93. If an organization's bylaws state that a majority of those present must adopt a motion, the majority is figured by the number of members present, not by the number of those voting. We will elaborate. 94. A meeting has 20 members present. A majority of those present is 11 votes. This number does not change, no matter how many members present vote. If 15 people vote, and the following occurs: 95. In that meeting, 10 members vote in the affirmative; 5 members vote in the negative; and 5 members do not vote (abstain). The motion fails because 11 people must vote for the motion to sustain a majority of those present and adopt the motion. 96. Aided by that example, *Robert's Rules of Order, Simplified and Applied* observes that those not voting are said to support the negative rather than remain neutral. 97. *Shackleton* *Shackleton*, 86, relied on by both the counsel, sheds further light on the issue. In Chapter 7 dealing with the Conduct of Meeting, the commentary at page 86 defines "Majority": Majority is a term signifying the greater number. In legislative assemblies and deliberative assemblies, it is usual to decide questions by a majority of those present and voting. This is sometimes expressed as a "simple" majority, which means that motion is carried by the mere fact that more votes are cast for than against, as distinct from a "special" majority where the size of the majority is critical. 98. Dealing with special majorities, *Shackleton*, 37 Id. 88 emphasizes that "the

provisions of the relevant statute or rules must be carefully observed." It illustrates this proposition by quoting from Eynsham, Re: where under an Old Act, a motion was to be "determined by a majority consisting of two-thirds of the votes of the taxpayers present" at a meeting, and 37 were present, the votes of 20 ratepayers in favour of the motion (the remainder abstaining) were deemed to be insufficient to comply with the statute. I believe the two illustrations provided by Shackleton and Roberts squarely answer the issue. Conclusion: 99. The interpretive indices strongly suggest that "judges present" is entirely different from "judges present and voting." We cannot judicially legislate by reading "present" to mean "present and voting." It is impermissible. Of the 32 judges present, PBSN did not get a two-thirds majority. He contends that-excluding abstentions, the figure of which is indeterminate-if we count the votes polled, he got 19-and no judge opposed his request. So, he has secured a two-thirds majority. 100. First, no judge abstained; all voted. Some judges left the ballots blank. They did not express their choice. Designating an advocate as a Senior is a conscious act-an administrative one, though. The judges deliberate and calibrate the applicant's merits as have been stated in Section 16 of the Act. However vigorous the deliberations may be, the element of subjectivity in the judges' assessing the advocate's ability cannot be avoided. An advocate's securing majority, again, is an active measure, not a passive one. A state of affairs or a status already existing continues by default so long as those that can alter the position remain inert. On the other hand, a state of affairs to be brought about or a status to be conferred cannot be achieved by default unless there is express, positive, and active effort to bring about that situation. In the judicial parlance, a plaintiff losing does not amount to a defendant's winning. Similarly, an advocate's not getting a no-vote does not amount his getting a positive or a decisive vote. Abstentions apart, what an advocate must secure under Rule 6 of the Rules is two-thirds of positive or "yes" votes of all the judges present. Anything short of this does not enure to the applicant's benefit. 101. I, therefore, hold that the High Court's destroying the ballot papers, and its failing to provide information to PBSN or any other applicant under the Right to Information Act does not alter the resulting position. Listed out, the conclusions are these: 1. "Judges present" differs from "judges present and voting". They both cannot be conflated; nor can they be taken as synonymous. 2. "Judges present" includes the judges abstained or voted "blank." 3. Abstentions, if any, must be counted to reckon two-thirds majority unless the Rules make the position as the High Courts of Delhi and Gujarat have done. 4. The Courts making Rules is not a sine qua non for them to exercise their powers under Section 16 of the Act. 5. "[T]he Conditions subject to which an advocate shall be permitted to practise in the High Court" as prescribed under Section 34 of the Act encompasses the process of designating advocates as Seniors. And the Rules made by the High Court specifying Section 16 of the Act as the source of power do not fall foul. 6. Ballot papers are not part of the record to be preserved; they can be preserved only with the Full Court's consent, not at the request of an applicant. 7. The petitioner has failed to secure two-third votes of the Judges

present in the Full Court on 19th June 2015. So, the High Court's refusal to designate him as Senior accords with the statutory scheme. 8. As to the justiciability of the issue, it seems the issue has already been seized of by the Supreme Court in Writ Petition (Civil) No.454 of 2015; we may await a definitive finding. But, legal nuances apart, litigation for designation robs the advocate of the gravitas the designation demands. 9. And, finally, I may say, the petitioner is neither imprudent nor impudent. He is, perhaps, impatient. His insistence on the Court's conferring on him what is treated as an honour or a privilege fails to gather judicial muster, literally and legally. He may revive his efforts in two years from the day the Full Court rejected his request. Thus, I dismiss the writ petition. No order on costs.