
(1994) 11 PAT CK 0023
In the Patna High Court
Case No : C.W.J.C. No. 6939 of 1994

Sailendra Kumar

APPELLANT

Vs

Chairman Bar Council of India and Others

RESPONDENT

Date of Decision : 02-11-1994

Acts Referred:

Citation : (1994) 11 PAT CK 0023

Judgement

B.P. Singh, J.—The petitioner herein is a practising advocate and a voter entitled to vote at the election held for the purpose of electing members of the Bihar State Bar Council. He has challenged the constitutional validity of Sub-section 3 of Section 8A of the Advocates Act (as amended) on the ground that the aforesaid provisions vest arbitrary and unguided power in the Bar Council of India to constitute a Special Committee for an indefinite period, thereby depriving the members of the Bar from electing their representatives its members of the Bihar State Bar Council for an indefinite period. The petitioner has further impugned the resolution of the Bar Council of India dated 13th February 1994 as also the letter of the Bar Council of India dated 11.4.1994, informing the Secretary of the Bar Council of Bihar that the Bar Council of India had extended for six months i.e., with effect 7.2.1994, the term of the Bar Council of the State which expired on 7th Feb., 1994. He has prayed that the Special Committee constituted u/s 8 of the Act be directed to hold election de novo to the Bihar State Bar Council, and not merely to continue and complete the process initiated by the defunct Bar Council of the State. It is claimed that The action taken by the erstwhile Bar Council of the State have no legal sanctity, and therefore the Special Committee appointed u/s 8A of the Act should hold the election afresh.

2. At the very outset, counsel for the petitioner stated that this matter should not be treated as adversary litigation. The petitioner was. only interested in getting the law declared for the benefit of all concerned, so that it may provide guidance for the future.

3. The relevant facts of the case are not in dispute. Admittedly a notification was published in the Official Gazette on 8.2.1989 notifying the election of the members of the Bihar State Bar Council. u/s 8 of the Advocates Act, 1961 (hereinafter referred to as the Act) the term of office of elected members of State Bar Council is five years from the date of publication of the result of the election. Consequently, the term of office of elected members of the Bar Council of the State was to come to an end on the 7th February, 1994. u/s 8 of the Act as it stood before its amendment by Act 70 of 1993 which came into effect from 27.12.1993. an outgoing member of the State Bar Council could continue in office until the publication of result of the election of his successor. The amendment brought about in the year 1993 made a significant change in Section 8 of the Act, and also inserted a new Section 8A. By the amendment of Section 8 it was provided that where the State Bar Council failed to provide for the election of its members before the expiry of the term of five years, 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. I shall consider Section 8A later. Having regard to the amendment to Section 8 of the Act, a meeting of the State Bar Council was held, and it was resolved that since it had decided to provide for the election of its members and as it was not possible to complete the election before the expiry of the term on 8.2.1994 the Bar Council of India should be requested to extend the term of the State Bar Council for six months. Consequently, an application was made to the Bar Council of India on 27.1.1994 for extending the term of the Bar Council of the State for a period of six months. In the meantime the State Bar Council took steps to provide for the election of its members. Five assistants were required to prepare the draft electoral roll, but on 28.1.1994 the Secretary of the Bar Council of the State wrote to the Chairman that the preparation of draft electoral roll manually would take considerable time, The Chairman directed that the matter be placed before the Executive Committee, which in turn decided to prepare computerised electoral roll. Further steps were taken to entrust the work to a reliable agency and ultimately on 6.2.1994 relevant records were handed over to the computer agency for preparation of the draft electoral roll.

4. It appears that though a request was sent to the Bar Council of India for extension of the term of the Bihar State Bar Council for a period of six months vide letter dated 27.1.1994 no response was received from the Bar Council of India. Consequently, the term of the elected members of the Bar Council of the State came to an end on the expiry of the term of five years on 7.2.1994. However, the Secretary of the Bar Council of the State received a communication from the Secretary of the Bar Council dated 27.1.1994 and informing him that the Bar Council of India had considered the request of the Bihar State Bar Council for extension of term in its meeting held in the month of February, 1994, and that the term of the Bar Council of the State had been extended for six months with effect from the date of expiry of the term of five years i.e. 7.2.1994. It further appears from Annexure 1 that a copy of the relevant extracts from the

minutes of the meeting of the Bar Council of India dated 13.2.1994, was communicated by the Bar Council of India to the State Bar Council as late as on 23.7.1994 i.e. more than five months later. This led the petitioner to doubt that the resolution said to have been passed on 13.2.1994 was not a genuine one. Consequently, we had to request the counsel for the Bar Council of India to produce before us the aforesaid resolution in original for our perusal. The minute book was produced before us and we have satisfied ourselves that the aforesaid resolution was actually passed by the Bar Council of India on 13.2.1994. The petitioner had also not challenged the genuineness of the resolution during the course of argument.

5. The preparation of the electoral roll is a tedious and lengthy process, and the same has to be prepared in accordance with the rules framed by the Bar Council of India. Part-3 Chapter-I of the Bar Council of India Rules provides for preparation of the electoral roll. It requires, that at least 150 days before the date of election, the State Bar Council shall publish notice in prescribed form in the Official Gazette and in two or more local newspapers asking each of the advocates on the roll of the concerned State Bar Council to intimate within the specified period as to whether he had incurred any disqualification mentioned in Rule 2 of the rules. Similar notice is also required to be given to all advocates on the roll of the State Bar Council concerned under certificate of posting. Thereafter a preliminary electoral roll is to be prepared, and is required to be put up on the Notice Board of the State Council 120 clear days before the expiry of the term of the members. The final roll is to be prepared thereafter incorporating such changes as may be necessary. The final electoral roll is required to be put upon the Notice Board of the State Council not more than 75 clear days and not less than 60 clear days before the date of election. On 21.2.1994 the Secretary of the State Bar Council directed for issuance of notice as required under the rules and the same was sent to the "Times of India" and "Hindustan" for publication as required. Thereafter on 2nd of March, 1994 a notice was sent for publication in the Bihar Gazette. The draft electoral roll was prepared on 1st of April, 1994 and the same was thereafter, finalised and published on 17th of May, 1994. The programme for election was published in the "Times of India" on 16.6.1994. The election schedules provided for nomination to be filed between 27th June, 1994 and 2nd July, 1994, The polling was to be held on 1st of August, 1994 and counting was to commence on 4th August, 1994.

6. As noticed earlier the term of the elected members of the Bar Council of the State came to an end on the 7th of February, 1994. On 13.2.1994 the Bar Council of India, extended the term of the State Bar Council for a period of six months with effect from the date of expiry of its term i.e. 7.2.1994. Even the extended term of the Bihar State Bar Council came to an end on the 7.8.1994. By then the election process had commenced and in fact counting of votes began on the 4th of August, 1994, The instant writ application was filed on 12.8.1994.

7. From annexure 3 it appears that the Bar Council of India had communicated

its decision to the Secretary, Bar Council of Bihar, under cover of its registered letter dated 9th June, 1994 that on failure to provide for the election of its members, the Bar Council of India had resolved to nominate the Chairman of the State Bar Council, and in case he was the Advocate General, then the Vice-Chairman of the State Bar Council, and the members of the Bar Council of India for the State, as the two members of the Special Committee constituted u/s 8A of the Advocates Act. After the expiry of the extended term of six months, the Advocate General shall be the Chairman of the three member Special Committee consisting of the other two members nominated as aforesaid. During the pendency of the writ application the Advocate General appeared and informed the court that he had taken over as the Chairman of the three member Special Committee, and that the Special Committee had taken over charge and responsibility with effect from 8.8.1994, after the expiry of the extended term of six months of the State Bar Council. It is also not disputed before us that the election process had continued! and the counting of votes took place even during the pendency of the writ application. The Returning Officer had submitted to the Advocate General the result of the election held on the 1st of August, 1994 declaring 25 members as having been elected. However under Rule 48(1) of the election rules framed by the Bihar State Bar Council, the Advocate General has to certify the same and after certification the list has to be published in the Official Gazette and copy thereof to be sent to the Advocate General and the various associations of advocates in the State of Bihar. Only on publication of the list in the Official Gazette, the persons whose names appear in the list, shall be deemed to have been declared elected to the Bar Council.

8. Learned Counsel for the petitioner submitted that the term of the elected members of the State Bar Council having come to an end on 7.2.1994, and in the absence of any resolution of the Bar Council of India extending the term on or before 8.2.1994, the members of the Bar Council of the State elected in the year 1989 ceased to hold office with effect from 8.2.1994. In these circumstances the only option left to the Bar Council of India was to nominate a Special Committee u/s 8A of the Act as amended. It was not authorised to pass a resolution on the 13th February, 1994 extending the term of the council with retrospective effect i.e, from 7.2.1994. Secondly it was submitted that even if it was assumed that the term of the State Bar Council was validity extended for a period of six months from 7.2.1994, that also came to an end on 7.8.1994. Even on that date the election had not been completed in as much as the result had not been declared. In these circumstances, according to him, it was left to the Special Committee constituted by the Bar Council of India to conduct an election, and in doing so it had to ignore all that had been done by the erstwhile Bar Council which had earlier initiated the process of election. The Special Committee had to conduct the election de novo, and was not authorised to continue the election process and complete the same, as is sought to be done. With a view to appreciate the submissions urged on behalf of the parties, it is necessary to notice the provision of the Advocates Act, 1961, before its amendment in 1993,

and thereafter.

9. Section 8 of the Act as it stood before the amendment reads as follows:

8. Term of office of members of State Bar Council: (1) 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,

(2) An outgoing member shall continue in office until the publication of the result of the election of his successor.

After its amendment in the year 1993 Section 8 reads as follows:

8. The term of office of an elected member of a State Bar Council (other than an elected member thereof referred to in Section 45) 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.

Section 8A was inserted which provides as follows:

8A. (1) Where a State Bar Council fails to provide for the election of its members before the expiry of the term of five years or the extended term, as the case may be, referred to in Section 8, the Bar Council of India shall, on and from the date immediately following the day of such expiry, constitute a Special Committee consisting of-

(i) The ex-officio member of the State Bar Council referred to in Clause (a) of Sub-section (2) of Section 3 to be the Chairman:

Provided that where there are more than one ex-officio members, the senior most amongst them shall be the Chairman; and

(ii) two members to be nominated by the Bar Council of India from amongst advocates on the electoral roll of the State Bar Council,

to discharge the functions of the State Bar Council until the Bar Council is constituted under this Act,

(2) On the constitution of the Special Committee and until State Bar Council is constituted,

(a) all properties and assets vesting in the State bar Council shall vest in the Special Committee;

(b) all rights, liabilities and obligations of the State Bar Council, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Special Committee;

(c) all proceedings pending before the State Bar Council in respect of any disciplinary matter or otherwise shall stand transferred to the Special Committee.

(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 elections to the State Bar Council within a period of six months from the date of its constitution under Sub-section (1) and where, for any 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.

10. It is quite apparent that Section 8 as it originally stood permitted an outgoing member to continue in office until the publication of result of the election of his successor notwithstanding the expiry of the term of five years for which he had been elected. The legislature thought proper that it was not prudent to permit outgoing members to continue in office indefinitely, and therefore by legislative intervention it was provided that where a State Bar Council failed to provide for the election of its members before the expiry of its term of five years, the Bar Council of India may by order, for reasons to be recorded in writing, extend the term for a period not exceeding six months. The legislative intention is apparent, Even under the amended section, the Bar Council of India, was vested with the discretion to extend the term for a period not exceeding six months. Moreover the grant of such extension was to be given for the reasons to be recorded in writing. Obviously, therefore, the extension was to be granted not as a matter of course, but for reasons to be recorded. The purpose sought to be achieved was that election of members of the State Bar Council was held promptly and the members of the State Bar Council should not continue indefinitely after the expiry of the term for which they were elected. Section 8 has to be read with Section 8A which provides for the constitution of Special Committee in the absence of election, It mandates that where the State Bar Council fails to provide election of its members before the expiry of the term of five years or the extended term, as the case may be, the Bar Council of India shall on and from the date immediately following the date of such expiry, constitute a Special Committee. The Special Committee so appointed is to discharge the functions of the State Bar Council until the Bar Council is constituted under the Act. Sub-section 3 of Section 8A provides that the Special Committee so constituted 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. If 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. In the writ petition the constitutional validity of Sub-section 3 of Section 8A was challenged but at the hearing of the writ petition. Shri Basudev Prasad, Senior Advocate appearing on behalf of the petitioner submitted that he was giving up the challenge to the validity of the aforesaid Sub-section. It is therefore, not necessary for me to examine that

question.

It is well settled that merely because a statutory provision uses the auxiliary verb "Shall" or then is absence of the imperative, it does not necessarily follow that the provision is either mandatory or directory. The law was succinctly stated by the Supreme Court in *The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others*, in the following words:

It is needless to say that the employment of the auxiliary verb "shall" is inconclusively and similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any special provision which for instance sets out the consequences of the omission to observe the requirement, but on the purpose for which the requirement has been enacted. Particularly in the context of the other provisions of the Act and the general scheme thereof it would, *inter alia* depend on whether the requirement is insisted on as a protection for safeguarding of the right of liberty of person or of property which the action might involve.

11. The proviso to Section 8 after its amendment vests a discretion in the Bar Council of India to grant an extension of term, not exceeding six months to the State Bar Council which has failed to provide for the election of its members. Before its amendment, Section 8 authorised the members of the State Bar Council to continue in office until the publication of the result of their successor. Under the earlier scheme of the Act, no order extending term was required to be passed by anyone, only after its amendment, it has become necessary for the Bar Council of India to pass an order recording its reason, if the term of the State Bar Council is to be extended. If no such order is passed on the expiry of the term for which they are elected, the members of the State Bar Council cease to hold office, and consequently are not entitled to carry on any of the functions of the State Bar Council. No hiatus is envisaged by the Act, and failure of the Bar Council to exercise its discretion under proviso to Section 8 to the Act, results in the members of the State Bar Council ceasing to hold office. They having been elected to hold office for a fixed term, cease to hold office on the expiry of the term, unless the term is extended.

12. It is futile to urge that the term of the members should be deemed to have been extended, even if no order is passed by the Bar Council of India. The language of the section permits of no confusion or ambiguity. In clear terms, it authorises the Bar Council of India to pass an order, recording the reasons in writing, granting an extension of the term. It is also clear that the extension is not to be granted as a matter of course, because the requirement to record reasons in writing, only emphasises that the order must be supported by good reason. In the absence of good reason, the Bar Council of India may not be justified in granting an extension. Similarly, the extension may be granted for a term not exceeding six months. Therefore an extension may be granted for a term of less than six months. The Bar Council of India has therefore to take into

consideration all relevant circumstances, not only justifying the grant of extension, but also its extent. The reasons that it may record are justiciable, and an aggrieved person may challenge the same before the appropriate forum. All this only emphasises the fact that the grant of extension of term is not a formality, and extension may be granted only on relevant considerations.

13. The question then arises as to at what point of time such discretion is to be exercised. In my view, Section 8 must be read along with Section 8A to find an answer. Section 8A also contemplates a situation where despite grant of extension the State Bar Council fails to provide for the election of its members. In such a situation, the Bar Council of India is authorised to appoint a Special Committee to discharge the functions of the State Bar Council until the Bar Council is constituted under the Act. As I have observed earlier the Bar Council of India may not grant an extension of term in exercise of its discretion under proviso to Section 8. In that event it must proceed to appoint a Special Committee. In the event it grants an extension, and yet the State Bar Council fails to provide for the election of its members, it must appoint a Special Committee in the manner prescribed by Section 8A. In both situations, namely, where the State Bar Council has failed to provide for election before the expiry of its term of five years and when it fails to do so before the expiry of its extended term, the Bar Council of India is obliged "on and from the date immediately following the day of such expiry" to constitute a Special Committee. The use of the words "on and from" is significant and implies that the order appointing a special committee must fulfil both conditions. It must be passed "on" the date immediately following the day of such expiry and must also have effect "from" such date. The use of the conjunction "and" rules out the possibility of the order being passed on any subsequent date, but with effect from an earlier date. If any other interpretation is given to those words, it may create uncertainty and confusion. After the expiry of the term, the members of the State Bar Council may continue to function, not knowing whether their term will be extended. They may take important decisions, and if subsequently their term is not extended, the liability and obligations created by them may become illegal and invalid. Moreover, their term having come to an end, they cannot continue in office except in accordance with the provisions of the Act. The Act requires that the term can be extended only by an order passed by the Bar Council of India for reasons to be recorded in writing. The law insists upon a positive action by the Bar Council of India before any extension of term can be granted. In its absence, the members of the State Bar Council cease to hold office on the expiry of the term for which they were elected. The inaction of the Bar Council of India will not inject life into a body which dies a natural death by efflux of the term for which it was elected under the Act.

14. I have therefore no hesitation in coming to the conclusion that the order extending the term of the members of the State Bar Council must be passed latest by the date immediately following the day of expiry of the term of such members. If no such order is passed, the members whose terms have expired,

cease to hold such office. As a consequence, and as of necessity, the Bar Council must appoint a Special Committee as contemplated by the Act since the State Bar Council cannot be revived once its members have ceased to function by reason of ceasing to hold office on expiry of the term for which they were elected.

15. A question may very well arise whether the Bar Council of India can exercise its discretion even before the expiry of the term of the elected members of the State Bar Council, or the extended term, as the case may be. In my view there is nothing in the Act which prevents the Bar Council of India from doing so. The time prescribed for passing the order only mandates the Bar Council of India to exercise its discretion not later than the date immediately following the day of expiry of the term, so that there is no uncertainty about the status of the elected members of the State Bar Council, and a hiatus is avoided. There are good reasons to support this conclusion. It is well settled that if the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative constructions. As was observed by Lord Shaw in *Shannon Realities Ltd. v. St. Michel* (1924) A.C. 185 (PC), "where words of a statute are clear, they must, of course, be followed, but in their Lordships' opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the Statute purports to be regulating; and that alternative is to be rejected which will not reduce uncertainty, friction or confusion into the working of the system."

16. Applying the principle to the case in hand, it will be seen that the very purpose of extending the term of the members of the State Bar Council, it to enable the Council to provide for the election of its members, which it had failed to provide before the expiry of its term. In fact, even the appointment of the special committee is with a view to conduct the aforesaid election which the State Bar Council failed to provide. That is why Section 8A(3) enjoins upon the Special Committee the duty to hold the election within six months. There is of course a provision for the extension of its term, but that may be granted with a view to achieve the same objective. I have also noticed earlier the detailed and lengthy procedure prescribing the manner in which the election has to be conducted, Considerable time is consumed in preparing the final electoral roll, and thereafter as well, some time is bound to be consumed in taking other necessary steps. Such being the position, and having regard to the time bound procedure prescribed by the Rules, the Bar Council of India may well be in a position to assess whether the State Bar Council will be able to complete the process of election before the expiry of the term. If it finds that the process of election may not be completed before the expiry of term of the members of the State Bar Council and the facts and circumstances afford a good ground for grant of extension, it may as well pass an order granting extension of the term which may take effect upon expiry of the term of the elected members of the State Bar Council. It need not wait till the last date to take the decision. If this is insisted upon, it will create considerable practical difficulties for Bar Council of India in

exercising its power under Sections 8 and 8A of the Act. It will mean that on the very last day of the term of a State Bar Council, the Bar Council of India must hold a meeting to take a decision. It being an All India body, it may not be possible for it to take any decision without sufficient notice to its members. Several meetings may have to be held at short intervals to take decisions in regard to several State Bar Councils whose terms may be expiring on different dates within a short span of time. There is no reason why the Bar Council of India should wait till the last day to pass an order. If the object of the provision is to avoid any uncertainty about the status of the elected members of the State Bar Council after expiry of their term, that can be well achieved by passing an order even earlier, without waiting for the last day, but to make the order operative with effect from the date immediately following the day of expiry of term of the elected members. All that the act insists upon is that such an order of extension should not be passed later than the date immediately following the day of expiry of term of the members. Consequently an order granting the extension, or refusing to grant an extension and appointing a Special Committee instead, can be passed earlier than the date of expiry of the term, but so as to be operative from the date immediately following the day of expiry of term of the members of the State Bar Council.

17. In the instant case, the extended term of the State Bar Council expired on February 7, 1994. Consequently, the Bar Council of India was required to pass an order extending the term on or before February 8, 1994. Admittedly, that was not done. The elected members of the State Bar Council therefore ceased to hold office with effect from February 8, 1994. The order extending the term was passed on February 13, 1994. In my considered opinion, the aforesaid order was illegal, not having been passed on or before the last date prescribed by law for passing of such order. In the absence of such an order, the elected members of the State Bar Council ceased to hold office with effect from February 8, 1994, and the order subsequently passed could not have the effect of reviving their membership of the State Bar Council which came to an end by operation of law.

18. There is yet another reason why the order/resolution dated February 13, 1994 cannot be sustained. As noticed earlier, the proviso to Section 8 provides that the Bar Council of India may, by order, "for reasons to be recorded in writing", extend the term for a period not exceeding six months. Counsel for the petitioner contends that the resolution of the Bar Council of India dated February 13, 1994 discloses no reason for the grant of extension. The contention has force and must be upheld. For the sake of convenience the aforesaid resolution is reproduced below:

The Council considered the reports of S/Shri V.S. Mishra, Chairman and K.J. Shethna, Member in regard to the term of office of the Members of the State Bar Councils under the Advocates Amendment Act No. 70 of 1993 and resolves that the term of five years of the State Bar Councils viz. West Bengal Himanchal Pradesh, Gujarat, Tamil Nadu and Uttar Pradesh be extended till 25th June, 1994

u/s 8 of the Advocates Amendment Act No. 70 of 1993.

Shri D.V. Patil dissented and the rest of the members cast their votes in its favour and the resolution is declared passed.

It is further resolved that in the case of State Bar Council of Bihar whose term of five years is expiring some-time in February, 1994 be extended for six months more from the date of expiry of the term of five years.

On a bare reading of the resolution it is apparent that no reasons have been recorded by the Bar Council of India while granting extension of term to the State Bar Council. In fact the terms in which the resolution has been passed, give an impression that the Bar Council of India was passing the resolution on the assumption that the term of the State Bar Council was yet to expire. This factual assumption is also incorrect, as the term had expired on February 7, 1994. What is however, material is the fact that no reasons have been recorded, however brief. All that is apparent is that the Bar Council of India had two reports before it. What the reports contained is not known, but in any event no reasons have been recorded even if they were based on the reports. The existence of such reports is not a substitute for the reasons which are required to be recorded in writing. The reasons only can give an indication as to how the mind of the Bar Council of India worked, what were the considerations taken into account and what factors influenced the taking of such decision. Counsel for the Bar Council of India stated that apart from the resolution, there is nothing to show that reasons were recorded at any other place.

19. It is well settled that where the law requires the concerned authority to record reasons in writing for the action taken by it, in the absence of recording of such reasons the action itself is vitiated. The reasons for recording of the reasons is to enable any person aggrieved by the action taken, to approach the appropriate forum challenging the order passed or the action taken on the grounds inter alia that it is malafide or arbitrary, or that it is based on irrelevant or extraneous considerations see *Ajantha Industries and Others Vs. Central Board of Direct Taxes, New Delhi and Others*, . In the event of such challenge to the action taken, such action can be defended only on the basis of the reasons recorded in writing. Those reasons must appear on the face of the order and there should be no need to infer or guess the reasons which might have prompted the action taken or the order passed. Even if it be assumed that relevant material existed justifying such an action or order that will not absolve the concerned authority of its obligation under law to record its reasons, even though based on such material available to it. The reasons required to be recorded in writing only will disclose the manner in which the mind worked, and what was taken into consideration, and what was ignored, while passing the order or taking the action impugned. Only then it can be judged whether the action was malafide or arbitrary, whether it was based on irrelevant or extraneous considerations. The reasons need not be detailed as in the case of judgments of a court of law, but however brief, they must disclose the manner in which the mind worked and the

considerations taken into account.

20. The resolution of the Bar Council of India dated February 13, 1994, discloses no reason whatsoever, only the decision, and not the reasons therefor, is apparent. The resolution is bad for this reason as well. The recording of reasons is another face of fairness in action, and where the law enjoins in express terms a duty to record reasons, the same cannot be ignored lightly.

21. Counsel for the respondents relied upon a decision of this Court dated 21st Sept, 1994 in C.J.C. No. 6444 of 1994 (reported in 1994 BBCJ 591) and submitted that the aforesaid decision of a Division Bench of this Court is binding upon us and therefore we are bound to hold that the extension of the term of the State Bar Council was done in accordance with law and that the Bar Council of India had given reasons for grant of such extension. On the other hand counsel for the petitioner submitted that the aforesaid earlier judgment of the court was rendered per incuriam. Provisions of Section 8A of the Act, which are most crucial, were not brought to the notice of the Court, nor did the Court of its own noticed the aforesaid provisions which clearly contemplate the exercise of power by the Bar Council of India at a particular time. If the aforesaid provision had been noticed by the court, the Court may well have come to a different conclusion. On the question as to whether the Bar Council of India had recorded its reasons while granting extension, it was submitted that the conclusion reached by the earlier Bench was in the teeth of the law declared by the Supreme Court of India holding that the reasons must appear from a bare reading of the order, and must not require argument or involve any guess work or conjecture as to what possibly could be the reasons for making the order.

22. The submission urged on behalf of the petitioner has force and must be accepted. I have carefully perused the aforesaid decision of this Court, with the care that it deserves, particularly as I have great respect for the learned judges deciding the case. It is no doubt true that the question was precisely urged before the court that the life of the elected body could be extended for a period of six months only by an order to be passed by the Bar Council of India before expiry of the term of five years. Since such an order was not passed within the period prescribed the announcement of the election programme by the State Bar Council after that period was illegal and therefore it was contended that the Bar Council had no jurisdiction to conduct the election. The learned judges noticed the fact that the term of the State Bar Council expired on 7.2.1994 but the order extending the term was passed only on 13.2.1994. Their Lordships noticed Section 8 of the Act as amended, and relying upon the proviso of the aforesaid section, held that the power of extension under the proviso could be exercised if before the expiry of the term the State Bar Council failed to hold the election, it held:

therefore from a plain reading of the aforesaid provision, it would be apparent that election would be held even by the last date on which the term is to expire and the question of extension arises only if by the last date the election is not

held. If the power of extension is exercised before expiry of the term, the same in my view, would be premature. If the legislature would have intended that the order of extension would be passed before the expiry of five years nothing prevented it from incorporating in the proviso that Bar Council of India may, before expiry of the term, by order, extend the said term.

23. It is apparent from the judgment of this Court that the conclusion was reached on the basis of the provisions of Section 8 of the Act only. Section 8A of the Act was not brought to the notice of the Court. I have earlier noticed the provision of Sections 8 and 8-A of the Act, and in my view both the provisions have to be read together to answer the question raised at the Bar. Section 8A which according to the is the most relevant provision for answering the question, was not noticed by the learned judges in the earlier case.

24. On the second question as to whether the reasons were recorded in writing, in the earlier decision it was observed:

In the present case, from the aforesaid facts, it would appear that the Bar Council of India at the time of passing the order of extension has taken into consideration request of the State Bar Council and report submitted by the Chairman and member of the Bar Council of India on the said request, therefore, it cannot be said that the order has been passed without recording any reason.

25. From the above it would appear that the mere fact that the order was passed on the request of the State Bar Council and report submitted by the Chairman and one of the members of the Bar Council of India, the Court held that the requirement of recording reasons was fulfilled. With great respect, the conclusion reached cannot be supported in view of clear pronouncements of the Supreme Court that if a law requires the reasons to be recorded, the same must be expressly recorded in the order itself, or at any other place, so that it challenged, the forum before which the order is challenged can look into those reasons to judge the validity of the action. Their Lordships did not held that the reasons were recorded, hut at best held that there were reasons for passing the order. What those reasons were is not known, and perhaps can be gathered from the requests made by the State Bar Council and the reports submitted by the Chairman of the Bar Council of India and one of its members. The requirement of law is not that there Should be reasons for the order, because that is implicit in the exercise of all powers by an authority to save it from the vice of arbitrariness. That the law expressly required the Bar Council of India to do was to record the reasons which justified the grant of extension of term to the State Bar Council. There reasons must appear on the face of the order, or if recorded elsewhere, they should be so retorded as to be available for scrutiny. From the requirement that reasons must be recorded it follows that the exercise of power is not merely administrative but partakes of judicial or quasi-judicial character. The correctness of the reasons, therefore, may have to be tested before the forum established by law.

26. It is not necessary to refer to the several authorities cited at the Bar for the proposition that a judgment rendered per incuriam is not a binding precedent. It is not disputed that a judgment rendered in ignorance of a material statutory provision, or the relevant law applicable to the case, or a judgment rendered contrary to a binding precedent of the same court or superior court, is a judgment rendered per in-curiam, and therefore is not to be treated as a binding precedent. I am, therefore, inclined to uphold the submission of the counsel for the petitioner that the aforesaid earlier judgment of this Court was rendered per incuriam and cannot, therefore be treated as a binding precedent.

27. Counsel for the petitioner then submitted that if the term of State Bar Council was not extended in accordance with law, the continuance of the State Bar Council after expiry of its term was illegal. Consequently all actions taken by it for holding the election were also illegal. No election should therefore be held on the basis of the earlier actions taken by the State Bar Council, and the only option for the Special Committee is to take steps for holding the election de novo. The argument is plausible, but must be rejected. Counsel for the respondents rightly submitted that having regard to the facts of this case, by application of the de facto doctrine the actions of the Bar Council taken during the extended term must be held to be legal. There is good authority to support the argument. In *Gokaraju Rangaraju Vs. State of Andhra Pradesh*, the Supreme Court was dealing with a case where appointment of an Additional Sessions Judge had been declared by the Supreme Court to be invalid. The question arose as to whether the judgments pronounced by the judge, prior to such declaration, were void. The court on a careful consideration of the authorities on the subject held:

The doctrine is now well established that the acts of officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding as if they were the acts of officers de jure.

The court held that the doctrine is founded on good sense, sound policy and practical experience. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids endless confusion and needless chaos. An illegal appointment may be set aside and a proper appointment may be made, but the acts of those who hold office de facto are not so easily undone and may have lasting repercussions and confusing sequels if attempted to be undone. Hence the de facto doctrine. In that case it was held that a judge de facto is one who is not a mere intruder or usurper but one who holds office under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine borne of necessity and public policy to prevent needless

confusion and endless mischief.

28. The same principle was reiterated by the Supreme Court in *Beopar Sahayal Pvt. Ltd. v. Vishwanath and Ors.* AIR 1987 SC 211. In that case the of the prescribed authority was found to be illegal in as much as he did not possess the requisite qualification for being appointed as such authority. An order of release passed by such prescribed authority under the local Act was challenged, and one of the grounds of attack was that the prescribed authority did not have the requisite qualification for being appointed as such authority, and consequently the orders passed by him were null and void as he had no jurisdiction. The argument was repelled and it was held that in such a case the de facto doctrine would be attracted. Assuming that he did not have the requisite experience, he could not be holding the office as a usurper, but would be deemed to be holding the office under colour of lawful authority.

29. I shall not advert to the facts of the instant case. It is not in dispute that the State Bar Council was lawfully elected in the year 1989. Its term was to expire on the 7th of February, 1994. The law provides that the Bar Council of India may grant an extension of term not exceeding six months. The Bar Council of India did pass a resolution extending the term of the State Bar Council for a period of six months. It did so in purported exercise of power vested in it under the proviso to Section 8 of the Act. It is not as if the Bar Council of India lacked inherent jurisdiction to pass such an order. It is also not anyone's case that State Bar Council of its own continued to function as the Bar Council. The continuance of the State Bar Council was consequent upon the order of extension passed by the Bar Council of India. The State Bar Council thereafter started performing its statutory duties in purported exercise of authority lawfully vested in it by the Act. The purported discharge of such duties has not to achieve any person gain for any of the members. Their actions were calculated to provide for election of the members of the State Bar Council which they were obliged in law to provide. The electoral roll was got prepared and the programme for the election was finalised and notified. In a nutshell, by reason of the grant of extension of term by the Bar Council of India, the State Bar Council continued in office and performed its statutory duties. In these circumstances it cannot said that the members of the State Bar Council were usurpers, nor can it be denied that they exercised jurisdiction under colour of lawful authority, even though the extension of the term has been subsequently found to be defective. In these facts the de facto doctrine must apply and I am not prepared to go to the extent of holding that all actions taken by the Bar Council after the expiry of its initial term are void by reason of the order of extension being defective in law. The validity of such actions taken by the State Bar Council, by application of de facto doctrine, must be upheld as if the State Bar Council acted de jure.

30. It was then contended by counsel for the petitioner that the Special Committee when appointed must take steps de novo to hold election to the State Bar Council. The first ground on which the argument was sought to be sustained

has been negated by the fact that since I have held that the action of the State Bar Council during its extended term cannot be termed as void, necessitating the Special Committee to take all actions de novo. But, counsel for the petitioner urged before us that even if the term of the State Bar Council was duly and validly extended, but the State Bar Council during its extended term still failed to provide for election to the State Bar Council, the Special Committee upon its appointment must ignore the steps taken by the State Bar Council towards providing for elections, and must proceed de novo to conduct elections to the State Bar Council, contended that whereas the proviso to Section 8 refers to the failure of State Bar Council "to provide for the election of its members" and the same words are used in Section 8A with regard to failure of the State Bar Council to provide for the election of its members even during the extended term, in Sub-section 3 of Section 8A, the mandate to the Special Committee is to "hold elections to the State Bar Council". Counsel referred to several authorities in support of the argument that "to hold elections" must include not only the voting and declaration of results, but all other steps which are required to be taken for initiating the process of election and completing the same. That would include the preparation of electoral roll, nomination of candidates, recording of votes, counting of votes, declaration of result and notifying of result. It has not been disputed before us that the expression "to hold election" may include all these, but the submission urged is as to whether in the context in which the words are used in Sub-section 3 of Section 8A, that meaning is intended. Counsel for the petitioner submitted that the language employed by the legislature in proviso to Section 8 and in Sub-section 1 of Section 8A is different from the words used in Sub-section 3 of Section 8A. He sought to draw a distinction between the words "to provide for election" and "hold election". While the former, was descriptive of the act to be performed by the State Bar Council during its initial term of extended term, the latter was descriptive of the function to be performed by the Special Committee. He argued that since different words would have been used in the same Act at different places, they must of necessity be given different meanings. On the other hand counsel for the respondents submitted that the words have to be given a meaning in the context in which they occur so as to make the scheme of law workable and not to make it unworkable and difficult to achieve the object. It was submitted that while giving contextual meaning, it has been held that the same word used in different parts of the same Act and even in the same section, may be given different meanings. Therefore, there is no strength in the plea that if the legislature intended to give the same meaning though using different words, the courts must still give the words different meaning, contrary to the intention of the legislature. This question of course can arise only where the words are capable of bearing more than one meaning.

31. I have carefully considered the arguments addressed at the Bar. On a reading of Sections 8 and 8A of the Act, the scheme of the section appears to be unambiguous and clear. In the proviso of Section 8 and Sub-section 1 of Section 8A the words used are "to provide for election". Counsel for the respondents

urged the extreme submission that if any one of the steps for holding the election was taken by the State Bar Council, it cannot be said that the State Bar Council had failed "to provide for election". In my view this extreme argument must also be repelled. The law casts an obligation on the State Bar Council to see to it that before expiry of its term the successor members of the State Bar Council are elected. This naturally would mean that the State Bar Council is under an obligation to complete the process of election before expiry of its term. If it fails to do so a provision has been made for extension of the term for a period not exceeding six months. The failure of the State Bar Council has been described as its failure "to provide for the election of its members". This would obviously mean its failure to conclude the process of election before expiry of its term. If some steps have been taken and some other steps are still required to be taken, when its term expires, the Bar Council of India may grant an extension of the term so as to continue the process of election. It is, therefore, that the Bar Council of India has a discretion not only in the matter of grant of extension but also in the matter of the extent to which such extension may be granted, which in no case shall exceed six months. It is therefore expected that the Bar Council of India must make an appraisal of the steps taken by the State Council and grant extension of term only to the extent necessary. What is however clear is that failure to provide for election means failure to complete the process of election before expiry of the original term or the extended term, as the case may be. When the State Bar Council fails to do so, the Special Committee is appointed, charged with the duty to "hold elections". In other words the Special Committee is required to do that which the State Bar Council failed to do. Obviously, therefore, the State Bar Council as well as the Special Committee are required to do the same thing, namely to conduct the election of the members of the State Bar Council. In the context, therefore the legislature intended to give the same meaning to the words "to provide for election" and to "hold elections", namely, to initiate and complete the process of election ending in the publication of the result in accordance with law.

32. The petitioner contends that the Special Committee should not, even otherwise, hold elections on the basis of the steps already taken by the State Bar Council and therefore, must in all cases initiate the process de novo. Neither it is practical nor it is warranted to give such meaning to the words used in Sub-section 3 of Section 8A. If the action of the State Bar Council is not illegal, the steps taken by it cannot be said to be tainted with illegality. If steps have been taken by the State Bar Council in accordance with law, and there is no reason to doubt the legality and genuineness of the actions of the erstwhile members of the State Bar Council, there is no reason for the Special Committee to start the process of election de novo. It may continue the process from the stage where it was stopped when the term, or the extended term of State Bar Council, expired/ The Special Committee is obliged in law to continue the process of election so as to bring it to a conclusion by notifying the result in accordance with law.

33. It should however be noticed that the Special Committee has to take its own-

decision in the matter of holding election. If it is satisfied that the process of election earlier initiated by the State Bar Council was in accordance with law, it may continue with the process and conclude the election as soon as possible. However, if the Special Committee finds that the procedure adopted by the erstwhile members of the State Bar Council was either irregular or that the steps taken lacked bona fides and were not in accordance with law, there is nothing in Section 8A which prevent the Special Committee from holding an election de novo. It is the Special Committee which must exercise this discretion. This Court will not issue a writ commanding the Special Committee to hold an election de novo. The Special Committee is expected to exercise its power fairly and in accordance with law with the sole objective of holding a fair election.

34. There is another reason why I am not persuaded to issue writ of mandamus directing the Special Committee to hold election de novo. If the argument, is accepted the time consuming process of preparation of electoral roll, nomination of-candidates, recording of votes etc. which had,taken place before the Special Committee was appointed, will be rendered futile,. If the petitioner was aggrieved by the fact that the extension of the term of State Bar Council was not granted in accordance with law he ought to have approached this Court forthwith. The term of the State Bar Council expired on 7.2.1994 and the order granting extension was passed on 13.2.1994. The instant writ application was filed on the 12th of August, 1994 i.e. after the Special Committee was appointed and must be deemed to have taken over"its responsibilities on 7.8.1994. During this period several steps were taken by the State Bar Council to provide for the election, which even otherwise has been held by the not to be illegal. Since the petioier had approached this Court after much delay, in exercise of discretion this Court may refuse to grant the relief prayed for, particularly when refusal of such relief does not have the effect of perpetuating an illegality. This however is not the only ground for refusal of the relief prayed for because even otherwise I have come to the conclusion that the steps taken by the State Bar Council were not void even if the order granting the extension of term is now found to be defective.

35. In the result I hold that the Bar Council of India did riot act in accordance with the mandate of Section 8A of the Act in as much as it failed to exercise its discretion under Sub-section (1) thereof within the period prescribed by law. It ought to have passed the order granting extension on or before the date immediately following the date of expiry of the term of the State Bar Council, and with effect from the date immediately following the date of such expiry. It could not pass the order later but with effect from an earlier date. The grant of extension by the Bar Council of India by it's order dated 13.2.1994 but with effect from 7.2.1994 was therefore illegal. The grant of extension is also illegal because no reasons therefore have been recorded as mandatorily required. That however will have no effect on the steps taken by the State Bar Council to provide for election as those steps were taken by the State Bar Council under colour of lawful authority. The members of the State Bar Council were not

intruders or usurpers of office.

The actions taken by them during the extended period of their term were, therefore, accorded legal sanction by operation aide, facto doctrine. The Special Committee which has since taken over, is under an obligation to hold elections. In the exercise of its discretion the Special Committee may conclude the process of election which has already been initiated by the erstwhile members; of the State Bar Council. It may however, if reasons so justify, hold elections de novo. Such discretion may be exercised on relevant considerations, the paramount consideration being fairness of the election.

36. It is therefore, declared that the orders of the Bar Courtcil of India dated 13.2.1994 is illegal. However beyond this no other relief can be granted to the petitioners for the reasons recorded above. The Special Committee is directed to proceed further in accordance with law having regard to the observations contained in this judgment. There will be no order as to costs.

N.K. Sinha, J.

37. I agree.