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(1985) 11 MP CK 0007

In the Madhya Pradesh High Court

Case No : L.P.A. No. 98 of 1985

Laxmi Narain Nayak — APPELLANT

Vs

Ramratan Chaturvedi and Others — RESPONDENT

Date of Decision : 19-11-1985

Acts Referred:
Letters Patent Act, 1865 — Clause 10
Representation of the People Act, 1951 — Section 116A

Citation : (1986) JLJ 238

Hon'ble Judges : J.S. Verma, Acting C.J.;S.S. Sharma, J;C.P. Sen, J;B.M. Lal, J;B.C. Varma, J

Bench : Full Bench

Advocate : Y.S. Dharmadhikari, for the Appellant; B.P. Tiwari, N.C. Jain for Respondent No. 1, A.M. Mathur, Advocate General for State and A.K. Chitale, Amicus Curiae, for the Respondent

Judgement

J S. Verma, A.C.J.

1. The only question for decision by us is whether an appeal under Clause 10 of the Letters Patent is tenable against an interlocutory order passed in an election petition by a single judge which amounts to a ''judgment'' within the meaning of that expression used in Clause 10. This question has to be answered on the assumption that the right of appeal under Clause 10 of the Letters Patent subsists notwithstanding the enactment of M.P. Uchcba Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam (29 of 1981) abolishing the right of such appeals since this enactment has been held to be constitutionally invalid by a full Bench of this Court in Balkrishna Das v. Pottery Co. Ltd. (1985 JLJ 140 : A1R 1985 MP 42), In case it is held that such an appeal is tenable, the appeal has to be heard and decided on merits by a Division Bench which will also decide whether the impugned interlocutory order passed in the election petition amounts to a ''judgment'' within the meaning of that expression used in Clause 10 of the Letters Patent. On the other hand, if the conclusion reached by us is that no such appeal is tenable under Clause 10 of the Letters Patent against an interlocutory

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order passed in an election petition by a single judge even if the order amounts to a judgment'' within the meaning of that expression used in Clause 10 of the Letters Patent, then the further question of considering the appeal on merits would not arise.

2. This appeal is against an interlocutory order dated 28-8-1985 passed by Gupta, J., in a pending election petition. The appellant''s contention is that the impugned order amounts to a ''judgment'' and is, therefore, appealable-under Clause 10 of the Letters Patent notwithstanding Section 116-A of the Representation of the people Act, 1951, providing for an appeal to the Supreme Court against final decision in an election petition at the conclusion of the trial. This appeal came up for motion hearing on 25-9-1985 before a Division Bench consisting of myself and Adhikari, J. Reliance was placed on behalf of the appellant on two decisions of the Gujrat High Court in Chhotalat Jivabhai v. Vadilal Mehta (1971 G.L.R. 12 850) and Indulal Kanaiyalal Yagnik Vs. Prasannadas D. Patwari and Others, and a decision of the Madras High Court in Kadiravan v. Thirumalal Kumar (ILR (1970) 2 Mad. 183) in support of the contention that an appeal lies under Clause 10 of the Letters Patent against an interlocutory order passed in an election petition by a single judge which amounts to a ''judgment'' within the meaning of that expression used in Clause 10. The question of tenability of such an appeal had been raised earlier in Amotakchand Chhajed v. Bhagwandas and Another (L.P.A. No. 12 of 1973; Decided on 23rd November 1973) before a full Bench of this Court but that question was left open after mentioning its importance and intricacy and referring to the decisions of the Gujarat and Madras High Courts in Chhotalal Jivabhai v. Vadilal Mehta (1), Indulal v. Prasannadas (2) and Kadiravan v. Thirnmali Kumar (3). The Division Bench, therefore, considered it appropriate to refer the question of tenability of such an appeal to a full Bench instead of deciding it itself. Accordingly, this question was referred by the Division Bench for being decided by a larger Bench. A Full Bench was then constituted consisting of myself, C. P. Sen, J., and B. M. Lal, J., to decide the question of tenability of the appeal under Clause 10 of the Letters Patent assuming that the right of appeal under Clause 10 of the Letters Patent survives in view of the Full Bench decision in Balkrishna Das v. Pottery Co. Ltd. (supra). At the commencement of hearing of this question before the Full Bench on 28-10-1985 it was felt by one of us (B.M. Lal, J.) that the basic question of survival of appeal under Clause 10 of the Letters Patent in all matters after the Constitution of India came into force and the changes in law were made from time to time also requires consideration in the present case. Obviously the consideration of this basic question could have involved, considering even the correctness of the Full Bench decision in Balkrishna Dass v. Pottery Co. Ltd. (supra) at least impliedly, decided by a Bench of three judges. It was, therefore, considered appropriate that the matter should be heard by a Bench of more than three judges if this larger question had also to be considered, The matter was, therefore, referred to a larger Bench. This is how the matter came to be heard by this Bench of five judges. However, at the

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commencement of the hearing before us, it was decided unanimously that it would be inappropriate for this Court to consider this larger or basic question about survival of the right of appeal under Clause 10 of the Letters Patent in all matters at a time when the question of correctness of the Full Bench decision in Balkrishna Das v. Pottery Co. Ltd. (supra) is before the Supreme Court in a pending appeal and consideration by us of this basic question could involve consideration of the correctness of the Full Bench decision in Balkrishna Das v. Pottery Co. Ltd. (supra).

3. Accordingly, we have confined the hearing to the only question referred by the Division Bench regarding tenability of an appeal under Clause 10 of the Letters Patent against an interlocutory order passed by a single judge in a pending election petition which amounts to ''judgment'' within the meaning of Clause 10 of the Letters Patent. Our decision is also, therefore, confined only to this point.

4. On the only question for decision by us, I have reached the conclusion that the view taken by the Gujarat High Court in Chhotalal Jivabhai v. Vadilal Metha (supra) and Indulal v. Prasannadas (supra) as well as the Madras High Court in Kadiravan v. Thirumalal Kumar (sapra) must be preferred and followed since the same meets all the arguments advanced in support of the contrary view and it also appears to be more logical of the two views. The first of these decisions is the decision in Chhotalal Jivabhai v. Vadilal Metha (supra) which considers this question at great length and meets all the arguments urged in support of the contrary view. Since I am in full agreement with the view taken therein as well as the reasons given, I propose to mention only briefly my reasons for taking this view. P. N. Bhagwati, C. J. (as he then was) speaking for the Division Bench of the Gujarat High Court in this decision, has considered the matter, at length in paragraphs 12,13 and 20 to 28 of the judgment for reaching the conclusion as follows ;-

This construction which we are adopting does not lead to any harm or mischief nor does it operate to frustrate the object and purpose of the enactment of the new Scheme for trial of election disputes introduced by the Parliament. It was pressed upon us that if we hold that there is a right of appeal against intermediate orders under Clause 15, that would act as an impediment in the expeditious disposal of election petitions and it would be difficult, if not impossible, to dispose of election petitions within six months. We do not think this apprehension is well founded. Apart from the exceptional case which we have before us we cannot reasonably foresee any intermediate orders in the course of an election petition which would amount to judgments within the meaning of Clause 15. Whatever intermediate orders may be passed in an election petition would be ordinarily orders regulating the procedure and would not amount to judgments within the meaning of Clause 15. The smooth and even course of an election petition is, therefore, not likely to be retarded or impeded by the view which we are inclined to take. Furthermore, it must be remembered that even if an appeal is entertained by the High Court against an intermediate

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order under Clause 15, the High Court would see to it that the times limit of six months which the Legislature has set for the disposal of the election petition is not, as far as practicable, transgressed. It may also be noted that the view we are taking will make it possible for an aggrieved party to obtain redress from the High Court without approaching the Supreme Court in the exercise of its extra-ordinary jurisdiction under Article 136.... The view contended for on behalf of the petitioner and the second respondent, therefore, commends itself to us and we accept it in preference to the view contended for on behalf of the first respondent. We, therefore, hold that the right of appeal against intermediate orders under Clause 15 is not excluded by necessary implication and if an intermediate order made by a single Judge in an election petition amounts to ''judgment'' within the meaning of Clause 15, it would be appealable.

5. This conclusion was reached basically on the reasoning that section 116-A of the representation of the people Act, 1951, providing for an appeal to the Supreme Court from every order made at the conclusion of the trial of the election petition u/s 98 or section 99 of the Act supersedes only the right of appeal under Clause 10 of the Letters Patent against the final decision in the election petition made at the conclusion of trial and it does not even impliedly supersede the remaining right of appeal under Clause 10 of the Letters Patent against an interlocutory order passed by a single judge in the election petition which amounts to a ''judgment''. It may be mentioned that Clause 10 of the Letters Patent of this High Court and Clause 15 of the Letters Patent considered by the Gujarat High Court are in pari materia for our purpose. This reasoning was based on the well established principle that where a matter is referred for trial to an established or existing Court, it imports that the ordinary incidents of the procedure of that Court including any general right of appeal from its decision attach likewise to that matter. Since trial of the election petition is by the High Court, according to the provisions of the Representation of the people Act, 1951, the ordinary incidents of procedure including the right of appeal apply to it where the trial is by single judge. Obviously, the question of any appeal under Clause 10 of the Letters Patent would not arise if any election petition is tried by a Division Bench since an appeal under Clause 10 of the Letters Patent is provided only against a judgment of a single Judge. This, in substance, is the summary of the reasoning in the above Gujarat decision which was followed by that Court in Indulal v. Prasannadas (supra).

6. Same is the view taken later by a Division Bench of the Madras High Court in Kadiravan v. Thirumalai Kumar (ILR (1970) 2 Madras 183) which is based substantially on the reasoning given by Bhagwati, C. J. in the aforesaid decision given earlier even though reported later in Chhotalal Jivabhai v. Vadilal Metha (1971 GLR12 850).

7. In view of the fact that I am in complete agreement with this view and the reasons given elaborately in paragraph 12,13 and 20 to 28 of the decision in Chhotalal Jivabhai v. Vadilal Mehta (supra) it is not necessary to reiterate the

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same. I would only mention that the right of appeal conferred by section 116-A of the Representation of the people Act, 1951 can abrogate the right of appeal available under Clause 10 of the Letters Patent only to the extent section 116-A covers the field and no more. Section 116-A of the Representation of the people Act provides for an appeal against every order made by a High Court in an election petition u/s 98 or section 99, i.e. at the conclusion of the trial of the election petition. The non obstante clause in sub-section (1) of section 116-A, therefore, has the effect of abrogating the right of appeal under Clause 10 of the 1etters Patent against the final decision of a single judge in an election petition. The enacting part of section 116-A gives no indication that it covers the entire field relating to appeals including appeals against interlocutory orders in addition to providing for appeals against the final orders made under sections 98 or 99. It no where says that an appeal shall not lie against any other order not specified therein as has been done in section "9 of the Arbitration Act by use of the words "and from no others" which clearly indicate that except for orders specified in subsection (1) of section 39, no appeal shall lie from any other order which has not been so specified.

8. I am, therefore, unable to accept the contention that section 116-A of the Representation of the people Act covers the entire field of appeals, including an appeal against interlocutory order passed by a single judge in the election petition which amounts to a ''judgment'' and is, therefore, appealable under Clause 10 of the Letters Patent. Even the learned counsel canvassing the contrary view before us conceded that but for the provision contained in section 116-A of the Representation of the people Act an appeal under Clause 10 of the Letters Patent would lie not only against every order made u/s 98 or section 99 of the Act at the conclusion of the trial but also interlocutory order made therein by a single judge which amounts to a judgment'' within the meaning of that expression used in Clause JO. This argument itself implies that unless section 116-A of the Representation of the people Act is construed as covering the entire field relating to the right of appeals against all orders passed in an election petition, (he contrary view is not acceptable. As already indicated, I am unable to hold that section 116-A covers the field relating to right of appeal in excess of the right of appeal only against the orders made at the conclusion of the trial u/s 98 or section 99.

9. As a result of this construction made by me of section 116-A, it follows that this appeal is tenable under Clause 10 of the Letters Patent in case the impugned interlocutory order passed by the learned single judge amounts to ''judgment'' within the meaning of that expectation used in Clause 10.

10. I may now refer to the two decisions supporting the contrary view which have been relied on by the learned Advocate General, the counsel for respondent No. 1 and others who have appeared to support the contrary view. These decisions are Sitaram v. Nathuram (1968 ALJ 576) and Ramdhan v. Bhanwar Lal (AIR 1985 Raj 185 (FB)).

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11. The Full Bench decision of Rajasthan High Court in Ramdhan''s case (supra) does not consider and meet the reasons given by the Gujarat and Madras High Courts in the aforesaid decisions for the conclusion reached therein and merely mentions in paragraph 62 that certain aspects which had been adverted to in the Rajasthan case were not placed before the Gujarat and Madras High Courts. No counsel relying on the Rajasthan decision was able to point out to us any aspect considered therein which had been overlooked in the Gujarat and Madras decisions. The difference in the conclusion reached in the Rajasthan case results from the assumption that section 116-A of the Representation of the people Act covers the entire field pertaining to appeal and not merely the appeal against the orders, passed u/s 98 or section 99 of the Act. I have already pointed out my inability to accept this basic assumption which is the foundation of the contrary view taken in the Rajasthan case.

12. The decision of the Allahabad High Court in Sivaram''s case (supra) no doubt, takes the same view as was taken in the Rajasthan case but it was held that the appeal therein was against an interlocutory order passed by a single judge which did not amount to ''judgment'' against which alone appeal was permitted. Having taken the view that the impugned interlocutory order in that case did not amount to a ''judgment'' and was. therefore, not appealable for this reason, the ultimate conclusion reached in the Allahabad case was supportable on this ground alone without going into the question of tenability of the appeal. That apart, the elaborate reasons given in the aforesaid first Gujarat decision on which I have placed reliance for reaching my conclusion were not considered at any length in the Allahabad decision. This decision is not of much assistance.

13. As a result of the aforesaid discussion, I have reached the conclusion that the view taken by the Gujarat and Madras High Courts in the aforesaid decisions must be preferred as the reasoning therein is more persuasive and meets all the points urged to support the contrary view, with respect, I am unable to concur with the view taken by the Rajasthan and Allahabad High Courts in the aforesaid decisions.

14. Consequently, I hold that an appeal lies under Game 10 of the Letters Patent against an interlocutory order passed by single judge in an election petition which amounts to a ''judgment'' within the meaning of that expression used in Clause 10, The question for our decision is answered accordingly. In view of the conclusion I have reached on this point, I would direct that the appeal be now heard on merits by a Division Bench for deciding the further question arising therein.

B.C. Varma, J.

I agree.

S.S. Sharma, J.

I agree.

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C.P. Sen, J.

15. I had the advantage of going through the opinion of the learned acting Chief Justice that Letters Patent appeal lies under Clause 10 of the Letters Patent against an interlocutory order which amounts to a ''judgment'' within the meaning of that expression used in Clause 10 in an election petition under the Representation of the People Act, 1951, but I regret that I am unable to subscribe to that view and according to me no such appeal lies against interlocutory orders which may amount to ''judgment'' in an election petition filed u/s 81 of the Act. We are not called into question to go into the correctness of the Full Bench decision of this Court in Balkrishna Das and Others Vs. Perfect Pottery Co. Ltd. and Others, because appeal is pending in the Supreme Court and the question has to be answered on the assumption that right of appeal under Clause 10 of the Letters Patent subsists notwithstanding the enactment of the M. P. Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981, abolishing Letters Patent appeals.

16. There are conflicting views on this question. According to one set of decisions, the Representation of the People Act, 1951, is a self-contained code which has created liability not existing at common law and at the same time gives a special remedy for enforcing it. Only appeal lies against decision of Single Judge of the High Court in an election petition u/s 116-A of the Act to the Supreme Court in respect of orders made under sections 98 or 99 of the Act and by necessary implication no appeal lies against interlocutory orders, Siaram v. Nathuram (1968 All. LJ 576) Ramdhan v. Bhanwarlal, F.B. (AIR 1985 SC 185). The other view is that since now election petition is tried by a Judge of the High Court, the ordinary incidents of the procedure of the Court attach to the jurisdiction and, as such, the right of appeal against intermediate orders under Letters Patent which otherwise attaches as an ordinary incident is not excluded by necessary implication, Chhotalal Jivabhai v. Vadilal Mehta (1971 GLR 850), Indulal Kanaiyalal Yagnik Vs. Prasannadas D. Patwari and Others, and Kadiravan v. Thirumali Kumar (ILR (1970) 2 Mad 183). It may be mentioned that the Rajas than Full Bench case distinguished these cases by simply saying that all the aspects considered by the Full Bench were not considered in those cases. It may also be mentioned that P.N Bhagwati, C. J. (as he then was) in Chhotalal Jivabhai v. Vadilal Metha (supra) observed that there are two views possible but the view which they are adopting commends itself to them and which is accepted in preference to the other view. However, there is unanimity in all those decisions that some interlocutory orders that may be passed in an election petition may amount to ''judgment'' within the meaning of that clause of the Letters Patent, which provided for an appeal against such judgment. Evidently, two views are possible and the question is which view should be preferred under the present circumstances.

17. Article 329(b) of the Constitution provides that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be

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called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. Representation of the People Act, 1951, has been enacted under this provision. Part VI of the Act deals with disputes relating to election and begins with section 80 which provides that no election shall be called in question except by an election petition presented in accordance with the provisions of that Part. Under sub sections 6 and 7 of section 86, the trial of an election petition shall be continued from day to day until its conclusion and if the High Court finds the adjournment of the trial beyond the following day to be necessary, then the reasons for such adjournment should be recorded and every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of presentation of the petition. Section 87 provides that subject to the provisions of the Act and of any rules made thereunder, every election petition shall be tried by the High Court, as may be, in accordance with the procedure applicable under the Code of Civil Procedure. Chapter IV-A of that Part deals with appeals. u/s 116-A notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to Supreme Court on any question (whether of law or fact) from every order made by a High Court u/s 98 or section 99. It may be mentioned that under Explanation to sub-section (1) of section 86 an order of the High Court dismissing an election petition under this sub-section shad be deemed to be an order made under Clause (a) of section 98. Since election petition is tried by a Judge of the High Court i. e. an established Court, normally ordinary incidents of the procedure of that Court are to apply including any general right of appeal from its decision, but where a statute creates new rights and liabilities and prescribes special remedy for enforcement of such right, then by express words or by necessary implication right of appeal which is ordinarily available may be excluded. The Supreme Court in N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, held that Representation of the People Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with election, we have only to look at the Act and the rules made thereunder. It should be noted that there is no provision anywhere to the effect that anything connected with elections can be questioned at an intermediate stage. The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it Strictly speaking it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it. Therefore, it was held that in view of the provisions of Article 329(b) of the Constitution a writ of certiorari or mandamus under Article 226 was barred in respect of electoral matters as the Representation of the People Act read with Part XV of the Constitution was a Code in itself and created rights and provides for the enforcement thereof by a

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special tribunal. The Supreme Court in Durga Shankar Mehta Vs. Thakur Raghuraj Singh and Others, held that the right of seeking election and sitting in Parliament or in a State Legislature is a creature of the Constitution and when the Constitution provides a special remedy for enforcing that right, no other remedy by ordinary action in a Court of law is available to a person in regard to election disputes. It may be stated that earlier under the Act election petition lay before election tribunal consisting of three members, then it was substituted by trial by a District Judge and now it is by a Single Judge of the High Court.

18. The Supreme Court in K. Venkateswara Rao and Another Vs. Bekkam Narasimha Reddi and Others, held that an analysis of the provisions of the Act is sufficient to show that the trial of an election petition is not the same thing as the trial of a suit, even though the procedure applicable to the trial of election petition is the same as that of the trial of a suit. While dealing with the question of applicability of the provisions of the Limitation Act to an election petition, it was observed that the Limitation Act cannot apply to proceedings like an election petition in as much as the Representation of the People Act is a complete and self-contained Code which does not admit of the introduction of the principles or the provisions of law contained in the Prabhu Narayan Vs. A.K. Srivastava, it was held that an election petition and the affidavit filed in support thereof must be in accordance with the provisions of the Act and the rules made thereunder. But if the provisions of the High Court rules were infringed, the election petition could not be dismissed. It was observed that according to S. 86 of the Act, only petitions which do not comply with the provisions of section 81 or 82 or 117 were liable to be dismissed and the failure to comply with the rules of the High Court in respect of affidavits could not be held to be fatal to the election petition. It may also be noted that section 116-A which provides for appeal to the Supreme Court begins with the non-obstante clause notwithstanding anything contained in any other law for the time being in force, the use of this non-obstante clause goes to show that the enactment following it will have it full effect and the provisions of any other law to the contrary would not be operative in the same field which is covered by section 116-A of the Act. It does not appeal to me that section 116-A merely excludes Letters Patent appeals in respect of orders made by the High Court u/s 98 or 99 of the Act and in case of other orders amounting to ''judgment'' passed during trial of the election petitions, the non-obstante clause has no application. According to me, all appeals against the orders amounting to ''judgment'', under clause 10 of the Letters Patent are barred by necessary implication under the Act. There is a time-bound programme provided in the Act for dealing with election petitions. It has to be disposed of as expeditiously as possible within a period of 6 months and the trial once began should go on day to day and for any adjournment reasons has to be recorded. This intention of the Legislature will be frustrated if appeals are entertained against interlocutory orders amounting to judgment under clause 10 of the Letters Patent. A clear view is emerging that as far as possible only one appeal should be provided in order to meet the mounting arrears of cases in various

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Courts. So far as our State is concerned, Letters Patent appeals were abolished by M. P. Uchcha Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981, but it has been held to be invalid by a Full Bench of this Court in Balkrishna Das and Others Vs. Perfect Pottery Co. Ltd. and Others, as the full Bench was of the view that the enactment was beyond the competence of the State Legislature. Even under the amended section 100 C. P. C, now Letters Patent appeals against judgments in second appeals have been abolished.

19. I am, therefore, of the view that no appeal should be entertained under Clause 10 of the Letters Patent against an interlocutory order passed in an election petition under the Act which amounts to ''judgment'' within the meaning of clause 10 of the Letters Patent.

B.M. Lal, J.

20. I have had advantage of reading the opinion prepared by My Lord Acting Chief Justice, J. S. Verma and senior learned Brother Shri Justice C. P. Sen. However, I find myself unable to subscribe with the view expressed by my Lord, the Acting Chief Justice and the finding reached by him. However, agreeing with the conclusion reached by my senior learned Brother C. P. Sen, J. I would like to express my own views.

21. In this context at the very outset I must give brief history as to how the Full Bench of three Judges and later on larger Bench of Five Judges came to be constituted.

22. In Election Petition No. 43 of 1985 Laxminarayan Nayak v. Ramratan Chaturvedi and Others, learned Brother Gulab Gupta, J. has passed an order on 28-8-85 deciding certain preliminary issues against which the petitioner has filed the instant Letters Patent Appeal under Clause 10 of the Letters Patent and the same came up for hearing before the Division Bench of this Court consisting of Hon''ble Justice J. S. Verma (as he then was) and Justice K. K. Adhikari. This Division Bench by its order dated 25 9-1985 referred the matter to the Chief Justice, Shri G. L. Oza (as he then was) for referring the matter to the Full Bench in view of the earlier decision of this Court in Amolak Chartdv. Bhagwandas (LPA No. 12 of 1973, decided on 23rd November, 1973) upon which the Full Bench consisting of Hon''ble J. S. Verma (as he then was) C. P. Sen, J. and myself was constituted.

23. This Letters Patent Appeal came for final hearing on 28-10-1975. During the course of arguments before the Full Bench, I raised the basic question, whether Letters Patent, in view of the fact that after coming into force of the Constitution of India and introducing several changes in law and notwithstanding the Full Beach decision (to which I was one of the Member of the Bench and delivered my separate judgment) in Balkishan Das v. Perfect Pottery and Others Ltd. (1985 JLJ 140 : AIR 1986 MP 42) wherein only the limited question of competency of State Legislature, which passed the Madhya Pradesh Uchcha Nyaylaya (Letters Patent Appeals) Samapti Adhiniyam (29 of 1981), was under consideration in view of

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the entry No. 78 in List I of Schedule 7 of the Constitution, and the majority view was that the State Legislature had no competency to legislate the said Samapti Adhiniyam of 1981, still survives.

24. The aforesaid question is really a matter of thought provoking on the analogy that even after 35 years of our independence and our Country becoming Sovereign Socialist Secular Democratic Republic, still our Courts in India are governed by adopting Letters Patent issued by the King Emperor of England under his Royal Prerogative powers. It is nothing but sheer indication of continuation of domination of sovereign powers of King Emperor of England, over us as if the Royal Prerogative Powers of King still prevail upon our Constitution even after our Country becoming a sovereign republic where there is no root of sovereign powers of King and when no order, notification or Charter issued by the King Emperor of England under his monarchial or prerogative powers, have been adopted in our Constitution.

25. Two sovereign powers i. e., one of our of our Sovereign Socialist Secular Democratic Republic of India, issued under the Constitution and another of monarch i. e. the King Emperor of England, cannot run together and therefore, laws enacted by our Parliament prevail upon the laws so passed or issued by the Ring Emperor under his prerogative powers, after coming into force of our Constitution. Therefore, the very continuance of the laws so made by the King of England appears to-be inconsistent with the legal philosophy of our Constitutional policy.

26. With the aforesaid background if we trace the history as to how the judicial system existed during the time of Mugals, then after the formation of East India Company and during the regimen of King or queen of England. This, no doubt, is very interesting matter, but without going in detail, it will suffice to say that at first the Court of Judicial Commissioner of Central Provinces and Berar was established by an Act of Governor General of India-m-Council, being Act No. XIII of 1865. However, in British India by various charters and Lastly by British Act, 1861, Her Majesty Queen Victoria was authorised to establish High Courts by issuing Letters Patent (which meant the mandate of the King or Queen of England). By issuing the Letters Patent in 1862 and 1865, certain High Courts were constituted in India. However, first Government of India Act was enacted in the year 1800, but from time to time the same has been repeated and the last but one was that of 1915 and the last was Government of India Act, 1935, which is relevant for us. The Government of India Act, 1935, by Chapter II, Section 219, gave power to the King Emperor of England to establish High Courts in British India by issuing Letters Patent. Section 223 related to jurisdiction and practice and procedure of the high Courts and by Section 229 the power to His/ Her Majesty to constitute or reconstitute High Courts by Letters Patent, was given.

27. On 2-1-1936, King Emperor, Geroge v. Edward of England, by issuing Letters Patent under his Royal Prerogative Powers, established the High Court of

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Judicature of Nagpur and in this way, the Nagpur High Court came into existence.

28. Now, we come to the post-independence era, i.e. after 15-8-1947. By Indian Independence Act, 1947 (10 and 11 Geo. Vi, c. 30), enacted by the British Parliament, vide Section 18(3) the existing laws then in force were saved and therefore, it is said that the Letters Patent being the law, has been saved. Then again, by coming into force of India (Provisional Constitution) Order, 1947. again the Letters Patent has been saved. (See Basu''s Commentary on Constitution of India Vol. VI (Fifth Edition at page 3.5), but consequent to the coming into force of the Indian provisional Constitution (Amendment) Order, 1948 (published in Parti at page 142 of C. P. and Berar Gazette dated 19-3 48) by Clause 2 (a), the words "His Majesty" and "Letters Patent" appearing in Section 219 of the Government of India Act, 1935 were substituted by the words "Governor General" and "Orders'''. As such Section 229 of the Government of India Act, 1935 was also amended and the powers of His Majesty to constitute or reconstitute High Courts by Letters Patent, were deleted and it was the Governor General of India who was only authorised to constitute and establish High Court by his "orders" and his powers were not regulated by the "Letters Patent" which was the exclusive prerogative of King Emperor of England. There fore, after coming into force of the Indian Provisional Constitution (Amendment) Order, 1948, the entire legal position in respect of Letters Patent, changed.

29. However, before coming into force of our Constitution, i. e., upto 25-1-1950, the Governor General of India, by issuing certain orders u/s 229 of the Government of India Act, 1935 regulated the establishment and jurisdiction of the High Courts and this power was never derived from the Letters Patent. Therefore, the Letters Patent deemed to have been omitted. Whatever orders were passed u/s 229 of the Government of India Act, 1935, were the orders of the Governor General in Council, but were not of the King Emperor under the Instrument of Letters Patent.

30. While enacting relevant provisions of our Constitution relating to the establishment of the High Court, there is no whisper about the provisions of Letters Patent and that is so because it stood repealed much earlier as the orders passed before 25-1-1950 were never issued by the Governor General of India by deriving his powers from the Letters Patent, but were issued under the amended provisions of Section 229 of the Government of India Act, 1935.

31. After coming into force of Constitution of India, i.e. with effect from 26th January, 1950, the Indian Independence Act, 1947 and Government of India Act, 1935 stand repealed by Article 395 of the Constitution of India. In the light of these two important aforesaid repealed Acts, we have to see, how far the law as to establishment and administration of the existing High Courts in independent India, has been saved. Article 225 of the Constitution merely reserves the power of the constitution of the High Courts, as they were before the Constitution. The words used "subject to the provision of this Constitution", only relate to the relevant provisions of our Constitution, relating to the establishment and

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administration of High Courts, i. e.. provisions of Articles 214 to 231, embodied in Chapter V of the Constitution and, therefore, the words used "subject to the provisions of this Constitution", only imply abridgement of its jurisdiction.

32. Similarly, Article 372 of the Constitution, which is a saving clause, envisages continuance in force of existing laws and their adaptation. Clause (1) of Article 372 reads thus :-

(l) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

Therefore, it is clear that the Government of India Act, 1935 and Indian Independence Act, 1947, though repealed, yet the laws made thereunder, have still been saved and still continue to be in force until altered, repealed or amended. But the Letters Patent was issued by the King Emperor of England exercising his Royal Prerogatives, it was not enacted by any Parliament, not even by British Parliament, and therefore. Letters Patent was not an enactment, but a ''law'' within the definition of Article 366(10) of the Constitution. The words used under Article 372 (i. e., "until altered or repealed or amended by a competent Legislature or other competent authority'') have got a significant meaning. A perusal of the Letters Patent shows that it contained, in all, 38 clauses; but after coming into force of the Constitution of India, most of the clauses thereof, stand repealed, viz

Clause-2 " " of the Letters Patent stands repealed by Art. 216

Clause-3 " " by Art. 219

Clause-4 " " by the High Courts Seal Act, 1950.

Clause-5 " " by S. 7 (2) of the Indian Independence Act, 1947.

Clause-6 " " by Art, 229

Clause-7

and-8 " " by Advocates Act, 1961.

Clause-9 " " by Art. 228 of the Constitution.

Thus, we find that almost all the relevant clauses of Letters Patent governing and regulating the function of the High Courts stand repealed and the rest of the clauses stand altered/repealed by necessary implication, as there is a presumption of repeal by necessary implication. The maxim Expressio Unius est exclusio alterius, is based on the theory that the Legislature while enacting a law, has a complete knowledge of the existing law on the same subject-matter. Therefore, while repealing most of the clauses of letters Patent, the Constituent Assembly of India while engrafting Articles in Chapter V of the Constitution, had

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the knowledge of Letters Patent and hence as a general rule of interpretation, the ''mention of one thing implies exclusion of another'' and therefore, in such cases, the doctrine of "qualified repeal" comes in operation and despite saving of certain provisions, if there is inconsistency between the remaining several provisions, then despise saving certain provision, repeal by implication shall be full and complete. Therefore, by necessary implication, it will be deemed that the remaining clauses of Letters Patent stand altered within the meaning of Article 372 of the Constitution.

33. Survival of the Letters Patent after coming into force of the Constitution has been considered by various High Courts, including ours, See S.S. Nirmalchand and Another Vs. Smt. Parmeshwari Devi and Others, , In Re: Putta Ranganayakulu and Others, , Sahida Ismail Vs. Petko R. Salvejkov and Others, . Chunnilal Basu and Another v. The Hon''ble Chief Justice of the High Court at Calcutta and Others (AIR 1972 Cal. 47). Shivarudrappa v. Kapurchand Meohaji Marwadi (AIR 1965 Mys 76) and it has been held that the Letters Patent is saved by Articles 225 and 372 of the Constitution.

34. But now, the legal position after the pronouncement of Their Lordships of the Supreme Court in S.P. Gupta Vs. President of India and Others, (relevant discus-ion a; pages 986to 592), has been entirely changed, wherein it has been observed that the High Courts in India came to be constituted or reconstituted after the commencement of the Constitution, i. e., in accordance with Article 214 read with Article 366(14) of the Constitution of India Thus, the wording ''reconstituted'' used relating to High Court, includes relevant provisions of the States Reorganization Act, 1956, Our High Court (High Court of Madhya Pradesh at Jabalpur) will come within the category of reconstituted High Court.

35. Further, in the year 1960 wisdom prevailed upon our Parliament to look into and consider that the laws enacted by the British Parliament, of which some of them became obsolete, thought it proper to repeal the laws enacted by the British Parliament and for this purpose alone The British Statutes (Application to India) Repeal Act, 1960 (Act LVII of 1960) was passed repealing the British Statutes, in their application to India, as specified in the Schedule. The pith and substance to enact this Act also throws light on the subject i. e. Letters Patent issued by the King of England under his prerogative powers. Since the Letters Patent was not passed by any Parliament, it was not included in the Schedule repealing the British Statutes in their application to India, but the intention of passing the Act No. LVII of 1960 clearly envisages the repeal of Letters Patent as well and further by necessary implication, it stands repealed.

36. Therefore, despite the decision of Balkishandas case (supra), (pending before the Supreme Court) it is also covered by the decision in S. P. Gupta''s case (supra) wherein vide para 990, it has been held that constitution and organization of the High Court is governed and vested with the Parliament alone by Entry No. 78, List I of Seventh Schedule of the Constitution. I, therefore, raised the point that on the basis of the aforesaid reasonings, despite

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Balkishandas''s case (supra) and numerous changes made in the relevant existing laws, Letters patent does not survive.

37. On 28-10-1985, Shri Y. S. Dharmadhikari, learned counsel appearing for the appellant raised an objection that the Full Bench (consisting of three Judges)was not constituted to examine the question which I raised, therefore, my Lord, the Acting Chief Justice Shri J. S. Verma, after examining the question relating to the existence/survival of Letters Patent, constituted a Larger Bench of Five Judges and in this way Justice S. S. Sharma and Justice B. C. Varma were included in the Larger Bench.

38. On 30-10-1985 when the matter came up for hearing, it was unanimously decided that the second question relating to the survival or the Letters Patent be dropped because of the pendency of Balkishandas''s case (supra), before the Supreme Court and the only question remained for our decision was relating to the applicability of Clause 10 of Letters Patent to the order (judgment within the meaning of Letters Patent Appeal) arising out of Election Petition cases under the Representation of the People Ac!, 1951, for which Full Bench of Three Judges was initially constituted. In this way again we reverted and relegated to our original position of the Bench of Three Judges only, as the Larger Bench of Five Judges was constituted for the sole purpose of determining the question of survival of the Letters Patent despite the decision of this Court in Balkishandas''s case (supra).

39. K(sic), without expressing any opinion on second quest on relating to the survival of the Letters Patent I shall now confine and proceed to answer the question relating to the application of Clause 10 of the Letters Patent to the orders (judgments within the meaning of Letters Patent) Appeal arising out of election petition cases.

40. Although the application of Clause 10 of Letters Patent has been considered in relation to the orders arising out o! Election petition cases, in Chhotalal Jivabhai v. Vedilal Mehta (1971 GLR XII 850) decided on 29 7 1967 and Kodinvan v. Thirumali Kumar (AIR (1970) 2 Mad 183) decided on 17-2-1969 and also in Ramdhan Vs. Bhanwarlal, decided on 20-5-1983. In the case of Chhotalal Jivabhai (supra), the Bench expressed opinion that two views are possible, one is that appeal under Letters Patent does lie against the orders arising out of election petition cases and another is that it does not lie. However, the former view, was adopted. Although, in Gujrat and Madras High Courts, all the relevant provisions of the Representation of the People Act, 1961 (hereinafter referred to as the ''Act''), have been taken into consideration, yet thereafter, it has been held that appeal lies under Letters Patent against orders arising out of the orders passed in election petition. However, case of Ramdan (supra) of Rajasthan High Court, takes a contrary view that no appeal lies under the Letters Patent.

41. In my opinion, applicability of Clause 10 of the Letters Patent is to be considered in the light of the objects of the Representation of People Act, 1951

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which implies that the Act is a self-contained enactment so far as election to Legislatures are concerned, which means that whenever one has to ascertain the true position with regard to any matter connected with elections to the Legislatures, he has to took in the Act and the Rules made thereunder and at the same time the pith and substance of the Amending Act No. 47 of 1966 which has amended the relevant provisions of the Act, viz., Sections 80-A, 86, 98, 99 and 116-A., has also to be taken into consideration.

42. Section 116-A of the Act runs as under :-

11-A. Appeals to Supreme Court-(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the Supreme Court on any question (whether of law or fact) from every order made by a High Court u/s 98 or section 99. (2) Every appeal under this Chapter shall be preferred within a period of thirty days from the date of the order of the High Court u/s 98 or section 99;

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

Section 116-A of the Act starts with non-obstante clause and therefore, the words used "anything contained in any other law" include Letters Patent as well and, therefore, no resort could be made for appeal under Clause 10 of the Letters Patent. In this respect it has to be seen that the law as laid down is to be exercised in the same manner as provided in the statute. In Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others, , Their Lordships of Supreme Court have held that-

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. This rule squarely applies where the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other way.

The same view has been again reiterated by Their Lordships of the Supreme Court in A. Madan Mohan Vs. Kalavakunta Chandrasekhara, holding that-

It is well settled principle of interpretation of statute that wherever a statute contains stringent provisions they must be literally and strictly construed so as to promote the object of the Act....

Therefore, it is clear that the non-obstante clauses as u/s 116A of the Act, be given effective meaning for the purposes of appeal so that this mandatory provision may not become otiose.

43. Further, Article 329(2) of the Constitution is very emphatic on the subject. It reads thus-

329. Bar to interference by Courts in electoral matters.-Notwithstanding anything

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in this Constitution.

(a) X X X X

(b) no election to either House of Parliament or to the either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

In exercise of its powers under Article 329(b) of the Constitution, the Parliament has enacted the Representation of the People Act, 1951 and therefore, the procedure provided by the Act has the binding force of a constitutional prescribed procedure and hence in no manner whatsoever, it could be bypassed and therefore, according to Article 329(b) of the Constitution, an election dispute can only be resolved by an election petition u/s 80-A of the Act and appeal u/s 116-A of the Act before the Supreme Court alone In Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, , Their Lordship of the Supreme Courts have held that the Representation of the People Act provides a complete procedure which could not be circumvented. Therefore, the non-obstante clause of Section 116-A of the Act, makes Clause 10 of the Letters Patent, a complete nugatory.

44. In this context it is necessary to point out that it is a settled legal position that Article 19 of the Constitution does not extend any fundamental right to exercise the right of franchise and to contest any election, but such a right is purely a statutory right governed by a particular statute creating the right. As such the Act being a special Act, providing special right and giving original jurisdiction to the High Courts u/s 80-A of the Act. Clause 10 of the Letters Patent which is a general provision, could not be resorted to in the case of appeal arising out of election petitions.

45. In Union of India (UOI) Vs. Mohindra Supply Company, , Their Lordships of the Supreme Court dealing with the scope of Clause 15 of the Letters Patent of Punjab High Court, which is pari materia to Clause 10 of the Letters Patent of our High Court, decided that when an Act is a complete Code in itself providing forum of appeal etc., then in that circumstances, Clause 15 of Letters Patent cannot be invoked. Therefore, in my opinion, this preposition of law fully applies in the case of the Representation of the People Act, as well.

46. Further, the amending Act No. 47 of 1966 introduced radical changes in the Representation of the People Act, 1951 by incorporating various new provisions, but for deciding the issue in hand, only a few provisions of the Act are necessary to be referred to, i. e , Sec. 79(a) which defines ''High Court and Section 80-A which deals the with trial of the election petitions. While interpreting the provisions of Article 235 of the Constitution, in various cases Their Lordships of the Supreme Court have held that ''High Court'' means ''all the Judges of the High Court.'' Therefore, applying the definition of ''High Court'' and reading subsection (2) of Section 80-A of the Act, it is abundantly clear that election petition also may be tried not by one Judge alone but also could be tried by more

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than one Judges and in that situation, question of application of Clause 10 of the Letters Patent is automatically wiped out. The words used in Section 80-A of the Act also neutralise the application of Clause 10 of the Letters Patent.

47. Similarly, by introducing sub sections (6) and (7) to Section 86 of the Act, the Legislature have shown their intention that the election petition be disposed of as early as possible say, within six months and if Clause 10 of the Letters Patent is made applicable then sub section (6) of Section 86 of the Act, becomes redundant. In my opinion, such was not the intention of the Legislature while enacting the provisions of Section 86 of the Act. Therefore, the pith and substance of the Amending Act No. 47 of 1966 also completely ruled out the possibility of the applicability of Clause 10 of the Letters Patent in orders arising out of elections petitions.

48. The next question arises for consideration is whether appeal u/s 116-A of the Act lies to the Supreme Court, against "every orders'"' and whether this expression ''every order'' includes'' ''interlocutory orders'' as well.

49. Section 116-A of the Act specifically lays down that appeal lies to the Supreme Court against order passed under S 98 or S. 99 of the Act. But, if we look to the provision of Section 86(1) and its explanation clause, then, even on a preliminary stage if an election petition is dismissed, that would be construed to be an order u/s 98(a) of the Act. It means that appeal lies against an order even if it is passed either at a preliminary stage or at final stage. Section 98 of the Act the says "At the conclusion of the trial of an election petition the High Court shall make an order" dismissing the election petition under sub-section (a) of S. 98. No doubt, election petition and every interlocutory application in an election case can be construed to be a petition; but to harmonies the words ''every order'' with the provisions of Section 86(1) of the Act and its explanation clause, and Section 98(1) and its other clauses, it is necessary to deal with this point in little more detail.

50. The words used in Section 98(a) of the Act are, ''dismissing the election petition.'' The phraseology of the words which contains the words "petition", has to be construed in the light of its, true logical and dictionary meaning particularly as to how this word is being used in common parlance, as well as in judicial sphere. According to the dictionary meaning, the word ''petition'' has got the same meaning as ''application''. It is also well known that the two words i. e. ''petition'' and ''application'' are used interchangeably and the party ranged on opposite side is variously called ''opponent'' ''counter petition'', ''non-applicant'' or ''respondent''. (See Naniappa v. Vimla Devi (AIR 1957 Mys 44).

51. It may also be seen that u/s 26 of the Hindu Marriage Act, which provides for custody of children, the language employed is "upon application or petition for the purpose." It would indicate that an interlocutory application will also be a petition. Therefore, in this context, the person who files the election petition is known as ''petitioner'' and the other party is known as ''respondent'' as this

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nomenclature has been used in election matters and even if the respondent files any interlocutory application in the election petition, it may by termed as "petition'' and if that application/ petition is dismissed, the same may be termed as dismissal of the election petition and if allowed, resulting in attracting other clauses of Section 98 relating to the valuable rights of the parties, will also give cause of action to the aggrieved party to prefer appeal u/s 116-A of the Act which envisages "appeal against every order." The words "every order" also indicate any order passed on interlocutory application. By this interpretation only, we could harmonies the words and language used in Section 116-A and Section 98(a) of the Act, i. e., ''every order'' and ''dismissal of election petition''.

52. Therefore, I am of the opinion that if any application is presented either by the petitioner or by the respondent, during the course of election petition, that may be construed as ''petition'' in the light of the aforesaid discussion and if that application/petition is dismissed that will be construed to be a dismissal order u/s 98(a) of the Act, giving cause to the aggrieved party to file appeal by invoking the provisions of Section 116-A of the Act. By this interpretation only the provisions of Section 98(a) of the Act can be co-related with the words ''every order'' used in section 116-A of the Act.

53. Therefore, against an interlocutory order which decides the matters of movement or affect vital or valuable rights of the parties and works serious injustice to the party concerned and attains the finality to the order, attracting sub-sections (a), (b) and (c) of Section 98 of the Act, appeal u/s 116-A of the Act, in wider sense would be maintainable, even against interlocutory orders, before the Supreme Court.

54. With due respects to the views taken by Gujrat and Madras High Courts, respectively, in the case of Chhotalal Jivabhai (supra) and Kadiravan (supra), if accepted, fear, would not only lead to a great anomaly but would run contrary to the provision of Article 329(b) of the Constitution and Section 116-A of the Act; inasmuch as if Clause 10 of the Letters Patent is made applicable in election petitions, despite the statutory remedy provided in the Act itself, then why not Article 226 of the Constitution be also resorted to in the matter of election petitions against orders arising out of an election petition or in any matter relating there to with elections ?

55. In Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, it has been held :

...Article 329(b) rules out the maintainability of the writ application.

Further, it has been held-

...The writ application is, therefore, barred under Article 329(b) of the Constitution....

(See para 125 of the Judgment)

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56. Therefore, to me, it appears that the view taken by the Gujrat High Court and Madras High Court, has not become the view of the Hon''ble Supreme Court so far in view of the law laid down in Mohinder Singh''s case (supra) and Smt Indira Nehru Gandhi''s case (supra).

57. Hence, from the discussion aforesaid, I am of the opinion that no resort could be made under Clause 10 of the Letters Patent against an order arising out of election petition in view of Article 329(b) of the Constitution and the non-obstante clause of Section 116-A of the Act.

58. Before parting with the case, I would like to mention my intention by making the position clear that as stated aforesaid, since the second question relating to the survival of the Letters Patent was unanimously dropped, for which the Larger Bench of Five Judges was constituted and the sole purpose of its constitution came to an end, we are relegated to our original position of the Full Bench of Three Judges only. Initially, Full Bench of Three Judges was constituted to answer the question relating to the applicability of Clause 10 of the Letters Patent in the orders arising out of election petitions. Therefore, in this situation, the majority view expressed by the Three Judges of the Full Bench in this regard will only prevail.

Per Full Bench

59. According to the majority opinion, it is held that an appeal lies under Clause 10 of the Letters Patent against an interlocutory order passed by single judge in election petition which amounts to a ''judgment'' within the meaning of that expression used in Clause 10. On this conclusion reached in the majority opinion, it is directed that the appeal be now listed for hearing on merits before a Division Bench for deciding the further questions arising therein.

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