

**IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Subrata Talukdar

And

The Hon'ble Justice Supratim Bhattacharya

APOT/95/2022

with

EP/2/2021

IA No. GA/1/2022, GA/2/2022, GA/3/2022

Alo Rani Sarkar

VS

Swapan Majumdar

For the Appellants

: Mr. Anirban Ray,
Mr. Jayanta Sengupta,
Mr. Shayak Mitra,
Mr. Piyush Agarwal,
Mr. Piyush Kr. Ray,
Mr. Agnish Basu,
Mr. Kush Agarwal.

For Respondents

: Mr. Jagriti Mishra,
Mr. Arindam Paul,
Mr. Subham Gupta,
Mr. Debayan Goswami,
Mr. Reshab Kumar,

Ms. Ananya Bhattacharya,

Mr. Raj Kumar Mitra,

Ms. Parna Mukherjee.

For E.C.I. : Mr. Anuran Samanta.

Heard on : 18.01.2023

Judgment on : 20.04.2023

Subrata Talukdar, J.:- This appeal has been directed against the Judgement and Order dated 20th May, 2022 dismissing Election Petition 2 of 2021 (EP/2/2021) and also deciding the application being GA 4 of 2022 filed in connection with EP 2 of 2021.

The only issue to be decided by this Court is whether this *intra-court* appeal being APOT 95 of 2022 is maintainable in the light of The Representation of People Act, 1951 (for short the *1951 Act*) under which the said Election Petition being EP 2 of 2021 came to be filed before the designated Court of this Hon'ble Court.

In the event this Court finds this appeal to be maintainable, only then the next question would arise of hearing the parties on the merits of the electoral dispute. In the event this Court decides against the maintainability of this appeal, the parties shall be at liberty to approach the appropriate Court which, in the statutory scheme of the *1951 Act*, is the Hon'ble Supreme Court of India.

Before advertng to the legal discussion on the maintainability of the appeal a brief reference to the background facts is necessary.

The present Appellant, Smt. Alo Rani Sarkar, was the Petitioner in EP 2 of 2021. The Appellant contested the Legislative Assembly Elections of the State of West Bengal held in April, 2021 from Bongaon Dakshin (SC) Assembly Constituency of District North 24 Parganas as the candidate of a particular political party.

The Respondent in EP 2 of 2021, Mr. Swapan Majumdar, who is also the Respondent in this appeal, contested as a candidate of a rival political party from the same Constituency.

Upon declaration of the result the Respondent was declared the winner and hence stood Elected. The Appellant/Petitioner challenged the election of the Respondent before the Court of the Hon'ble Single Bench being the designated Court in terms of *Section 80A* of the *1951 Act*. The Appellant/Petitioner alleged that the Respondent had indulged in corrupt electoral practices. Hence, the election of the Respondent be declared *void* and be set aside and an interim order of injunction be also passed restraining the Respondent from functioning and/or acting as a Member of the West Bengal Legislative Assembly till disposal of the Election Petition.

The Respondent thereafter filed two applications under *Order 7 Rule 11* of the Code of Civil Procedure (*CPC*) before the Hon'ble Single Bench seeking rejection of the Election Petition. One of the two applications was *simplicitor* under *Order 7 Rule 11 CPC* and the other was under *Order 7 Rule 11(d)* of the *CPC*. In his application filed under *Order 7 Rule 11(d)*, the Respondent alleged that the Election Petition filed by the Appellant was not maintainable since at the time of contesting the said Election the Appellant

was a Bangladeshi national and not an Indian citizen. The Respondent relied on several factual data before the Hon'ble Single Bench to demonstrate that as on the date of the Assembly Election for Bangaon Dakshin (SC) Constituency, the Appellant/Petitioner was the wife of a Bangladeshi national and her name had appeared in the Voters List of Bangladesh as well as the further fact that the Appellant/Petitioner was the holder of a Bangladeshi National Identity Card. The Respondent therefore sought dismissal of EP 2 of 2021 by the Hon'ble Single Bench on the ground that the Election Petition was not maintainable at the behest of the Appellant/Petitioner.

By the Judgement and Order impugned dated 20th of May, 2022, the Hon'ble Single Bench was pleased to find that the Appellant/Petitioner had practically admitted to the fact she was a Bangladeshi national at the time the said Assembly Election was held. The Hon'ble Single Bench further found that the Appellant/Petitioner had only denied the charge of being a Bangladeshi national on the ground that she had applied to the concerned Bangladeshi authorities for deletion of her name from the Electoral Roll of Bangladesh.

The Hon'ble Single Bench also held that it was not possible for any person to hold a dual citizenship in India. The Appellant/Petitioner had merely applied to have her name struck off from the Electoral Roll of Bangladesh. Therefore, the Appellant/Petitioner still remained a Bangladeshi national and hence was not qualified to contest the said

Assembly Election as a candidate. *Ipso facto*, the Election Petition filed by the Appellant/Petitioner was also not maintainable.

Based on the above stated facts, the Hon'ble Single Bench held that the Election Petition is barred under the law of the land. The Hon'ble Single Bench proceeded to exercise powers under *Order XII Rule 6* of the *CPC*. *Order XII Rule 6* entitles the Court to exercise powers based upon admission of facts, either upon the application of any party or of its own motion and without waiting for determination of any other question between the parties, by making such order or delivering such judgement as the Court may think fit having regard to such admitted fact.

Based on the admitted facts emanating from the pleadings on record, the Hon'ble Single Bench in exercise of powers under *Order XII Rule 6 CPC* while dismissing EP 2 of 2021 also referred the issue of the identity of the Appellant/Petitioner to the Election Commission of India for information and taking necessary action.

The operative part of the Judgment and Order of the Hon'ble Single Bench reads as follows:-

"22. From the enquiry report dated 29th June, 2021, regarding deletion of name of Petitioner from the Electoral Roll of Bangladesh which the Petitioner has relied upon in her affidavit-in-opposition, it is ascertained that the parents of the Petitioner all along used to reside in Bangladesh. Admittedly her mother and brother are still residing in Bangladesh. Therefore, Petitioner's claim that she became the citizen of India by birth by virtue of the provision of Article 5 of the Constitution or Section 3 of the Citizenship Act is proved to have been false.

23. This Court has already pointed out that in her EPIC Card, Pan Card and Aadhar Card, the Petitioner mentioned her date of birth as on 22nd March, 1969. However, in NID Certificate issued by Bangladesh Election Commission in favour of the Petitioner, her date of birth was recorded as on 15th January, 1967. Therefore, there is discrepancy between the said two documents. The Petitioner could not produce any document in support of her date of birth and place of birth. There is absolutely no record to prove that the parents of the Petitioner came to India from Bangladesh and acquired citizenship of this Country following the procedures contained in Section 3(2) to Section 6 of the Citizenship Act, 1955. Therefore, from the documents submitted by the Petitioner it is found that the parents of the Petitioner were not the citizens of India . The Petitioner never acquired citizenship of this country following the provisions of the Citizenship Act, 1955. On the contrary the admitted position is that the Petitioner was a Bangladeshi citizen on the date of declaration of General Election of West Bengal State Assembly by the Election Commission, filing of the nomination paper, date of election and declaration of the result. It is further found from the Petitioner's own documents that though she claimed that she severed all marital relation with her husband, she herself mentioned her husband's name Harendra Nath Sarkar in the Voters Identity Card and Aadhar Card. Needless to mention that Voter Identity Card was issued in the name of Petitioner on 1st March, 2012, and Aadhar Card was issued subsequent to the issuance of Voter Card. Thus, on the date of issuance of Adhar Card marital tie of the Petitioner existed with the said Harendra Nath Sarkar who is a Bangladeshi national. The Petitioner herself admitted that her marriage with Harendra Nath Sarkar was solemnized in the year 1980 and while she was living with her husband she applied for citizenship of Bangladesh and on the basis of her application her name was recorded in the electoral roll of Bangladesh and National Identification Certificate was issued in her name. Even assuming that in the mean time the name of the Petitioner was struck off by the concerned authority, on the date of Assembly Election the Petitioner was not a citizen of India.

24. Under such backdrop the question as to whether such admitted facts can be taken into consideration to hold that the election petition filed by the Petitioner is barred by the provision of Article 173 read with Section 16 of The Representation of the People Act, 1951 while disposing of an application under Order VII Rule 11 of the CPC.

25. The law on this point is no longer *res integra*. In order to dispose of an application under Order VII Rule 11 CPC, the court can look into the averments in the plaint and no other document. In other words, only the pleadings of the Petitioner as disclosed in the election petition can be considered while disposing of an application under Order VII Rule 11 CPC. Even the pleadings made out by the Petitioner in her affidavit-in-opposition cannot be considered.

26. At the same time the court has come to this conclusion that the Petitioner filed the election petition claiming to be a citizen of India. She filed nomination paper as a citizen of India. She contested the election as a citizen of India. But from the documents filed and relied on by the Petitioner in her affidavit-in-opposition, it is ascertained that in the month of June 2021, her application for deletion of her name from the electoral roll of Bangladesh was under consideration before the appropriate authority of Election Commission of Bangladesh. Thus, her name was not deleted till 29th June, 2021 from NID and Electoral Roll of Bangladesh. The record shows that the Petitioner filed nomination to contest the State Assembly seat of 96-Bangaon Dakshin of SC(Constituency) on 31st March, 2021. Election was conducted on 22nd April 2021 and the result was published on 2nd May, 2021. The election petition was filed on 11th June, 2021. Therefore, admittedly on all the above dates, the name of the Petitioner appeared on in the Electoral Roll of Bangladesh.

27. Thus, the election petition is barred under the provision of Article 173 of the Constitution of India read with Section 16 of the Representation of the People Act, 1950. This Court comes to the above decision not from any

pleading filed by the Respondent, but from the pleadings and documents annexed thereto in support of the pleadings of the Petitioner in her plaint and written objection.

28. However, when this Court finds that though the election petition is barred under the above mentioned provisions of law, the court cannot reject the plaint under Order VII Rule 11 of the CPC because such pleadings were not the part of the election petition filed by the Petitioner. At this stage, under the facts and circumstances involved in the instant case, this court finds that the court can dispose of the election petition under Order XII Rule 6 of the CPC.

29. Order XII Rule 6 speaks about judgment on admissions. The said provision runs thus:-

(1) R 6(1). Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit having regard to such admissions.

(2) Whenever a judgment is pronounced under Rule 1 a decree shall be drawn up upon in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.

30. From plain reading of the above provisions, it appears that the power of the court under Order XII Rule 6, is very wide. It is open to the court to pronounce a judgment on admission on the pleading or otherwise. The word "otherwise" in the said provision clearly indicates that it is open to the court to base the judgment on statements made by a party not only in the pleadings but also de hors the pleadings. Such admission may be made either expressly or constructively.

31. Thus, in order to pronounce a judgment under Order XII Rule 6 CPC , it is not necessary that the defendant

shall have to admit the claim of the plaintiff in his written statement. He can admit any claim or fact even otherwise. In the instant case the Petitioner admitted that she acquired citizenship of Bangladesh mistakenly. However, the name of the Petitioner still exists in the Electoral Roll of Bangladesh. I am in agreement with the learned advocate for the Respondent that the principle of 'Dual Citizenship' is not applicable in India. Therefore, the Petitioner cannot claim to be a citizen of India when her name appeared in the Electoral Roll of Bangladesh. The relevant date is the date of filing nomination paper by the Petitioner. It is admitted from the documents filed by the Petitioner that on the date of filing of the nomination paper by her she was a Bangladeshi national.

32. In view of such circumstances, it is open for the court to pronounce judgment under Order XII Rule 6 of the CPC.

33. For the reasons stated above this Court finds that continuation of the proceeding in Election Petition 2/2021 will be unnecessary and fruitless exercise of judicial process and time.

34. The court can under the facts and circumstances dated above pass a judgment on admission.

35. In view of the above discussion, the election petition is liable to be dismissed under Order XII Rule 6 of the CPC.

36. The instant application is thus disposed of.

37. The order of dismissal of election proceeding be passed in EP2/2021.

38. In view of the peculiar facts and circumstances of this case, a copy of this order be sent to the Election Commission of India for information and taking necessary action in respect of the Petitioner's status in this country as on this date, through the learned Registrar General, High Court, Calcutta."

Aggrieved by the Judgement and Order of the Hon'ble Single Bench, the Appellant/Petitioner has filed the instant appeal.

Mr. Jagriti Mishra, Learned Counsel appearing on behalf of the Respondent raises a *demurrer* that an *intra-court* appeal is not maintainable. It is submitted that the *1951 Act* unambiguously provides that an appeal against dismissal of an Election Petition shall lie before the Hon'ble Supreme Court under *Sections 116A* of the *1951 Act*. *Section 116A* provides for appeals against orders made by the High Court in an Election Petition under *Section 98 or 99* of the *1951 Act*. The period of limitation for filing an appeal under *Section 116A* is also provided in the *1951 Act*.

It is submitted that The Representation of People Act, 1950 was followed by the *1951 Act* and thereafter amendments were brought in 1966 creating a designated statutory court for challenging elections. The creation of a statutory election Court arose from the intent as expressed in *Article 329(b)* of the Constitution of India. Relying on the authorities reported in *AIR 1952 SC 64 (In Re: N.P. Ponnuswami)*, which stood reiterated in *(1988) 2 SCC 1 (In Re: Upadhyaya Hargovind Devshanker vs. Dhirendrasinh Virbhadrasinhji Solanki & Ors.)*, Learned Counsel submits that the present *intra-court* appeal is not maintainable and requires to be dismissed *in limine*.

Per contra, Mr. Anirban Ray, Learned Counsel appearing for the Appellant/Petitioner relies on the authorities reported in *(2003) 10 SCC 361, AIR 2007 Cal 260* and *(1986) 4 SCC 78* to argue that the present appeal is maintainable. It is submitted that *Clause 15* of the Letters Patent does not restrict the filing of an appeal in connection with an Election Petition,

notwithstanding the bar created under *Section 116A* of the *1951 Act*. It is pointed out that the right of filing an *intra-court* appeal cannot be taken away by inference. Although the *1951 Act* is a self-contained Code, an *intra-court* appeal is maintainable in respect of any order passed in an Election Petition which is not an Order under *Sections 98 and 99* of the *1951 Act* which are only appealable to the Hon'ble Supreme Court under *Section 116A* of the *1951 Act*.

Having heard the parties and considering the materials placed, this Court is at the threshold required to notice the statutory position governing the field.

First, the designated Judge of a High Court shall have the power to try an Election Petition under *Section 80A* of the *1951 Act*. The grounds on which an Election Petition may be presented have been specified in *Section 100* of the *1951 Act*. The involvement of a *returned candidate* in any corrupt practice shall be one of the grounds for declaring the Election to be *void* under *Section 100 (1)(b)* of the *1951 Act*.

The contents of the Election Petition are specified in *Section 83* of the *1951 Act*.

The High Court shall render a decision in the Election Petition under *Section 98* of the *1951 Act*. While passing an Order under *Section 98*, the High Court shall be eligible to pass other orders as specified in *Section 99* of the *1951 Act*. *Sections 98 and 99* read as follows:-

“98. Decision of the High Court

At the conclusion of the trial of an election petition the High Court shall make an order-

- (a) Dismissing the election petition; or*
- (b) declaring the election of all or any of the returned candidates to be void; or*
- (c) declaring the election of all or any of the returned candidates to be void and the Petitioner or any other candidate to have been duly elected.*

99. Other orders to be made by the High Court

(1) At the time of making an order under section 98, the High Court shall also make an order-

- (a) where any charge is made in the petition of any corrupt practice having been committed at the election, recording-*
 - (i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and*
 - (ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and*

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid:

PROVIDED that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless-

- (a) He has been given notice to appear before the High Court and to show cause why he should not be so named; and*
- (b) If he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him, or calling evidence in his defence and of being heard.*

(2) In this section and in section 100, the expression "agent" has the same meaning as in section 123."

The procedure for filing an appeal is provided in Section 116C of the 1951 Act.

Upon a close examination of the provisions of the statute, i.e. the 1951 Act, this Court finds that appeals under *Section 116A* shall lie against orders passed under *Sections 98 and 99 (supra)*. Admittedly, the trial of the instant Election Petition being EP 2 of 2021 could not be held by the Hon'ble Single Bench. Therefore, there could be no reason to conclude the trial as contemplated by *Section 98 (supra)*. Consequently, no decision could be rendered by the High Court at the conclusion of the trial dismissing the Election Petition and/or declaring the Election of the *Returned Candidate* to be *void* and/or declaring the Petitioner or any other person to be duly elected.

Since no decision could be rendered at the conclusion of the trial, no other orders connected to the trial could be passed by the High Court under *Section 99* of 1951 Act. *Stricto sensu* therefore, no appeal could be filed before the Hon'ble Supreme Court under *Section 116A* of the 1951 Act which provides for appeals from every order made by a High Court under *Section 98* or *Section 99 (supra)*. For the benefit of this discussion *Section 116A* stands quoted below.

“116A. 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 under section 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 under section 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.”

Clause 15 of the Letters Patent also contains no specific bar against an *intra-Court* appeal from any other order in an Election Petition which is not an order under Sections 98 and 99 of the 1951 Act. Clause 15 of the Letters Patent reads as follows:-

“15. Appeal from the courts of original jurisdiction to the High Court in its appellate jurisdiction.- And we do further ordain that an appeal to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgement passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the powers of superintendence under the provisions of Section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made on or after the first day of February, 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us, or heirs or successors in our or their Privy Council as hereinafter provided.”

This point came up for discussion in (2012) 12 SCC 27 wherein speaking for himself, one of the Hon'ble Judges observed as follows:-

“5. Section 116A of the Representation of the People Act, 1951 provides for appeals to this Court both on facts as also on questions of law from every order made by the High Court under Section 98 or 99 of the Act. Sub-section (2) of Section 116A prescribes a period of 30 days for filing of such appeals while proviso to sub-section (2) empowers this Court to entertain an appeal even after the expiry of the said period if the Appellant shows sufficient cause for not preferring the appeal within such period.

6. Section 98 of the Act provides for the orders that the High Court shall make at the conclusion of the trial in an election petition. These orders could be in the nature of dismissal of an election petition or declaring the election of all or any of the returned candidates to be void or declaring the election of all or any of the returned candidates to be void and the Petitioner or any other candidate to have been declared elected.

7. Section 86 of the Act deals with the trial of election petitions and, inter alia, provides that the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81 or 82 or Section 117 of the Act. Any such dismissal may come after the parties go to trial or even at the threshold. An election petition which does not call for dismissal on the ground that the same violates any one of the three provisions, namely, Section 81 or 82 or 117 may still be dismissed summarily and without the parties going to trial on the merits of the controversy under Order VII Rule 11 of CPC. Any such order if may not be qualifying for a challenge before this Court under Section 116A as an appeal is under that provision limited to only such orders as are passed under Section 98 of the Act at the conclusion of the trial of election petition. Strictly speaking, it could well be said that an order which does not fall within the four corners of Section 98 inasmuch as the same is not passed at the conclusion of the trial of an election petition may not

qualify for being challenged in appeal under Section 116A including an order dismissing the petitions summarily under Section 86 of the Act for non-compliance of the provisions of the Sections 81, 82 and 117.

8. What is important and what makes a difference is the presence of an explanation under Section 86(1) that by a legal fiction makes an order passed under Section 86 of the Act to be an order under Section 98 thereof explanation reads :

“Explanation to Section 86: An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98.”

The fiction is, however, limited to orders passed under Section 86(1) alone namely to cases where dismissal is for non-compliance with the provisions of Sections 81, 82 and 117 of the Act. It does not extend to dismissal under Order VII Rule 11 of the CPC for non-compliance with the provisions of Section 83 of the Act. In other words, if a petition does not state the material facts on which the Petitioner relies as required under Section 83(1)(a) and thereby fails to disclose any cause of action and is consequently dismissed by the Court in exercise of its powers under Order VII, Rule 11 CPC, such an order of rejection of the petition is not in terms of Explanation to Section 86 treated as an order made under Section 98 so as to be appealable under Section 116A of the Act.

9. Mr. Prasad was, therefore, perfectly justified in arguing that since the High Court has, in the instant case, dismissed the election petitions not under Section 86 to which the Explanation appearing thereunder is attracted but under Order VII Rule 11 for the alleged failure of the Petitioners to state the material facts on which they relied, the order passed by the High Court was not appealable under Section 116A. The only difficulty which was encountered by us in holding that the special leave petitions were maintainable is a decision of this Court in Dipak Chandra Ruhidas case (supra) where this Court has taken the view that Section 116A must be interpreted liberally and an order dismissing the election petition on

the ground that the averments do not state material facts would be appealable under Section 116A. With utmost respect to the Hon'ble Judges comprising the Bench, we find that conclusion to be contrary to the scheme of the Act. We were, therefore, inclined to make a reference to a larger Bench for re-consideration of that view, for the same, in our opinion, extends the fiction created under the Explanation to Section 86 even to case where the Court does not invoke Section 86 while passing an order of dismissal but exercises its power of rejection of the plaint/petition under Order 7 Rule 11 CPC.

10. It is noteworthy that an order under Order VII Rule 11 CPC by reason of Section 2(2) of the CPC is a decree hence appealable under Section 96 of the Code. Since, however, the right of appeal under the Representation of the People Act is regulated by Section 116A, the fact that an order rejecting a plaint under Order VII Rule 11 CPC would have been in the ordinary course appealable before the higher Court hearing such appeals would not make any difference. Inasmuch as the right of appeal is a creature of the statute, and Section 116A does not provide for an appeal against an order passed under Order VII Rule 11 CPC read with Section 83 of the Representation of the People Act, 1951 no resort can be taken to that provision by a process of interpretation of the Explanation to Section 86 or an artificial extension of the legal fiction beyond the said provision. Mr. Prasad was not, however, very keen to pursue his argument to its logical end for obvious reasons. A reference to a larger bench would inevitably delay the disposal of these appeals and even the election petitions. Mr. Prasad, therefore, chose the alternative course available to him and sought permission of this Court to convert the SLPs into appeals under Section 116A of the Act. Two applications, one seeking permission to convert the petitions into an appeal under Section 116A and the other seeking condonation of delay in the filing of the appeals were accordingly made by the Petitioner. Having heard learned counsel for the parties at some length we are inclined to allow both these applications in both the special leave petitions.

11. Whether or not an appeal was maintainable against the impugned order was and continues to be a highly debatable issue as seen in the foregoing paragraphs. The Petitioners appear to have been advised that the orders could be challenged only by way of SLPs. That advice cannot in the circumstances of the case, be said to be a reckless piece of advice nor can the Petitioners be accused of lack of diligence in the matter when the SLPs were admittedly filed within the period of limitation stipulated for the purpose. The decision of this Court in Deputy Collector, Northern Sub-Division Panaji v. Comunidade of Bambolim (1995) 5 SCC 333, recognizes a bonafide mistake on the part of the counsel in pursuing a remedy as a good ground for condonation of delay in approaching the right forum in the right kind of proceedings. The limitation prescribed for filing an appeal under Section 116A is just about 30 days from the date of the order. There is, therefore, a delay of nearly 20 days in the filing of the appeal which deserves to be condoned. We accordingly allow the applications for conversion and for condonation of delay in both the special leave petitions and direct that the SLPs shall be treated as appeals filed under Section 116A of the Representation of the People Act.”

Applying the same logic to the order of the Hon’ble Single Bench which purports to dismiss the Election Petition based on admission of facts and in exercise of powers under *Order XII Rule 6 CPC*, such a dismissal, not being an order passed under *Sections 98 and 99 of the 1951 Act*, arguably is amenable to an intra-Court appeal under *Clause 15 of the Letters Patent*.

However, at this juncture this Court must notice the clear pronouncement of the Hon’ble Supreme Court in *(1988) 2 SCC 1 (supra)* which at *Paragraphs 16, 17, 18 and 19* thereof read as follows:-

“16. Even on this occasion the Act did not provide for any appeal against any interlocutory order passed by judge

trying an election petition. After the above amendment the authority referred to in Article 329(b) of the Constitution to decide an election petition under the Act is again two-tier authority- the High Court Judge trying an election petition being the original authority and the Supreme Court the appellate authority. The effect of clause (b) of Article 329 of the Constitution as already referred to above has been explained by the Constitution Bench of this Court in N.P. Ponnuswami case. No court exercising power under any ordinary law other than the judge of a High Court who has been assigned the work of trying an election petition under sub-section (2) of Section 80-A of the Act and the Supreme Court which is empowered to hear an appeal against any order passed by the judge of the High Court under Section 98 or Section 99 of the Act can therefore decide any question arising out of an election petition. The power of the Supreme Court under the provisions of the Constitution which is the fundamental law of the land and not an ordinary law is however unaffected by any of the provisions of the Act. It means that when the election petition is pending in the High Court only the judge who is asked to try an election petition can deal with questions arising in it and no other judge or judges of the High Court can deal with them. When the order passed by the judge of the High Court in an election petition is an order passed under Section 98 or Section 99 of the Act it is subject to the appellate jurisdiction of the Supreme Court under Section 116-A of the Act as Article 136 of the Constitution naturally stands excluded in view of the express provisions contained in Section 116-A of the Act. The remedy available under Article 136 of the Constitution may, however, be resorted to by any party who is aggrieved by any order passed by the judge trying an election petition which does not fall under Section 98 or Section 99 of the Act. It follows that the Division Bench of the High Court which is entitled to hear an appeal against any order of a Single Judge under Clause 15 of the Letters Patent of the High Court which is an ordinary law cannot hear an appeal against any interlocutory order passed in the course of the trial of an election petition by the judge trying an election petition since the Division Bench is not specified in the Act as an appellate authority which can

deal with questions arising out of an election petition filed under the Act.

17. Clause 15 of the Letters Patent of the High Court of Gujarat (omitting the unnecessary portions) reads as follows:

15. Appeal from the courts of original jurisdiction to the High Court in its appellate jurisdiction. And we do further ordain that an appeal shall lie to the said High Court from the judgment (not being a judgment passed in the exercise of appellate jurisdiction) of one judge of the said High Court or one judge of any Division Court, pursuant to Section 108 of the Government of India Act,

18. The relevant part of Clause 15 of the Letters Patent which is referred to above provides for an appeal against a judgment passed by a Single Judge of a High Court to the same High Court and the scope of the said appellate power has been explained by this Court in Shah Babulal Khimji vs. Jayaben D. Kania. An appeal no doubt lies under that clause from an order of a Single Judge of the High Court exercising original jurisdiction to the High Court itself irrespective of the fact that the judgment is preliminary or final or that it is one passed at an interlocutory stage provided it satisfies the conditions set out in the above decision but the said provision cannot be extended to an election petition filed under the Act. Conferment of the power to try an election petition filed under the Act does not amount to enlargement of the existing jurisdiction of the High Court. The jurisdiction exercisable by the Single judge under the Act is a special jurisdiction conferred on the High Court by virtue of Article 329(b) of the Constitution. Having regard to the history of the legislation and the limited nature of the appeal expressly provided in Section 116-A of the Act it should be held that any other right of appeal (excluding that under the Constitution) is taken away by necessary implication. We, therefore, find it difficult to subscribe to the view that when once the jurisdiction to try an election petition is conferred on the High Court all other powers incidental to the ordinary original jurisdiction exercised by a Single

Judge of a High Court would become applicable to an election petition filed under the Act. It is not doubt true that in Dr Chotalal Jivabhai Patel case the Division Bench of the High Court of Gujarat applied to the rule laid down in National Telephone Company Ltd. v. Postmaster General namely: "When a question is stated to be referred to an established court without more, it, imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right of appeal from its decisions likewise attaches." (emphasis added) to an election petition filed under the Act which the High Court could try in exercise of the special jurisdiction conferred on it by the Act and held that except an order under Section 98 or Section 99 of the Act which was made expressly appealable under Section 116-A of the Act to this Court all other orders passed by the judge trying an election petition would be appealable to the High Court under Clause 15 of the Letters Patent. The principle applied by the High Court is not an unqualified case. That rule itself suggests that even where a court is asked to hear a case, it is quite possible that the nature of the jurisdiction may be such that all the incidents of procedure of any general right of appeal from its decision may not be attracted. Perhaps the Division Bench would not have reached the said conclusion if it had considered the effect of Article 329(b) of the Constitution which authorised the creation of an authority for trying disputes arising out of elections to the Houses of Parliament and to the Houses of State legislatures and the history and the scheme of the Act and the limited right of appeal provided in Section 116-A of the Act. We do not find any discussion about the effect of the constitutional provision in Article 329(b) in the course of the said decision. There was also no adequate appreciation of the need to construe the Act as a complete code regarding all matters relating to settlement of election disputes. It is significant that in sub-section (7) of Section 86 of the Act it is stated that 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 on which the election petition is presented to the High Court for trial. If Parliament intended that the Division Bench of the High Court should exercise its appellate

jurisdiction under Clause 15 of the Letters Patent of the High Court probably it would not have enacted sub-section (7) of Section 86 of the Act having regard to the well known tendency one or the other party to an election petition preferring appeals against interlocutory orders to the Division Bench. The presence of such a remedy is enough to defeat the object of enacting sub-section (7) of Section 86. If such appeals against interlocutory orders to the High Court are permitted perhaps no election dispute will be finally settled until the next election becomes due. The intention of Parliament is that at the level of the High Court only the judge who is asked by the learned Chief Justice to try an election petition should be the sole judge to decide any question arising out of any such election petition and that at the appellate stage the Supreme Court alone should deal with any matter arising out of the election petition. We are of the view that as regards the jurisdiction to try an election petition and the right of appeal of the parties to an election petition, the provisions of the Act (apart from the provisions in the Constitution) constitute a complete code and no other judge or judges other than the Single Judge of the High Court who is asked to try an election petition and the Supreme Court exercising appellate powers under Section 116-A of the Act in respect of orders passed under Section 98 or Section 99 of the Act or under Article 136 of the Constitution in respect of other orders can have any jurisdiction to deal with any matter arising out of an election petition filed under the Act. We do not therefore agree with the view expressed on this question by the High Court of Gujarat in *Dr. Chotalal Jivabhai Patel* case. We therefore overrule the said decision. We also overrule the decision of the Madras High Court in *Kadiravan alias Shamsudeen v. B. Thirumalaikumar* and the decision of the Madhya Pradesh High Court in *Laxmi Narayan Nayak v. Ramratan Chaturvedi* which have taken the same view as in *Dr. Chotalal Jivabhai Patel* case. We are, however, in agreement with the view expressed by the High Court of Allahabad in *Siaram v. Nathuram* and by the High Court of Rajasthan in *Ramdhan v. Bhanwarlal* which have held that by necessary implication an appeal to the High Court from an interlocutory order passed by the Single Judge of

the High Court in the course of a trial of an election petition filed under the Act is excluded. The reasons given in the latter case by the Full Bench of the Rajasthan High Court are indeed quite substantial.

19. the Division Bench of the High Court of Gujarat had, therefore, no jurisdiction to hear the appeal filed by Respondent 1 against the interlocutory order passed by the learned Single Judge who was trying the election petition. We, therefore, set aside the judgment of the Division Bench of the High Court and dismiss the Letters Patent appeal filed before the High Court. We however express to opinion on the merits of the case. The parties are at liberty to resort to any other remedy open to them in law. The appeal is accordingly allowed. No costs."

Having regard to the above discussion in (1988) 2 SCC 1, this Court cannot have two views on the entire procedure connected to an Election Petition being part of a single statutory framework. The period of limitation specified in the 1951 Act for filing an appeal to the Hon'ble Supreme Court also indicates the statutory intent of maintaining a single framework for conduct of election proceedings.

Therefore, arguably though the order impugned of the Hon'ble Single Bench is not an Order under Sections 98 and 99 of the 1951 Act but, at the same time, by the said impugned Order an Election Petition stood dismissed.

Accordingly, having regard to the pronouncement of law as laid down in (1988) 2 SCC 1 (*supra*) Orders, even if considered incidental to an Election Petition but have resulted in an adjudication of such Election Petition must be restricted to the particular channel of appeal to the Hon'ble Supreme Court having regard to the overall statutory intent of keeping disputes

connected to the electoral process under a consolidated adjudicatory framework.

Before parting with this discussion, this Court must also notice that the facts relied upon by the Hon'ble Single Bench as gathered from the pleadings on record are part of the "*contents of an election petition disclosing material facts*" and covered by *Section 83* of the *1951 Act*. Admittedly therefore, the Hon'ble Single Bench has considered such material facts and dismissed the Election Petition. Fundamentally therefore, the dismissal of an Election Petition is only amenable to a challenge as provided by *Section 116A* of the *1951 Act*. or, by way of a Special Leave Petition under *Article 136* of the Constitution of India.

APOT 95 of 2022 stands accordingly **dismissed** only on the ground of being not maintainable.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Supratim Bhattacharya, J.)

(Subrata Talukdar, J.)

Later:-

Stay of the Order is prayed for by Mr. Sengupta, Learned Counsel appearing for the appellant.

The prayer for stay is considered and refused.

I agree.

(Supratim Bhattacharya, J.)

(Subrata Talukdar, J.)