Gujarat High Court
Indulal Kanaiyalal Yagnik vs Prasannadas D. Patwari And Ors. on 10 November, 1971
Equivalent citations: AIR 1972 Guj 92, (1972) GLR 269
Author: Bhagwati
Bench: P Bhagwati, T Mehta
JUDGMENT Bhagwati, C.J.

1. This appeal under Clause 15 of the Letters Patent is directed against a decision given by Mr. Justice Divan on a preliminary issue in Election Petition No.1 of 1971 holding that the election petition filed by the first respondent is properly constituted and is not liable to be dismissed on account of non-joinder of one Vasudev Tripathi. The election petition was filed by the first respondent challenging the election of the appellant who was declared elected as a member of the House of the People from the Ahmedabad City Constituency. The election was challenged on various grounds which included inter alia allegations of corrupt practice within the meaning of sub-sections (2) and (3) of Section 123 of the Representation of the People Act, 1951. The appellant contested the election petition and one of the contentions raised by him in an amended paragraph introduced in the written statement was that there were allegations of corrupt practice made in the petition against Vasudev Tripathi. President of the City District Congress (Shashak) Committee and since he was one of the candidates validly nominated for the election, though he withdrew his candidature on or before the date fixed for withdrawal of nomination papers, he was a candidate within the meaning of Section 79(b) and hence a necessary party under Section 82(b) and in his absence the petition was, by reason of Section 86, liable to be dismissed in limine on account of non-compliance with Section 82(b). This contention formed the subject-matter of Issue No.(2) before Mr. Justice Divan to whom the petition was assigned for hearing by me in my capacity as the Chief Justice. Since this issue raised the question whether the petition was liable to be dismissed in limine under Section 86, it was tried by Mr. Justice Divan as a preliminary issue. Mr. Justice Divan took the view, for reasons given in a judgment delivered on 20th August 1971, that there were no allegations of corrupt practice against Vasudev Tripathi in the petition and it was, therefore, not necessary for the first respondent to have joined Vasudev Tripathi and a respondent and the non-joinder of Vasudev Tripathi did not render the petition liable to dismissal under Section 86 and on this view, he answered Issue No.2 in the negative. The appellant thereupon preferred the present appeal in this Court under clause 15 of the Letters Patent.

2. When the appeal reached hearing before us, a preliminary objection was taken on behalf of the first and second respondents against the maintainability of the appeal. The first and second respondents urged that the decision of Mr. Justice Divan did not constitute "judgment" within the meaning of Clause 15 of the Letters Patent and no appeal was, therefore, maintainable against it. Now an appeal could lie against the decision of Mr. Justice Divan to a Division Bench of this Court only under Clause 15 of the Letters Patent and, therefore in order to determine the maintainability of the appeal, it is necessary to inquire whether the decision of Mr. Justice Divan could be aside to be a "judgment" within the meaning of Clause 15 of the Letters Patent. What is the true meaning and connotation of the expression "judgment" in clause 15 of the Letters Patent has been the subject-matter of judicial scrutiny in various decided cases and there has been a sharp cleavage of opinion amongst the different High Courts on this question. Some High Courts have given a narrow

meaning to the word "judgment" while some others have given a liberal meaning according as they wished to restrict or expand the appellate jurisdiction as a matter of policy. This cleavage of opinion amongst the different High Courts was noticed by the Supreme Court in Asrumati Devi v. Rupendra Deb. AIR 1953 SC 198, but the Supreme Court did not find it necessary in that case to pronounce on the validity of the rival interpretations, as the order which was sought to be appealed against could not be regarded as "judgment" on any interpretation of that word. There is, therefore, no final and authoritative pronouncement of the Supreme Court on the true interpretation of what is a "judgment" within the meaning of Clause 15 of the Letters Patent and we are left to be governed by the interpretation which has been accepted by the Bombay High Court over the years. Now so far as the Bombay High Court is concerned, the meaning of word "judgment" which has always and invariably been accepted as a working definition since as far back as 1895 when the case of Sonbai v. Ahmelbhai. (1872) a Bom HCR 398 was decided, is that given by Sir Richard Couch, C. J. In Justices of the Peace for Calcutta v. Oriental Gas Co., (1872) 8 Beng LR 433 at page 452. The learned Chief Justice gave the following meaning in a passage which has now become classical and which is always recalled when a question arises whether a decision given by a Single Judge of the High Court is a "judgment":-

"We think 'judgment' in clause 15 means a decision which affects the merits determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determinates only a part of it, leaving other matters to be determined."

Though this meaning has always been accepted by the Bombay High Court and in a number of decisions given subsequent to the bifurcation of the State of Bombay, notably the unreported decision given by a Division Bench consisting of Vakil. J. and myself on 29.9.1967 in Letter Patent Appeals Nos. 1, 2 and 3 of 1967 (Bom), this High Court has consistently adopted it, it must be remembered, as observed by Chagla, C. J. in Collector of Bombay v. Issac Penhas. 49 Bom LR 709 = (AIR 1948 Bom 103) that "it is not a statutory definition and cannot be regarded as giving an inflexible or exhaustive meaning." Couch C. J.. himself extended the meaning beyond this definition by including within it an adjudication which, though it may not decide the merits of any question between the parties, may yet, by its direct and inevitable effect, put an end to the suit or proceeding. Take for example, a case where an order is passed rejecting a plaint. Such an order does not decide the case or any part of it on merits but none-the-less it is a "judgment", because it has the effect of terminating the suit so far as the Court which makes the order is concerned. This was precisely the example given by Couch C. J.. when he said in the case of (1872) 8 Beng LR 433 (supra):-

"For example, there is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing but is merely the first step towards putting the case in a shape for determination. The latter determines finally so far as the Court which makes the order is concerned that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term."

The Supreme Court in its judgment in Asrumati Devi's case. AIR 1953 SC 198 (supra) referred to this passage from the judgment of Couch, C. J. and pointed out that, according to Couch C. J., a final

pronouncement, which puts an end to the proceeding so far as the Court dealing with it is concerned, would be a "judgment" and in such a case "it may not be necessary that there must be a decision on the merits". The test which has been accepted by the Calcutta High Court and which has also been consistently followed by the Bombay High Court as well as this High Court may, therefore, be stated to be that a decision in order to be a "judgment" within the meaning of Clause 15 of the Letters Patent must be a decision which, whether it be final or preliminary or interlocutory, affects the merits of the question in controversy between the parties in the proceeding by determining some right or liability or which, whatever be the form in which it is outwardly clothed is such that its direct and inevitable effect is to terminate or dispose of the proceeding or its effect, if not complied with, is to put an end to the suit or proceeding. If a decision, to quote the words of Robinson C. J. in Yeo Eng Byan v. Beng Seng & Co., AIR 1925 Rang 43, "merely paves the way for the determination of the question between the parties," it cannot be considered to be a judgment: nor can a mere formal order regulating the procedure in the proceeding or one which is nothing more than a step towards obtaining a final adjudication. Though the Supreme Court has not resolved the difference of opinion amongst the different High Courts on this point by a final and authoritative pronouncement and this test cannot be said to have been approved by the Supreme Court in a few of the decisions rendered by it on Clause 15 of the Letters Patent seems to be in favour of accepting this test. The case of Asrumati Devi, AIR 1953 SC 198 (supra) was decided by the Supreme Court by applying this test and it was held that an order made by a Single Judge of the Calcutta High Court under Clause 13 of the Letters Patent transferring a suit from the subordinate Court to the High Court was not a "judgment" appealable under Clause 15 of the Letters Patent because:

"The order in the present case neither affects the merits of the controversy between the parties in the suit itself, nor does it terminate or dispose of the suit on any ground. An order for transfer cannot be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground as has been referred to by Couch C. J. In his observations quoted above. An order directing a plaint to be rejected or taken off the file amounts to a final disposal of the suit so far as the Court making the order is concerned. That suit is completely at an end and it is immaterial that another suit could be filed in the same or another Court after removing the defects which led to the order of rejection. On the other hand, and order of transfer under clause 13 of the Letters Patent, is in the first place, not at all an order made by the Court in which the suit is pending. In the second place, the order does not put a end to the suit which remains perfectly alive and that very suit is to be tried by another Court, the proceedings in the letter, to be taken only from the stage at which they were left in the Court in which the suit was originally filed."

So also in Radhey Shyam v. Shyam Behari Singh, (1970) 2 SCC 405 = (AIR 1971 SC 2337) the same test was applied by the Supreme Court for the purpose of deciding that an order setting aside an auction sale under Order 21, Rule 90 of the Code of Civil Procedure was a "judgment" within the meaning of Clause 15 of the Letters Patent.

3. We may at this stage refer to a Full Bench decision of the Madras High Court in Palaniappa v. Krishnamurthy, AIR 1968 Mad 1 (FB) where a Full Bench consisting of three Judges laid down four tests for the purpose of determining whether a decision of a single Judge constitutes a judgment. These four tests were formulated by Anantanarayanan. D. J.. in the following words and he claimed

to derive them from the decision of the Supreme Court in Asrumati Devi's case, AIR 1953 SC 198:-

"(1) Whether the order or judgment of the single judge terminates the suit or proceedings?

(2) Whether it affects the merits of the controversy between the parties in the suit itself ?

(3) a test that can be considered a refinement of test No. 2. but which upon juristic principle should be separately stated, namely, whether it determines some right or liability as between the two parties? and (4) the negative test that has found express recognition in the dicta of White, C. J., with reference to (1905) ILR 29 Bom by their Lordships of the Supreme Court in Ashrumati Devi's case AIR 1953 SC 198 but which instead, would appear to have been impliedly approved, namely, whether apart from the actual words in the lis or proceeding. 'A conceivable order' or an order to the contrary effect would have disposed of the suit and would come within the definition of 'judgment' ".

The appellant, resting on this decision of the Madras High Court pleaded that these four tests must be accepted by us as valid and he relied particularly on the fourth test which we may for the sake of convenience refer as the conceivable order test and urged that since a decision on Issue No. 2 in his favour would have disposed of the petition and would have, therefore, admittedly been a judgment, a converse decision on Issue No. 2 against him should also likewise be regarded as a judgment. Now it may be pointed out straightway that this decision of a Full Bench of three Judges is directly contradictory to an earlier decision of a Full Bench of five Judges of the same High Court in Southern Roadways (P) Ltd. v. P. M. Veeraswami. AIR 1964 Mad 194. The Full Bench of five Judges in this earlier decision adopted the same test which has found favour with the Bombay High Court and our High Court, namely that a decision in order to be a judgment must either terminate the suit or proceeding or affect the merits of the controversy between the parties in the suit or proceeding. This test was adopted by the Full Bench of five Judges following a similar view taken by an earlier Full Bench of three Judges in Central Brokers v. Ramnarayana Poddar and Co., AIR 1954 Mad 1057 (FB). The decision of the Full Bench of three Judges in Palaniappa v. Krishnamurthy (supra) would therefore, seem to be of little authority even in the State of Madras. Moreover, we fail to see how the conceivable order test follows from the decision of the Supreme Court in Asrumati Devi's case. AIR 1953 SC 198. The observations of White, C. J., in Tuljaram v. Alagappa, (1902) ILR 35 Mad 1 which according to Anantanarayanan. C. J., lend support to the conceivable order test, were no doubt quoted by the Supreme Court in Asrumati Devi's case but that was for the purpose of distinguishing an order directing removal of a suit under Clause 13 from an order refusing to rescind leave under clause 12. The Supreme Court did not refer to these observations for the purpose of according its approval to the line of reasoning which held that an order refusing to rescind leave under Clause 12 is a judgment. That was made clear by the Supreme Court by saying: "We need not express any final opinion as to the propriety or otherwise of this view!" The conceivable order test was at no stage discussed by the Supreme Court nor did the Supreme Court at any time give its approval to it expressly or by necessary implication. We confess our inability to perceive how the Supreme Court could by said to have impliedly approved of the conceivable order test. We may point out that so far as the Bombay High Court and this High Court are concerned, the conceivable order test has at no time been accepted by them. The decisions of the Bombay High Court given prior to the bifurcation of the State of Bombay clearly negative the adoption of this test. It would be sufficient to cite only

one decision, namely, that reported in Goverdhanlalji v. Chandraprabhavati, 27 Bom LR 1496 = (AIR 1926 Bom 136). There the question arose whether an appeal lay against a decision given by a Single Judge of the Bombay High Court holding that the suit is maintainable. If the learned Single Judge had taken the view that the suit is not maintainable, it would have been dismissed and the decision dismissing the suit would have been indisputably a judgment. Now on the view that the conceivable order test were a valid test, the decision of the learned Single Judge holding that the suit is maintainable should also have been likewise regarded as a judgment but a Division Bench of the Bombay High Court held that it was not a judgment within the meaning of Clause 15. Furthermore, we find that there is a decision of a Division Bench of this Court consisting of B. J. Divan and J. B. Mehta. JJ. in The Esso Standard Eastern Inc. Bombay v. Vrajlal Ramjibhai and Co., ILR (1969) Guj 144 where the learned Judges have taken the same view which we are taking and declined to accept the conceivable order test as a valid test. We cannot, therefore, give our assent to the conceivable order test and we cannot, therefore, give our assent to the conceivable order test and we must proceed to decided the question before us on an application of the aforementioned well-recognised test which has always been accepted by the Bombay High Court and this High Court.

4. Numerous decision s were cited before us to illustrate the application of this test but if we look at these decisions, we find ourselves faced with what Lord Goddard, C. J., described as "a completed fog of authorities" or what Upjohn. J. called "a rough sea of contradictory authorities." It is not possible to discover any logical consistency amongst them nor to fit them into clear well-defined categories. The reason is that though the Courts have professed in these cases to apply the aforesaid test, they have not been invariably logical in the process of application. Their approach has been pragmatic rather than logical. Their decision in each particular case has been guided more by policy considerations than strict logical consistency. To quote only a passage from the judgment of Sir Norman Macleod, C. J. in 27 Bom LR 1496 = (AIR 1926 Bom 136) (supra) to illustrate what we have said.

"For the purposes of this case to my mind the distinction between decisions and orders thereon which stand by themselves. and decisions on a single issue in a suit is a very real one. It is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the suit should proceed can never to my mind amount to a judgment."

Logical consistency however much it may appeal to a scientific and ordered mind has never been regarded as a virtue of the legal process. No less a person than Mr. Justice Holmes said "life of the law is not logic but experience." And it is s well that it should be so, for otherwise law would be deprived of much of its capacity for growth: it would cease to be an instrument or tool in the hands of the society for doing real justice and become instead a lifeless mechanical set of rules. The examination of the decisions cited before us can, therefore, have only a limited purpose. They can at most offer guidance by way of illustration. They cannot be applied or extended by analogy.

5. We shall refer to some of the decided cases but before was do so, we may advert to an important question which may arise while considering what is the true scope and ambit of the test we have to apply. The question is whether it is sufficient, in order that a decision given by a Single Judge in a proceeding may be a judgment, that it determines some right or liability in the proceeding, in which

the order is made or it is necessary that it should determine some right or liability in the main proceeding, in reference to which, the proceeding, in which the order is made, is taken. It is not strictly necessary for the purpose of deciding the present appeal to go into this interesting question but some decisions were cited before us which seemed to suggest that a decision in order to qualify as a judgment must determine some right or liability in the main proceeding and we, therefore think it necessary to express our opinion on this question, though we are aware that in doing so, we would be laying ourselves open to the criticism that what we say will be obiter dicta and therefore without binding authority. We are of the view that, while considering this question a line must be drawn between proceedings which are purely ancillary to the main proceeding and proceedings which in themselves involve the determination of some right or liability not in issue in the main proceeding. If a proceeding is purely an ancillary proceeding for the purpose of facilitating the progress of the main suit or proceeding, an order made in such proceeding cannot be said to amount to a judgment unless it determines some right or liability in the main suit or proceeding. But if a proceeding is instituted which in itself involves determination of some right or liability, which is not in issue in the main suit of proceeding, and such right or liability is determined by an order made in such proceeding, it would amount to a judgment. We do not wish to hazard an enumeration of the cases which would fall in one category or the other but the obvious cases which might fall in the former category are cases of orders granting amendment and other orders of procedural character while cases which might fall in the latter category are cases of orders made on an application for setting aside an ex parte decree or an application for setting aside an abatement or an application for excuse of delay in filing an appeal. This view as regards the latter category of cases is, it must be conceded, contrary to the current of authority of the Bombay High Court. Where an order is made refusing to set aside abatement of a proceeding or to excuse delay in filling an appeal or to set aside an ex parte decree, it is well settled by decision of the Bombay High Court, that such an order would be a "judgment" because it negatives the right of the party to proceed further for adjudication of his rights on merits. But where an order is made setting aside abatement of a proceeding or excusing delay in filling an appeal or setting aside an ex parte decree, the view taken by the Bombay High Court in decided cases is that it would not be a "judgment" because it does not affect the merits of the question between the parties by determining some right or liability in the main proceeding but is merely a procedural step restoring the main proceeding to an actionable condition in which the substantive rights and liabilities, for adjudication of which the main proceeding is brought, can be determined. See Almedia v. Ramchandra Asavle. 40 Bom LR 658 = (AIR 1938 Bom 408): Vaijayantappa Shirsappa v. Ansuya. 42 Bom LR 377: and Elphinstone Etc. Mills v. Sondhi Sons, 63 Bom LR 947 = (AIR 1963 Bom 241 (FB)). This view taken by the Bombay High Court results in an anomaly that though an application of the nature above mentioned is an independent proceeding involving determination of some right or liability not in issue in the main proceeding, an order terminating the application one way would amount to a "judgment" while an order terminating the application the other way would not be a "judgment". We do not see any valid reason for making this distinction. Where an application is made for setting aside an abatement, it is independent proceeding in which the question arises whether the party applying is entitled to have the abatement set aside. This question would not be a question in controversy between the parties on merits in the main proceeding and the decision of this question one way or the other would not, therefore, be liable to be regarded as a "judgment" on the ground that it affects the merits of any question between the parties by determination between the parties by determining some right or liability in

the main proceeding. Not would the decision of this question be liable to the regarded as a "judgment" on the ground that it has the effect of terminating the main proceeding because even if it is held that the party applying is not entitled to have the abatement set aside, it would not have the effect of putting an end to the main proceeding since the main proceeding has already come to an end by reason of abate prior to the making of the application for setting aside the abatement: a decision refusing to revive a dead proceeding can not be said to have the effect of annihilating the proceeding or putting an end to it. The decision refusing to set aside the abatement could therefore be regarded as a judgment only on the hypothesis that it determines some right or liability in the application for setting aside the abatement and if that be so, the decision setting aside the abatement must also likewise be regarded as a judgment. The same reasoning would also apply in case of an application for setting aside an ex parte decree or an application for excusing delay in filing an appeal. It would therefore seem that the view taken by the Bombay High Court making a distinction between two kinds of orders in such applications, is not justifiable on principle, and some day, when a proper case comes before this Court, it may have to be reconsidered. But so far as the present case is concerned no such question arises for consideration because Issue No. 2 as to whether the petition was not properly constituted and was liable to be dismissed on account of non-joinder of Vasudev Tripathi was an issue in the petition and it did not form the subject-matter of an independent proceeding in which some right or liability not in issue in the petition was sought to be agitated.

6. We may now proceed to consider a few of the decided cases which were cited before us on behalf of the appellant. The first decision to which we must refer in this connection is Vaghoji v. Camaji. (1905) ILR 29 Bom 249. The appellant placed very strong reliance on this decision and contended that, according go to this decision if there is a determination on a question of jurisdiction, it would be a "judgment" irrespective whether it negatives the jurisdiction of the Court or upholds it. What happened in this case was that a suit was filed by the plaintiff after obtaining leave of the Court under Clause 12 of the Letters Patent and the defendants took out a summons for revocation of the leave on the ground that the suit was a suit for land and no leave could, therefore, be granted under Clause 12. Mr. Justice Russell who heard the summons took the view that the suit was not a suit for land and leave under Clause 12 was, therefore, rightly granted to the plaintiff and he accordingly dismissed the summons. The defendants preferred an appeal against the order passed by Mr. Justice Russell and the question was whether the appeal was maintainable. The Division Bench held that the order of Mr. Justice Russell dismissing the summons was a judgment appealable under Clause 15. Now it may be noted that when jurisdiction of the Court is invoked on the ground that a part of the cause of action has arisen within the limits of the jurisdiction of the Court, the plaintiff has to apply for leave under Clause 12, for without leave, the Court would, have no jurisdiction to entertain the suit. The practice in the Bombay High Court has always been that ordinarily leave under Clause 12 is granted ex parts and if the defendant wishes to contend that leave should not have been granted, he has to take out a Chamber Summons for revocation of leave and the decision on the Chamber Summons for revocation of leave would, in effect and substance, be a decision on the question whether leave should be granted or not. It is only if leave is granted that the Court would get jurisdiction to entertain the suit an therefore the decision of the question whether leave should be granted or not would be a decision in an independent proceeding which would come to an end when the question is decided on way or the other and hence the decision on the Chamber

Summons for revocation of leave would be a "judgment". This was precisely the ground on which Sir Lawrence Jenkins C. K. based his decision when he said:-

"From the note of his judgment it is apparent that on the question whether the suit was one for land, Mr. Justice Russell has decided adversely to the defendants, so that the dismissal of the summons has (so far as Mr. Justice Russell is concerned) become decisive against the defendants. It thus falls within the rule laid down in Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub. (1874) 13 Beng LR 91 and (in my opinion) an appeal lies."

This decision therefore merely applied the well-know test which we have discussed above. It cannot be read as laying down a broad proposition that whenever a question of jurisdiction arises in a proceeding the decision of such question would be a "judgment" irrespective whether it upholds the jurisdiction of the Court or negatives it.

7. The next decision to which reference may be made is the decision given by a Division Bench of the Bombay High Court in P. V. Rao v. Ahmed Haji Noormahomed, 50 Bom LR 711 = (AIR 1949 Bom 125). This case arose out of a petition filed by the owner of a building challenging the validity of an order of requisition purporting to be made by the Government of Bombay. The contention of the petitioner was that though the order of requisition purported to be an order made by the Government of Bombay, it was in fact made by one Rao and not by the Government of Bombay and it was, therefore, outside the power conferred by the Bombay Land Requisition Act, 1948. The petitioner in order to establish this contention, made an application to N. H. Bhagwati. J., while the hearing of the petition was in progress, that an order should be made summoning Rao for cross-examination under Rule 180 of the High Court Rules and on this application an order was made by N. H. Bhagwati, J,, requiring Rao to attend for cross-examination. Rao immediately preferred an appeal against this order to a Division Bench of the High Court and when the appeal came on for hearing, a preliminary objection was raised on behalf of the petitioner that the appeal was not maintainable since the order made by N. H. Bhagwati. J., was not a "judgment". The Division Bench rejected the preliminary objection holding that the order of N. H. Bhagwati. J., was a "judgment" and gave reasons for taking this view which were strongly relied upon on behalf of the appellant. Chagla. C. J., speaking on behalf of the Divisions Bench said:-

"The next question is whether having misapprehended the extent of his jurisdiction he has made an order which affects the merits of the question between the parties by determining some right or liability. Now. Mr. Rao has contended that the petition is misconceived because he has not made the order, but the Government of Bombay has, and in face of the order it must be decided that it is the Government of Bombay from whom the order has emanated and not from him. The learned Judge in making the order under Rule 180 has decided on the merits of this question that it is open to him not to accept the order at its face value. It also determines the rights of the parties because the right of Mr. Rao is to have the petition dismissed against him inasmuch as the petition is not served on the proper party which made the order and he has a right to have that petition dismissed on the strength of the order as it stands and as it is made. The learned Judge has determined his right against him by taking the view that the question whether it was he or the Government that made the order must be determined not by referring to the order itself, not by considering the terms of the

order, but aliunde by having oral testimony led by Mr. Rao who has authenticated the document."

It is clear from this passage that, according to the Division Bench, the order made by N. H. Bhagwati. J. though ostensibly an order merely permitting cross-examination of Rao, was, in effect and substance, an order deciding that it was open to the petitioner to show by evidence that the order of requisition was not an order made by the Govt, of Bombay but was an order made by Rao. Now one of the questions, and indeed the main question, in controversy between the parties in the petition was whether the authentication of the order of requisition by Rao in the name or Governor of Bombay was conclusive to show that the order of requisition was an order made by the Government of Bombay but was made by Rao. This question was determined by the order made by N. H. Bhagwati, J., and it was for this reason that the Division Bench held that it was a "judgment". It is no doubt true that while taking this view the Division Bench made certain observations which might seem to suggest that any decision which determines the right of a party to contend that the proceeding against him should be dismissed would be a "judgment" but these observations must be read in the context in which they are made and if they are so read, it is clear that they do not lay down any broad proposition that a determination of the right of a party to insist that the proceeding against him shall be dismissed is a "judgment". The real ground on which the Division Bench based its judgment was that the order of N. H. Bhagwati. J., operated to determine a question in controversy between the parties and any incidental observation made by the Division Bench while elaborating this ground cannot be regarded as forming the ratio of the decision. The decision of the Division Bench merely applied the well-recognised test to the facts of the case before it and the only significant feature of the decision may be said to be that it looked at the substance of the order rather than the form.

8 We then go to the last decision cited on behalf of the appellant, namely, the decision in Jai Hind Iron Mart v. Tulsiram, 54 Bom LR 844 = (AIR 1953 Bom 117). This decision was strongly relied upon on behalf of the appellant and it is, therefore, necessary to notice briefly the facts on which this decision was given. The question which arose in this case was whether an order made by a Single Judge of the High Court refusing to stay a subsequently instituted suit under Section 10 of the Code of Civil Procedure on the ground that the matter in issue in the subsequently instituted suit was not directly and substantially in issue in the previously instituted suit could be said to be a "judgment". The Division Bench of the Bombay High Court held that such an order would be a "judgment". This view was taken by the Division Bench following an earlier decision given in Jivanlal Narsi v. Pirojshaw Vakharia and Co., 35 Bom LR 15 = (AIR 1933 Bom 85) and after referring to this decision, the Division Bench pointed out that what was said in the earlier decision was "that an order under Section 10 is not an order dealing with procedure, it was an order dealing with the jurisdiction of the Court, because under Section 10 whatever order is passed affects the jurisdiction of the Court. It is a mandatory provision and the suit cannot go on if it is stayed and therefore the decision under Section 10 must affect the jurisdiction of the Court one way or the other, and every decision which deals with the jurisdiction of the Court is a decision which affects the rights of parties." The appellant relied strongly on these observations of the Division Bench and urged that whenever a question relating to the jurisdiction of the Court is decided, such a decision would be a "judgment", whether it affirmed the jurisdiction of the Court or negatived it. Now there can be no doubt that the observations made by the Division Bench are very wide and they seem to lend support to the

argument of the appellant but we do not think it would be right to read them as laying down a general proposition that in every case, whenever there is a decision which deals with the jurisdiction of the Court, it must be regarded to be a "judgment". The question would have to be asked in each case: what is the nature of the question affecting the jurisdiction of the Court on which the decision is given. If it is a question affecting the substantive rights of the parties for adjudication of which the proceeding is brought before the Court. It would be a "judgment" but not otherwise. The decision of the Division Bench in this case was, of course, right because in holding that the suit was not liable to be stayed under Section 10 of the Code of Civil Procedure, the learned Single Judge in effect and substance determined that the decision of the previously instituted suit would not operate as res judicata in the subsequently instituted suit and the question whether the decision of the issues in a subsequently instituted suit would be barred by res judicata would clearly be a question relating to the merits of the controversy between the parties and if determined one way or the other, it would affect the rights of parties. The ratio of this decision cannot, therefore, have any applicability in the present case where what has been held by Mr. Justice Divan in nothing more than this, namely that the petition is properly constituted and is not liable to be dismissed on account of non-joinder of Vasudev Tripathi. It is difficult to see how the decision of Mr. Justice Divan can be said to affect the merit of any substantive right of the parties which are to be adjudicated in the petition.

9. We may also point out that even if the decision of the Bombay High Court in 54 Bom LR 844 = (AIR 1953 Bom 117) (supra) were taken as deciding that every decision which deals with the jurisdiction of the Court is a "judgment", it would still have no application in the present case because the question which has been decided here by Mr. Justice Divan is not a question affecting the jurisdiction of the Court. The contention of the appellant was that the Court had jurisdiction to entertain the petition only if it complied with the provisions of Sections 81, 82 and 117 and if there was non-compliance with the provisions of any of these Sections, there was no valid petition in the eye of the law and the Court had no jurisdiction to entertain it. The Court, said the appellant, could not invest itself with jurisdiction which it did not possess by wrongly deciding that the petition complied with the provision of Sections 81, 82 and 117. The question whether there was compliance with the provisions of Section 81, 82 and 117 was, therefore, a question the jurisdiction of the Court and, on the view taken by the Divisions Bench in 54 Bom LR 844 = (AIR 1953 Bom 117) (supra), the decision of this question must be regarded as a "judgment". This contention of the appellant is, in our opinion, without force and must be rejected. It is based on a misconception of the true nature of an order which may be made under Section 86. Article 329(b) of the Constitution of India provides that notwithstanding anything in the Constitution, no election to either House of Parliament or to the House or 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 by or under any law made by the appropriate Legislature. The Parliament has, therefore, enacted the Representation of the People Act, 1951, providing the authority an election petition may be filed for challenging the election inter alia to the House of the People. Section 80-A gives jurisdiction to the High Court to try an election petition challenging inter alia the election to the house of the People and Sections 81, 82 and 117 provide the procedure which must be followed by the petitioner in presenting the election petition. Section 81 provides that the election petition must be based on one or more (1) of S. 100 and S. 101: it must be presented by a candidate at the election or an elector and that must be done within forty-five days from the date of election of the returned candidate. Section

82 lays down as to who should be joined as respondents to the petition and C1. (B) include every validly nominated candidate even though he has withdrawn his candidature and not contested the election, shall be joined as a respondent to the petition if allegations of corrupt practice are made against him in the petition. Section 117 provides that at the time of presenting an election petition, the petitioner shall deposit in the High Court a sum of two thousand rupees as security for the cost of the petition. These are all procedural provision which must be complied with in order that there should be a proper and validly constituted petition before the Court. If there is non-compliance with any of these provisions. Section 86 says that the High Court shall dismiss the election petition. Therefore, when an election petition is presented to the High Court, the first question to which the High Court has to address itself is whether the election petition complied with the provisions of Section 81, 82 and 117. If these provisions are not complied with, the High Court has no option but to dismiss the election petition. If on the other hand, the High Court comes to the conclusion that the provisions of Section 81, 82 and 117 are complied with, the High Court would have to proceed to determine the election petition on merits. The question whether the election petition complies with the provisions of Sections 81, 82 and 117 is, therefore, a question which is entrusted by the Parliament for its determination to the jurisdiction of the High Court. It is not a collateral question on the determination of which depends the jurisdiction of the High Court to entertain the election petition. The High Court may determine the question rightly or wrongly but whatever be the determination, it would be a determination within the jurisdiction of the High Court. If the determination made by the High Court is wrong the Supreme Court in appeal under S. 116-A may set aside such wrong determination but it cannot be said that be such wrong determination the High Court has invested itself with jurisdiction which if did not possess and that the subsequent proceedings before the High Court were without jurisdiction. Moreover, the question whether a particular person is a necessary party to the petition and in his absence, the petition is liable to be dismissed in limine is a question affecting the proper constitution of the petition and not one affecting the jurisdiction of the Court. The question is of the same nature as that relating to payment of proper court-fees. If the court-fees paid on a plaint are not adequate and the plaintiff on being required by the Court to make good the deficiency within a time fixed by the Court, fails to do so, the plaint is liable to be rejected under O. 7. R. 11 of the Code of Civil Procedure. Can it be said in such a case that the question whether the court-fees paid and proper or not is a question affecting the jurisdiction of the Court? The same position obtains when an election petition is not properly constituted on account of non-joinder of a necessary party under Section 82(b). Section 86 merely emphasizes the mandatory character of the requirement embodied in Section 82(b) and it does not make the question of compliance with that requirement a question of jurisdiction. The decision of the question whether the petition did no comply with the provisions of Section 82(b) on account of non-joinder of Vasudev Tripathi could not therefore, be regarded as a "judgment" on the analogy of the decision in 54 Bom LR 844 = (AIR 1953 Bom 117) (supra).

10. We may now proceed to consider, on principles, whether, on the application of the test which we have discussed above, the decision of Mr. Justice Divan could be said to be a "judgment". It is obvious that the decision of Mr. Justice Divan did not relate to any question in controversy between the parties on merits nor did it determine any substantive right or liability sought to be adjudicated in the petition. The petition sought to challenge the election of the controversy between the parties on merits, therefore, related to the question whether any of these grounds were established and, if

so, whether they vitiated the election of the appellant. There was no decision on any aspect of this question when Mr. Justice Divan decided that Vasudev Tripathi was not a necessary party to the petition and the petition was not liable to fail on account of his non-joinder. What Mr. Justice Divan decided was only procedural matter, namely, whether the petition was properly constituted. There were, as we have pointed out above, certain procedural requirements to be fulfilled before a petition could be properly constituted. The contention of the petitioner was that one of these requirements was not satisfied inasmuch as Vasudev Tripathi was not joined as a respondent to the petition. Mr. Justice Divan held that Vasudev Tripathi was not a necessary party to the petition and in the circumstances though he was not joined as a respondent, the petition was properly constituted. None of the substantive rights or liabilities for adjudication of which the petition was filed was decided by Mr. Justice Divan on merits. The decision of Mr. Justice Divan merely. The decision of Mr. Justice Divan merely paved the way for determination of the substantive rights and liabilities. What it said in effect was that the petition being properly constituted, the first respondent could proceed with the petition and the substantive rights and liabilities for adjudication of which the petition was filed could be determined on merits. This was clearly an order in procedure it did not affect the merits of the question in controversy between the parties by determining some right or liability in the petition and it could not, therefore, be regarded as a "judgment".

11. This view which we are taking on principle is amply supported by the decision in 27 Bom LR 1496 = (AIR 1926 Bom 136) (supra). We have already made a brief reference to this decision but we may now examine it closely as very strong reliance was placed upon it on behalf of the first and second respondents. There a suit was filed by the plaintiff for increase in the rate of maintenance which was fixed by a consent decree made between the parties. The defendant contended inter alia that since the rate of maintenance was fixed by the consent decree, the suit was not maintainable Mizra, J., who heard the suit raised a preliminary issue on this contention and decided the preliminary issue by holding that, despite the consent decree, the suit was maintainable. The defendant thereupon preferred a Letters Patent Appeal before a Division Bench of the High Court. The question arose whether the appeal was maintainable under C1. 15 and that required the Division Bench to consider whether the order of Mirza. J., was a "judgment". The Division Bench held that the order of Mirza. J., was not a "judgment" since it did not decide anything with regard to the rights and liabilities of the parties but the only decision was that the suit should proceed and no appeal lay against such a decision. Macleod. C. J., delivering the judgment of the Division Bench observed:-

"It is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the suit should proceed can never to my mind amount to a judgment.

If in this case the Judge had decided that the suit was not maintainable and had dismissed the suit, then undoubtedly an appeal would lie against that decision. But in this case the Judge has decided that the suit should proceed. He will then consider the remaining issue in the suit, whether the plaintiff should be granted in the circumstances of the case increased maintenance or not and when he has decided that question there will be a judgment, against which all the arguments which are now sought to the raised against the decision on this issue can be placed before the Court. We are not shutting out the defendant from any objection which he may eventually be advised to raise

against the final decree in the suit. We are merely pointing out that so far nothing has been decided with regard to the rights and liabilities of the parties, there is only a decision that the suit should proceed and against that decision no appeal lies."

This decision is a direct authority in favour of the contention urged on behalf of respondents Nos. 1 and 2 and we find ourselves wholly in agreement with it.

12. We are therefore, of the view that the decision of Mr. Justice Divan could not be said to be a "judgment" within the meaning of C1. 15 of the Letters Patent and the present appeal filed by the appellant must accordingly be held to not maintainable and must be dismissed with costs in favour of respondent No. 1. Mr. H. M. Mehta, learned advocate appearing on behalf of the appellant, applies for leave to appeal to the Supreme Court under Art. 133(1) (c) of the Constitution. We do not think this is a fit case for appeal to the Supreme Court since the question as to what constitutes a "judgment" within the meaning of C1. 15 of the Letters Patent is settled so far as this Court is concerned and we have merely given effect to the view which has been consistently followed by the Bombay High Court and this High Court over the years. Moreover, the order made by us in this appeal is not a final order, judgment of decree within the meaning of Art. 133(1)(c). The application for leave to appeal to the Supreme Court is therefore rejected. We however direct, on the application of the appellant, that for a period of fifteen days from the date of receipt of certified copy of this judgment by the appellant the hearing of the election petition shall be stayed in order to enable the appellant to apply for special leave to the Supreme Court.

13. Appeal dismissed.