

JAMAL UDDIN AHMAD
v.
ABU SALEH NAJMUDDIN AND ANR.

FEBRUARY 28, 2003

[R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

Election Law:

Representation of People Act, 1951—Sections 80, 80A, 81, 86 and 169 – Constitution of India, 1950—Articles 329, 214 and 216—Election Petition—Presentation of before Stamp Reporter—Validity of—High Court Rules authorising such presentation—No law by Central Government or Parliament regarding the presentation—Held: Presentation of the petition to High Court would mean delivery of the petition to High Court through its authorized officer—High Court having been conferred with the substantive jurisdiction to hear and try an election petition, it is competent to make provision for all incidental and ancillary matters—Even in the absence of the Rules High Court could have authorised its officer to receive the petition—The term “High Court” in Section 81 does not mean as constituted within the meaning of Article 216 —Hence, presentation of election petition to the Stamp Reporter is a valid presentation—Gauhati High Court Rules—Chapter VIII-A.

Judiciary—Ministerial function and Judicial function—Distinction between—Discussed.

Interpretation of Statutes—Principle of interpretation—Irrationality perversity and hyper-technically are out of place while interpreting the Statutes or testing the vires of legislation.

Legal Maxim—‘Cursus Curia est lex Curiae’—Explained—Practice and Procedure.

Respondent challenged the election of appellant to the legislative assembly of Assam. The election petition under Section 80/81 of the Representation of People Act, 1951 was presented before Stamp Reporter of the High Court of Assam. Thereafter, the petition was put up before Designated Election Judge. Appellant filed an application raising preliminary objection as to maintainability of the petition on the ground

A that the presentation before the Stamp Reporter was invalid under Section 81 of the Act. Designated Election Judge, relying on Chapter VIII-A of Gauhati High Court Rules, held that the election petition was properly presented.

B In appeal to this Court, respondents contended that presentation having been made in conformity with the High Court Rules, no exception could be taken to its validity.

C Appellants contended that since Constitution of India as well as the Act do not provide for or specify the person to whom an election petition can be presented, the petition should be presented either to the High Court as defined by Articles 214 and 216 of the Constitution or at least to the Chief Justice or to the Judge designated as the Election Judge; that High Court does not have jurisdiction to entertain and decide on merits of petition presented to a Stamp Reporter, the presentation itself being a nullity; and that the only provision which empowers the Rules being
D framed under the Act is contained in Section 169 which contemplates the Rules being made by the Central Government and in as much as the Central Government has not framed any Rules, the Rules framed by the High Court are invalid and cannot be given effect to for saving the validity of its presentation.

E Dismissing the appeals, the Court

HELD: 1.1. Presentation of an election petition to the Stamp Reporter of the High Court of Gauhati is a valid presentation. The Designated Election Judge has rightly overruled the preliminary objection preferred by the respondent. [494-B]
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Abdul Jabbar v. Syeda Anwara Tajmur and Ors., (1986) 1 GLR 257; *Shri Melhupra Vero v. Shri Vamuzo*, (1990) 1 GLR 290; *Shri Saingura v. Shri F. Sapa and Ors.*, (1990) 2 GLR (NOC) 48 and *Nawab Khan v. Vishwanath Shastri*, AIR (1993) Allahabad 104, approved.

G 1.2. The functions discharged by a High Court can be divided broadly into judicial and administrative functions. The judicial functions are to be discharged essentially by the Judges as per the rules of the Court and cannot be delegated. However, administrative functions need not necessarily be discharged by the Judges by themselves, whether
H individually or collectively or in a group of two or more, and may be

delegated or entrusted by authorization to subordinates unless there be some rule of law restraining such delegation or authorization. There can be 'delegation' as also there can be 'authorization' in favour of the Registry and the officials therein by empowering or entrusting them with authority or by permitting a few things to be done by them for and on behalf of the Court so as to aid the judges in discharge of their judicial functioning. [486-G, H; 487-A, B]

1.3. Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, may be after making an enquiry, and the decision affects the rights and obligations of the parties, there is duty to act judicially. The judge may construe the law and apply it to a particular state of facts presented for the determination of controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. In ministerial duty nothing is left to discretion; it is a simple, definite duty. [488-C-E]

1.4. Presentation of election petition to the High Court within the meaning of Section 81 of the Act without anything more would mean delivery of election petition to the High Court through one of its officers competent or authorized to receive the same on behalf of and for the High Court. Receiving an election petition presented under Section 81 of the Act is certainly not a judicial function which needs to be performed by a judge alone. There is no discretion in receiving an election petition. An election petition, when presented, has to be received. It is a simple, definite duty. It is a ministerial function simplicitor. It can safely be left to be performed by one of the administrative or ministerial staff of the High Court which is as much a part of the High Court. It may be delegated or be performed through someone authorized. The manner of authorization is not prescribed. [488-E-G]

1.5. High Court, in authorizing an official to receive an election petition either by collective decision of all the Judges or under the directions of the Chief Justice of the High Court, does not 'delegate' any of its functions, much less a judicial function; it merely 'authorizes' an official to do an act incidental to the main judicial function of trial of an election petition which is entrusted to the High Court exercisable

A ordinarily by a Single judge of the High Court assigned by the Chief Justice for that purpose. Such authorization whether made by rules of the High Court or by decision of the Court or by an order of the Chief justice shall hold good unless there be a provision to the contrary in the Act or in the rules framed by the Central Government in exercise of the powers conferred by Section 169 of the Act, which there is none. [488-H; 489, A, B]

1.6. Article 329(b) of the Constitution speaks of an election petition being presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. The Representation of the People Act, 1951 is such law made by the Parliament.

C By no stretch of imagination it can be said that the "presentation" of an election petition is part of the "trial" of an election petition. The term "High Court" in Section 81 has been used to denote an institution and not literally the High Court as constituted within the meaning of Article 216 of the Constitution. It would be an absurdity to assume that even though the election petition can be tried by a Single Judge of the High Court in so far as presentation is concerned it must be presented to the Chief Justice and all the Judges sitting together as contemplated by Article 216. It is equally absurd to assume that a Single Judge assigned or to be assigned with the trial of an election petition must himself receive the election petition. A Judge of the High Court may be designated as an Election Judge and assigned the trial of an election petition subsequent to its being received in the High Court. It may be that the Chief Justice has not designated an Election Judge under Section 80A (2) of the Act until an election petition was actually received in the High Court. In such a situation, the Constitution and the Act cannot expect the Chief Justice himself to discharge the ministerial act of receiving an election petition presented to the High Court. [486-B-G]

2.1. A power conferred by a statute often contains express conditions for its exercise and in the absence of or in addition to the express conditions there are also implied conditions for exercise of the power. An affirmative statute introductive of a new law directing a thing to be done in a certain way mandates, even if there be no negative words, that the thing shall not be done in any other way. This rule of implied prohibition is subservient to the basic principle that the Court must, as far as possible, attach a construction which effectuates the legislative intent and purpose. Further, the rule of implied prohibition does not negative the principle that an express grant of statutory power carries with it by necessary implication

the authority to use all reasonable means to make such grant effective. [484-G, H; 485-A, B]

Income Tax Officer, Cannanore v. M.K. Mohammed Kunhi, [1969] 2 SCR 65; and *Chief Executive Officer and Vice-Chairman, Gujarat Maritime Board v. Haji Daud Haji Harun Abu and Ors.*, [1996] 11 SCC 23, referred to.

Wiseman v. Boardman, (1971) AC 297, referred to

Principles of Statutory Interpretation by G.P. Singh (Eighth Edition); *Craies on Statute Law*, Seventh Edition; *Maxwell on Interpretation of Statutes*, Eleventh Edition and *Sutherland's Statutory Construction* and *Domat's Civil Law*, referred to.

2.2. The jurisdiction to try an election petition has been conferred by the Parliament on the High Court so as to carry out the mandate of Article 329 of the Constitution. Neither the Parliament nor the Central Government have exercised their power by designating an authority to whom the election petition can be presented. There is a void left open by legislation. The gap is not to be found in the jurisdiction created nor in the substantive provision; the gap is in the field of procedural law, for failure to specifically enact an incidental or ancillary provision which would enable the statutory right of an election petitioner being exercised so as to enable the election petition, in the hands of the election petitioner reaching the High Court - the competent jurisdiction, for being subjected to hearing and trial. An intention is to be attributed to the Parliament that the High Court having been conferred with the substantive jurisdiction to hear and try an election petition, the making of provision for all incidental and ancillary matters was left to the High Court which can either continue with the existing practice of receiving petitions and documents, just as in other civil jurisdictions exercised by it, or could make or devise convenient and workable procedure of receiving election petitions and other documents presented to it in exercise of the jurisdiction conferred by the Act. [492-F-H; 493-A, B]

High Court of Judicature for Rajasthan v. P.P. Singh and Anr., JT (2003) 1 SC 403; *All India Judges' Association v. Union of India and Ors.* [1992] 1 SCC 119; *State of Uttar Pradesh v. Batuk Deo Pati Tripathi and Anr.* [1978] 2 SCC 102 and *Utpal Dutta v. Indira Gogoi* decided by Gauhati High Court on 29.8.2002 in Misc. Case No. 13/ 2001 in E.P. No. 7/2001,

A referred to.

B 3.1. Section 81(1) before amendment by Act 47 of 1966 required the election petition being presented to the Election Commission. Sub-section (2) provided for the election petition being delivered to the Secretary to the Commission or to such other officer as may be appointed by the Election Commission or even being sent by registered post and delivered to the Secretary to the Commission or to such other officer as may be appointed by the Election Commission so as to be deemed to have been presented to the Election Commission. While "High Court" has been substituted in place of Election Commission in sub-Section (1), sub-Section C (2) of the erstwhile Section 81 has been deleted without re-enacting a corresponding provision. So far as the High Court is concerned, such a provision was not required to be enacted into the Act. Jurisdiction to try an election petition has been conferred on the High Court in place of the Election Tribunal. The High Court is a constitutional Court which was pre-existing. It is a Court of record and exercises plenary powers. The D High Court being a pre-existing judicial institution also had rules, directions and practice already existing and prevalent and governing the reception of documents presented to it; the same would apply to election petitions. [490-C-F]

E 3.2. *Cursus curiae est lex curiae* - The practice of the Court is the law of the Court. Every Court is the guardian of its own records and the master of its own practice; and where a practice has existed, it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that F are founded in justice and convenience. [490-F, G]

Broom's Legal Maxims, Tenth Edition, referred to.

G 3.3. Even in the absence of rules or directions if there is any practice prevailing under which the administrative or ministerial functions of the High Court are being performed, unless there be something inherently objectionable or impermissible about it the same should be allowed to prevail if it satisfies the test of being incidental and essential to the performance of the main judicial functions of the High Court. The rules may not be referable to the provision of the Act as the source of power of the High Court, the fact remains that such rules manifest the H administrative decision of the High Court to which the Chief Justice is a

party. Inasmuch as such decision does not run counter to any rule of law it is binding and must be upheld. [490-H] A

3.4. Even in the absence of Chapter VIII-A in the Gauhati High Court Rules there would have been nothing wrong in the High Court or the Chief Justice authorizing any of its officers to receive the election petition presented to it so as to enable exercise of the jurisdiction conferred on the High Court by Chapter II of the Act. The Gauhati High Court thought it proper to incorporate Chapter VIII-A in its Rules in view of the amendment made in Chapter II of the Act. [490-H; 491-A] B

4. The fundamentals or the first principles of law often articulated as the maxims are manifestly founded in reason, public convenience and necessity. Modern trend of introducing subtleties and distinctions, both in legal reasoning and in the application of legal principles, formerly unknown, have rendered an accurate acquaintance with the first principles more necessary rather than diminishing the values of simple fundamental rules. The fundamental rules are the basis of the law; may be either directly applied, or qualified or limited, according to the exigencies of the particular case and the novelty of the circumstances which present themselves. [491-G, H; 492-A] C D

Dhannalal v. Kalawatibai and Ors., [2002] 6 SCC 16, referred to. E

5. Irrationality perversity and hyper-technicality are out of place while interpreting the Statutes or testing the vires of legislation. [494-A]

The State of Punjab and Anr. v. Shamlal Murari and Anr., [1976] 1 SCC 719, referred to. F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1860 of 2003.

From the Judgment and Order dated 21.12.2001 of the Gauhati High Court at Assam in Misc. Case No. 26/2001 in E.P. No. 16 of 2001.

WITH G

C.A. Nos. 1861 and 1862 of 2003.

R.K. Jain, Gopal Subramaniam, Dr. A.M. Singhvi (NP), S.B. Sanyal, Shakil Ahmed Syed, Manoj Goel, Shuvodeep Roy, Pankaj Kalra, Brij Bhushan, Chinmoy, A. Khaladkar, S.K. Nandy, B. Aggarwalla, Rajiv Mehta, Ms. Krishna H

- A Sarma, Ms. Asha G. Nair, V.K. Sidatharan, N.G.J.R. Luwang, Nitin S. Tambwekar and V.N. Raghupathy, for the appearing parties.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. Leave granted in all the SLPs.

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A common question of law arises for decision in all the three appeals. It would suffice to state the facts of one of the cases to have a glimpse of the backdrop events in which the question has emerged for decision. In Civil Appeal No. 1860/2003 arising out of SLP (C) No. 6098/2002 the appellant contested the last election to legislative assembly from 'No.5 Badarpur

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Legislative Assembly Constituency of Assam' held on 10.5.2001. The appellant was declared duly elected. On 27.6.2001 the contesting respondent filed an Election Petition under Section 80/81 of the Representation of the People Act, 1951 (hereinafter RPA, for short), laying challenge to the appellant's election. The Election Petition was presented before Stamp Reporter-cum-

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Oath Commissioner of the High Court of Assam. The Stamp Reporter received the election petition, conducted the preliminary scrutiny thereof, and, along with his note, put up the same before the Designated Election Judge. The appellant respondent before the High Court) on being noticed and having been served with a copy of the election petition, filed an application raising preliminary objection to the maintainability of the petition, seeking its dismissal

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in limine under Section 86 of the Act for non-compliance with Section 81 of the Act. The gist of the plea raised by the appellant is that the Election Petition should have been presented either before the Designated Election Judge or the Chief Justice of the High Court; and that the presentation before the Stamp Reporter is invalid under Section 81 of the Act; and therefore, the petition is liable to be dismissed without trial. The learned Designated Election

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Judge has overruled the objection preferred by the appellant and held that the election petition was properly presented. In forming this opinion the learned Designated Election Judge has relied on Chapter VIIIA of the High Court Rules which will be noticed hereafter at an appropriate place.

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The facts in the other two appeals are similar and it would suffice to state that similar objections that were preferred by the respondents in the High Court (appellants before us) disputing the validity of the presentation of the respective election petitions, which had been presented before the Stamp Reporter, have been overruled.

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We have heard the learned counsel for the parties led by the learned

Senior Advocates on both the sides. We are satisfied that there is no merit A
in these appeals and the same are liable to be dismissed.

The submissions made on behalf of the appellants led by Shri R.K. Jain, Senior Advocate, may briefly be noticed. It was submitted that under Article 329 of the Constitution no election to either House of Parliament or to the Houses of the Legislature of the State shall be called in question except B
by an election petition presented to such authority and in such manner as may be provided for by or under any law made by an appropriate Legislature. The RPA, provides for the conduct of elections to the Houses of Parliament and to the Houses of the Legislature of each State, and for the decision of disputes arising out of or in connection with such elections, amongst other things. C
Chapter II deals with presentation of election petitions to High Court. Under Section 80, no election shall be called in question except by an election petition presented in accordance with the provisions of this Part. Under Section 80-A the Court having jurisdiction to try an election petition shall be the High Court. Such jurisdiction shall be exercised ordinarily by a Single Judge of the High Court and the Chief Justice, shall, from time to time, assign one D
or more judges for that purpose. Section 81 provides for presentation of petitions, Section 86 deals with the consequences of non-compliance. These provisions are reproduced hereunder:-

"81 Presentation of petitions.—(1) An election petition calling in question any election may be presented on one or more of the grounds E
specified in [sub-section (1) of section 100 and section 101 to the High Court by any candidates at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidates or if there are more than one returned candidate at the election and dates of their election are different, the later of F
those two dates].

Explanation.- In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not."

86. Trial of election petitions.- (1) The High Court shall dismiss an G
election petition which does not comply with the provisions of section 81 or section 82 or section 117.

Explanation.- An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made H

A under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.

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Developing their submissions further, the learned counsel appearing for the appellants submitted that an election petition has to be presented to the High Court. Under Articles 214 and 216 of the Constitution, there shall be a High Court for each State and every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. The Constitution and the Act do not provide for or specify the person to whom an election petition can be presented, and therefore, an election petition should be presented either to the High Court as defined by Articles 214 and 216 of the Constitution or at least to the Chief Justice or to the Judge designated by the Chief Justice as the Election Judge. In any case, the presentation of an election petition to the Stamp Reporter is wholly unwarranted and unsupportable in law. The High Court does not have jurisdiction to entertain and decide on merits a petition which has been presented to a Stamp Reporter, the presentation itself being a nullity.

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On behalf of the private respondents, the learned counsel led by Mr. S.B. Sanyal, learned Sr. Advocate placed reliance on the following rules framed by Gauhati High Court contained in Chapter VIII A.

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**“Chapter VIII-A
Special provisions relating to procedure
in election petitions under the
Representation of People Act, 1951 as
amended by Act No. XLVII of 1966**

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1. An election petition under S. 80-A of the Representation of Peoples Act may be presented duly verified in the form prescribed under Ss.82 and 83 of the said Act, before the stamp reporter of this Court with a Court-fee of Rs.6 affixed thereon, within 45 days from the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the latter of those two dates. Every such petition

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shall be accompanied by—

- (a) as many copies thereof as there are respondents mentioned in the petition together with one extra copy, all the copies being fully attested by the petitioner under his own signature to be a true copy of the petition and as many envelopes as there are respondents bearing requisite postage stamp to enable service to be effected by registered post with acknowledgement due;
- (b) as many printed forms of notices, duly filled in, as there are respondents;
- (c) an affidavit in support of the contents of the petitions as prescribed in R.83 (c) of the aforesaid Act where necessary, and
- (d) a chalan showing the deposit of Rs. 2,000 (Rupees two thousand) into the State Bank of India Gauhati Branch in favour of the Registrar of this Court, as security for the costs of the petition:

Provided that such deposit in respect of petition to be filed in the Benches at Kohima, Imphal and Agartala may be made in the State Bank of Kohima, Imphal and Agartala, as the case may be in favour of the Deputy Registrar of the Bench concerned.

Note (I). The petition shall be legibly type-written or printed in the English language on durable foolscap paper or other paper similar to it in size and quality, book-wise, on one side of the paper, with not more than 20 or less than 18 lines, of about 10 words in each line on each page and with an inner margin of about an inch and a quarter wide.

Note (II). Any petition which is presented out of time and without any of the above mentioned requisites duly satisfied shall forthwith be returned by the stamp reporter for refileing."

It was submitted on behalf of the respondents that the presentation having been made in conformity with the Rules, no exception can be taken to its validity. To this the learned counsel for the appellants replied by submitting that the only provision which empowers the rules being framed under the Act is contained in Section 169, which contemplates the rules for carrying out the purposes of the Act being made by the Central Government after consulting the Election Commission and by notification in the official gazette. Inasmuch as the Central Government has not framed any rules

- A governing the presentation of election petition the rules framed by the High Court are invalid and cannot be given effect to or looked into for saving the validity of its presentation. It was also submitted that the right to contest for and hold an elective office is not a common law right but a right conferred by the Statute and so also the resolution of election disputes is not a common law remedy governed by ordinary law of the land; it is a special statutory remedy provided for by a special enactment, and therefore, any departure from the provisions of the Constitution or the Act cannot be countenanced. The Court would always be slow to interfere with the success of a winning candidate at the election and an election petition which does not strictly comply with the requirements as to its presentation shall be liable to be dismissed and thrown out by strictly interpreting the law.

- D The question which arises for decision is whether the High Court is at all competent to frame rules making provision for receiving the election petitions presented to the High Court under Section 81 of the RPA; and if the High Court is not competent to frame the rules, then whether in the absence of any provision in the Act or rules framed by the Central Government specifying the person who is competent to receive election petitions presented to the High Court, no petition can be presented; or, so long as there is no specific provision can it be inferred by reading Article 329 with Articles 214 and 216 of the Constitution that the election petition can be presented only to the High Court in the sense of the Chief Justice and other judges constituting the High Court for the time being sitting together to receive the election petition?

- F In our opinion, the controversy which has been raised is devoid of any merit. It is pertinent to note that in the RPA as originally enacted an election petition could be presented to the Election Commission and thereafter it was to be tried by an Election Tribunal. Act No.47 of 1966 has drastically amended chapter II of RPA and with effect from 14.12.1966 the jurisdiction to try election petitions has been conferred on the High Court. High Court is a Court which was pre-existing on the date of amendment brought into being by Act No.47 of 1966. It is a constitution Court and a Court of record having plenary jurisdiction.

- H Dealing with "Statutes conferring power; implied conditions, judicial review", Justice G.P. Singh states in the Principles of Statutory Interpretation (Eighth Edition 2001, at pp. 333,334) that a power conferred by a statute often contains express conditions for its exercise and in the absence of or in

addition to the express condition there are also implied conditions for exercise of the power. An affirmative statute introductive of a new law directing a thing to be done in a certain way mandates, even if there be no negative words, that the thing shall not be done in any other way. This rule of implied prohibition is subservient to the basic principle that the Court must, as far as possible, attach a construction which effectuates the legislative intent and purpose. Further, the rule of implied prohibition does not negative the principle that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. To illustrate, an Act of Parliament conferring jurisdiction over an offence implies a power in that jurisdiction to make out a warrant and secure production of the person charged with the offence; power conferred on Magistrate to grant maintenance under Section 125 of the Code of Criminal procedure 1973 to prevent vagrancy implies a power to allow interim maintenance; power conferred on a local authority to issue licences for holding 'hats' or fairs implies incidental power to fix days therefor; power conferred to compel cane growers to supply cane to sugar factories implies an incidental power to ensure payment of price. In short, conferment of a power implies authority to do everything which could be fairly and reasonably regarded as incidental consequential to the power conferred.

"For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation", said Lord Reid in *Wiseman v. Boardman*, [1971] AC 297, 308. "If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the courts are at liberty to infer that the statute by implication empowers that detail to be carried out." (Craies on Statute LAW, Seventh Edition, p. 111). *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit*—"Where an act confers jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution." (See, Maxwell on Interpretation of Statutes, Eleventh Edition, p. 350). Referring to Maxwell (ibid), Sutherlands's Statutory Construction and Domat's Civil Law, the law was thus stated, as a "firmly established rule", by this Court in *Income Tax Officer, Cannanore v. M.K. Mohammed*

- A *Kunhi*, [1969] 2 SCR 65, that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. In *Chief Executive Officer and Vice-Chairman, Gujarat Maritime Board v. Haji Daud Haji Harun Abu and Ors.*, [1966] 11 SCC 23, this Court held that the conferral of incidental and ancillary powers necessarily
- B flown from the conferral of the substantive power. "It is well settled that where a substantive power is conferred upon a court or tribunal, all incidental and ancillary powers necessary for an effective exercise of the substantive power have to be inferred".

- C Undoubtedly clause (b) of Article 329 of the Constitution speaks of an election petition being presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature. The Representation of the People Act, 1951 is such law made by the Parliament. Section 80A of the Act confers jurisdiction to try an election petition upon the High Court. By no stretch of imagination it can be said that
- D the "presentation" of an election petition is part of the "trial" of an election petition. Section 81 of the Act prescribes limitation, the manner and requirements of presentation and that the election petition may be presented to the High Court. The term "High Court" in Section 81 has been used to denote an institution and not literally the High Court as constituted within the meaning of Article 216 of the Constitution. It would be an absurdity to
- E assume that even though the election petition can be tried by a single Judge of the High Court in so far as presentation is concerned it must be to the "High Court" in the sense of the High Court consisting of a Chief Justice and other Judges appointed to the High Court (as contemplated by Article 216), i.e. presented to the Chief Justice and all the Judges sitting together. It is
- F equally absurd to assume that a single Judge assigned or to be assigned with the trial of an election petition must himself receive the election petition. A Judge of the High Court may be designated as an Election Judge and assigned the trial of an election petition subsequent to its being received in the High Court. It may be that the Chief Justice has not designated an Election Judge under sub-Section (2) of Section 80A of the Act until an election petition was
- G actually received in the High Court. Who then would receive the election petition? Do the Constitution and the RPA expect the Chief Justice himself to discharge the ministerial act of receiving an election petition presented to the High Court? Our answer is an emphatic 'no'.

- H The functions discharged by a High Court can be divided broadly into judicial and administrative functions. The judicial functions are to be

discharged essentially by the judges as per the rules of the Court and cannot be delegated. However, administrative functions need not necessarily be discharged by the judges by themselves, whether individually or collectively or in a group of two or more, and may be delegated or entrusted by authorization to subordinates unless there be some rule of law restraining such delegation or authorisation. Every High Court consists of some administrative and ministerial staff which is as much a part of the High Court as an institution and is meant to be entrusted with the responsibility of discharging administrative and ministerial functions. There can be 'delegation' as also there can be 'authorization' in favour of the Registry and the officials therein by empowering or entrusting them with authority or by permitting a few things to be done by them for and or behalf of the Court so as to aid the judges in discharge of the judicial functioning. Authorization may take the form of formal conferral or sanction or may be by way of approval or countenance. Such delegation or authorization is not a matter of mere convenience but a necessity at times. The Judges are already overburdened with the task of performing judicial functions and the constraints on their time and energy are so demanding that it is in public interest to allow them to devote time and energy as much as possible in discharging their judicial functions, relieving them of the need for diverting their limited resources of time and energy to such administrative or ministerial functions, which, on any principle of propriety, logic, or necessity are not required necessarily to be performed by the Judges. Receiving a cause or a document and making it presentable to a Judge for the purpose of hearing or trial and many a functions post-decision, which functions are administrative and ministerial in nature, can be and are generally entrusted or made over to be discharged by the staff of the High Court, often by making a provision in the rules or under the orders of the Chief Justice or by issuing practice directions, and at times, in the absence of rules, by sheer practice. The practice gathers the strength of law and the older the practice the greater is the strength. The Judges rarely receive personally any document required to be presented to the Court. Plaints, petitions, memoranda or other document required to be presented to the Court are invariably received by the administrative or ministerial staff, who would also carry out preliminary scrutiny of such documents so as to find that they are in order and then make the documents presentable to the judge, so that the valuable time of the Judge is not wasted over such matters as do not need to be dealt with personally by the Judge.

The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or

- A performance whereof may be secured through authorization. "The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the state sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all state officials who are neither legislators nor judges" (See Constitutional and Administrative Law, Philips and Jackson, Sixth Edition, p. 13). P. Ramnath Aiyer's Law Lexicon defines Judicial Function as the doing of something in the nature or in the course of an action in court. (p. 1015). The distinction between "Judicial" and "Ministerial Acts" is : "if a judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting ministerially." (p. 1013-14). Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, may be after making an enquiry, and the decision affects the rights and obligations of the parties. There is duty to act judicially. The judge may construe the law and apply it to a particular state of facts presented for the determination of controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done (Law Lexicon, Ibid., p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty. Presentation of election petition to the High Court within the meaning of Section 81 of the Act without anything more would mean delivery of election petition to the High Court through one of its officers competent or authorized to receive the same on behalf of and for the High Court. Receiving an election petition presented under Section 81 of the Act is certainly not a judicial function which needs to be performed by a judge alone. There is no discretion in receiving an election petition. An election petition, when presented, has to be received. It is a simple, definite duty. The date and time of presentation and the name of person who presented (with such other particulars as may be prescribed) are to be endorsed truly and mechanically on the document presented. It is a ministerial function simpliciter. It can safely be left to be performed by one of the administrative or ministerial staff of the High Court which is as much a part of the High Court. It may be delegated or be performed through someone authorized. The manner of authorization is not prescribed.

The High Court, in authorizing an official to receive an election petition either by collective decision of all the Judges or under the directions of the Chief Justice of the High Court, does not 'delegate' any of its functions much less a judicial function; it merely 'authorizes' an official to do an act incidental to the main judicial functional of trial of an election petition which is entrusted to the High Court exercisable ordinarily by a single Judge of the High Court assigned by the Chief Justice for that purpose. Such authorization whether made by rules of the High Court or by decision of the Court or by an order of the Chief Justice shall hold good unless there be a provision to the contrary in the Act or in the rules framed by the Central Government in exercise of the powers conferred by Section 169 of the Act, which there is none.

It is not disputed that the Stamp Reporter is an official in the Gauhati High Court and a necessary part of the administrative staff performing functions of utility and responsibility in the administrative set up.

It will be useful to notice how Section 81 read prior to its amendment by Act No. 47 of 1966. The provision as originally contained in the Representation of Peoples Act, 1951 read as under:-

"81. Presentation of petitions.—(1) An election petition calling question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and section 101 to the Election Commission by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates.

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) An election petition shall be deemed to have been presented to the Election Commission—

(a) when it is delivered to the Secretary to the Commission or to such officer as may be appointed by the Election Commission in this behalf-

(i) by the person making the petition, or

(ii) by a person authorized in writing in this behalf by the person

- A making the petition; or
- (b) when it is sent by registered post and is delivered to the Secretary to the Commission or the officer so appointed.

- B (3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and one more copy for the use of the Election Commission, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

- C Sub-Section (1) of the above said provision required the election petition being presented to the Election Commission. Sub-Section (2) provided for the election petition being delivered to the Secretary to the Commission or to such other officer as may be appointed by the Election Commission or even being sent by registered post and delivered to the Secretary to the Commission or the officer appointed so as to be deemed to have been presented to the Election Commissioner. While "High Court" has been substituted in
- D place of Election Commission in sub-Section (1), sub-Section (2) of the erstwhile Section 81 has been deleted without re-enacting a corresponding provision. The reason is more that obvious. The Parliament knew that so far as the Election Commissioner is concerned, it was considered necessary to trust only the Secretary to the Commission or such other officer as may be
- E appointed by the Election Commission entrusted with the responsibility of receiving the election petition presented to the Election Commission. So far as the High Court is concerned, such a provision was not required to be enacted into the Act. Jurisdiction to try an election petition has been conferred on the High Court in place of the Election Tribunal. The High Court is a constitutional Court which was pre-existing. It is a Court of record and
- F exercises plenary powers. The High Court being a pre-existing judicial institution also had rules, directions and practice already existing and prevalent and governing the reception of documents presented to it; the same would apply to election petitions. CURSUS CURIAE EST LEX CURIAE.—*The practice of the Court is the law of the Court.* Every Court is the guardian of
- G its own records and the master of its own practice; and where a practice has existed, it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience. (See Broom's Legal Maxims, Tenth Edition, p. 82). Even in the absence of Chapter VIII-A In the Gauhati
- H High Court Rules there would have been nothing wrong in the High Court

or the Chief Justice authorizing any of its officers to receive the election petition presented to it so as to enable exercise of the jurisdiction conferred on the High Court by Chapter II of the Act. The Gauhati High Court thought it proper to incorporate Chapter VIII-A in its Rules in view of the amendment made in Chapter II of the Act. A

We are therefore of the opinion that presentation of an election petition to the Stamp Reporter of the High Court of Gauhati is a valid presentation. Such has been the view taken by the High Court of Gauhati consistently. At least three decisions can be referred to immediately : *Abdul Jabbar v. Syeda Anwara Taimur and Ors.*, (1986) 1 GLR 257, *Shri Melhupra Vero v. Shri Vamuzo*, (1990) 1 GLR 290 and *Shri Saingura v. Shri F. Sapa and Ors.*, (1990) 2 GLR (NOC) 48. So is the view taken by the High Court of Allahabad in *Nawab Khan v. Vishwanath Shastri*, AIR (1993) Allahabad 104. We find ourselves in agreement with the view so taken by the learned single judges of Gauhati and Allahabad High Courts. B C

During the course of hearing a recent decision by a learned single Judge of Gauhati High Court in *Utpal Dutta v. Indra Gogoi*, (Misc. Case No.13/2001 in E.P.No.7/2001 decided on 29.8.2002) was brought to our notice wherein Rule 1 of Chapter VIIIA of Gauhati High Court Rules has been struck down as *ultra vires* of Sections 80, 80A, 81 of the RPA read with Article 329 (b) of the Constitution. It was forcefully submitted by the learned counsel for the appellants that the rule having been struck down as *ultra vires*, it would be deemed to be non-existent and therefore all the election petitions presented to the Stamp Reporter of Gauhati High Court would be *non est* and such election petition cannot be set down for hearing and be tried. The question of the vires of the abovesaid rule does not directly arise for decision before us as the same was not put in issue in any of the three cases the orders passed wherein are the subject matter in these appeals. It would suffice for us to observe that going into the vires of the rules is an intellectual exercise in futility, for, it would lead us nowhere. D E F

Herbert Broom states in the preface to his celebrated work on Legal Maxims - "In the Legal Science, perhaps more frequently than in any other, reference must be made to first principles." The fundamentals or the first principles of law often articulated as the maxims are manifestly founded in reason, public convenience and necessity. Modern trend of introducing subtleties and distinctions, both in legal reasoning and in the application of legal principles, formerly unknown, have rendered an accurate acquaintance G H

- A with the first principles more necessary rather than diminishing the values of simple fundamental rules. The fundamental rules are the basis of the law; may be either directly applied, or qualified or limited, according to the exigencies of the particular case and the novelty of the circumstance which present themselves. In *Dhannalal v. Kalawatibai and Ors.*, [2002] 6 SCC 16,
- B this Court has held, “when the statute does not provide the path and the precedents abstain to lead, then sound logic, rational reasoning, common sense and urge for public good play as guides of those who decide.”

- Whether the High Court has the power to frame the rules under the provision of the RPA, or not, is a question which need not be gone into. As
- C we have already held, the High Court and the Chief Justice, as the case may be, have the power to frame rules and issue directions regulating the own affairs and conduct of business in the High Court. Even in the absence of rules or directions if there is any practice prevailing under which the administrative or ministerial functions of the High Court are being performed, unless there be something inherently objectionable or impermissible about it
- D the same should be allowed to prevail if it satisfies the test of being incidental and essential to the performance of the main judicial functions of the High Court. The rules may not be referable to the provision of the RPA as the source of power of the High Court - on which we express no opinion as the same is not necessary- the fact remains that such rules manifest the administrative decision of the High Court to which the Chief Justice is a
- E party. Inasmuch as such decision does not run counter to any rule of law it is binding and must be upheld.

- Strange consequences would follow if the submission made on behalf of the appellants and the reasoning which has prevailed with the learned
- F single Judge of Gauhati High Court in *Utpal Dutta v. Indra Gogoi*, (supra) was to be accepted. The jurisdiction to try an election petition has been conferred by the Parliament on the High Court so as to carry out the mandate of Article 329 of the Constitution. Neither the Parliament nor the Central Government have exercised their power by designating an authority to whom the election petition can be presented. There is a void left open by legislation.
- G The gap is not to be found in the jurisdiction created nor in the substantive provision; the gap is in the field of procedural law, for failure to specifically enact an incidental or ancillary provision which would enable the statutory right of an election petitioner being exercised so as to enable the election petition, in the hands of the election petitioner reaching the High Court—the
- H competent jurisdiction, for being subjected to hearing and trial. We have to

attribute an intention to the Parliament that the High Court having been conferred with the substantive jurisdiction to hear and try an election petition, the making of provision for all incidental and ancillary matters was left to the High Court which can either continue with the existing practice of receiving petitions and documents just as in other civil jurisdiction exercised by it, or could make or devise convenient and workable procedure of receiving election petitions and other documents presented to it in exercise of the jurisdiction conferred by the Act.

Recently in *High Court of Judicature of Rajasthan v. P.P. Singh and Anr.*, JT (2003) 1 SC 403, a question arose as to power and propriety of the High Court and the Chief Justice delegating or referring administrative matters of the High Court for the opinion of a Committee of Judges and acting thereon. A few observations made by this Court in this context are apposite to the case on hand. "Whereas control over the subordinate Courts vests in the High Court as a whole, the control over the High Court vests in the Chief Justice. [See *All India Judges' Association v. Union of India and Ors.*, [1992] 1 SCC 119]. In *State of Uttar Pradesh v. Batuk Deo Pati Tripathi and Anr.*, [1978] 2 SCC 102, keeping in view the nature of the power conferred by the Constitution on the High Court, this Court held that it is wrong to characterize as "delegation" the process whereby the entire High Court authorizes a Judge or some of the Judges of the Court to act on behalf of the whole Court. Delegation has to be distinguished from authorization. Authorisation effectuates the purpose of Article 235 and indeed without it the control vested in the High Court over the subordinate Courts will tend gradually to become lax and ineffective. Administrative functions are only a part, though an important part, of the High Court's constitutional functions. Judicial functions ought to occupy and do in fact consume the best part of a Judges's time. For balancing these two-fold functions it is inevitable that the administrative duties should be left to be discharged by some on behalf of all the Judges. Judicial functions brook no such sharing of responsibilities by any instrumentality.

In *The State of Punjab and Anr. v. Shamlal Murari and Anr.*, [1976] 1 SCC 719 at page 722, this Court held "Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the hand maid and not the mistress, a lubricant not a resistant, in the administration of justice. Where the non-compliance, though procedural, will thwart fair hearing or prejudice the doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, the court should not enthrone a regulatory

A requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities." Irrationality, perversity and hyper-technicality are out of place while interpreting the Statutes or testing the vires of legislation.

B We do not find any fault with the election petitions having been presented to and received by the Stamp Reporter of the High Court of Gauhati. The learned Designated Election Judge has rightly overruled the preliminary objection preferred by the respondents. All the appeals are held devoid of any merit and liable to be dismissed. They are dismissed accordingly and with costs. Counsel fee Rs. 5000.

C K.K.T.

Appeals dismissed.