ALLAHABAD HIGH COURT

Duryodhan

Vs.

Sitaram

First Appeal No. 255 of 1965, against order of Member Election Tribunal Kanpur
(Bishambhar Dayal, Satish Chandra and B.N. Lokur, JJ.)

27.04.1965. 19.11.1968

JUDGMENT

B. Dayal, J.

1. This appeal under Section 116-A of the Representation of the People Act, 1951 has been referred to this Full Bench because there appeared to be an apparent conflict between two Division Bench cases of this Court reported in *Vishwanath Prasad v. Malkhan Singh Sharma*[1], and *B. P. Maurya v. Election Tribunal*[2], on the question whether the Election Tribunal while hearing an election petition had the power to dismiss the election petition under Order 9, Rule 8 of the Civil Procedure Code for default of appearance of the election-petitioner and also to restore it in a proper case under Order 9, Rule 9 of the same Code.

2. After hearing learned counsel for both the sides at length, I have come to the conclusion that in this appeal this question is of a mere academic interest and it is unnecessary to decide it.

3. The facts of the case may be briefly stated. Respondent No. 1 (Shri Sitaram) (hereinafter referred to as the respondent) was elected a member of the Council of the State (Rajya Sabha) from the Uttar Pradesh State Assembly constituency on the 29th of March, 1962. The appellant was a member of the Uttar Pradesh Legislative Assembly and was, as such, a voter in the Constituency. This election petition was, therefore, filed by a voter on the 14th of May, 1962 alleging, inter alia, several instances of corrupt practices of bribery and undue influence. A written statement was filed on the 30th of July, 1962 denying the allegations of corrupt practices, etc. Issues were framed on the 25th January, 1963 and thereafter several dates were fixed for hearing which had to be postponed for some reason or the other. Ultimately on the 27th of January, 1965, on which date the election-petition was fixed for final hearing, neither the election-petitioner nor his counsel appeared. The clerk of the counsel asked for an adjournment of the case. The case was fixed for the 1st of February 1965 and on that date in the presence of the counsel for both the sides, the case was fixed for the 19th of April, 1965. On this date again the petitioner did not appear and the counsel stated that he had no instructions. Although the counsel

[1] *AIR 1964 All 181*

did not withdraw his vakalatnama from the case yet on account of his statement that he had no instructions to proceed with the matter, the position was that the petitioner was
neither himself present nor was he represented before the Election Tribunal on that date. The Tribunal then asked the respondent's counsel as to what was the proper procedure, whereupon the respondent's counsel suggested that the petition be dismissed for default. But the Tribunal, on a review of law, came to the conclusion that it could not dismiss the petition finally merely for default of the petitioner but had to go into the facts of the case and decide it on merits. The Tribunal, therefore, by an order dated the 20th of April, 1965, directed the case to be listed on the 22nd of April, 1965 for decision on merits.
On the 22nd of April, 1965, the Tribunal recorded the statement of the respondent and reserved judgment. On the 27th of April. 1965, the Tribunal passed an order dismissing the election-petition as there was no evidence on record to support the allegations of the petition and which allegations had been denied both in the written statement and in the statement on oath by the respondent and which the Tribunal believed. It will thus be seen that from the 27th January, 1965 till the 27th of April, 1965, when the order under appeal was delivered, the election-petitioner remained absent and did not take any steps or appeared in the case. The petitioner thereafter did not file any application before the Tribunal asking it to set aside the ex parte order showing any grounds which could be sufficient for his non-appearance. Instead he filed the present appeal on the 5th of July, 1965. In this appeal as many as twelve grounds have been taken but none of them even suggests that the petitioner-appellant had sufficient reason for his non-appearance on the relevant dates before the Tribunal.

4. It has now been argued in this appeal that the Tribunal had jurisdiction under Order 9, Rule 8 of the Civil Procedure Code to dismiss the petition in default, and the Tribunal erred in not dismissing the election-petition in default but in deciding the same on merits. It is contended that if the petition had been dismissed in default the Petitioner-appellant would have had an opportunity of making an application for restoration under Order 9, Rule 9 of the Code. On this ground, the order of the Tribunal is assailed. In the circumstances of the present case, it is quite clear that the decision of the Tribunal was given in the absence of the election-petitioner and was, therefore, in fact, an ex parte decision. The mere fact that the Tribunal while dismissing the election-petition also went into the facts of the case and held that the allegations had not been proved, would not make the decision other than an ex parte one. For instance, when an ex parte decree is passed in the absence of a defendant the judgment on which the decree is based is on merits, after considering the plaintiffs evidence, in the absence of the defendant and yet the decree is an ex parte decree and can be set aside under Order 9, Rule 13 of the Civil Procedure Code, if the defendant shows sufficient cause for his non-appearance. The decision of the Tribunal in the present case thus being apparently an ex parte decision, the election-petitioner should have filed an application under Order 9, Rule 9 of the Civil P. C, to set aside the ex parte decision, if the petitioner was advised that Order 9, Rule 9 of the Civil Procedure Code was

applicable and the Tribunal could set aside its order on being satisfied that the petitioner had sufficient cause not to appear. But no such application was made and in the absence of any such application, the argument advanced in this Court that such an application could have been made, is a mere academic discussion and it is wholly unnecessary to decide that point in this case.

5. Learned counsel for the appellant contended that the Tribunal having already expressed its view that the Tribunal could not dispose of the election petition in default, it was no use making an application for restoration. It is, no doubt, true that the Tribunal had expressed its opinion but that opinion was expressed in the absence of the election-petitioner and it was open to the election-petitioner to make an application for restoration and to try and convince the Tribunal that its view was wrong. I am, therefore, not satisfied that this was a good reason for not filing an application for restoration.

6. It is, however, true that under Section 116-A of the Representation of the People Act, 1951, an appeal lies to this Court against every order of the Tribunal under Sections 98 and 99 of the said Act and the present appeal is, therefore, competent. But in this appeal, there being no evidence on the record to prove the allegations of the petition, the only ground on which the appellant could show that the order of the Tribunal dismissing the election-petition in default was either wrong or improper, could have been, that the petitioner-appellant had sufficient cause for non-appearance before the Tribunal. No such ground has been taken in the appeal, nor has any basis for such a ground been laid by making a request to the Tribunal to set aside the ex parte order and to hear the petitioner again on sufficient cause being shown.

7. In these circumstances, the question of law regarding the power of the Tribunal to dispose of the election-petition in default of the election-petitioner does not really fall for consideration. Even if the Tribunal had such a power, as alleged by the appellant, no case has been made out to set aside the order of the Tribunal dismissing the election-petition. The petition was by a mere voter and he apparently lost interest in the petition at the crucial moment and seems to have revived interest in it after several months when he filed the present appeal. He apparently had no good reason to show for his non-appearance at the relevant time. In such a case, I think it is unnecessary to go into the question of law raised, particularly as the Tribunals have now been abolished and such a question will not crop up in future.

8. The appeal is accordingly dismissed with costs on parties.

Satish Chandra, J.

9. Being of the opinion that there was a conflict of opinion between AIR 1964 Allahabad 181 and 1964 All LJ 155, a Division Bench of this Court referred this appeal to a Full Bench for decision. The question is whether an Election Tribunal is possessed of the power to dismiss an election petition for default of appearance under Order 9, Rule 8, Civil Procedure Code.

10. At the election for 12 seats in the Rajya Sabha held in March 1962, respondent No. 1, Sita Ram Jaipuria, was declared elected to one of them on 29th March, 1962. The appellant, Duryodhan, a member of the U. P. Legislative Assembly, challenged the election of respondent No. 1 by an election petition. The petition was referred to the Election Tribunal and on 25th January, 1963, issues were framed in it. The matter remained pending because of stay orders issued in writ proceedings against the interlocutory orders passed by the Tribunal. Ultimately the Tribunal fixed 19th April, 1965, and the subsequent days for the final hearing of the election petition. The election petitioner-appellant did not appear. The appellant's counsel stated that he had no instructions from the petitioner to conduct the case and so he was unable to appear on behalf of the petitioner but that did not mean that he was retiring from the case. The counsel appearing for the respondent contended before the Tribunal that O. 9, Civil Procedure Code, was applicable to these proceedings and the petition may be dismissed for default of appearance of the petitioner. The Tribunal heard arguments and directed that orders would be announced the next day. On 20th April, 1965, the Tribunal passed an order that an Election Tribunal has no power to dismiss the election petition for default of appearance of the petitioner, and that the hearing of the petition, therefore, must proceed according to law and conclude on the merits. It directed the case to be put up the next day for final hearing. The Tribunal noticed that this was the view of the Allahabad High Court in Vishwanath Prasad's case, AIR 1964 Allahabad 181 (supra). The other decision In B. P. Maurya's case. 1964 All LJ 155 (supra) does not appear to have been cited before the Tribunal.

11. The case was taken up the next day, namely on 21st April, 1965. After hearing further arguments on behalf of the respondents regarding the procedure to be followed, the Tribunal held that the procedure contemplated by Sections 108 to 110 and 112 to 116 of the Representation of the People Act, 1951, of giving a public notice of the absence of the petitioner to the electorate, and to invite any of them to come and apply for being substituted in place of the election petitioner and then to conduct it, was applicable only where the election petitioner is permitted to withdraw from the election petition, and that procedure will not be applicable where the election petitioner had failed to appear. The case was then taken up on the next day, namely, the 22nd April, 1965. The Tribunal asked the contesting respondent if he wished to examine any witness. Respondent No, 1 examined himself on oath. Since the election petitioner was absent on all these dates, respondent No. 1 was not cross-examined. Thereafter the Tribunal heard arguments on behalf of the respondents and reserved orders. Ultimately the Election Tribunal by its judgment dated 27th April, 1965, dismissed the petition after recording findings on the various issues in favor of respondent No. 1 solely on the basis of his deposition. The election petition was dismissed with costs to the contesting respondent which were assessed at Rs. 300.

12. The election petitioner came to this Court in appeal under Section 116-A of the Representation of the People Act against the order dated 27th April, 1965, dismissing the election petition. The principal grievance expressed in the memorandum of appeal was that the

view of the Tribunal that the procedure prescribed by Sections 108 to 110 and 112 to 116 was not aplicable where the election petitioner failed to appear, was erroneous. The findings recorded by the Tribunal on the various issues were also challenged. Ground No. 11 expressed a grievance that the Tribunal ought to have given notice to the petitioner before deciding the election petition behind the back of the petitioner. The last ground, namely ground No. 12, was a general ground that the judgment of the Election Tribunal is against law and is liable to be set aside. It is noticeable that the memorandum of appeal did not question the detailed order passed by the Tribunal on 20th April, 1965, holding that an Election Tribunal had no power to dismiss an election petition for default in appearance of the parties.

13. When the appeal came up for hearing before a Bench, a contention was raised on behalf of the appellant that the petition ought to have been dismissed for default of prosecution and not on the merits. It was also urged that the procedure prescribed by Sections 112 to 116 ought to have been followed before deciding the election petition. The Bench entertained the first paint and considered that there was a difference between the two Division Benches mentioned at the beginning of this judgment. It observed that since no disputed question of fact arises for consideration it was desirable that the conflict be settled by a Full Bench. The Hon'ble the Chief Justice then constituted this Full Bench for resolving the conflict mentioned in the order of reference.

14. The learned Advocate General, appearing for the contesting respondent, raised a preliminary objection that the question whether an Election Tribunal possessed the power to dismiss an election petition for default of appearance not having been raised in the memorandum of appeal does not arise for consideration. The question is purely one of law which requires no investigation of facts. It is settled that a litigant can raise a pure question of law for the first time in appeal. The Division Bench which heard the appeal entertained this question; and the Hon'ble the Chief Justice thought it a fit case for constituting a Full Bench, obviously to settle the problem. In these circumstances it will not be fair either to the referring Bench or to the Hon'ble the Chief Justice or to the members of the Bar, who were heard at length on the merits of the problem, to decline to decide the question.

15. In Vishwanath Prasad's case, AIR 1964 Allahabad 181 (supra) the Election Tribunal framed some preliminary issues. November 2, 1962, was fixed for their decision only. On that date the Tribunal felt that evidence was necessary to be recorded on those preliminary issues. Kamla Kant, one of the petitioners, was examined as a witness. The hearing was then postponed to 16th November, 1962, for his cross-examination. On that day Kamla Kant did not appear. The other election petitioners as well as the respondents also did not appear before the Tribunal. The Tribunal then dismissed the petition for default of the parties. Later in the day Kamla Kant appeared and made an application for setting aside the order dismissing the petition. The Tribunal being satisfied with the cause shown, set aside the order of dismissal on 1st December, 1962. This latter order was challenged in this Court by a writ petition. The principal contention of

the applicant was that an order dismissing the petition for default of appearance was an order of dismissal under Section 98 (a) of the Representation of the People Act. Such an order was appealable under Section 116 of the Act, but the Tribunal had not been conferred by the Act any jurisdiction to set aside such an order. The Bench rejected the submission. It held that the scheme of the Act was not to confer all the powers under the Code of Civil Procedure which a Court possesses, upon the Tribunal. The only power possessed by the Election Tribunal to dismiss the election petition without deciding the questions raised in it on merits, was to be found in Section 90 (3), which confers powers to dismiss a petition for non-compliance of Sections 81 and 82. Non-appearance of the parties was not within either of these two sections. Under Section 98 (a) the Tribunal could make an order dismissing the election petition only at the conclusion of the trial. The Bench observed: -

> "It is noteworthy in this section that the orders mentioned in Clauses (a), (b) and (c) are to follow conclusion of the trial and the trial has to conclude after deciding the issues that have been raised in the petition. If there are issues which require evidence then after taking the evidence the Tribunal can come to the conclusion that the evidence proves a particular fact or not and if there are questions of law for which mere arguments are sufficient, then after hearing the arguments, the trial could conclude. There thus appears to be no provision in the Representation of the People Act empowering the Tribunal to dismiss a petition simply because one of the witnesses or one of the parties to the petition did not appear when the case is called on for hearing. "

The Bench then held that the order dismissing the petition for default was on facts improper. The date on which the petition was dismissed was not fixed for hearing the whole petition, but only for cross-examination of one witness. The Tribunal could at the most decide the preliminary issue on that date. It could not dismiss the entire petition.

16. The Bench, relying upon *Rameshwar Dayal v. Sub Divisional Officer Ghatampur*[3], also held that an Election Tribunal does not possess inherent powers. It has Jurisdiction to do only what it has been expressly empowered to do. The Election Tribunal has not been empowered to dismiss the election petition without deciding the issues raised therein. It dissented from the view expressed by the Madhya Pradesh High Court in *Sunderlal Mannalal v. Nandram-das Dwarka Das*[4], wherein it was held that though the Act does not give any power of dismissal, it is an inherent power which every Tribunal possesses. The Bench also felt that the Tribunal having no power to dismiss the petition in default of appearance, in the eye of law the petition remained pending and undisposed of. The notification by the Election Commission treating the order of dismissal for default to be under Section 98 (a) of the Act would be without jurisdiction and would not prevent the Tribunal from continuing with the election petition and disposing it of on the merits. On these grounds the writ petition was dismissed.

17. The Bench, therefore, held that an Election Tribunal has no inherent powers. It possesses

only such powers as have been expressly conferred on it. Section 90 (3) and Section 98 (a) are the only provisions authorising dismissal of the petition. Section 90 (3) does not apply to default of appearance. Section 98 (a) entitles dismissal on the conclusion of the trial which happens on the decision of the issues. Thus the Tribunal has no power to dismiss the petition for non-appearance of the petitioner. The Bench did not express any opinion on the effect of Clause (e) of Section 92.

18. B. P. Maurya's case, 1964 All LJ 155 (supra) was decided by another Division Bench of this Court. There the recording of the evidence of the parties in the election petition commenced on 15th July, 1963, and continued from day to day. On 24th July, 1963, the election petitioner did not appear. The Tribunal dismissed the petition for default. Later the same day an application for the setting aside of the order of dismissal was presented. The Tribunal allowed the application and set aside the order of dismissal. This latter order was challenged by way of a writ petition in this Court. It was urged that the Election Tribunal having dismissed the election petition though for default of the petitioner, the Tribunal became not only functus officio but ceased to exist. It had, therefore, no jurisdiction to pass the impugned order and to continue the proceedings. The Bench rejected this submission. The Bench appears to have been of the opinion that the effect of

[3]AIR 1963 All 518

[4]AIR 1958 Mad Pra 26

Section 90 of the Act directing that every election petition shall be triable by the Tribunal as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits was to enable the Tribunal to dismiss an election petition for
default under Order 9, Rule 8. Civil Procedure Code. It then emphasised and held that if Order 9, Rule 8, Civil Procedure Code, was applicable, Order 9, Rule 9 would equally be applicable because the two provisions are the inverse and reverse sides of the power. It approved the decision of the Madhya Pradesh High Court in Sunderlal's case, AIR 1958 Madhya Pradesh 260 which had been disapproved by the other Division Bench in Vishwanath Prasad's case, AIR 1964 Allahabad 181 mentioned above. The Bench dismissed the writ petition on the ground that there were no merits in it. It did not proceed on the basis that the Tribunal initially had no jurisdiction to dismiss the election petition for default of appearance, as was done by the other Bench in Vishwanath Prasad's case. AIR 1964 Allahabad 181. There does, therefore, appear to be a divergence of opinion on the question whether the Tribunal possesses the power to dismiss the petition for default of appearance, either inherently or in virtue of the provisions of the Act.

19. In *K. Kamaraja Nadar v. Kunju Thevar*[5], relying upon *Jagan Nath v. Jaswant Singh*[6], the Supreme Court after examining the scheme of the Representation of the People Act held that an election contest is not an action at law or a suit in equity but is purely a statutory proceeding unknown to the common law and that the Tribunal possesses no common law powers. The Election Tribunal would not, hence, possess inherent powers other than those which may be ancillary to the powers conferred on it by the statute.

20. Part VI of the Representation of the People Act deals with "Disputes regarding election. "

Chapter I of this part is the definition chapter. Chapter II deals with preliminary matters and reference of the election petition to a Tribunal Chapter III relates to the trial of election petitions. It consists of 21 sections. Section 90 prescribes the procedure to be followed by the Tribunal Sub-section (1) thereof says:

> "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Civil Procedure Code 1908 (V of 1908) to the trial of suits."

Sub-section (3) provides: -

> "(3) The Tribunal shall dismiss an election petition which does not comply with the provisions of Section 81, or Section 82 notwithstanding that it has not been dismissed by the Election Commission under Section 85.
> Explanation- An order of the Tribunal dismissing an election petition under this sub-section shall be deemed to be an order made under Clause (a) of Section 98. "

21. Section 92 is also material. It states: -

> "92. Powers of the Tribunal- The Tribunal shall have the powers which are vested

5 *AIR 1958 SC 687*
6 *AIR 1954 SC 210*

in a Court under the Code of Civil Procedure, 1908, when trying a suit in respect of the following matters: -

> (a) discovery and inspection;
> (b) enforcing the attendance of witnesses, and requiring the deposit of their expenses;
> (c) compelling the production of documents;
> (d) examining witnesses on oath;
> (e) granting adjournments;
> (f) reception of evidence taken on affidavit; and
> (g) issuing commissions for the examination of witnesses,

and may summon and examine 540 motu any person whose evidence appears to it to be material; and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898.

> Explanation- For the purpose of enforcing the attendance of witnesses, the local limits of the jurisdiction of the Tribunal shall be the limits of the State in which the election was held."

22. Section 97 provides for recrimination proceedings. Section 98 deals with the decision of the Tribunal. It reads:

> "At the conclusion of the trial of an election petition the Tribunal shall make an order-
> (a) dismissing the election petition; or
> (b) declaring the election of all or any of the returned candidates to be void; or
> (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. "

23. Section 99 provides for the other orders to be made by a Tribunal at the time of making an order under Section 98.

24. Section 90 (1) provides that the trial of an election petition is to be governed as nearly as may be, by the procedure applicable to the trial of suits under the Code of Civil Procedure. For the appellant it was urged that Section 90 (1) makes all those provisions of the Code of Civil Procedure applicable to election petitions as deal with the day to day progress of the election petition from the commencement of the trial till their conclusion and accordingly Order 9, Rules 8, 9 and 13 apply. For the respondents Mr. Advocate General laid emphasis on Section 92 and urged that in view of the specification of "powers" by Section 92, the "procedure" contemplated by Section 90 (1) would not include "powers". The matter of dismissal for default of appearance appertains to the "powers" of the Court or the Tribunal, and not to the "procedure", which only regulates the conduct and continuance of the proceedings. It was also submitted by him that Section 90 (1) makes the provision of the Code of Civil Procedure applicable to the trial of election petitions "subject to the provisions of the Act and the Rules" made there under. Section 98 provides for the dismissal of an election petition at the conclusion of a trial. A trial can be said to conclude only after there has been a hearing, and the issues raised in the petition decided. So, the dismissal of an election petition in any other manner would be contrary to Section 98 (a) and so would not be within Section 90 (1). In the alternative, Section 98 (a) makes a provision on the topic of dismissal of the election petition. The Act would be deemed to provide for that topic, and the same matter could not be imported by way of the procedure contemplated by Section 90 (1).

25. These submissions, therefore, require consideration of the questions whether the trial commences prior to hearing and would a dismissal for default prior to the hearing conclude it, and what does the Legislature intend by using the words "procedure" in Section 90 and "powers" in Section 92. In my opinion all these aspects are no longer res integra. They are concluded by the decisions of the Supreme Court.

26. In *Harish Chandra Bajpai v. Triloki Singh*[7], it was urged that the word "trial" must be understood in a limited sense, as meaning the final hearing of the petition, consisting of

examination of witnesses, filing documents and addressing arguments. Venkatarama Ayyar, J. speaking for the Court rejected this submission. It was held (paragraph 16) that the provisions of Chapter III read as a whole clearly show that "trial" is used as meaning the entire proceedings before the Tribunal from the time when the petition is transferred to it under Section 86 until the pronouncement of the award. His Lordship referred to the decision of the Supreme Court in AIR 1954 Supreme Court 210, where it had been held that the Tribunal had power to pass an order for addition of the parties under Order 1, Rules 9, 10 and 13, and observed that this was a direct authority for the proposition that "trial" for purposes of Section 90(1) includes the stages prior to the hearing of the petition. Then, in *Chandrika Prasad Tripathi v. Shiv Prasad Chanpuria,* Gajendragadkar[8], J. held that dismissal of a petition under Section 90 (3) for non-compliance with the provisions of Section 117 would be a dismissal at the conclusion of the trial within meaning of Section 98 (a) of the Act. His Lordship held that once the petition has passed the scrutiny of the Election Commission under Section 85 and it has been referred to the Election Tribunal 'for trial' any further action taken by the parties or any order passed by the Tribunal under the said petition would constitute a part of the trial of the said petition. The Court affirmed its decision in Harish Chandra's case, AIR 1957 Supreme Court 444 (Supra), mentioned above, that the word "trial" in Section 90 is used as meaning the entire proceedings before the Tribunal from the time the petition is transferred to it under Section 86 until tile pronouncement of the award. It was held that an order dismissing the petition under Section 90 (3) would be an order passed at the conclusion of the trial because it in fact concludes the trial. The conclusion was formed by the Supreme Court independently of the explanation added to sub-section (3) of Section 90.

27. The same view was expressed by another Bench of the Supreme Court in *Om Prabha Jain v. Gian Chand*[9]*,* In paragraph 7, Sarkar J. rejected the submission that an order dismissing a petition under Section 90 (3) is not an order passed at the conclusion of the trial within meaning of Section 98 (a).
His Lordship observed (paragraph 7): -

> "We see no justification for this view. An order made under the powers contained in Section 90 (3) brings to an end the proceedings arising out of a petition: after it is made nothing more remains for the Election Tribunal to try or do in respect of that petition. Therefore, it would appear that it is made at the conclusion of the proceedings before the Tribunal. It follows that such an order is made at the conclusion of the trial by the Tribunal for, as will be presently seen, the sole duty of the Tribunal is to try the petition; the proceeding before it is the trial before it. "

[7] AIR 1957 SC 444 [9] AIR 1959 SC 837
[8] AIR 1959 SC 827

In paragraph 8 his Lordship observed that under Section 85 the Election Commission has to refer the petition "for trial" to an Election Tribunal constituted by it for that purpose. The Election Tribunal was an ad hoc body created under Section 86 for this purpose only. When it passes an

order which closes the proceedings before it arising out of an election petition, it must be deemed to have tried the petition and passed the order at the conclusion of such trial. The Court relied upon its previous decision in Harish Chandra's case, AIR 1957 Supreme Court 444 (supra) for the proposition that the word "trial" carries the same meaning under Section 90 of the Act also (Paragraph 11). In this case the provisions of Section 90 (3) of the Representation of the People Act as they stood prior to the addition of the explanation by Act 18 of 1958 were considered.

28. On these decisions it is apparent that the word "trial" has been used in the same sense in Section 90 (1) and Section 98 (a) of the Act. For purposes of both these provisions the trial of an election petition commences on the reference of the petition to the Tribunal. The trial concludes when the Tribunal makes an order which in fact puts an end to or closes the proceedings before it arising out of the election petition. The trial of an election petition is the entire process of the litigation from its first seisin by the Tribunal to its disposal, and includes matters prior to the actual hearing of the petition. The matters relating to the service of summons, calling for and finalising the pleadings, and settling the issues, are all constituent stages of the trial. The 'procedure' provided by the Code of Civil Procedure in relation to these various matters would govern the proceedings arising out of an election petition, in virtue of Section 90 (1) of the Act.

29. The next question would be, what is the "procedure" under Section 90 (1), and whether Orders 9 and 17, Civil Procedure Code, are included in it. The question as to what is meant by procedure has also been spoken of by the Supreme Court. Referring to Section 90 (2) (which after the amendment of 1956 was Section 90 (1) Bose, J., in *Sangram Singh v. Election Tribunal, Kotah*[10], speaking for the Court observed:

> "We must, therefore, direct our attention to that portion of the Civil Procedure Code that deals with the trial of suits. "

Before adverting to the provisions themselves his Lordship observed that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Then his Lordship observed (paragraph 17): -

[10] AIR 1955 SC 425

"Of course, there must be exceptions and where they are clearly defined they must be given effect to. "

In paragraph 21 he referred to O. 9 which is headed "Appearance of parties and consequence of non-appearance. " In paragraph 22 his Lordship emphasized that the word "consequence" as opposed to the word "penalty" used in Section 32 of the Code is significant. Then in paragraph 24 it was observed that Rule 1 of Order 9 starts by saying "on the day fixed in the summons for the defendant to appear and answer....." It was observed: "and the rest of the rules in that

order are consequential on that". This shows that it was held that the rules relating to appearance of parties and the consequence of non-appearance are part of the procedure prescribed by the Code of Civil Procedure for the trial of suits and are consequently applicable to the trial of election petitions. The fact that Order 9, Rule 13 is applicable is further clear from paragraph 27 where it was observed that the first hearing is either for the settlement of issues or for final hearing. If it is only for the settlement of issues, then the Court cannot pass an ex parte decree on that date because of the proviso to Order 15 Rule 3 (1) which provides that that can be done when "the parties or their pleaders are present and none of them objects". On the other hand if it is for final hearing, an ex parte decree can be passed, and if it is passed, then Order 9, Rule 13 comes into play and before the decree is set aside the Court Is required to make an order to set it aside. In paragraph 29, O. 17 which deals with adjourned hearing was mentioned.

30. In that case the procedure contemplated by Section 90 (1) of the Act was exhaustively dealt with in order to bring out the proper effect of Order 9, Rule 6 of the Code. Then in paragraph 32, Order 8, Rule 10 was dealt with whereunder the Court may pronounce judgment against the defendant if he fails to comply with an order to file a written statement of his defence. That would indicate that in the opinion of the Supreme Court the provisions which confer a power even of pronouncing final judgment for the default of the defendant were within the concept of the procedure contemplated by Section 90 (1).

31. From this decision it would be clear that the provisions of O. 9 which deal with appearance of parties and consequence of non-appearance and O. 17 which deals with adjournment relate to procedure and are attracted to the trial of an election petition. Order 9, Rule 8 provides the consequence of non-appearance by the plaintiff when the suit is called on for hearing. The consequence is that the Court shall make an order that the suit be dismissed. This is not a penalty. It would be a matter of procedure just as the pronouncing of judgment against the defendant under Order 8, Rule 10 is. Rule 9 of Order 9 is a provision properly consequential upon an order passed under Rule 8. Both will stand on the same footing. They do not militate against any provision in the Act or the Rules. There is nothing in their purpose or effect which may make them inherently inapplicable to proceedings arising out of an election petition. Their applicability cannot be excluded either on the ground that Section 90 (1) is subject to the provisions of the Act and the Rules, or that it makes the provisions of the Act applicable in so far as they may be applicable.

32. For the respondents Mr. Advocate General referred to the decision of the Supreme Court in *Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa*[11], and urged that there

[11] AIR 1958 SC 698

was a clear distinction between the "procedure" provided by Section 90 (1) and the "powers" conferred upon the Tribunal by Section 92. In that case the question for consideration was whether Order 23, Rule 1, C. P. C., enabling a party to abandon a part of the claim was applicable to an election petition by virtue of Section 90 (1). It was held that that provision was

not applicable, because, in view of the scheme of the Representation of the People Act an election petitioner cannot withdraw a part of the claim. That would defeat recrimination proceedings. Then, the Act especially provided for withdrawal of the election petition. Section 90 (1) being subject to the Act, the topic of withdrawal could not be brought in under Section 90 (1). Further, Order 23, Rule 1 (2) provides for liberty being given by the Court to a party withdrawing or abandoning a part of his claim to file a fresh suit on the same cause of action, if so advised. In the very nature of things such liberty could not be reserved to a petitioner in an election petition. The provisions of the Act in regard to withdrawal of petitions do not provide for liberty to file a fresh election petition. For these reasons it was held that Order 23, Rule 1 was inherently inapplicable to election petitions.

33. Bhagwati J. who spoke for the Court, referred to the various provisions of the Act to show that their effect was to constitute the Act a self-contained Code governing the trial of election petitions. He observed that Section 90 only provides for the procedure for trial of election petitions. The powers are, however, separately dealt with in Section 92. His Lordship then observed: -

> "It will be noticed that the procedure for trial before the Tribunal and the powers of the Tribunal are treated separately, thus distinguishing between the procedure to be followed by the Tribunal and the powers to be exercised by it"

His Lordship then mentioned various other provisions governing the trial and observed that the effect of all these provisions really is to constitute the Act a self-contained Code governing the trial of election petitions, and it would appear that in spite of Section 90 (1) of the Act, the provisions of Order 23 Rule 1, Civil Procedure Code, would not be applicable to the trial of election petitions by the Tribunals.

34. It was argued by the learned Advocate General that one reason for the exclusion of Order 23, Rule 1 was that powers of the Tribunal were separately dealt with by Section 92, which did not include Order 23, Rule 1, and, that would lead to the conclusion that the powers mentioned in Section 92 were not included in the procedure provided for by Section 90 (1). It is noticeable that though it was mentioned that the provisions distinguished between the procedure to be followed by the Tribunal and the powers conferred upon the Tribunal, yet his Lordship did not hold that they were mutually exclusive provisions or that the matters provided for by Section 92 were completely independent of and outside the purview of Section 90.

35. There are several reasons for taking this view. The Court was not in that case concerned with or adjudicating upon any antithesis between Sections 90 and 92. Then, the exact point as to the inter-relations of these two provisions had been the subject of an express declaration of law by the Supreme Court in a previously decided case to which Bhagwati J. himself was a party. I am referring to the case of Harish Chandra, AIR 1957

Supreme Court 444 (supra). In paragraph 20 Venkatarama Ayyar J. speaking for the Court held that in *Sitaram v. Yograjsingh*[12], it was held that "procedure" in Section 90 and "powers" in Section 92 were inter-changeable terms and held that the law was correctly laid down in that case. In paragraph 17 his Lordship dealt with the argument that if the provisions of the Code of Civil Procedure are held to be applicable then there was no need to provide in Section 92 that the Tribunal was to have powers of Courts under the Code of Civil Procedure in respect of the matters mentioned therein, as those powers would pass to it under Section 90 (2). It was held:

> "But this argument overlooks that the scope of Section 90 (2) is in a material particular, different from that of Section 92. While under Section 90 (2) the provisions of the Civil Procedure Code are applicable only subject to the provisions of the Act and the rules made thereunder, there is no such limitation as regards the powers conferred by Section 92. It was obviously the intention of the Legislature to put the powers of the Tribunal in respect of the matters mentioned in Section 92 as distinguished from the other provisions of the Code on a higher pedestal and as observed in AIR 1953 Bombay 293, they are the irreducible minimum which the Tribunal is to possess. "

His Lordship then specifically dealt with the supposed distinction between "procedure" and "powers" in paragraph 18 and observed: -

> "It is then argued that Section 92 confers powers on the Tribunal in respect of certain matters, while Section 90 (2) applies the Civil Procedure Code in respect of matters relating to procedure, that there is a distinction between power and procedure, and that the granting of amendment being a power and not a matter of procedure, it can be claimed only under Section 92 and not under Section 90 (2). "

Rejecting this argument it was held: -

> "We do not see any antithesis between 'procedure' in Section 90 (2) and 'power' under Section 92. When the respondent applied to the Tribunal for amendment he took a procedural step, and that, he was clearly entitled to do under Section 90 (2). The question of power arises only with reference to the order to be passed on the petition by the Tribunal. Is it to be held that the presentation of petition is competent, but the passing of any order thereon is not? We are of opinion that there is no substance in this contention either. "

36. The case of Harish Chandra, AIR 1957 Supreme Court 444 was decided by a four-Judge Bench of the Supreme Court (Bhagwati. Venkatarama Ayyar, Sinha and S. K. Das, JJ.). The case of Inamati Malappa, AIR 1958 Supreme Court 698 (supra), relied on by the respondent, was decided by a three-Judge Bench of the Supreme Court (Bhagwati, Kapur and Sarkar, JJ.). Bhagwati, J. was a party to both the decisions. If his Lordship was intending to lay down a rule

contrary to Harish Chandra's case, AIR 1957 Supreme Court 444 he would have certainly referred to it and dealt with it. Then, a decision of a three-Judge Bench cannot be construed as overruling the express opinion of a four-Judge Bench decision of the same Court. For all these reasons, the observations of Bhagwati, J.

[12] AIR 1953 Bom 293

in paragraph 17 of the judgment in Inamati Malappa's case, AIR 1958 Supreme Court 698 ought not be construed to mean that Sections 90 (1) and 92 are mutually exclusive so that the matters referred to in Section 92 are outside the purview of Section 90. In my opinion, the matters mentioned in Section 92 appertain to the procedure for trial, and are also attracted by virtue of Section 90 (1). They were separately stated in Section 92 to make them operate in spite of any provision to the contrary in the Act or the Rules, and not with a view to curtail the amplitude of Section 90 (1). The provisions of Order 9, Rules 8 and 9, Civil Procedure Code, even if they deal with powers, would be procedural powers and be attracted by virtue of Section 90 (1).

37. But assuming that the submission of the learned Advocate General on the interpretation of Section 92 was correct, it would, in my opinion, not advance his case on this point. Section 92 states that the Tribunal shall have the powers which are vested in a Court when trying a suit "in respect of the following "matters"; one of which under Clause (e) is, granting adjournments. So the Tribunal possesses the powers in respect of the matter of granting adjournments. The matter of granting adjournments is the field or the topic in respect of which the Tribunal is to have all powers provided by the Code of Civil Procedure. The use of the phrase "in respect of" would bring in all those provisions which deal with or provide for the subject-matter of granting adjournments. The provisions which provide for matters ancillary or consequential to the granting of adjournments would equally be applicable to the Tribunal. The Government of India Act, 1935, uses the phrase "with respect to" in a large number of items in the legislative lists mentioned in the Seventh Schedule. In *United Provinces v. Atiqa Begum*[13], the Federal Court held that the expression "with respect to" includes all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that topic or category of legislation. So, the provisions of the Code of Civil Procedure dealing with the granting or refusing of adjournments as well as providing for the consequence of the grant of or refusal to grant adjournments would be within the purview of Section 92 and the Tribunal shall have all such powers. Order 17 of the Code, is headed as "adjournments. " It would clearly apply. Rule 1 authorizes the court to adjourn the hearing of the suit from time to time. Rules 2 and 3 provide for the consequence of non-appearance on the date to which the hearing has been adjourned. Under Rule 2 if the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit. This brings in O. 9 of the Code of Civil Procedure. Order 9, therefore, would clearly be available to the Tribunal. Rules 8, 9 and 13 of O. 9 provide the modes in which the Court may proceed to dispose of the suit. The Tribunal thus would have the power to proceed in one of those modes.

38. Order 9, Rule 1 states: -

"On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. " This rule directly deals with the topic of granting an adjournment. It would be attracted. In AIR 1955 Supreme Court 425 Bose, J. specifically observed that the rest of the rules in O. 9 are consequential on R. 1 (vide paragraph 24). Thus, under Section 92 (e) of the Act the provisions of O. 17

[13]AIR 1941 FC 16 at p. 25

and O. 9 of the Code of Civil Procedure would confer the relevant power to dismiss for default, and the power to set aside that order on sufficient cause being shown, on the Election Tribunal.

39. In my opinion Sections 90 (1) and 92 severally as well as jointly authorise the Election Tribunal to dismiss the proceedings arising out of an election petition for default of appearance of the election petitioner.

40. I would, respectfully, differ from the decision of a Bench of this Court in Vishwanath Prasad's case, AIR 1964 Allahabad 181.

41. It was also urged that an order dismissing the proceedings for default in appearance would not be an order under Section 98 (a). For this reliance was placed upon the Bench decision in Vishwanath Prasad's case, AIR 1964 Allahabad 181 as well as the decision in B. P. Maurya's case, 1964 All LJ 155. In Vishwanath Prasad's case, AIR 1964 Allahabad 181 it was observed that Clause (a) of Section 98 requires an order of dismissal after the conclusion of the trial and the trial has to conclude after the decision of the issues that have been raised in the petition. That view does not appear to be in line with the various decisions of the Supreme Court mentioned earlier in this judgment viz. Chandrika Prasad, AIR 1959 Supreme Court 827 and Om Prabha Jain, AIR 1959 Supreme Court 837, wherein it has been held that the trial commences prior to the hearing of the petition and an order which in fact concludes the trial even before the issues have been framed, would also be an order within Section 98 (a), for instance an order of dismissal under Section 90 (3) for non-compliance with the provisions of Sections 81, 82 and 117. The reason for that conclusion was not the explanation added subsequently to Section 90 (3) of the Act, but the view that the trial commences from the moment the petition is referred to the Tribunal and that the trial concludes when an order has been passed which in fact closes the proceedings arising out of the election petition.

42. According to Sangram Singh's case, AIR 1955 Supreme Court 425, Order 8, Rule 10, Civil Procedure Code is by virtue of Section 90 (1) attracted to the trial of election petitions. Under it if the Court had required the defendant to file a written statement and he fails to do so, it can pass judgment. This would be a stage prior to the settling of issues. If the view expressed in

Vishwanath Prasad's case, AIR 1964 Allahabad 181 be correct an order under Order 8, Rule 10, Civil Procedure Code, would not be within Section 98 (a). The result would be that the Tribunal would be obliged to proceed on with the election petition to frame issues and then to decide them even though there is no written statement. Similarly, Order 7, Rule 11, Civil Procedure Code, entitles the Court to reject a plaint if it discloses no cause of action. That is a stage even prior to the issuance of summons to the defendant. If such an order, even though it completely concludes the proceedings arising out of the election petition be not treated as an order of dismissal under Section 98 (a), the result would be startling. The Tribunal would be bound to proceed with the election petition, call for a written statement, settle issues, record all the evidence that may be adduced by the parties, hear arguments and then dismiss the petition on the ground that it discloses no cause of action. The Legislature could not, in my opinion, be attributed an intention to force the Tribunal to keep on flogging a dead horse knowing full well that no useful result would follow. On the other hand orders under Order 7 Rule 11, Civil Procedure Code, Order 8, Rule 10, Civil Procedure Code, as well as Order 9 Rule 8, Civil Procedure Code, in fact bring to a close the proceedings before the Tribunal. They are, therefore, passed at the conclusion of the trial, The only condition mentioned in Section 98 Ss that the order dismissing the election petition should be one which is passed at the conclusion of the trial. That test is amply satisfied in all these cases. In B. P. Maurya's case, 1964 All LJ 155 (page 159) the Bench observed that obviously Section 98 does not contemplate an order of dismissal for default. It distinguished the Supreme Court decision in Om Prabha Jain's case, AIR 1959 Supreme Court 837 on the ground that under Section 90 (3) the Tribunal has no option but to pass an order of dismissal, but in the case of a dismissal for default the order dismissing the petition is passed subject to its being set aside under Order 9, Rule 9, Civil Procedure Code on sufficient cause being shown and the Court has a discretion in respect of it. With respect, I am unable to endorse this view-point. Order 9, Rule 8, Civil Procedure Code provides that where the plaintiff does not appear "the Court shall make an order that the suit be dismissed". The Court has no discretion in the matter. Further, it cannot be said that the Tribunal has no option but to dismiss the petition for non-compliance with the provisions of Sections 81, 82 and 117. In Harish Chandra's case. AIR 1957 Supreme Court 444, at para. 16 P. 453 it was observed: -

> "Section 90 (4) enacts that when an election petition does not comply with the provisions of Section 81, Section 83 or Section 117 the Tribunal may dismiss it. But if it does not dismiss it, it must necessarily have the powers to order rectification of the defects arising by reason of non-compliance with the requirements of Section 81, Section 83 or Section 117. "

This observation would suggest that the Tribunal has a discretion in the matter. It can order rectification of the defects. The case of Om Prabha Jain, AIR 1959 Supreme Court 837 (supra) would not, in my opinion, be distinghishable on this ground. I am, therefore, unable to uphold the view that Section 98 contemplates an order on merits alone, or that an order of dismissal for default would not be an order dismissing the election petition under Section 98 (a) of the Act.

43-44. It was then urged that Sections 103, 106 and 107 of the Act require only an order dismissing a petition under Section 98 (a) to be communicated to the Election Commission under Section 103 and then transmitted by the Election Commission to the appropriate authority under Section 106 for being notified. An order of dismissal otherwise is not required to be notified and so even though an election petition may be dismissed for default of appearance the order would remain uncommunicated and unnotified, The same argument was advanced in relation to an order of dismissal under Section 90(3) in Chandrika Prasad's case. AIR 1959 Supreme Court 827. There the case arose prior to the amendment of Section 90 (3) by Act 18 of 1958 where under the explanation was added. The Supreme Court considered the provisions as they stood prior to the addition of the explanation. It was held that an order under Section 90 (3) would be an order within meaning of Section 98 (a). Gajendragadkar J. observed (paragraph 9): -

> "It cannot be suggested that the order passed by the tribunal dismissing the election petition for non-compliance of Section 117 is not required to be communicated to the Election Commission under Section 103 or transmitted by the Election Commission to the appropriate authority under Section 106. Similarly it cannot be said that such an order would not take effect as soon as it is pronounced by the tribunal under Section 107. It would thus be noticed that though the provisions of these sections are obviously applicable to an order dismissing the election petition on the ground of non-compliance of Section 117, in terms the said sections refer to orders passed under Section 98 or Section 99. Therefore, we think it would be reasonable to hold that, where the tribunal dismisses an election petition by virtue of the provisions contained in Section 90, sub-section (3), the order of dismissal must be deemed to have been made under Section 98. "

The same line of reasoning would apply to an order of dismissal for default of appearance. In the premises, such an order of dismissal must also be deemed to have been made under Section 98,
45. It was then suggested that in the case of dismissal for default of appearance an order under Section 99 would be inappropriate. The same submission was made in relation to an order under Section 90 (3) in Chandrika Prasad's case, AIR 1959 Supreme Court 827 (supra), It was rejected on the views:

> "Similarly Section 99 (1) (b) which empowers the tribunal to fix the total amount of costs payable and to specify the person by and to whom that shall be paid in terms refers to cases where an order is made under Section 98. It cannot be suggested that, where an order of dismissal is passed under Section 90, subsection (3), the tribunal cannot make an appropriate order of costs. This provision also indicates that the order passed under Section 90, sub-section (3) is in law and in substance an order passed under Section 98 (a). It is true that in cases where such an order is passed Section 99 (1) (a} would not come into operation, but that can hardly affect the position that an order under Section 90, sub-section (3) is nevertheless an order under Section 98. "

An order for dismissal in default of appearance would stand identically on the same footing.
46. It was then urged that Section 116-B of the Act provides:

> "The decision of the High Court on appeal under this Chapter and subject only to such decision, the order of the Tribunal under Section 98 or Section 99 shall be final and conclusive"

and hence an order under Order 9, Rule 8, Civil Procedure Code, would be final and conclusive if it was treated an order under Section 98, In that situation such an order could not be set aside under Order 9, Rule 9, Civil Procedure Code. This submission was rejected by a Bench in B. P. Maurya's case, 1964 All LJ 155 (supra). The Bench held that: -

> "It is trite that a decree passed by a regular Civil Court is final subject to its being reversed but no one has so far argued that the Civil Court has no power to set aside an ex parte decree under Order 9, Rule 9, Civil Procedure Code "

With respect I am in agreement with this view-point. The finality contemplated by Section 116-B is to be read along with the other provisions of the Act which provide for the setting aside of specified orders. Section 116-B does not open with the clause "notwithstanding the other provisions of the Act. " It should be construed so as to harmonise with the other provisions, namely sections 90 (2), 92 (e) read with Order 9, Rule 9, Civil Procedure Code.

47. In Sunderlal Mannalal's case, AIR 1958 Madhya Pradesh 260 it was observed that the Tribunal possesses inherent power of dismissal for non-appearance or non-prosecution. I will not go that far. The Supreme Court in Jagannath's case, AIR 1954 Supreme Court 210 and in Kamraj Nadar's case, AIR 1958 Supreme Court 687 emphasised that an Election Tribunal does not possess any common law powers. Further, in my opinion the power of dismissal for non-appearance has been expressly conferred upon the Tribunal under Sections 90 (1) and 92 (e) of the Act.

48. A Bench of the Patna High Court In *Sawalia Behari Lall Verma v. Tribik Ram Deo Narain Singh*[14], accepted the position that Section 90 (1) of the Act imported the provisions of O. 9, Civil Procedure Code, and the Tribunal was competent to dismiss the election petition under Order 9, Rule 8, Civil Procedure Code. I would express my respectful dissent from the decision to the contrary by the Full Bench of Jammu and Kashmir High Court in *Dina Nath Kaul v. Election Tribunal, J. and K*[15]., A Full Bench of the Punjab High Court In *Jugal Kishore v. Baldeo Parkash*[16], did not accept the view expressed by a Bench of this Court in Vishwanath Prasad's case, AIR 1964 Allahabad 181 and the Full Bench of Jammu and Kashmir High Court mentioned above, but agreed with the views of the Patna High Court in Sawalia Behari Lall's case, AIR 1965 Patna 378 (supra). It held that O. 9 and O. 17, Civil Procedure Code, are

applicable to the trial of election petitions.

49. In my opinion Orders 9 and 17 of the Code of Civil Procedure are applicable to the trial of an election petition both under Section 90 (1) as well as Section 92 (e) of the Representation of the People Act.

50. The second submission of the learned counsel for the appellant was that either before dismissing the petition for default of appearance of the election petitioner or after such an order had been passed, it was incumbent upon the Tribunal to have followed the procedure prescribed by Sections 109 and 110 of the Act. Under Section 109 when a petition for withdrawal is made notice thereof fixing a date for the hearing of the application shall be given to all other parties to the petition and shall be published in the Official Gazette. Under Section 110 an application for withdrawal cannot be granted if in the opinion of the Court such an application has been induced by a bargain or consideration which ought not to be allowed. But if the application is granted notice of the withdrawal is to be published in the official gazette and a person who might have been a petitioner may apply to be substituted as petitioner in place of the party withdrawing. The same procedure has to be followed under Sections 113 to 115 when an election petition abates by reason of the death of the petitioner. It was urged that if an election petitioner has entered into any bargain or consideration which ought not to be allowed

[14] AIR 1965 Pat 378 [16] AIR 1968 Punj 152 (FB)

[15] AIR 1960 Jam and Kas 25

under Section 110, he may instead of filing an application for withdrawal, just refuse to prosecute the petition: and, if the provisions of Section 109 onwards are not held applicable to such a situation, there would be no power or machinery by which the proceeding could be continued. The intention of the Legislature that a petition should not fail by reason of any bargain or collusion between the election petitioner and the successful candidate would be frustrated. There is undoubtedly a lacuna in the Act, because it makes provision when an election petitioner is allowed to withdraw, but makes no such provision if he just refuses to prosecute it. But that reason would not, as pointed out by Grover J. in Jugal Kishore's case, AIR 1958 Punjab 152 (supra) be a sufficient reason to construe the provisions beyond the purview of their language. Sections 109 to 115 apply only in the case of withdrawal or abatement. They do not apply to a dismissal for default. For the same reason the amplitude of Section 90(1) or 92(e) of the Act could not be cut down on such considerations. It is for the Legislature to fill in the lacuna by appropriate amendment. The Courts ought not to legislate in the guise of interpretation. In my opinion the Tribunal was right in its opinion that the provisions of Sections 109 and 110 were not attracted when the election petitioner failed to prosecute the petition.

51. The position is that the Election Tribunal had power to dismiss the petition for default of appearance of the election petitioner. The order passed by it on 20th April, 1965, holding that it had no such power was erroneous. It could in its discretion adjourn the hearing or dismiss the petition for default of appearance. It adjourned the hearing more than once. But the appellant never appeared. The Tribunal ought not to have proceeded to record findings. The ultimate order

of dismissal was passed ex parte. It should be deemed in law to be a dismissal for default of appearance of the petitioner. With this observation, the appeal is dismissed. The parties may bear their own costs in this Court.

Lokur, J.

52. This appeal involves the application of Section 90 (1) of the Representation of the People Act, 1951, as it stood prior to the amendment of the Act in 1966. The Section requires that subject to the provisions of the Act and any other rules made thereunder, every Election petition shall be tried by the Tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. The question is no more of general importance as the Election Tribunals have been abolished by the Amending Act of 1966 and the election disputes have now to be tried by the High Courts. The amended Act also lays down the same procedure for trial of Election Petitions by High Courts under Section 87 of the amended Act. But the High Courts being courts of record, the power of the High Courts cannot in any way be compared with those of the Election Tribunals. Nevertheless, the question has been referred to this Full Bench and we have heard arguments thereon at full length and, in fairness, I am of the view that the question should be examined by us.

53. The words "as nearly as may be" in Section 90 (1) are significant. Although the entire procedure laid down under the Code of Civil Procedure need not be followed the direction requires that that procedure should be followed to the extent possible. If there is nothing in the Act which precludes the application of Order 9, Rule 8 of the Civil Procedure Code, there would be no adequate reason why that rule should not be applied.

54. It is urged that Section 90 (1) provides for "procedure" but the dismissal of the Election Petition for default of appearance of the petitioner is exercise of a "power" and since that power is not included in Section 92 of the Act, which is said to set out the powers of the Tribunal, the Tribunal had no power to dismiss the Election Petition under Order 9, Rule 8. Reference may, in this connection, be made to the observations of Venkatarama Ayyar, J., in AIR 1957 Supreme Court 444 that there is no antithesis between "procedure" in Section 90 (1) and "power" under Section 92. There is, however, a contrary observation of Bhagwati J. in the case of AIR 1958 Supreme Court 698 that there was a clear distinction between the "procedure" provided in Section 90 (1) and the "powers" conferred by Section 92. The case of Harish Chandra, AIR 1957 Supreme Court 444 was decided by a Bench of four Judges, while the case of Inamati Mallappa, AIR 1958 Supreme Court 698 was decided by a Bench of three Judges; Bhagwati J. was a party to the decision in Harish Chandra's case, AIR 1957 Supreme Court 444 also. Inamati Mallappa'e case, AIR 1958 Supreme Court 698 did not refer to Harish Chandra's case and, in the circumstances, the decision in Harish Chandra's case, AIR 1957 Supreme Court 444 appears to be entitled to greater weight. Accordingly, in my opinion even if the dismissal of an Election

Petition is exercise of a power it is covered by Section 90 (1).

55. It was next contended that the only orders to be made in an Election Petition are those specified in Section 98 and as such the orders have to be made "at the conclusion of the trial of Election Petition" and it cannot be said that dismissal of an Election Petition for default of appearance of the petitioner would be at the conclusion of the petition. It is however, well settled by the decision of the Supreme Court that trial before the Election Tribunal commences as soon as the Tribunal became seized of the petition on reference of the petition to it by the Election Commission under Section 86 (1). Hence the dismissal of an Election Petition for default of petitioner's appearance is covered by Section 98 (a).

56. It was further argued that on the dismissal of the petition for default of the petitioner's appearance, copies of the order have to be forwarded to the various authorities and the order will also have to be published by the Election Commission under Section 106 but there is no provision in the Act enabling this action to be annulled in the event of the Election Petition being restored on an application under Order 9, Rule 13 of the Code of Civil Procedure and decided afresh. Where the petition is decided afresh, in such a situation, the Election Commission will, no doubt, make the position clear as to how the petition was decided a second time.

57. It may be observed that if the Election Petition is not dismissed for default of the petitioner's appearance but heard on merits, the only evidence available to the Tribunal for consideration is the evidence of the respondent and decision on such interested evidence on serious matters, like corrupt practices, would be travesty of justice.

58. On the whole, the better view to my mind is that the Election Petition ought to be dismissed if the petitioner remains absent on the date of its hearing. If, however, the Tribunal dismisses the petition on merits, the dismissal would remain in Law a dismissal for default of the petitioner's appearance. The petitioner will then be at liberty either to approach the Tribunal to have the order of dismissal set aside or to go in appeal to the High Court. If he chooses the latter course, he must, to get relief, satisfy the High Court that he had sufficient cause to be absent on the date of hearing. In the present case no attempt has been made by the petitioner to explain the reasons which compelled him to be absent at the hearing. That being so, this is not a fit case to relieve the petitioner from the consequences of the order of the Tribunal.

59. The appeal ought, in my opinion, to be dismissed.

60. BY THE COURT: The appeal is dismissed. Parties will bear their own costs.

Appeal dismissed.