

Sundaram Vs. Vadivelu

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Court : Chennai

Decided On : Nov-09-1998

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Judge : S.S. Subramani, J.

Acts : Tamil Nadu Panchayat (Elections) rules, 1995 -- Rule 59, 60, 61, 66, 122 & 122; Tamil Nadu Panchayat (Procedure) Rules, 1993, Rule 63; [Constitution of India](#) -- Article 226, 227; Tamil Nadu Panchayats Act, 1994; Representation of Peoples Act -- Sections 83(1); Tamil Nadu Panchayats Act, 1958

Appeal No. : C.R.P. No. 2935 of 1998

Appellant : Sundaram

Respondent : Vadivelu

Advocate for Def. : Mr. V.K. Vijayaraghavan Adv.

Advocate for Pet/Ap. : Mr. A. Muthukumar, Adv.

Judgement :

ORDER

1. This Revision is filed under Article 227 of the [Constitution of India](#), challenging the Order of the Election Tribunal under the Tamil Nadu Panchayats Act, 1994, made in Election Original Petition No.12 of 1996, on the file of Additional District

Judge-cum-Chief Judicial Magistrate, Pudukkottai, dated 22.6.1998.

2. The Election Original Petition was filed challenging the election of the petitioner herein, as President of Vennavalkudi Panchayat.

3. Reference to parties in this Order will be according to their rank in the Election Original Petition before the Election Tribunal below.

4. Petitioner and respondents contested the election for post of President to the said Panchayat under different symbols. Election was held on 12.10.1996. According to the petitioner, wrong electoral roll was utilised by the presiding Officer. Though the petitioner and his agents protested against wrong electoral roll, their objection was of no use. Names of dead persons were not deleted from the electoral roll. Voters from other Panchayats were also included in the electoral roll. The Presiding Officer did not take care about the electoral roll and the impersonation. The said votes polled in favour of first respondent are void and, therefore, they have to be excluded. It is also further said that while counting of votes, the petitioner and his agents represented the above facts and requested the Counting Officers and the Returning Officer, both orally and in writing to reject the votes polled by these persons. It is said that the Counting Officers wantonly put the petitioner's valid votes in invalid vote box. The petitioner's valid votes were added in the invalid votes. Many votes which were polled in favour of petitioner were added to that of the first respondent. Counting Officers were also not in a position to know what are valid votes and invalid votes. Counting was also going on in a great speed, and petitioner's agents were not allowed to inspect the same, and finally the result was declared, by which the first respondent was declared elected by a margin of one vote. Petitioner gave a representation to the Returning Officer for recounting. He did not give any acknowledgment, and also did not agree for recounting. Petitioner has, therefore, filed the Election Petition to declare the election of the first respondent as void, and to declare the petitioner as duly elected as President of Vennavalkudi Village Panchayat, and for costs.

5. A detailed counter was filed by first respondent wherein all the allegations made in the election petition were denied. It is said that during polling, there was no objection from any source, and even during counting, there was no room for any

complaint. The allegation that valid votes of petitioner were treated as invalid, is denied. According to first respondent, there was no irregularity or illegality either during polling or counting, and the Election Petition is liable to be dismissed.

6. During trial, P.Ws. 1 to 4 were examined, and Ex. A-1 was marked on the side of the petitioner. No documents were marked on the side of first respondent. Exx. X-1 to X-9 were marked through witness. Petitioner was examined as P.W.1 and P.Ws.2 to 4 were also examined on his side. First respondent was examined as R.W.1 and another witness was examined as R.W.2.

7. After considering the entire evidence, the Election Tribunal held that no dead person was included in the Electoral roll, and there were no voters from other Panchayats, who cast their votes in the Election in question, and there was no irregularity in the voting.

8. Regarding counting, the Tribunal held that during first round, what was the number of votes polled by petitioner and first respondent, no details are given. It was further found that an application was filed by petitioner at 11-35 p.m. for recount, though the election was declared at 10-30 p.m. Therefore, it was found that there must be irregularity in the counting and, therefore, the Election Tribunal appointed a Commissioner to recount all the votes. Thereafter, the Commissioner opened all the ballot boxes and filed a report. The Commissioner found that some of the ballot papers polled both in favour of petitioner as well as first respondent were not signed by the Presiding Officer. 31 votes in favour of first respondent were found to be not signed by the Presiding Officer, and likewise, 18 votes polled in favour of petitioner were found not signed by the Presiding Officer. Three votes polled in favour of another candidate were also found not signed by the Presiding Officer. It was also found that there were some defects in the postal votes. When the Report was submitted before the Tribunal, it declared that all the ballot papers which were not signed by the Presiding Officer will be excluded and they have to be rejected. It also found that two of the postal ballots which were counted in favour of first respondent have to be rejected. Ultimately it was held that the first respondent has failed, and the petitioner was declared elected. The same is challenged in this Revision under Article 227 of the [Constitution of India](#).

9. The main contention raised by learned Counsel for revision petitioner is that when the very election petition is not maintainable, the same ought to have been rejected at the threshold. According to him, no material facts have been pleaded, and the Election Petition itself has been filed only for fishing information, and the Court has also played its part in appointing a Commissioner by ordering recounting. According to learned Counsel, the Order dated 22.6.1998 is invalid. It was further found that even if it is held that the order of recounting is proper, rejection of certain valid votes polled in favour of first respondent was improper. Learned counsel further submitted that even regarding those votes, there must be necessary pleading that they are invalid votes. Even if there is a mistake on the part of the Presiding Officer in not signing some ballot papers, the same shall not be treated as invalid votes.

10. As against the said contention, learned Counsel for the election petitioner submitted that the Order dated 22.6.1998 has become final, and the same cannot be challenged in this Revision. Secondly it was submitted that under the Tamil Nadu Panchayats (Elections) Rules, 1995, ballot papers which have not been signed by Presiding Officer have to be rejected, unless it is substantiated by the first respondent that it was due to the mistake of the Presiding Officer, it was not signed. It is also submitted by learned counsel for election petitioner that lack of material facts or pleadings is irrelevant at this stage, when evidence has been let in. Learned Counsel also submitted that when the entire evidence is before Court, the question whether there was proper pleading or not is irrelevant, especially when the earlier Order has become final. He prayed for dismissal of the Revision Petition. An alternative contention was also raised that scope of Article 227 of the [Constitution of India](#) is very much limited, and this Court need consider only whether the Tribunal below has acted within its jurisdiction.

11. The above contentions will be considered in seriatim.

12. Paragraphs 5 and 6 of the Election Petition read thus:-

'The voters of Vennavalkudi Village Panchayat have exercised their franchise and polled their votes as scheduled on 12.10.1996. The wrong electoral roll was utilised by the Presiding Officer. The petitioner and his agents strongly protested

against the wrong electoral roll. The dead persons' names were not deleted from the electoral roll, and other Panchayat Villagers' names are in the electoral roll. The first respondent utilised the same. The petitioner and his agent strongly objected. But the Presiding Officer has not taken any care about the electoral roll and impersonation. The said votes polled in favour of the first respondent is void and therefor has to be excluded.

While counting of votes, the petitioner and his agent represented these facts and requested the Counting Officers and the Returning Officer both orally and in writing to reject these votes polled by these persons. But they refused to consider the said objections. Their such acts are illegal. They had failed to supply any form to the petitioner as prescribed. Subsequently the Counting Officers and the Returning Officer were against the petitioner. The Counting Officers wantonly put the petitioner's valid votes to invalid vote box. The petitioner's valid votes were added in the invalid votes. The petitioner and his agents strongly objected. But the Counting Officers and Returning Officer did not care about the objections. The Counting Officers counted the votes in favour of 1st respondent. Further, the Counting Officers did not know which is valid vote and which is invalid vote. During the polling of votes, the Booth Officers received the thumb-impression from some voters and gave the ballot papers. The thumb-impression or ink mark is available in the ballot papers. The same votes are rejected and put into the invalid votes. Totally, the Counting Officers are newly appointed. They were not properly counting the votes. The Counting Officers were counting the votes very fast, and they have not shown the ballots to the agents when there were objections. The Counting Officers threatened the petitioner's agent and told him they were Supreme Authority for counting votes. The Counting Officers and the Returning Officer were not allowing the petitioner and his agent their rights during counting. The petitioner and his agent have every right to verify the votes. But they were not permitted for the same. Finally, the Returning Officer announced that the first respondent had secured 1011 votes. The Petitioner had secured 1010 votes. The difference is only one vote. More than 100 voters' votes were added in the invalid votes by the Counting Officers. Some invalid votes were included to the 1st respondent which are void and which ought to have been rejected. The Counting Officers and Returning Officer have not seen the intention of voters in the ballot.

The petitioner has given petition to the Returning Officer for recounting of votes. But the Returning Officer has not given any acknowledgment to the petitioner and has not accepted to recounting of votes. The Returning Officer illegally declared elected the first respondent. Therefore, declaration of election of the 1st respondent is illegal and, therefore, has to be declared void and the petitioner has to be declared elected as the President of Vennavalkudi Village Panchayat.'

13. According to me, this Election Petition ought to have been dismissed even at the initial stage itself. No material facts are pleaded and the entire pleadings are vague. No details are given as to how the counting is improper, which are the valid votes which have been treated as invalid, and which are the invalid votes that were treated as valid votes insofar as the first respondent is concerned; and what was the objection raised by the election agent to the counting officers, and what was their reply. These particulars are nowhere stated. In this connection, it should be mentioned that both in regard to the polling as well as counting, a procedure is provided under the Tamil Nadu Panchayats (Elections) Rules, 1995. Rule 60 provides as to the persons who can be at the counting place along with the Counting Officer. It is admitted by the Election petitioner himself that himself and the Election Agents were present at the time of counting. (I am only referring to the procedure for counting, because, the Tribunal itself has found that there was no irregularity at the time of voting; dead persons were not allowed to vote, and there was no impersonation. The Tribunal also found that voters from other Panchayats have not voted. These findings have not been challenged).

14. Rule 61 provides for counting of postal ballot papers and opening of ballot boxes. Rule 63 is of some importance. It deals with the rejection of ballot papers. Rule 63 (1) (h) is relevant for our purpose. It reads thus:-

'63. Rejection of ballot papers.-

(1) A ballot paper shall be rejected - (a) to (g) XXX XXX

(h) if it does not bear both the distinguishing mark and or the signature of the Presiding Officer which it should have borne under the provisions of sub-rule (1) of rule 51 or the words 'elector on election duty' under sub-rule (1) of rule 52.'

There is a Proviso also attached to the said Rule, which reads thus:-

'Provided that where the Returning Officer is satisfied that any such defect as is mentioned in clause (g) or clause (h) has been caused by any mistake Or failure on the part of the Presiding Officer, the ballot paper shall not be rejected merely on the ground of such defect.' (Italics added)

Rule 51 provides for issue of ballot papers and voting procedure. Relevant portion reads thus:-

'Before any ballot paper is delivered to an elector, the Presiding Officer shall sign his name in full on the back of each ballot paper and affix the distinguishing mark of the polling station.'

Rule 66 provides for recount of votes. It reads thus:-

'66. Recount of Votes:- (1) After the completion of the counting and recording in Form 22 the total number of votes polled by each candidate under sub-rule (2) of rule 64, the Returning Officer shall announce the same. After such announcement and before the declaration of the result of the election, a contesting candidate or in his absence his election agent, may apply in writing to the Returning Officer for a recount of all or any of the votes already counted stating the grounds on which he demands such recount.

(2) On such application being made, the Returning Officer shall decide the matter and may allow the application in whole or in part, or may reject it in toto if it appears to him to be frivolous or unreasonable.

(3) Every decision of the Returning Officer under sub-rule (2) shall be in writing and contain the reasons therefor.

(4) If the Returning Officer decides under sub-rule (2) to allow an application either in whole or in part, he shall

(a) count the votes again in accordance with his decision;

(b) amend the result sheet in Form 22 to the extent necessary after such recount, and

(c) announce the amendments so made by him.

(5) After the total number of votes polled by each candidate has been announced under sub-rule (1) or under sub-rule (4) of this rule, the Returning Officer shall complete and sign the result sheet in Form 22 and no application for a recount shall be entertained thereafter;

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates or the election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub- rule (1).'

15. The Tamil Nadu Panchayats (Elections) Rules, 1995 is a self-contained code by itself, and the election petitioner has to succeed or fail only on satisfying the provisions of the Rules. Under Rule 59, after the polling was over, the Presiding Officer has to deliver or cause to be delivered to the Returning Officer the ballot boxes (used and unused), the ballot paper account or accounts, and paper seal account, and such other documents referred to in clauses (d) and (e).

16. I will first consider the argument of learned counsel for petitioner that the petitioner satisfied the requirements as to material facts. The Election Petition was filed under Rule 122 of the Rules, and Rule 125 deals with the contents of an election petition. It says that an election petition shall contain a statement in a concise form the materials on which the petitioner relies. It is similar to Section 83 of the Representation of Peoples Act, where the words are also similar.

17. As early as in *Ramsewak v. H.K. Kidwai*, : [1964]6SCR238 . Their Lordships held thus:-

'..... at every stage in the process of scrutiny and counting of votes, the candidate or his agents have an opportunity of remaining present at the counting of votes, watching the proceedings of the returning officer, inspecting any rejected votes, and to demand a re-count. Therefore, a candidate who seeks to challenge an

election on the ground that there has been improper reception, refusal or rejection of votes at the time of counting, has ample opportunity of acquainting himself with the manner in which the ballot boxes were scrutinised and opened, and the votes were counted. He has also opportunity of inspecting rejected ballot papers, and of demanding a recount. It is in the light of the provisions of Section 83 (1) which require a concise statement of material facts on which the petitioner relies and to the opportunity which a defeated candidate had at the time of counting, of watching and of claiming a recount that the application for inspection must be considered.' (Italics added)

Then, in paragraph 7 of the judgment, Their Lordships said thus:-

'An order for inspection may not be granted as a matter of course; having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled:

- (i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support in his case, and
- (ii) the Tribunal is *prima facie* satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for its inspection.'

The said decision was followed in *Jitendra Bahadur v. Krishna Behari*, : [1970]1SCR852 of the judgment, after following the decision in *Ramsewak Yadav's* case, Their Lordships held thus:-

'The trial court was of the opinion that if an election petitioner in his election petition gives some figures as to the rejection of the valid votes and acceptance of invalid votes, the same must not be considered as an adequate statement of material facts. In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bold assertion that he got those figures from the counting agents of the Congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information. It is not his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as material supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition. The facts stated in paragraphs 13 and 14 of the election petition and in Schedule 'E' are mere allegations and are not material facts supporting those allegations. This Court in insisting that the election petitioner should state in the petition the material facts as referring to a point of substance and not of mere form. Unfortunately the trial Court has mistaken the form for the substance. The material facts disclosed by the petitioner must afford an adequate basis for the allegations made.'

18. In *Sasanagouda v. S.B. Amarkhed*, : AIR 1992 SC1163 the Honourable Supreme Court held that the court shall not permit a roving enquiry to enable the defeated candidate/election petitioner to have access thereto to fish out the grounds.

19. The same principles were reiterated in the decision reported in *Charandass v. Surinder Kumar*, 1995 Suppl. (3) SCC 318. There, the allegations were similar as in this case. The argument before the Honourable Supreme Court can be seen in paragraph 4 of the judgment, which reads thus:-

'Mr. Tewatia, learned counsel appearing for the appellant, assails the above findings contending that the counting of votes did not take place in the manner as provided in Rule 56 of Conduct of Election Rules and lot of irregularities were committed at the time of counting and that the High Courtought to have granted an

inspection of the ballot papers in order to decide the dispute for doing complete justice between the parties. He further contends that the counting agents of the appellant were kept away from the counting tables and it was, therefore, not possible for the counting agents to supervise the counting and note down the invalid ballot papers. In support of his contention, he placed reliance on three rulings of this Court, namely : (1) Bhim Sen v. Gopalai; (2) Sharadha Devi (Km.) v. Krishna Chandra Pant; and (3) N.E. Hero v. Leander Tiru.'

20. After following the decisions referred to supra, the finding of the High Court that the allegations are vague was sustained. There also, the allegations were only that there was a lot of irregularities committed at the time of counting and the counting agents of the petitioner were kept away and, therefore, it was not possible for the counting agents to supervise the counting and note down the invalid ballot papers. Details were not given. Their Lordships held that lack of material facts and particulars disentitles the election petitioner to have relief.

21. In M.R. Gopalakrishnan v. Thachady Prabhakaran, : 1994(5)SCALE192 in paragraph 17, Their Lordships followed an early decision reported in Bhabhi v. Sheo Govind, : AIR 1975 SC2117 and also followed the guidelines stated in that decision on which alone an inspection of ballot papers could be ordered. Paragraph 17 reads thus:-

'This Court in Bhabhi v. Sheo Govind, : AIR 1975 SC2117 while dealing with the question of direction for inspection and re-count, on a close and careful consideration of various authorities of this Court laid down certain guidelines and conditions which are imperative before a court can grant inspection of the ballot papers. The said conditions and guidelines are set out below: (SCC pp. 693-94, para 15)

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate

statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection, it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the appellant to indulge in a roving enquiry with a view to fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount and for the purpose of fishing out materials.'

In a recent decision in *Satyanarain Dudhani v. Uday Kumar Singh*, this Court again reiterated the similar view by observing that the secrecy of the ballot papers cannot be permitted to be tinkered with lightly and an order of recount cannot be granted as a matter of course. It is only when the High Court is satisfied on The basis of material facts pleaded in the petition and supported by the contemporaneous evidence that recount can be ordered when there is no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition.' (Italics supplied)

On the aforesaid legal principles, thereafter, Their Lordships held thus:-

'After a cursory glance of the relevant provisions discussed above, it is thus abundantly clear that the rules provide adequate opportunity to a candidate, his election agent and counting agent to have a watch over the counting process before the result is declared and if they raise any objection as to the validity or otherwise of any ballot paper and if the said objection is improperly rejected, the candidate, his counting and election agent are well informed of the nature of the objection that was raised with regard to the ballot papers and make a concise

statement of material facts in the election petition in relation thereto. It is for these reasons that this Court has repeatedly held that the secrecy of the vote has to be maintained and a demand of recount should not ordinarily be granted unless the election petitioner makes out a prima facie case with regard to the errors in the counting and is able to show that the errors' are of such magnitude that the result of the election of the returned candidate is materially affected. The election petitioner, in order to seek an order of recount, has to place material and make out a prima facie case on the threshold and before an order of re-count is actually made. The demand of a defeated candidate for re-count of votes has to be considered keeping in view that secrecy of the ballot is sacrosanct in a democracy and, therefore, unless the election petitioner is able not only to plead and disclose the material facts but also substantiate the same by means of evidence of reliable character that there existed a prima facie case for the recount, no tribunal or court would be justified in directing the recount.' (Italics supplied)

22. On the basis of the above decisions, there cannot be any doubt that the allegations in the Election Petition are vague and the intention of the election petitioner is only to make a roving enquiry. He wanted to take evidence first without looking into the pleading. Even as admitted by the election petitioner in his Election Petition, his agents were present, and he has not given the detail as to which are the votes that were rejected, though polled in favour of the election petitioner. Absolutely no material facts have been stated. In fact, following the above decisions, the Himachal Pradesh High Court, in the decision reported in *Narain Chand Prashar v. Prem Kumar Dhumal*, held that the number of ballot papers should be mentioned, and, if objection is raised before the Counting Officer, the precise nature of objection, and apart from that, the figures of the ballot papers and also the basis on which the figures were arrived at should also be mentioned in the Election Petition. If these are the material facts that should be mentioned in an Election Petition, paragraphs 5 and 6 of the Election Tribunal do not contain the necessary materials, and, therefore, the Election Petition should have been dismissed even without taking any trial.

23. I have already said that Rule 60 of the Rules provides for recounting. After completion of the counting and recording in Form No.22 and before declaration of

election, any contesting candidate or in his absence his election agent may apply to the Returning Officer for recounting. That application must be in writing and the Returning Officer must consider the same, and he may allow recounting in whole or in part, and every such decision shall be in writing containing the reasons. If he orders recounting, whether whole or in part, Form No.22 will be corrected, if any correction is required, and thereafter the result will be declared. In this case, evidence shows that the counting itself was completed at 1.00 p.m. and the election was declared at about 10.30 P.M., and it was at about 11-35 p.m., the application for recounting was filed. So, between 1-00 p.m. and 10.30 p.m., there was no application filed by the election petitioner to have recount. P.W.1 himself has admitted that on 14.10.1996, i.e., on the counting day, at about 1-00 p.m., counting was over. R.W.1 has said that through loud-speaker result of the election was declared at about 10.30 p.m. From the last portion of the Election Petition also, it can be inferred that it was only after declaration of results, petitioner applied for recounting. Ex.A-1 is that application. The consequences of non-application for recounting are provided in the Rules, and this came for consideration in the decision reported in *Ram Rati (Smt) v. Saroj Devi and others*, : [1997]3SCR1050 . That was under the Madhya Pradesh Panchayat Election Rules, 1994. Rule 76 of those Rules provides for recounting, which is similar to our Rule. In paragraph 8 of the judgment, Their Lordships have held thus: (Relevant portion):

'..... In the light of the mandatory language of Rule 76 of the Rules, it is incumbent upon a candidate or an agent, if the candidate was not present, to make an application in writing and give reasons in support thereof, while seeking recounting. If it is not done, then the tribunal or the court is not empowered to direct recounting even after adduction of evidence and consideration of the alleged irregularities in the counting. The essential condition-precedent is that an application in writing should be made and the Returning Officer should pass an order with reasons in support thereof either to recall the order or otherwise, in writing. The fact that the officer had not passed any order in writing would, indicate that the respondent had not made any application. Obviously some subsequent manipulation, as contended by the appellant, would have taken place, as a result of which the election petition was filed, and the arguments were addressed for

recounting. It is settled legal position that secrecy of ballot should not be breached and as far as possible, the secrecy of ballot should be maintained. In rare cases, the tribunal or the court is required to order recount, that too on giving satisfactory grounds for recounting. In view of the fact that the rule itself provides that, as soon as the result of the election is announced, an application in writing must be made at the first instance and the fact that no such application has been placed before us does indicate that no such application had been made on the date of the declaration of the result. The allegation of an application having been made, would be an afterthought. The Tribunal, therefore, has committed manifest error in directing recount.'

24. In the evidence of P.W.1 also, he has not given any details about the alleged irregularities. As I said already, in the Election petition, it is said that the Returning Officer announced that the first respondent secured 1011 votes, and election petitioner secured 1010 votes. The difference was only one vote. This was the declaration of the result. As P.W.1, election petitioner has said thus:

This is the only evidence that has been let in by P.W.1. In the earlier portion, he has said thus:-

On the basis of the above evidence, no Election Petition can be decided. Even in the cross-examination, he was not in a position to give any details about the alleged irregularities in counting. In these circumstances, the finding of the Tribunal that the counting procedure was not proper, cannot be accepted, since that was not the case of even the election petitioner. If the jurisdiction of Election Tribunal to order recounting depends upon satisfactory pleadings and proof, I do not think that this is a case where such an order could have been made. In my view, the Order of the Tribunal below, appointing a Commissioner to recount all the votes, is one without jurisdiction. Even the petitioner has no case that counting has to take place once again. What he wanted was, regarding the invalid votes. When he did not get details of the invalid votes, naturally, counting cannot be ordered. The Tribunal below circumvented the same by ordering recounting, and it was far beyond the claim of the election petitioner himself.

25. What is the effect of the recount already made in such cases? The same came for consideration in *P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen and others*, : AIR 1989 SC640 . That is a case under the Tamil Nadu Panchayats Act, 1958. That was also a case where the Election Tribunal ordered recounting, and the Court itself recounted the same. Ultimately, on recounting, it was found that the candidate who was successful as per the declaration of result had not obtained that number of votes, and many votes in his favour were declared invalid. There was no objection raised for recounting and after recounting the correctness of recounting of votes was signed by all the contestants and a memo was also filed to that effect, before the Tribunal. After recounting, the defeated candidate was declared elected. When the matter was taken before the Honourable Supreme Court, Their Lordships held as follows in paragraph 13 to 15 of the judgment:-

'Thus the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly and hastily broken unless there is *prima facie* genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a *prima facie* case of high degree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or court should not order the recount of votes.

Viewed in the light of these well enunciated principles, we find that the petitioner has neither made such averments in the petition nor adduced evidence of such a compulsive nature as could have made the Tribunal reach a *prima facie* satisfaction that there was adequate justification for the secrecy of ballot being breached in the petitioner's case. Factors urged before us by Mr. Padmanabhan

such as that respondent 1 had accepted the correctness of the recount, and that he had conceded his defeat and wanted a re-election to be held cannot constitute justifying materials in law for the initial order of recount of votes made by the Tribunal.

'Mr. Padmanabhan also contended that the purpose and object of the election law is to ensure that only that person should represent the constituency who is chosen by the majority of the electors and that is the essence of democratic process, and this position has been observed by a Bench of this Court in their order of reference of the case of N. Gopal Reddy v. Bonala Krishnamurthy, and hence it would be a travesty of justice and opposed to all democratic cannons to allow respondent 1 to continue to hold the post of the President of the Panchayat when the recount disclosed that he had secured 28 votes less than the petitioner. We are unable to sustain this contention because as we have stated earlier an order of recount of votes must stand or fall on the nature of the averments made and the evidence adduced before the order of recount is made and not from the results emanating from the recount of votes.' (Itlakis supplied)

26. It could be seen from the above decision that the election petitioner will have to stand or fall on the nature of averments made in the Election Petition and the evidence adduced before the order of recount, and not from the results emanated from the recount of votes. Their Lordships of the Supreme Court held that the preservation of secrecy of the ballot is asacrosanct principle which cannot be lightly and hastily broken on the basis of mere allegations.

27. A Division Bench of the Kerala High Court, in the decision reported in Krishnan Kutty Pilial v. Joint Registrar, 1993 (1) K.L.J. 802, has followed the above decision of the Honourable Supreme Court. In that case (of Kerala), election was to a co-operative Society. In paragraph 14, a Division Bench of the Kerala High Court held thus:

'In T. Penchalaiah v. Election Court, 1990 (1) ALT 669 Andhra High Court, after reviewing all the decisions rendered by the Supreme Court on the point, divided the cases coming for recount of the votes into four categories. The first category of cases is one where the allegations in the election petition can be held to be

absolutely vague. Second category is one where some details are given, but are not sufficient to order re-count. In the third category, facts are given in great detail, but are made only for the purpose of satisfying the principle laid down in certain decided cases and there is no documentary evidence to support the correctness of the details. The fourth category is the one where details are given in the petition and also substantiated in evidence. We are in respectful agreement with above grouping made in that decision. Tribunals and Courts are not to order recount in cases other than those falling within the fourth category.' (Italics supplied)

The Bench further held as follows in paragraph 13:-

'... An order of recount must stand or fall on the nature of proof submitted by the petitioner before the Arbitrator asking for recount. Re-count can be ordered only on the materials placed before the Arbitrator prior to the order. Recount cannot be justified from the results emanating from the recount of votes. The result of the recount can by no stretch of imagination be considered as sufficient justification of the order of recount.'

28. This itself is sufficient to allow the Revision and dismiss the Election Petition. But an argument was advanced by learned Counsel for both parties on the basis of the Commissioner's Report. The main objection raised by learned Counsel for petitioner to the Report was that both the Commissioner and the Tribunal should not have rejected those ballot papers which did not contain the signature of the Presiding Officer. According to learned Counsel, mere absence of signature by the Presiding Officer is not a ground for rejecting a ballot paper. Learned Counsel for the petitioner relied on Rule 63 and contended that it is a mandatory Rule. I have already extracted clause (h) and the Proviso. The absence of signature is not a ground to reject the ballot paper on all occasions, is clear from the Proviso.

29. Under Rule 59, the Presiding Officer has to deliver the ballot box and ballot paper account or accounts alongwith Paper Seal Account. These ballot papers were seen in the ballot boxes, and it could be seen that these ballot papers were polled in favour of either election petitioner, or first respondent, or another candidate. From the Election Petition, it is clear that there was no objection raised by the election petitioner that the same must be counted. When these ballot

papers were counted in his favour, the election petitioner never said that they are invalid votes. He wanted those ballot papers also to be counted in his favour. The same yardstick was followed in favour of first respondent also, and also in favour of another candidate. Nobody has a case that they are spurious ballot papers. In the Election Petition, petitioner has no case that any spurious ballot paper has been inserted into the ballot box and any invalid ballot paper has been included in his account. What he has said is that valid ballot paper has been treated as invalid so far as he is concerned. The petitioner ought to have produced the Ballot Paper Account to substantiate his case that these ballot papers are spurious ballot papers. In the decision reported in *Arun Kumar Bose v. Mohd. Furkan Ansari*, : [1984]1SCR118, a similar question came for consideration. In paragraph 14, this point is dealt with. It reads thus:

'Once it is held that the 74 ballot papers were not spurious, and had been issued to the voters at the booth in the course of the poll, it would be reasonable to presume that the ballot papers had been issued to the voters without signatures of the Presiding Officer though the distinguishing mark had been put. The absence of the Presiding Officer from the place of the poll has clearly been established. Whether it was for 5 to 10 minutes as deposed by him or it was on three or four occasions, as suggested to him in cross-examination or for a good length of time during which he was having a nap under a neem tree as deposed by R.W.2, it is clear that he was away from the place of polling for quite some time. The polling process must have continued and voters who came during his absence had obviously been issued these unsigned ballot papers. If the facts be these, would it not be a case of failure of the Presiding Officer to put his signatures on the ballot papers is the question for consideration. It was the obligation of the Presiding Officer to put his signature on the ballot papers before they were issued to the voters. Every voter has the right to vote and in the democratic set up prevailing in the country no person entitled to share the franchise can be denied the privilege. Nor can the candidate be made to suffer. Keeping this position in view, we are of the definite view that the present case is one of failure on the part of the Presiding Officer to put his signature on those ballot papers so as to satisfy the requirement of law. The proviso, once it is applicable, has also a mandate that the ballot papers are not to be rejected. We, therefore, hold that the ballot papers were not liable to

be rejected as the proviso applied and the High Court, in our opinion, came to the correct conclusion in counting these ballot papers and giving credit thereof to the respondent No.1.' (Italics supplied)

According to me, the above decision fully applies to the facts of this case.

30. When P.W.1 was examined, he did not speak that any voter used ballot papers which were not issued by the Presiding Officer. Even after Commissioner's Report P.W.1 did not think of examining himself to depose that these ballot papers were not issued by the Presiding Officer, If the ballot papers were issued by the Presiding Officer and the same were used by the voters, merely because some of them had not been signed by the Presiding Officer, they cannot be treated as invalid. In such cases, there is a presumption that the omission is on the part of the Presiding Officer that he omitted to sign. That will not affect the validity of the vote, nor such ballot papers are liable to be rejected.

31. At this juncture, learned Counsel for election petitioner submitted that the first respondent wanted to examine the Presiding Officer and also took steps, and later he was not examined. The argument was, an attempt was made by first respondent to explain the omission of the signature in the ballot papers, and having failed in that attempt, an adverse inference has been drawn. Adverse inference by itself cannot be a substitute for proof. In this case, such an adverse inference also need not be drawn, when the election petitioner himself has no case that these ballot papers were not issued by the Presiding Officer. Insofar as the 18 ballot papers which were counted in his favour by the Counting Officers are concerned, he has no case that those ballot papers were not issued. By comparing the serial numbers, it could be seen that all these are included in the same serial. The Tribunal has not taken into consideration the Proviso, and if only it had considered, the result would have been different. It was also found by the Tribunal that two of the postal votes are to be rejected. According to me, the finding on the same also requires interference. On going through the instructions issued to Counting Supervisors and Counting Assistants, I find that the rejection of the postal ballots is also not correct. Regarding the same, in the Report it is said that two of the ballot papers polled in favour of Aeroplane, i.e., the symbol allotted

to first respondent, they were marked in clockwise direction, by using ink pen. As per Instructions, they have to be treated as valid. In fact, learned Counsel for election petitioner also did not seriously oppose regarding the said contention.

31. Finally, an argument was advanced by learned counsel for election petitioner that I should not invoke Article 227 of the [Constitution of India](#). I do not think that the said submission also could be accepted. Learned Counsel relied on my decision in Valli v. Gandhimathi, C.R.P.No.1536 of 1998 (Order dated 11.9.1998). Article 227 of the [Constitution of India](#) which deals with judicial supervisory jurisdiction enables this Court to see that the Tribunals act within their jurisdiction. If the Tribunal ignores the provisions of a Statute and also ignores the law declared by the Honourable Supreme Court, and if the same is patently illegal, such decisions are liable to be interfered with under Article 227 of the [Constitution of India](#). When recounting could be ordered only on satisfaction of certain conditions, naturally it follows that any order for recounting which does not satisfy the statutory requirements will be one without jurisdiction, and that will be a fit case to exercise the power under Article 227 of the [Constitution of India](#). It is not a case of appreciation of evidence, and in this case, the entire decision depends only upon the question of law, how far the Tribunal below acted in its jurisdiction. There is no disputed question of fact, as was the case in C.R.P. No. 1536 of 1998 (referred to supra). Therefore, I do not think that there can be any bar for invoking the jurisdiction under Article 227 of the [Constitution of India](#), in this case.

32. In the result, the Civil Revision Petition is allowed with costs. Election Petition No.12 of 1996, on the file of Additional District Judge-cum-Chief Judicial Magistrate, Pudukkottai, will stand dismissed with costs. Advocate's fee in this Revision is fixed at Rs.3,000. CMP No. 14708 of 1998 is closed.