



No. 374] CHENNAI, MONDAY, DECEMBER 13, 2010
Karthigai 27, Thiruvalluvar Aandu-2041

Part V—Section 4

Notifications by the Election Commission of India.

NOTIFICATIONS BY THE ELECTION COMMISSION OF INDIA

JUDGEMENT OF THE HIGH COURT OF JUDICATURE AT MADRAS
IN ELECTION PETITION No. 14 OF 2006.

No. SRO G-44/2010.

The following Notification of the Election Commission of India, Nirvachan Sadan, Ashoka Road, New Delhi-110 001, dated 18th November, 2010 [27 Kartika, 1932 (Saka)] is published:—

No. 82/TN-LA (14/2006)/2009.—In pursuance of Section 106 (b) of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgement of the High Court of Madras dated 6th October 2010 in Election Petition No. 14 of 2006.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(Ordinary Original Civil Jurisdiction)

Wednesday, the 6th Day of October 2010.

THE HON'BLE MRS. JUSTICE R. BANUMATHI

ELECTION PETITION No. 14 OF 2006

Election Petition No. 14 of 2006:

R. Rajendran,
S/o. Rajangam,
Sorathur Village,
Vallam Post, Panruti Taluk.—*Petitioner.*

Versus

1. Velmurugan, T.,
S/o. Thirunavukkarasu,
Puliyurkattusagai,
Puliyur Post,
Panruti Taluk.
2. Selvakumar, R.M.,
S/o. Munusamy,
278, Mariamman Koil Street,
Soorakuppam, Maligaimedu Post,
Panruti Taluk.
3. Ramamoorthy, G.,
S/o. Govindasamy,
1-113, North Street,
Sembalakurichi Village,
T. Gopalapuram Post,
Vridhachalam Taluk.
4. Ramachandran, S.,
S/o. Sankaradevan,
8, Puliyur Kattusagai Village,
Puliyur Post,
Kullanchavadi Via,
Panruti Taluk.
5. Kamalakanna, C.,
S/o. Chakravarthy,
22/3D, Ayyanarkoil Steet,
Panruti.
6. Kumaraguru, V.K.,
S/o. Kaliyaperumal,
30, West Street,
Karuppanchavadi Village,
Krishnakuppam Post,
Cuddalore Taluk.
7. Balu, S.,
S/o. Selvaraj,
82, Sathiyamoorthy Street,
Panruti.
8. The Returning Officer,
No. 64, Panruti Assembly Constituency,
Cuddalore District.

*R8 has been struck down from the array of respondents as per the order of this Hon'ble Court dated 17-08-2007 in ELP No. 14 of 2006—*Respondents.*

This Election Petition praying that this Hon'ble Court be pleased to

(a) declare the election of the candidate *viz.* The first respondent herein from No. 64, Panruti Assembly Constituency (Tamil Nadu) in the General election held on 8-5-2006 and the result of which declared on 11-05-2006 as illegal and void.

(b) declare the petitioner as the duly elected member of the Tamil Nadu Legislative Assembly from No. 64, Panruti Assembly Constituency in the General Election held on 8-5-2006 for which the result was declared on 11-5-2006.

(c) declare that the result in respect of postal ballot is not in accordance with the letter and material document.

(d) directing the first respondent to pay the costs of this Election petition and

(e) grant such other suitable other relief or reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case.

The above Election Petition coming on for hearing before this Court on various dates and finally coming on 24-09-2010 and upon hearing the arguments of Mr. K. Moorthy and S.R. Sundar, advocate for the petitioner herein and Mr. K. Gandhi Kumar, advocate for the 1st respondent and, of Mr. M.R. Raghavan, Standing Counsel for Election, the 8th respondent (The Returning Officer), and respondents 2 to 7 set exparte and upon reading the Election Petition filed by the Election Petitioner and counter affidavit of respondent 1 respectively filed herein and upon perusing the evidence adduced therein and also the exhibits marked thereto and having stood over for consideration till this date and coming on this day before this Court for orders in the presence of the said advocates for the parties hereto and,

The Court made the following Order:

The Petition is filed by the Petitioner under Sections 80 to 84, 100(1) (b), 100(1) (d) (i), (ii), (iii), (iv) 123 (i), (ii), (iii), 3A, 4, 135(1), 135A(e) and 65 of the Representation of the People Act, 1951 (in short, "R.P. Act") read with Rule 54A of the conduct of Election Rules, read with Rule 2 of the Madras High Court (Election Petition) Rules, 1967 to declare the election of the 1st Respondent from No. 64 Panruti Assembly Constituency in the General election held on 8-5-2006 and the result of which declared on 11-5-2006 as illegal and void.

2. The Petitioner contested the 13th Assembly elections held in the State of Tamil Nadu as a candidate of All India Dravida Munnetra Kazhagam (in short, "AIADMK") for No. 64, Panruti Assembly Constituency in the official symbol of the political party *viz.*, "two leaves" symbol. The 1st Respondent - elected candidate represented Pattali Makkal Katchi (PMK) and was allotted the official symbol of "Mango". Respondents 2 to 4 represented the recognised political parties and Respondents 5 to 7 contested the election as independent candidates. The 8th Respondent is the Returning Officer for conducting election to the above Assembly Constituency No. 64, Panruti Assembly Constituency, who was struck down from the array of respondents by order dated 17-8-2007. There were 194 polling booths and total number of eligible voters are 1,75,294 and total number of votes polled in the said Assembly Constituency was 1,43,148 and the petitioner secured 54,505 votes and the 1st Respondent was declared elected by a margin of 148 votes. Levelling charges against Respondents 1 and 8, the Petitioner has filed the Election Petition alleging that the election is to be declared as illegal and void. In the petition, the Petitioner averred that inspite of his repeated and specific request to clearly demonstrate display of electronic gadgets - Electronic Voting Machines (in short, EVMs'), the 8th Respondent

has not shown the display properly to the voters and thereby the voters, who had come to cast their vote in favour of the Petitioner, were confused and their democratic right of electing the representatives of their choice was denied. The Petitioner alleged that the Returning Officer was very lenient and amenable with the 1st Respondent and votes of illiterate voters had been canvassed by inducement to favour the 1st Respondent and the said practice of the 1st Respondent - Returning Officer clearly attract Section 123 of R.P. Act and the 1st Respondent is to be held responsible for the corrupt practice. It is further averred that the election was on 8-5-2006 and the postal ballot paper was issued only a day prior to the result of the election, which is incorrect and the 8th Respondent has not followed the procedure as contemplated for postal ballots. Only due to the negligence and reckless attitude of the Returning Officer, the postal ballots were not handed over to the persons, who are entitled to the vote. The counting procedure contemplated for counting of postal ballots was also not followed. The Petitioner has further averred that in respect of Booth Nos. 131-M, 131-W, 132 and 73 of Panruti Assembly Constituency in Puliur Kattusagai Village, there was a massive booth capturing and illegal votes were cast in the said booth and inspite of reporting the same to the 8th respondent, no action was taken by the 8th Respondent in this regard. Alleging that the election is vitiated by corrupt practice of the 1st Respondent and his men and agents, Petitioner has filed the Election Petition to declare the election of the 1st Respondent as illegal and void and to declare the Petitioner as a duly elected member of the Tamil Nadu Legislative Assembly Constituency No. 64, Panruti.

3. Stoutly denying the averments in the Election Petition, the 1st Respondent has filed the counter contending that the rules regarding the postal ballots were strictly complied with. According to the 1st Respondent, Petitioner has not made any complaint about any irregularity with respect to the postal votes and there was no complaint from any person regarding defect in the postal balloting and also counting. The allegation of booth capturing in Puliur Kattusagai is also denied. 2006 Assembly Election was the 3rd election using the Electronic Voting Machine and all the voters had been fully instructed as to how to use it and clear instructions were displayed in every booth and electronic and print media were used to publicize the method of using the machine and therefore the Petitioner cannot make any grievance in respect of display of Electronic Voting Machines. Denying any irregularity, the 1st Respondent prayed for dismissal of the petition. The 1st Respondent has averred that the Election Petition has been filed only to harass the 1st respondent.

4. On the above pleadings, the following issues were framed:

(1) Whether there is non-compliance with the mandatory requirements under Section 83 of the Representation of the People Act (Act 43/1951) and whether Election Petition has to be dismissed?

(2) Whether particulars of the corrupt practice alleged in the petition have not been furnished in detail?

(3) Whether the Election Petitioner is entitled to the re-polling of the postal ballot papers issued to the voters in the election held on 08-05-2006 and to the consequential relief of counting these votes?

(4) Whether the act of the 8th Respondent in counting the votes polled in Electronic Voting Machines and postal ballots simultaneously will amount to violation of the election rules?

(5) Whether the Election Petitioner has waived his right to question the election as the Petitioner's agents has signed all the required documents at the close of the election without raising any objection?

(6) Whether there was any procedural irregularity at the time of counting votes as alleged?

(7) Whether the Election Petitioner is entitled for the declaration that the election of the first respondent/Returned candidate is void?

(8) Whether the Election Petitioner is entitled for the further declaration as duly elected member of the Tamil Nadu Legislative Assembly from No. 64, Panruti Assembly Constituency in the general election held on 08-05-2006 for which the result was declared on 11-05-2006?

(9) To what other relief Petitioner is entitled to?

On 23-1-2009, the following Additional Issues were framed:

i. Whether the Petitioner is right in saying that the non-despatch of postal votes in time would vitiate the declaration of the returning candidate election as void?

ii. Whether the objections of the petitioner seeking intervention of the 8th Respondent and the alleged inaction in booth capturing in Booth No. 131-M, 131-W, 132 and 73 at Puliur Kattusagai Village, etc., by the agent/representative of the 1st Respondent would attract Section 123 of the Representation of the People Act, 1951?

5. The Election Petitioner examined himself as P.W.1 and P.W.2- Mr. Thiruvengatam, District Adi-Dravida and Tribal Welfare Officer, Cuddalore and the Present Returning Officer of Panruti Assembly Constituency was examined as P.W.2-Mr. Kamalakannan, Chief Election Agent of the Election Petitioner was examined as P.W.3 and one Sivasubramaniam, In-charge of AIADMK booth agents for ten villages during the assembly election in May 2006, was examined as P.W.4. On behalf of the Petitioner, Ex.P.1 and M.O.1 was marked. On the side of Respondents, the 1st Respondent was examined himself as R.W.1 and Ex.R.1 was marked. Ex.C.1 was marked.

6. There is no dispute on facts. In Panruti Assembly Constituency, the total number of eligible voters was 1,75,294 and the total number of votes polled is 1,43,148 and the Petitioner secured 54,505 votes and the 1st Respondent secured 54,653 votes. Hence, the difference between the Petitioner and the 1st Respondent was only 148 votes and the 1st Respondent-P.M.K. candidate was declared elected.

7. The learned counsel for Election Petitioner *inter alia* raised three contentions—(i) there was no proper display of EVMs; (ii) After counting of votes polled, it was stated that Petitioner was leading by 20 votes and only after counting votes polled in EVMs, postal ballots were brought and counted, which was in violation of Rule 54-A of the Conduct of Elections Rules, 1961; and (iii) Massive booth capturing at Puliur Kattusagai.

8. Learned counsel for the 1st Respondent submitted that the Petition lacks details as to the facts alleged to have been ignored by the 8th Respondent. It was submitted by the learned counsel that all rules and guidelines were strictly complied with and he alleged that the allegations in the Petition have not been substantiated by proper evidence. Learned counsel would further content that the Petitioner has not set out the exact particulars of the corrupt practice alleged to have been committed by the officers and the Petitioner cannot sustain the Petition.

9. Before we consider the facts and evidence and the contentions we may briefly refer to the law stipulating the contents of the petition and well settled principles elaborated in various decisions. Section 83 of the Representation of the People Act, 1951 deals with contents of a petition and Rule 94-A of the Conduct of Elections Rules, 1961 deals with Form of affidavit to be filed along with Election Petition. Section 83 of the Act and Rule 94-A of the Rules provided as under:

“83. Contents of petition: (1) An election petition-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the name of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition. Rules

94-A. Form of affidavit to be filed with election petition:- The affidavit referred to in the proviso to sub-section (1) of Section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25.”

10. In **Samant N. Balakrishna and another Vs. George Fernandez and others, (1969) 3 SCC 238**, the mandatory nature of the provisions contained in Section 83 was dealt with the consequences flowing from any breach of provision were set out. It was held by the Supreme Court that Section 83 is mandatory and requires the election petition to contain first a concise statement of material facts and then requires the fullest possible particulars. The word ‘Material’ shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the

cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. The material facts will sow the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action.

11. In **Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh And Others, (2004) 11 SCC 196**, the Supreme Court held as under:

“11. The principle have been reiterated recently in **H.D. Revanna Vs. G. Puttaswamy Gowda and ors. (1999) 2 SCC 217, V.S. Achuhandan Vs. P.J. Francis and anr. (1999) 3 SCC 737 and Mahendra Pal Vs. Ram Dass Malander and ors. (2000) 1 SCC 261**. We are tempted to quote the following passage from the three-Judge Bench decision in Mahendra Pal's case (Supra) wherein the learned Chief Justice has summed up the statement of law in the following words:

“Section 83(1) (a) of the Act mandates that in order to constitute a cause of action, all material facts, that is, the basic and preliminary facts which the petitioner is bound under the law to substantiate in order to succeed, have to be pleaded in an election petition. Whether in an election petition, a particular fact is material or not and as such required to be pleaded is a question which depends upon the nature of the charge levelled and the facts and circumstances of each case. The distinction between “material facts” and “particulars” has been explained by this Court in a large number of cases and we need not refer to all those decided cases. Facts which are essential to disclose a complete cause of action are material facts and are essentially required to be pleaded. On the other hand “particulars” are details of the case set up by the party and are such pleas which are necessary to amplify, refine or explain material facts. The function of particulars is, thus, to present a full picture of the cause of action to make the opposite party understand the case that has been set up against him and which he is required to meet. The distinction between “material facts” and “material particulars” is indeed important because different consequences follow from a deficiency of such facts or particulars in the pleadings. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6 Rule 16 of the Code of Civil Procedure. In the case of a petition suffering from a deficiency of material particulars the court has the discretion to allow the petitioner to supply the required particulars even after the expiry of limitation. Thus, whereas it may be permissible for a party to furnish particulars even after the period of limitation for filing an election petition has expired, with the permission of the court, no material fact unless already pleaded, can be permitted to be introduced, after the expiry of the period of limitation.”

12. Considering the meaning of the expression “material facts”, in **HARKIRAT SINGH VS. AMRINDER SINGH (2005) 13 SCC 511**, the Supreme Court held as under:

“48. The expression ‘material facts’ has neither been defined in the Act nor in the Code. According to the dictionary meaning, ‘material’ means ‘fundamental’, ‘vital’, ‘basic’, ‘cardinal’, ‘central’, ‘crucial’, ‘decisive’, ‘essential’, ‘pivotal’, indispensable’,

'elementary' or 'primary'. [Burton's Legal Thesaurus, (Third edn.); p.349]. The phrase 'material facts', therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, 'material facts' are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be 'material facts' would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

49. In the leadings case of **Phillips v. Phillips, (1878) 4 QBD 127 : 48 LJ QB 135**, Cotton, L.J. stated:

"What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial."

13. In **L.R. Shivaramgowda, etc. v. T.M. Chandrashekar etc., (1999) 1 SCC 666: JT 1998 (B) SC 278, referring to Udhav Singh Vs. Madhav Rao Scindia, [(1977) 1 SCC 511]**, the Supreme Court used two expressions, 'material facts' and 'material particulars' and held that while failure to plead material facts is fatal to the election petition and no amendment of the pleading could be allowed to introduce such material facts after the time limit prescribed for filing the election petition is over, absence of material particulars can be cured at a later stage by an appropriate amendment.

14. In **V.S. Achuthanandan v. P.J. Francis & Anr., (1999) 3 SCC 737**, referring to **Udhav Singh Vs. Madhav Rao Scindia, [(1977) 1 SCC 511]**, the Supreme Court drew the distinction between 'material facts' and 'material particulars'. It was observed that material facts are preliminary facts disclosing cause of action and they have to be specifically pleaded. Failure to do so would result in rejection of the election petition. Defect in material particulars, however, can be cured at a later stage by amendment and the petition cannot be dismissed in limine on the ground of such defect.

15. In **V. Narayanaswamy v. C.P. Thirunavukkarasu, (2000) 2 SCC 294: JT 2000 (1) SC 194**, again the Supreme Court discussed two phrases 'material facts' and 'material particulars'. Drawing the distinction between the two, the Supreme Court held that while failure to plead material facts was fatal to the petition, absence of material particulars could be cured subsequently.

16. In **Hari Shanker Jain v. Sonia Gandhi, (2001) 8 SCC 233, referring to Samant N. Balakrishna V. George Fernandez, (1969) 3 SCC 238**, the Supreme Court held that quoting the words of the section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. Failure to plead 'material facts' is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time-limit

prescribed for filling the election petition. The Supreme Court also stated that it is the duty of the court to examine the petition irrespective of any written statement or denial and reject the petition if it does not disclose a cause of action. To enable a court to reject a plaint on the ground that it does not disclose a cause of action, it should look at the plaint and nothing else.

17. In **Santosh Yadav V. Narender Singh, (2002) 1 SCC 160**, the Supreme Court stated that an election petition must set out all material facts wherefrom inferences vital to the success of the election petitioner and enabling the court to grant the relief prayed for by the petitioner can be drawn subject to the averments being substantiated by cogent evidence. Concise and specific pleadings setting out all material facts and then cogent affirmative evidence being adduced in support of such averments, are indispensable to the success of an election petition. An election petition, if allowed, results in avoiding an election and nullifying the success of a returned candidate. It is a serious step and, therefore, an election petition seeking relief on the ground of corrupt practice must precisely allege all material facts on which the petitioner relies in support of the plea.

18. By catena of decisions, it is well settled that all material facts have to be set out in an Election Petition. The expression "material facts" has neither been defined in the Act nor in the code. "material facts" are those facts upon which a party relies for his claim or defence. In other words, "material facts" are facts upon which the petitioner's cause of action or the defendant's defence depends. It is absolutely essential that all basic and primary facts, which must be proved at the trial by the party to establish the existence of the cause of action or defence, must be averred in the pleadings.

19. In the light of the above settled principles, let us examine the facts and consider whether the material facts have been set out in the Election Petition and whether the facts averred in the Election Petition are substantiated by evidence.

20. In the Election Petition, the Petitioner contends that the election of the 1st Respondent is vitiated on the following irregularities:-

(i) There was no proper display of electronic gadgets and the voters were confused;

(ii) There were irregularities in issuing and counting of postal ballots

-and-

(iii) there was massive booth capturing at Pulliyur kattusagai village

21. Issue Nos. 7 and 8.—In so far as the alleged first irregularity-no proper display of electronic gadgets, in paragraph No.7 of the Petition, the Petitioner has averred as follows:-

"The petitioner submits that the 8th respondent in spite of repeated and specific requests made by the petitioner to operate and show clearly the display of the electronic gadget, the respondent has not shown the display

properly to the voters, thereby the voters who had come to cast their vote in favour of the petitioner were confused and their valuable and democratic right of electing the representative of his choice was denied. Immediately thereafter the petitioner made a complaint with the 8th respondent to take appropriate action to protect the voters from casting their valuable rights according to their choice. The petitioner later on come to know that the Returning Officer was very lenient and amenable with the first respondent and the votes of illiterate voters had been canvassed by inducements to favour the first respondent.”

Case of the Petitioner is that the above practice of the 1st Respondent and Returning Officer would clearly attract Section 123 of R.P. Act and therefore, 1st Respondent is to be held responsible for the corrupt practice.

22. Even though the Petitioner has averred that there was no proper demonstration of electronic gadget display, no complaint was lodged by the Petitioner, or his Chief Polling Agent. Even though it is alleged that “there was no proper display of electronic gadget”, in the evidence, P.W. 1 has stated that at the time of counting the votes, the result had not been displayed properly. In his evidence, P.W. 3, who was the Chief Election Agent of the Election Petitioner stated that “at the time of Polling, about ten polling agents complained that the display board was not properly functioning and in this regard he orally complained to the respective Presiding Officers and the Presiding Officers, who assured him to take action, but they did not take any action.

23. On the alleged irregularity of improper display of electronic voting machines, gist of oral evidence is to the effect that:-

“(i) at the time of polling, E.V.M. display board was not properly functioning;

(ii) at the time of counting of votes polled in E.V.Ms, there was no proper display of E.V.Ms.”

24. As pointed out earlier, in paragraph 7 of the Election Petition, it is alleged that the 8th Respondent has not properly shown the E.V.M. display to the voters and thereby the voters, who came to cast their votes, were confused and were deprived of their democratic right of electing the representative of their choice. To put it in other words, in the Petition, it is alleged that there was no proper demonstration of display of E.V.Ms, which led to confusion in the mind of the voters. The oral evidence adduced by the Election Petitioner is not in consonance with the averments made in the Election Petition.

25. In his evidence, R.W.1 has stated that demonstration of electronic voting machine meant for polling was shown to all the polling booth agents of the contesting candidates and also in the presence of the public and only thereafter polling started. R.W.1- 1st Respondent has further stated that the Government servants, who were on election duty were given training for about two weeks prior to the election with regard to the operation of EVMs and when ever there was difficulty by the voters with regard to the casting of the votes, the same were looked into by the Polling Officers.

26. EVMs are simple machines that can be operated easily by both polling personnel and the voters. The control unit is a main unit, which stores all data and controls the functioning of EVM. The balloting unit holds the ballot paper containing the names and symbols of candidates. Before polling begins, balloting unit is made ready by the Presiding Officer. The voter has to identify his candidate on the balloting unit and press the blue button on the right side of candidate's name and symbol. Once the blue button is pressed there will be a beep sound and the colour of the indicator next to the symbol of the candidate will turn red, which means that the vote has been cast for the candidate concerned. In fact, voting by EVMs is simpler compared to conventional system, where one has to put the voting mark on or near the symbol of the candidate on his choice, then fold it and thereafter put into the ballot box. In EVMs, the voter has to simply press the blue button against the candidate and symbol of his choice and the vote is recorded. By and large the rural and illiterate people have no difficulty in recording their votes. The contention of the petitioner that there was no proper display of EVMs is not substantiated.

27. As rightly contended by the learned counsel for 1st Respondent, there was no complaint either from polling booth agents or the voters with regard to alleged defects in the functioning of electronic voting machines. Even through in his evidence P.W.3 has stated that the number of polling booth agents have complained that the display board was not properly functioning, none of the polling booth agent of the Election Petitioner was examined nor their names have been mentioned in the Election Petition. The facts pleaded in the Election Petition i.e., no proper demonstration of E.V.Ms have not been substantiated by evidence. As discussed earlier, evidence now adduced i.e., no proper display of E.V.Ms. during voting has not been specifically pleaded. The alleged irregularity of "no proper display of electronic voting machines to the voters" has not been substantiated by evidence and these issues are answered against the Election Petitioner.

28. **Issue Nos. 3, 4 and 6 and Additional Issue No.1.**—The second irregularity alleged by the Election Petitioner is in respect of the irregularity in issuance and counting the postal ballots. In his evidence, P.W.1 has stated that normal postal ballots will be given to officers/staff, who are in election duty, eight days prior to the election and that they would be casting their votes much before the election and postal ballots will be sent to the Returning Officers well in advance before counting, but in Panruti constituency, postal ballots were not received in advance not counted before the counting of votes polled started. P.W.1 has further stated that after counting was over, he was leading by 18 votes and only thereafter postal ballots were brought and counted and Returning Officer declared that the Petitioner was lagging behind the 1st Respondent.

29. P.W.1- Election Petitioner raises serious doubts about the manner in which the postal ballots were brought and counted and that according to him, casting and counting of postal ballots was not in accordance with the rules, which would vitiate the election. P.W.1 further stated that as per the electoral process, postal ballots will be counted first and only thereafter, votes polled in the EVMs will be counted. But contrary to the rules and practice, postal ballots were brought at the fag end of the counting when Election Petitioner was leading by 18 votes. As to the alleged

irregularity in casting and counting of postal ballots, gist of evidence of P.W.1 is to the effect that:- (i) there was delay in issuing the postal ballots, which has resulted in delay in casting postal ballots by the officers, who were on election duty; (ii) postal ballots were not counted in the first instance and only when the Election Petitioner was leading by 18 votes, postal ballots were brought by one person and thereafter they were counted; (iii) Petitioner was not informed as to how many postal ballots were brought and how many were received back after casting of votes.

30. P.W.3., the Chief Election Agent of the Petitioner has also stated that after counting of votes polled it was declared that the election petitioner was leading by 16 votes and only thereafter Union Chairman of Cuddalore belonging to P.M.K. – Mr. ThamaraiKannan brought a cover containing postal votes inside the counting hall. P.W.3 has further stated that normally the counting of postal ballots should be done before the commencement of counting of votes polled in EVMs, but contrary to the normal practice, the postal votes were counted after the counting of votes polled in the EVMs and regarding the violation, they raised objection to the District Collector both orally as well as in writing and that the District Collector did not accept their complaint and the counting of postal votes took place and the 1st Respondent was declared as elected candidate.

31. As per Rule 54A of the Conduct of Elections Rules, “the returning officer shall first deal with the postal ballot papers in the manner provided in Rule 54A. Drawing Court’s attention to Rule 54A, the learned counsel for Election Petitioner contended that only after counting of votes polled in EVMs and when it was stated that Election Petitioner was leading, only then, postal ballots were brought and in spite of objection raised by the Election Petitioner, those postal ballots were counted, which is in clear violation of Rule 54-A. In support of his contention, learned counsel for Election Petitioner strongly relied upon the evidence of P.W.3 refuting the evidence of P.Ws.1 and 3, in his evidence, R.W.1 has categorically stated that postal ballots were properly issued to the Government servants, who were deputed on election duty and there was no irregularity regarding the issuance of postal ballots and casting of postal ballots.

32. It is relevant to briefly mention the procedure for issuance of postal ballots. The list of persons, who are going on election duty, will be prepared by the District Collector. The persons, who are eligible for postal ballots, have to submit an application to the Returning Officer requesting for issuance of postal ballot and after verification, the Returning Officer will issue the ballot paper. Apart from the persons, who are on election duty, other persons like persons undergoing preventive detention and certain other persons are eligible for postal vote. Even though P.W.1 has alleged that there was a delay in issuance of postal ballots to the eligible postal voters, it is pertinent to note that there was no complaint from any eligible postal voters as to the delay or non-receipt of postal ballots. No eligible postal voter was also examined to substantiate the delay or non-receipt of postal ballots.

33. As pointed out earlier, in his evidence, P.Ws. 1 and 3 have stated that after counting of votes polled in EVMs, postal ballot votes were brought by a private individual. P.W.3 has stated ThamaraiKannan, Union Chairman of Cuddalore belonging to P.M.K. brought a cover containing postal votes inside the counting hall. A private

individual bringing postal ballots is a serious allegation. Such a serious allegation has not been averred in the Election Petition. Even though P.W.3 – Kamalakannan has stated that he preferred complaint that they have raised objection to the District Collector regarding the Union Chairman of P.M.K. (Thamaraikannan), bringing cover containing postal votes, no such complaint was marked on the petitioner's side. In the absence of contemporaneous petition in writing, no weight could be attached to the evidence of P.Ws.2 and 3, None of the counting agents of the Election Petitioner were examined to substantiate this serious allegation.

34. The averments made in the Petition as to the delay in issuance of Postal votes has not been substantiated. No eligible postal voters were examined to substantiate the delay in issuance of postal ballots or non-receipt of postal ballots. The alleged violation of Rule 54A of conduct of Election Rules is also not substantiated by any contemporaneous complaint/petition in writing. In the absence of evidence substantiating the alleged violation of Rule 54-A, it cannot be held that the alleged irregularity as to the delay in issuance of postal ballots and violation in counting of postal ballots vitiates the Election of the 1st Respondent.

35. Issue No. 5 and Additional Issue No. 2.—The next irregularity alleged by the Petitioner is the alleged massive capturing the Puliur Kattusagai. In his evidence, P.W. 1 has stated that there was massive booth capturing in booth Nos. 131M, 131-W, 132 and 73 in Puliur Kattusagai and illegal votes were cast and the same was duly reported to the Returning Officer and also to the election observer, but no action was taken. P.W.3 - Kamalakannan, the Chief Election Agent has also stated that he received information about the alleged booth capturing at Puliur Kattusagai. P.W. 4 - Sivasubramaniam was In-charge of AIADMK booth agents for ten Villages. In his evidence, P.W. 4 has stated that on the date of election, P.W. 3- Kamalakannan called him over phone and told him that there is some trouble in polling booth in Puliur Kattusagai and P.W. 3 asked him to go there and on receiving the phone message, P.W. 4 went to Puliur Kattusagai Village and he saw the first respondent's father - Thirunavukkarasu and his elder brother - Thirumalvalavan and one Kannan were inside the polling booth of Puliur Kattusagai Village and when they went at about 2.00 P.M. the polling booth of Puliur Kattusagai booth was found closed and the Presiding Officer told him that the polling was over. P.W.4 further stated that he complained to the Presiding Officer both orally as well as in writing complaining that the 1st respondent's family members themselves have polled the votes and prevented others and sent out the AIADMK booth agents. P.W. 4 would further state that the Presiding Officer did not accept his complaint and threw it out.

36. P.W. 4 has also stated that the Villagers in Puliur Kattusagai, who accompanied him, were also not allowed to cast their votes and that 1st respondent's men did not allow others to enter into the polling booth.

37. In his evidence, R.W. 1 has categorically denied the booth capture or other irregularities either from their party or from other party members. The 4th respondent Panruti S. Ramachandran, who is also a former Minister hails from Puliur Kattusagai Village. In his evidence, R.W. 1 has stated that since himself and 4th Respondent hail from the same Village, by and large, the votes will be cast in their favour since both of them have popularity in the Village. R.W.1 has also deposed that there was no complaint either to the police or to the Collector or to the Election Officer with regard to voting or alleged booth capturing.

38. Even though the Election Petitioner has alleged booth capturing in polling stations 131-M, 131-W, 132 and 73, to substantiate the same, polling agents of the Election Petitioner were not examined. As per Section 46 of R.P. Act read with Rule 13 of the Conduct of Election rules, a contesting candidate or his election agent may appoint in the prescribed manner such number of polling agents as may be prescribed to act as polling agents of such candidate at each polling station provided under Section 25 or at the place fixed under sub-section (1) of Section 29 for the poll. As per Rule 13, every such appointment shall be made in Form 10 and shall be made over to the polling agent for production at the polling station or the place fixed for the poll, as the case may be. As stipulated under Section 49 read with Rule 13, the Election Petitioner/his Chief Election Agent would have nominated persons as Polling Agents for Polling Stations-131-M, 131-W, 132 and 73 of Puliur Kattusagai Village. If really there was any such massive booth capturing as alleged by the Election Petitioner, the polling agents would have immediately objected to the same and they would have lodged the complaint. It is pertinent to note that to substantiate the allegation of booth capturing, none of the polling agents of the Election Petitioner were examined. Neither P.W.3- Chief Election Agent nor P.W.4 were in a position to mention the names of Polling Agents for the above said Polling Stations. Likewise, the villagers of Puliur Kattusagai were also not examined. The Election Petitioner has not endeavoured to adduce best attainable evidence.

39. Be that as it may, the allegation of booth capturing in Puliur Kattusagai has to be examined in the light of use of E.V.Ms for polling. As pointed out earlier, the voter has to press the candidate's button and once blue button is pressed there will be a beep sound and colour of the indicator next to the symbol of candidate will turn red, which means that the vote has been cast for the candidate concerned. EVMs are programmed in such a way that the machines will record only few words in a minute. In case of ballot papers, the miscreants can distribute several ballot papers assigned to polling station among themselves and stamp them, stuff them into the ballot boxes within a few minutes and run away before the police reach. But in EVMs, the miscreants can record only few votes by which time any such bogus voting would be noticed and objections raised. If the allegations of booth capturing is made to the Presiding Officer, they can always press the close button and thereafter it will not be possible to record any vote once the close button is pressed and this will frustrate the efforts of booth captures. Even though the allegation of booth capturing is levelled by the Election Petitioner, absolutely, there is no material to show that any complaint was lodged before the Presiding Officer. In the absence of any contemporaneous records showing objection, the mere allegation of booth capturing cannot be sustained.

40. The allegation of P.W.4 that the 1st Respondent's men did not allow others to enter into the polling booth and cast their votes is a serious complaint. It is quite unbelievable that the polling booth agents of Puliur Kattusagai Village have not made any written complaint. Likewise, the deposition of P.W.4 that the Presiding Officer did not consider his complaint is not acceptable. In fact, alleging that the Election Petitioner, who is a candidate of AIADMK and his party men distributed money to the public and asking them to cast their votes in his favour, the 1st Respondent's men lodged a complaint in Kullanchavadi Police Station on the basis of said complaint, F.I.R. was registered in Crime No. 0102/2006, dated 7-5-2006 under Section 171(E) read with 188 IPC. Ex. R.1 is the copy of the said complaint. If really there was any such booth

capturing, nothing prevented the Election Petitioner's men from lodging a complaint before the police. In the absence of examination of any booth agents of Puliur Kattusagai Village and contemporaneous.

List of Documents and Witnesses:-

Petitioner side Exhibits:

Ex. P. 1: 5-4-2006: Affidavit and Nomination form submitted by the 1st Respondent before the Returning Officer filed by the Petitioner

Respondents' side Exhibits:

Ex. R.1:7-5-2006: Copy of FIR attested by Mr. P. Selvaraj, Additional Public Prosecutor, Panruti, Produced by Mr. T. Velmurugan (R.W.1).

Court's Exhibits:

Ex. C.1: 6-5-2006: Proceedings of District Collector/District Election Officer in Na.Ka. 03/18466/2006, dated 6-5-2005 produced by the Returning Officer.

Petitioner side witnesses:

P.W.1: Mr. R. Rajendran, Petitioner
P.W.2: Mr. Thiruvengatam (who produced M.O.1)
P.W.3: Mr. Kamalakannan
P.W.4: Mr. Sivasubramaniam

Respondent side:

R.W.1: Mr. T. Velmurugan

Material Objects:

M.O.1: Video records of Polling booth Nos.131M, 131W, 132 and 73 of Puliur Kattusagai, produced by the Returning Officer.

WITNESS THE HON'BLE THIRU M. YUSUF EQBAL, THE CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 6TH DAY OF OCTOBER 2010.

Sd/
Assistant Registrar,
Original Side-II.

//Certified to be true copy//

Dated this the 26th day of October 2010.

K. KANNIAPPAN,
Court Officer (O.S.).

From 25th day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

MK-08/10/2010.

ELP. No. 14 of 2006

Order

Dated: 06-10-2010

THE HON'BLE MRS. JUSTICE
R. BANUMATHI

FOR APPROVAL : 19-10-2010

APPROVED ON : 19-10-2010

Copy to:

1. The Chief Election
Commission of India,
Nirvachan Sadan,
Ashoka Road,
New Delhi-110 001.
2. The Chief Electoral
Officer and Secretary to
Government,
Public (Elections-IV)
Department,
Secretariat, Fort St. George,
Chennai-600 009.
3. The Returning Officer,
No. 64, Panruti Assembly
Constituency and Cuddalore
District.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Ordinary Original Civil Jurisdiction)

Wednesday, The 6th Day of October 2010

THE HON'BLE MRS. JUSTICE R. BANUMATHI

ELECTION PETITION No. 14 OF 2006

ELECTION PETITION No. 14 of 2006:

R. Rajendran, S/o. Rajangam, Sorathur Village, Vallam Post, Panruti Taluk,—
Petitioner

Versus

1. Velmurugan, T., S/o. Thirunavukkarasu, Puliurkattusagai, Puliur Post, Panruti Taluk.
2. Selvakumar, R.M., S/o. Munusamy, 278, Mariamman Koil Street, Soorakuppam, Maligaimedu Post, Panruti Taluk.
3. Ramamoorthy, G., S/o. Govindasamy, 1-113, North Street, Sembalukurichi Village, T. Gopalapuram Post, Vridhachalam Taluk.
4. Ramachandran, S., S/o. Sankaradeven, 8, Puliur Kattu Sagai Village, Puliur Post, Kullanchavadi *Via*, Panruti Taluk.
5. Kamalakanna, C., S/o. Chakravarthy, 22/3D, Ayyanarkoil Street, Panruti.
6. Kumaraguru, V.K., S/o. Kaliyaperumal, 30, West Street, Karuppanchavadi Village, Krishnakuppam Post, Cuddalore Taluk.
7. Balu, S., S/o. Selvaraj, 82, Sathiyamoorthy Street, Panruti.
8. The Returning Officer, No.64, Panruti Assembly Constituency, Cuddalore District.

*R8 has been struck down from the array of respondents as per the order of this Hon'ble Court dated 17-8-2007 in ELP No.14 of 2006—*Respondents*.

This Election Petition praying that this Hon'ble Court be pleased to

(a) declare the election of the candidate *viz.* The first respondent herein from No.64, Panruti Assembly Constituency (Tamil Nadu) in the General Election held on 8-5-2006 and the result of which declared on 11-5-2006 as illegal and void.

(b) declare the petitioner as the duly elected member of the Tamil Nadu Legislative Assembly from No. 64, Panruti Assembly Constituency in the General Election held on 8-5-2006 for which the result was declared on 11-5-2006.

(c) declare that the result in respect of postal ballot is not in accordance with the letter and material document.

(d) directing the first respondent to pay the costs of this Election petition and

(e) grant such other suitable other relief or relief's as this Hon'ble Court may deem fit and proper in the circumstances of the case.

The above Election Petition coming on for hearing before this Court on various dates and finally coming on 24-09-2010 and upon hearing the arguments of Mr. K. Moorthy and S.R.Sundar, advocate for the petitioner herein and Mr. K. Gandhi Kumar, advocate for the 1st respondent and, of Mr. M.R. Raghavan, Standing Counsel for Election, the 8th respondent (The Returning Officer), and respondents 2 to 7 set exparte and upon reading The Election Petition filed by the Election Petitioner and counter affidavit of respondent 1 respectively filed herein and upon perusing the evidence adduced therein and also the exhibits marked thereto and having stood over for consideration till this date and coming on this day before this Court for orders in the presence of the said advocates for the parties hereto.

It is ordered as follows:—

That the Election Petition No. 14 of 2006 herein be and is hereby dismissed.

That there shall be no order as to costs.

WITNESS THE HON'BLE THIRU M. YUSUF EQBAL, THE CHIEF JUSTICE,
HIGH COURT AT MADRAS AFORESAID, THIS THE 6TH DAY OF OCTOBER 2010.

Sd/-
*Assistant Registrar,
Original Side-II.*

(By Order)

TAPAS KUMAR,
*Principal Secretary,
Election Commission of India.*

Secretariat,
Chennai-600 009,
13th December 2010.

PRAVEEN KUMAR,
*Chief Electoral Officer and
Secretary to Government,
Public (Elections) Department.*