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GOVERNMENT OF TAMIL NADU
2009

[Regd. No. TN/CCN/467/2009-11.
[Price : Rs. 6.40 Paise.



No. 91]

CHENNAI, THURSDAY, APRIL 2, 2009
Panguni 20, Thiruvalluvar Aandu-2040

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. 5 OF 2006

No. SRO G-11/2009.

The following notification of the Election Commission of India, Nirvachan Sadan, Ashoka Road, New Delhi-110 001, dated 23rd March 2009, [2 Chaitra 1931 (Saka)] is published:—

No.82/TN-LA/(5/2006)/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 30th June 2008 in Election Petition No. 5 of 2006.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(**Ordinary Original Civil Jurisdiction**)

Monday, the 30th day of June 2008

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

ELECTION PETITION No. 5 OF 2006

B. Arun Kumar,
S/o. Balasubramanian,
No. 3-A, Electricity Office Street, Co-op. Colony, Mettupalayam,
Coimbatore District— *Petitioner.*

Versus

1. O.K. Chinnaraj, S/o. Krishnasamy,
No.1/139, Tholampalayam Osur, Tholampalayam Post,
Via Seeniyur-641 113, Coimbatore District.
2. P. Jegannathan, S/o. Ponnusamy,
No. 38, Velliyangadu, Mettupalayam,
Coimbatore District.
3. V. Saraswathi, W/o. Velligiri,
No.1/36, Subbiagodar Street,
Lingapuram, Sirumugai,
Mettupalayam,
Coimbatore District.
4. N. Veerakumar,
S/o. K.S. Natarajan,
10/5, G.M.R.C. School, Mettupalayam,
Coimbatore District.
5. P.S. Chinnaraj, S/o. T.T. Subiah,
2/592, Pettikuttai, Sirumugai,
Mettupalayam,
Coimbatore District.
6. T.K. Pappannan,
S/o. Karian Chettiar,
23, Kempajagouder Lane, Karamadai,
Mettupalayam,
Coimbatore District.
7. R. Premnath
S/o. T. Rengaiyagouder,
3/24, Kalaatiyur Sikkampalayam, Karamadai,
Mettupalayam, Coimbatore District.

8. The Returning Officer,
No. 101, Mettupalayam,
Assembly Constituency,
and Assistant Director,
(Special Panchayat),
Coimbatore-641 018—*Respondents*.

* Respondent No. 8, Returning Officer No. 101, Mettupalayam
Assembly Constituency and Assistant Director
(Special Panchayat) has been deleted from the array of respondents
as per order dated 28-06-2007 made in
O.A. No. 689/07.

The Election Petition praying that this Hon'ble court be pleased to

(a) declare the election of the returned candidate, viz., the first respondent herein, from No.101, Mettupalayam Assembly Constituency (Tamil Nadu) in the election held on 08-05-2006 and the results was declared on 11-05-2006 as illegal and void;

(b) declare the petitioner as duly elected member of the Tamil Nadu Legislative Assembly from No. 101, Mettupalayam Assembly constituency in the election held on 08-05-2006 in which the result was declared on 11-05-2006;

(c) to declare that the result sheet in respect of the postal ballot is not in accordance with law and material documents;

(d) directing the first respondent to pay the cost of this election petition;

The above Election Petition having been heard on various dates and finally coming on for hearing before this court on 06-06-2008 and upon hearing the arguments of Mr. R. Viduthalai, Senior Advocate for M/s. V. Arun, G. Devarajan, G. Suriyanarayanan and V. Kalpana counsel for the Election petitioner and of Mr. L. Chandrakumar, counsel for the first respondent and respondent R6 (party in person) not appearing in person and respondents 2 to 5 and 7 already having been set exparte and upon reading the Election petition filed herein and upon perusing the evidence adduced therein and the exhibits referred thereto and having stood over for consideration till this day and coming on this day for orders the presence of the counsel for the respective parties and this court made the following order:

This Election petition has been filed challenging the result declared in the election conducted in respect of 101, Mettupalayam Assembly Constituency.

2. The petitioner represented Dravida Munnetra Kazhagam (hereinafter referred to as "DMK") The first respondent, who is the returned candidate represented the All India Anna Dravida Munnetra Kazhagam (hereinafter referred to as "AIADMK"). The election petitioner raised several grounds in the petition and Paragraphs 7 to 22 related to allegation of corrupt practices committed by the first respondent. The first respondent filed O.A.No.78 of 2007 for striking off the

pleadings in those paragraphs and by order of this Court dated 08-08-2007, those paragraphs were struck off. So, this election petition is now restricted to the averments in the remaining paragraphs viz. 23 to 34, which relate to the alleged procedural lapses committed by the Returning Officer. The Returning Officer is the eighth respondent and he was deleted from the array of respondents by order dated 28-06-2007 in O.A.No. 687 of 2007.

3. Therefore, the question whether the eighth respondent had committed procedural lapses will be decided on the basis of the materials and the evidence of C.W.1, who was the Returning Officer.

4. The averments are as follows and they mainly relate to the postal ballots. Admittedly, the number of postal ballots was 1071 for Voters of election duty. However, the list of voters on duty has been indicated as 882 and only 791 were entitled to copies of the postal ballot. Out of 791 postal ballots, in which only 681 were received. Most of the postal ballots were not posted or were posted a day prior to poll and received after the election. This resulted in the reduction of number of electors entitled to vote and thereby had denied the candidates of receipt of valid votes from such of those persons entitled to vote. Out of 681 postal votes 579 were cast in favour of the petitioner i.e., more than 80% of the postal ballot is in favour of the petitioner. Therefore, according to the election petitioner, if all the postal ballots had been brought into reckoning, then the election petitioner would have secured more number of votes and would have been returned as the winner. According to the election petitioner, the eighth respondent acted in favour of the then ruling party candidate, who is the first respondent.

5. The election petitioner has stated that the relevant rule provides that at least eight days prior to the election, the postal ballots shall be sent to the concerned person (election duty) entitled to vote and the Returning Officer shall ensure that all the persons entitled to postal ballots have been provided with such postal ballots atleast three days prior to the polling date. Even if the postal ballot envelop is returned, it shall be resent and every entry for sending and receipt shall be made in a register and kept by the Returning Officer. According to the election petitioner, the eighth respondent did not maintain proper account for receipt of postal ballots and though several complaints had been made of corrupt practices, the eighth respondent did not take action. The eighth respondent did not show the rejected postal ballots in the result sheet. It is averred that the Postal department had said only 579 postal ballots had been delivered to the Returning Officer and therefore, the Returning Officer should explain as to how 791 postal ballots had been accounted for and if Annexure XXIV-B is called for the real truth will surface. According to the election petitioner, the rule provides that a separate box shall be provided in the office of the Returning Officer at Coimbatore or in the office of the Assistant Returning Officer at Mettupalayam, which shall be opened daily and entries made were not complied with. It is the duty of the Returning Officer to explain as to how the postal ballots have been collected when no such box was provided. The election petitioner had collected one such postal ballot, which showed that the despatch itself was done on 03-05-2006 and the same was intentionally posted on 06-05-2006, which had reached the person on election

duty only on the next day after the polling. According to the election petitioner, this would show that the eighth respondent had not performed his statutory obligations properly. It is averred that when one Mr. A.P. Shanmugasundaram, Chief Agent of the DMK party candidate was in the counting centre representing the petitioner, at about 08.10 am., after visiting the strong room, it is stated that four persons brought two boxes containing postal ballots without any police protection and there was a seal in those boxes, which were not fixed by any of the candidate. The Returning Officer had not invited the agent of the petitioner for sealing the boxes and no register was produced to show how and when the postal ballots were received by the eighth respondent

6. It is also averred that the Election Observer Ms. Ameetha Prasad had suggested to the eighth respondent to count the postal ballots and the votes in EVM at one stroke as the Observer has to leave the counting centre by 12.00 noon to catch her flight to Bombay and the eighth respondent, who was aware of Rule 54-A of the Conduct of Election Rules, had want only and to distract the agent of the petitioner said that there is no prohibition in simultaneous counting of postal ballots and EVM votes. For this, concurrence was not taken and simultaneous counting was ordered. At that time, Mr. Elango, Assistant, who was employed at Taluk Office, Mettupalayam had influenced the Assistant Returning Officer to take decisions as the way he wanted to and he had side lined the complaints made by the petitioner right from the Notification of the said election till the end.

7. It is averred that when 1071 persons were sent out on election duty from No.101, Mettupalayam Constituency, only 882 postal ballots were accounted. The eighth respondent never sought to bring the 200 postal ballots, which were available as per the statement of Mr. Elango and this would show that there is some irregularity. Around 12.15 p.m., Mr. Elango came and told that the 17 rounds of counting is about to over and no postal ballots were left at the Returning Officer's office and the results will be announced. The petitioner rushed to the counting centre and had given a complaint that the postal ballots were not counted at the crucial time to favour the first respondent. It is alleged that the eighth respondent deliberately acknowledged the complaint only by 05.15 p.m. This would show that he is favouring the first respondent. The non-counting of the votes and not even bringing the postal ballot amount to statutory violations.

8. It is averred that the complaint was lodged by the petitioner with the Returning Officer on the same day at 12.30 p.m. regarding the irregularity in counting of the postal ballots. It is also averred that Rule 54-A of the Conduct of Election Rules has been violated. The postal ballots do not disclose the service voters and this is also an irregularity.

9. The above in brief are the allegations made by the election petitioner in respect of the procedural lapses alleged to have been committed by the eighth respondent.

10. In his counter, the first respondent has stated that all the postal ballots were accounted for and brought on record and these allegations are baseless and afterthought.

11. The sixth respondent, who appeared party in person has filed a counter, in which he has mainly referred to the allegations of corrupt practices. Since those have already been struck off, it is unnecessary to give much weight to the sixth respondent's counter. As regards the allegations made against the Returning Officer, the sixth respondent has merely stated that "if it is proved by the above petitioner", it will affect the entire poll.

12. On the basis of these materials, the following issues were framed:—

(i) Whether the postal ballots had been despatched to all those entitled for such postal ballot?

(ii) Whether the non posting of 280 postal ballots had vitiated the election and its result and the election is void?

(iii) Whether the violation of Rule 54-A of Conduct of Election Rules vitiates the counting and the results declared?

(iv) Whether the procedure prescribed for despatch of postal ballots had been followed and if not, whether the same had denied the petitioner of votes in his favour to be declared elected?

(v) Whether the non-maintenance of register to record receipt of postal ballots had vitiated the election and the election is void?

(vi) Whether the non-sealing of boxes containing postal ballot in the presence of candidates had vitiated the election and the result so declared as void?

(vii) Whether the non counting of box containing 200 votes has resulted in the election as void ab-initio?

(viii) Whether the non-accounting of service votes had resulted in vitiating the election and its results?

(ix) Whether the non recording and non accounting of votes using Form 12-B had resulted in vitiating the election results?

(x) Whether the non-filing of accounts within the time frame had resulted in disqualification of the first respondent?

(xi) Whether the election and its result is void and to what relief the petitioner is entitled to?

13. On the side of the petitioner, he was examined as P.W.1 and one A.P. Shanmughasundaram was examined as P.W.2. The Returning Officer was examined as C.W.1. Initially, P.W.1 was examined and thereafter, he also filed Proof Affidavit. In his cross-examination, he has stated as follows:—

"I was informed that total of 882 postal ballots were received. I was informed that a total of 791 postal votes said to have been issued. I was informed that

totally 681 postal votes were received. When we asked the postal Department, they informed me that they received 579 postal votes. Due to this, there is difference with regard to account of postal ballots". P.W.2, in his cross-examination has stated that he was present at the time of counting of postal ballots. They did not open both the boxes containing postal ballots. He knew that both the boxes contained postal ballots because one Elango, who was working as Assistant in Tahsildar Office told him that the box contains postal ballots relating to this constituency.

14. C.W.1 is the Returning Officer and he is the main witness. He has stated that there were totally 1071 voters, who were on election duty. The list of voters, who were on election duty was collected by them and sent to the Collector's office. For one polling station, there will be one Presiding Officer and three Polling Officers. In addition, if there are more than 1200 voters, there will be one more Polling Officer. He has stated that they started issuing Form 12 on 27-04-2006 in the Training Class and that they maintained a Register for receipt of Form 12 and a Register for despatch of the postal ballot papers. They despatched postal ballot papers by post under Certificate of Posting and also issued in person to the persons by getting their signature as per the individual's wish. Ex. C.2 is the Despatch Register with regard to the despatch of postal ballot papers. Ex.C.3 is the list of persons on election duty and entitled to postal ballots to No. 101, Mettupalayam Assembly Constituency. Ex.C.3 was prepared by the staff of Taluk Office, Mettupalayam. According to this witness, fifteen Form 12 were rejected. He has also stated that the time of receipt of Form 12, they may not know as to which particular constituency it pertains. But only after verification, they will know. Though the number of despatch on 02-05-2006 is shown as 300, on verification, it is found that there is no serial number with regard to one and with regard to two, there were double entries. In actuality, only 297 were despatched and not 300. On 03-05-2006, 122 postal ballot papers were despatched and on the same day, they have despatched another 92 postal ballot papers. Though the number shows 93, the actual despatch was only 92. On 04-05-2006, 196 postal ballot papers were despatched. On 05-05-2006, 24 postal ballot papers were despatched. On 06-05-2006, 42 postal ballot papers were despatched. According to him, totally 791 postal ballot papers were despatched, out of which 773 postal ballots were issued under Certificate of Posting and 18 were received by the concerned voters. Ex.C.4 is the Register for receipt of postal ballot papers from Polling Personnel on election duty. The postal ballots for the voters on election duty were dropped by persons in the drop box kept on the table of Special Grade Executive Officer (Administration), Coimbatore. According to this witness, on 11-05-2006, 15 postal ballot papers were received through postal department and two postal ballot papers were received in person before 08.00 a.m., when the counting was commenced. Ex.C.4 was maintained on a day to day basis. Questions were put to the witness with regard to some wrong entries of dates, to which the witness answered that date has been wrongly written by the Polling Officer. According to him, after the counting of votes, no postal ballots were received. Exs.C.8 and C.9 are returned unserved covers and received by them on 15-05-2006. According to this witness, one box was outside and one box was inside. He has denied the suggestion that there was non supply of Form 12 to 193 voters on election duty. He has stated that they first commenced the

counting of the postal ballots and when they were processing, the Election observer instructed counting of postal ballots and votes in EVM also. When examined by the counsel for respondent, the witness had stated that he has followed the procedure with regard to the despatch and receipt of postal ballot papers and that he counted all the postal ballots that were received before counting. This witness had stated that every one to whom postal ballots were sent need not necessarily cast their votes, it would depend on their decision. He had further stated that he had strictly followed all the Rules and regulations; maintained all the records in the prescribed forms at the appropriate time.

15. In addition to these three witnesses, 12 documents were marked as Exs. C.1 to C.12, and also Exs. A.-1 to A-14.

16. Learned counsel of the respective parties made their submissions orally and submitted written submissions.

17. Mr. R. Viduthalai, learned Senior Counsel appearing on behalf of the election petitioner would submit that the first respondent had actually polled 67,445 votes as against the 67,303 votes secured by the election petitioner and there was a margin of only 142 votes and therefore, the lapses with regard to the postal ballots have materially affect the final results. It was submitted that there were 1071 voters on election duty. However, only 882 were issued Form 12 and the remaining 189 voters on election duty were denied the right to vote by not being supplied with Form 12. Out of these 882 voters, 791 were supplied the postal ballots and 91 voters were unlawfully denied the supply of postal ballot on the ground that 76 belonged to 13 other Assembly constituencies and did not belong to No. 101. Mettupalayam Constituency and the remaining 15 voters did not fill up the application form viz, Form 12 properly. The rejection of request for the above 91 voters is thus contrary to law.

18. Learned Senior Counsel referred to the executive instructions in the Hand Book of Returning Officers, which according to him would bind the Returning Officer. According to him, there is an inordinate and unexplained delay in the despatch of postal ballot, which is contrary to the statutory provisions. Despatch of postal ballots had been done by the Returning Officer even as late as 06-05-2006 when the election was to be held on 08-05-2006 and therefore 109 voters were deprived of their right to vote by the belated despatch of postal ballots. It is submitted that there were 200 voters on election in various other Assembly Constituencies and their votes were not counted at all.

19. Learned Senior Counsel also referred to Articles 324 to 329 of the Constitution of India, Sections 24, 59, 62, 2(g), 169 of the Representation of People Act, 1951 and Rules 17(c), 18, 20, 22, 24 and 54-A the Conduct of Election Rules 1961. Learned Senior Counsel also placed reliance on the following decisions:—

1. Mohinder Singh Gill ..Vs.. The Chief Election Commissioner (A.I.R. 1978 S.C. 851)
2. Chhedi Ram.. Vs.. Jhilmit Ram (A.I.R. 1984 S.C. 146)
3. Rakesh Kumar.. Vs.. Sunil Kumar (A.I.R. 1999 S.C. 935)

4. Election Commission of India Vs. Ashok Kumar (A.I.R. 2000 SC. 2979)
5. Manda Jaganath Vs. K.S. Rathnam [2004 (7) S.C.C. 492]
6. Sathi Vijay Kumar Vs. Tota Singh [2006 (13) S.C.C. 353]
7. Union of India Vs. Central Electrical and Mechanical Engineering Service (A.I.R. 2008 S.C. 3)

The main crux of the submissions made on behalf of the petitioner is that out of the votes polled, 86% went in favour of the election petitioner and therefore, if all the postal ballots had been correctly counted, the petitioner would have received considerable more number of votes, which would have made a difference since the election petitioner lost by a very slender margin.

20. On behalf of the first respondent, it is submitted that there is nothing to show that there was any irregularity in the counting of postal ballots and nothing has been elicited in the evidence of C.W.1 to the contrary. It was not proved that 200 postal ballots were not taken into account. Learned counsel for the first respondent would submit mere repetition of the allegation that there were procedural lapses in the counting of postal ballots will not in any way advance the case of the election petitioner when the first respondent democratically won the election.

21. In *Mohinder Singh Gill and another Vs. The Chief Election Commissioner* (A.I.R. 1978 S.C. 851), the Supreme Court had held that Section 100 of the Representation of the People Act, 1951 has been designedly drafted to embrace the infirmities which may be urged and to make the object full proof, Section 100 (l)(d)(iv) has been added. Section 100 of the Act is exhaustive of all grievances regarding an election. Article 324 is the provision vesting the whole responsibility for National and State elections. It is not necessary to elaborate further since there is no dispute that the petitioner can raise all his grievances by filing an election petition.

22. In *Sathi Vijay Kumar Vs. Tota Singh and others* [2006 (13) S.C.C. 353] it was held that this Court while deciding the issue shall keep in mind the provisions of the Act, Rules and relevant Circulars and also relevant provisions of the Hand Book. We need not go any further since the learned counsel for the first respondent Mr. L. Chandrakumar does not dispute that the Hand Book is binding on the Returning Officer.

23. In *Manda Jaganath Vs. K.S. Rathnam and others* [2004 (7) S.C.C. 492], the Returning Officer had rejected the Form B filed by the first respondent and against that a writ petition was filed and the High Court interfered with the decision of the Returning Officer. In the said case, the Supreme Court held as follows:—

“24. We are not recording any conclusive opinion in regard to the applicability of the above statute, rules and orders because, as stated above, it is a matter to be decided in an election petition. Suffice it to say that the High Court on facts of this case, could not have interfered with the decision of the Returning Officer to reject Form B filed by the first respondent”.

Since we are dealing with the election petition and it is not in dispute that the directions contained in the Hand Book for Returning Officers are binding on the Returning Officer, this decision does not strengthen the case of the petitioner.

24. In *Election Commission of India through Secretary Vs. Ashok Kumar* (A.I.R. 2000 S.C.-2979), by an interim order passed in a petition under Article 226 of the Constitution of India, the Kerala High Court had stayed the Notification issued by the Election Commission of India, containing direction as to the manner of counting of votes. There again, the Supreme Court while holding that the Election Commissioner has the power to supervise and direct the manner of counting of votes, held that no case was made out for intervention by the High Court amidst progress of election proceedings. The Supreme Court summed up its conclusion by partly re-stating what the two Constitution Benches had earlier stated in *N.P. Ponnuswami Vs. The Returning Officer* (A.I.R. 1952 S.C. 64) and the above referred Mohinder Singh Gill's case. The scope of intervention in the election process and briefly stated the guidelines are as follows:—

1. Invoking of judicial remedy has to be postponed till after the completing of proceedings in elections;

2. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election;

3. Subject to the above the action taken or orders Issued by the Election Commission are open to judicial review on the well settled parameters which enable judicial review;

4. Judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings;

5. The Court must be very circumspect and act with caution while entertaining any election dispute.

25. In *Rakesh Kumar Vs. Sunil Kumar* [1999 (2) S.C.C. 489], the Supreme Court referred to the instructions contained in the Hand Book for Returning Officers and held that the Returning Officer in that case was not justified in rejecting the nomination papers of the respondent without further enquiry. This decision also only underscores the importance of the directions contained in the Handbook.

26. In *Chhedi Ram Vs. Jhilmit Ram and others* (A.I.R. 1984 S.C. 146), one Jhilmit Ram was elected from the constituency reserved for the Schedule Castes. He secured 17822 votes. The person, who obtained the next highest votes was Chhedi Ram, who filed the election petition. He secured 17,449 votes. Therefore the difference was 373 votes. One Moti Ram, who was an another candidate secured 6,710 votes. According to Chhedi Ram, Moti Ram was a Kahar by caste, not entitled to stand for election from the reserved constituency. The Supreme Court held as follows:—

“2. ... In the present case, that candidate whose nomination was improperly accepted had obtained 6710 votes, that is, almost 20 times the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes. Not merely that. The number of votes secured by the candidate whose nomination was improperly accepted bore a fairly high proportion to the number of votes secured by the successful candidate —it was a little over one third. Surely, in that situation, the result of the election may safely be said to have been affected...”

It is this case, which was strenuously stressed by Mr. R. Viduthalai, learned Senior Counsel for the election petitioner. According to the learned Senior Counsel, the lapses committed by the Returning Officer in not bringing into account all the postal ballots had materially affected the election results since as per his logic, the election petitioner had secured 86% of the postal ballots and if 86% of 1071 is calculated, he would have secured more than about 860 votes and actually he had secured 579 votes and the difference between 860 and 579 is 281. This is more than the margin, by which the election petitioner had been defeated, which is 142 votes. Therefore, the crux of the argument of the election petitioner is only with regard to the Returning Officer not reckoning all the 1071 postal ballots.

27. Chapter X of the Handbook for Returning Officers deals with the procedure to be adopted with regard to the postal ballot papers. Clause 12.1 reads as follows:—

“Applications from voters on election duty for permission to vote by postal ballot are required by law to be made in Form 12 at least seven days or such shorter period as you may allow before the day of poll or the first day of the poll in the constituency. This is to enable you to send the postal ballot papers in time and to make the necessary entries in the working copies of the electoral rolls for the respective polling stations. If you have appointed the officers and supplied them with the application forms in time, you need not relax this seven day rule. A Presiding Officer, Polling Officer or Policeman or other public servant may be appointed for duty at a polling station so late that though he is otherwise entitled to apply for a postal ballot paper, he cannot do so seven days before the first date fixed for the poll. You should, whenever practicable, exercise your discretion in favour of such officer or public servant and allow him the facility of postal ballot when he applies for such facility”.

Therefore, Clause 12.1 requires the Returning Officer to allow less than seven days period to file the application in Form 12 for permission to vote by postal ballot. This is only so that the postal ballot papers can be sent in time and it also gives the Returning Officer the discretion to relax the seven days rule and allow him the facility of postal ballot when he apply for such facility.

28. In the averments in the Election Petition, it is stated that the number of postal ballots as per the eighth respondent in the original instance was 1071 for voters on election duty. However, the list of voters on duty has been indicated as 882 and only 791 were entitled to copies of the postal ballots. In his cross-examination, P.W.1, the election petitioner has stated that he was informed that total of 882 Postal ballots were received and 791 postal votes were said to have been issued and 681 postal votes were received. P.W.1 has not said from where he has received the information. However, Ex.C.3 would show that out of the polling personnel of 1071, only 882 personnel applied for Form 12 for postal ballot papers, of which 76 Form 12 were belonging to other constituencies and they were sent to the respective Returning Officers and 15 Form 12 were rejected and only 791 polling personnel were entitled to avail of the postal ballot papers. Ex.C.6 is the list of postal voters on special duty, numbering 1071. According to the learned Senior Counsel appearing for the election petition, even though in the general election, the percentage of turn out of voters at the booth is not very high, it is always higher with regard to the voters on election duty since they are actually on duty and will be more conscious and conscientious of the duty to cast their vote.

According to the Returning Officer, all the persons, who applied in Form 12 were given the postal ballot papers either in person or sent by a Certificate of Posting as per the statutory requirements. The Returning Officer, C.W.1 said that it is not necessary that every body should apply and the Returning Officer can issue the postal ballot only to those who apply in Form 12. There is nothing on, record to show that 189 personnel (1071-882) had applied for postal ballots in Form 12 and that in spite of their applications, they were not issued the postal ballots. There is no reference to any complaint and the election petitioner had not given the names of those persons, who had applied in Form 12 and were still not given the postal ballot papers. In fact, even the names of those voters on election duty, who were not issued with postal ballots have not been furnished by the election petitioner. In the absence of any other evidence, I am unable to hold that the 1071 voters on election duty had applied in Form 12 and the Returning Officer had deliberately committed lapse by issuing postal ballots only to 882 persons.

29. Ex.C.2 would show that out of 882 persons in the list of voters on election duty, postal ballots were sent by post to 773 and 18 had received it in person. I have actually gone through Ex. C12 series and I find that the Returning Officer, C.W.1 is correct in his statement that out of 882 Forms 12, that were received, postal ballots were issued only to 791 because the remaining 91 Form 12 were either rejected or related to some other constituencies. I have seen the Register and wherever it relates to other Constituencies, Column. 9 refers to the Other Constituencies and wherever it was rejected on account of no such person, that was also meticulously entered. Therefore, the entries made in Ex.C.12 series and spoken to by C.W.1 is accurate. Out of 791 postal ballots issued, C.W.1. had said that he received 682 postal ballots and did not receive 109. Ex.C.2 series would show that postal ballots had been issued to all 791 persons mentioned above either by certificate of Posting or received in person. Ex.C.4, which has been recorded and signed by C.W.1. on 11-05-2006 would show the number of ballot papers that were received. On 06-5-2006, 16 were received; on 07-05-2006, 6 out of which 3 were received in person; on 09-05-2006, 450 were received out of which 398 by post and 52 in person; on 10-05-2006, 1093 were received out of which 1066 by post and 27 by person and on 11-05-2006, 17 postal ballots were received out of which 15 were by post and two in person. Therefore this evidence would show that all the postal ballots that were received had been brought into account.

30. The poll took place on 08.05.2006 and the counting of votes took place on 11-05-2006 and therefore, the postal ballot papers that have been received upto 11-05-2006 have been accounted for. The Returning Officer was called upon to produce the particulars as to the number of votes received after the counting of votes/election. Two returned covers relating to one Suganthi and one Palanisamy (Exs.C.8 and C.9) have been produced. These are returned covers with an endorsement no such person. From this, it is clear that the allegation of the election petitioner that most of the postal ballots were not posted or were posted on a day prior to the poll and received after the election is false proved since the postal ballots have been received by the Returning Officer right from 06-05-2006, which is two days prior to the voting date. Therefore, the allegation of the election petitioner that, this has resulted in reduction of number of electors entitled to vote must be rejected. Therefore, the averments in paragraph 23 that due to the negligence and recalcitrant attitude of the eighth respondent, the postal ballots were not handed over to the voters entitled to vote are not proved.

31. As regards the paragraph 24, the averment made that the rule relating to printing and despatching of the postal ballot papers within 24 hours of expiry of time fixed for withdrawal of the candidate cannot be accepted since apart from the pleading, no evidence has been adduced and no question has been asked to C.W.1 as to when the postal ballots were printed and despatched. The question that has been asked from him is from the date on which he started issuing form 12 and according to him, they started even on 27-04-2006. The other averment in Paragraph 24 is that no register has been maintained with regard to the despatch of the postal ballots. This allegation must also be rejected since C.W.1 has produced the register to show how the postal ballots have been despatched whether by Certificate of posting or received in person. Therefore, the averments in Paragraph 24 must be rejected. Averments were also made regarding the corrupt practices of the first respondent and that the Returning Officer did not take any action. But, these pleadings have already been struck off. Thus, the petitioner has not proved the procedural lapses as alleged in Paragraph 24 of the election petition. .

32. In Paragraph 25, the election petitioner has stated that the Postal Department has said that only 579 postal ballots have delivered to the Returning Officer and therefore how the Returning Officer accounted for 791 postal ballots is not explained. This is explained by Ex.C.4, which has already been mentioned above and therefore, there is no procedural lapse on the part of the Returning Officer. The election petitioner has referred to some of the postal ballot papers, which were posted intentionally only on 06-05-2006. Ex.A.1 is stated to be the ballot paper, which was despatched on 03-05-2006, but posted intentionally on 06-05-2006 and had reached the voter on election duty only on the next day after the polling. As regards Ex.A.1, which is said to be a deliberate lapse on the part of the Returning Officer is concerned, it is seen from Ex.C.5 series that the applicant had applied for Form 12 on 03-05-2000 and it is seen from Ex.C.2 series that the Certificate of Posting for this voter on duty Sl. No. 799 is 04-05-2006. Therefore, the Returning Officer is not responsible for any delay nor he has committed any delay. As regards Ex.A.14, it pertains to one Latha.

Allegations were made that the postal ballot was despatched deliberately on 6th May 2006, so that the petitioner will be denied a valid vote and that he obtained the ballot paper by chance. I have seen Ex.C.5 series and Voter No. 850 - Latha had submitted her form 12 only on 5th May 2006. Therefore, I am unable to comprehend how the election petitioner can expect the Returning Officer to hand over to this voter the ballot paper at an earlier date. The application was made on 5-5-2006 and the postal ballot was despatched on 6-5-2006 promptly. If this is a sample of the alleged procedural lapses, then I have no difficulty in concluding that all the allegations are baseless. In fact, I am not even satisfied about the bonafides of the manner in which the election petitioner has obtained the so called ballot paper by chance. I do not find that any lapse has been committed by the Returning Officer with regard to the despatch of the postal ballots under Ex.A-1 or Ex.A-14, It were despatched on the date after the day on which the application for Form 12 has been received by the Returning Officer. Therefore, non performance of the statutory obligations has not been proved by the election petitioner.

33. The petitioner has referred to the statement of P.W.2, the Chief Agent of the DMK party, informing that four persons had brought two boxes without any police protection and seal, which were not fixed by any candidate in the cross-examination, he had stated that he knew both the boxes contained postal ballots because one Elango, who is working as Assistant in Taluk Office told him. The Election petitioner has not chosen to examine the said Elango. During cross-examination of the Returning Officer, C.W.I., no question has been asked with regard to the boxes that were brought to the strong room without police protection, as alleged by P.W.2. In fact, C.W.I. had stated that there was only one box meant for receipt of postal ballots. Except for this, no question has been asked of him. Even the witness for the election Petitioner P.W.2 has admitted that he has stated that both the boxes contained the postal ballots without any authenticated information but only on the hear say from one Elango. I find it very difficult to accept the allegations made in paragraph 26.

34. In Paragraph 27, it is stated that one Ms. Ameetha Prasad, election observer had suggested to the eighth respondent to count the postal ballots and the votes in EVM since she had to catch her flight. Clause 14.1 of the Hand book for Returning Officers in Chapter XIV deals with counting of votes, which says that the postal ballot papers are to be counted first, and that the Returning Officer should deal with the postal ballot papers first. This is in consonance with Rule 54-A of the Conduct of Election Rules, which says that the Returning Officer shall first deal with the postal ballot papers in the manner provided therein. C.W.I. has stated that he commenced only with the postal ballot papers and when they were in the process of counting of postal ballots, the election observer told them to start the counting of votes in EVM also. Therefore, as far as the Returning Officer is concerned, he had complied with Rule 54-A of the Rules by counting of the postal ballot papers first. It is true that he has admitted that before he completed the counting of postal ballot papers, the election observer instructed to start to count the votes on EVM. This is also said to be a lapse. I do not find any infirmity in the election petition as to how this had materially affected the result of the election petitioner. The Judgment relied on by the learned Senior Counsel for the Election petitioner clearly shows that the election petitioner should show how a particular lapse had "materially affected" the results. If there was a lapse, the lapse may be on the part of the election observer. There is no evidence to show that the counting has been done in haste as alleged in Paragraph 29 or that the lapse has materially affected the result.

35. Paragraph 31 relates to the service voters and it is stated that the procedure has not been followed in respect of them. But in his evidence, the election petitioner has clearly stated that his grievance is with regard to only postal ballots. Therefore, whatever has been stated in Paragraph 31 remains unproved.

36. The Election petitioner has stated his claim on pure conjecture.

(a) all voters on duty will conscientiously cast their votes and so all the 1071 voters would have applied for Form 12.

(b) There were two boxes which must have contained postal ballots;

(c) Since the postal ballots counted 86% were in favour of the election petitioner, the same percentage must be taken for the total number and so on. But, we cannot decide an election on the basis of such conjecture and fond hope.

37. In those circumstances, I find that

1. Out of the 1071 voters on election duty, postal ballots had been despatched to those who had applied for it, excluding whose applications were rejected and those who were voters belonging to other constituencies, issue No.1 is answered against the petitioner.

2. Since I have held that out of 882 persons who applied in form 12, 791 postal ballots were despatched, deducting the persons those who were not entitled, issue No. 2 is answered against the petitioner.

3. It is seen from the evidence of the Returning Officer, C.W.I. that he had in fact Commenced the counting of postal ballots alone first as provided under Rule 54-A of the Conduct of Election Rules and when they were in the process of counting of ballots, the election observer had asked him to count the votes on EVM also. Since there is nothing no record to show that the counting of votes on EVM had in any way materially affected the results, the Issue No. 3, is answered against the petitioner.

4. The procedure for despatch of postal ballots have been followed. Hence, the Issue No. 4 is answered against the petitioner.

5. Regarding the receipt of postal ballot papers, Ex.C.4 has been produced to show that it is a register for receipt of postal ballot papers from the polling personnel, Hence, Issue No. 5, is answered against the petitioner.

6. As regards the sixth issue nothing has been proved that the boxes had not been sealed in the presence of candidates and therefore, this issue is answered against the petitioner.

7. The evidence of C.W.I. that there was only one box and whatever contained in that box was counted stands unrebutted and therefore, the petitioner has not proved that there was a box containing 200 votes, which were not counted. Hence, this issue is answered against the petitioner.

8. As regards issue Nos. 8,9,10 and 11 apart from making the pleadings and that too not very clearly, the allegations which gives rise to issue Nos. 8,9,10 and 11 have not been proved. The accounts have been filed and as I have already held, there is no irregularity in either issuance of Form 12 B, receipt of the same or issuance of postal ballots corresponding to the application. All the votes polled have been duly accounted. Therefore, issue Nos. 8,9,10 and 11 are answered against the petitioner.

So, all the issues are answered against the petitioner.

38. In the result, all the issues are answered against the election petitioner and this Election Petition is dismissed, No costs.

WITNESS, THE HON'BLE THIRU ASOK KUMAR GANGULY, CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 30TH DAY OF JUNE 2008.

Sd/-

(G. Pachaiyappan),

Dated 1-08-2008

Assistant Registrar (O.S.II).

(By Order)

TAPAS KUMAR,
Principal Secretary,
Election Commission of India.

Secretariat,
Chennai-600 009,
2nd April 2009.

NARESH GUPTA,
Chief Electoral Officer and
Additional Chief Secretary to Government,
Public (Elections) Department.

ELECTION PETITION
No. 5 of 2006.

Order dated : 30-6-2008.

THE HON'BLE MRS. JUSTICE
PRABHA SRIDEVAN

For Approval: 29-7-2008

Approved on: 1-8-2008