



Ele.P.No.2 of 2021
&
O.A.No.665 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :16.06.2023

Pronounced on :05.07.2023

Coram:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Election Petition No.2 of 2021
and
O.A.No.665 of 2021

S.Selva Mohandas Pandian

.. Petitioner

/versus/

1.S.Palani Nadar

2.K.M.Udhayakumar

3.S.Chandrasegar

4.S.Sureshkumar

5.R.Selvakumar

6.R.Thirumalaimuthu

7.S.Mohamed

8.K.Mugundhan



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- 9.R.Vincentraj
- 10.M.Jeganathan
- 11.J.Arokkiya Prabhu
- 12.Doctor S.Kauruppasamy
- 13.A.Palanikumar
- 14.P.Palanimurugan
- 15.A.Madasamy
- 16.R.Ramesh
- 17.M.Reegankumar
- 18.The Returning Officer,
No.222, Tenkasi Assembly Constituency
The Revenue Divisional Officer
Tenkasi 627 811.

.. Respondents

Prayer: Election Petition has been filed under Sections 80,80A,81,82,83,84,98(b)(c) r/w Section 100,100(1)(iii), 100(1)(d)(iv) and 101 of the Representation of the People Act, 1951 read with the Conduct of Election Rules, 1961 and the Madras High Court (Election Petitions) Rules, 1967, praying to:



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(i)Declare the election of the Returned Candidate namely, Mr.S.Palani Nadar, the 1st respondent herein in No.222 Tenkasi Assembly Constituency to be void

(ii)Order re-verification and re-count of all votes polled by Postal Ballots in No.222 Tenkasi Assembly Constituency

(iii)Order re-count of all votes polled by Electronic Voting Machines covered under Counting Round Nos.28,29 and 30 in No.222 Tenkasi Assembly Constituency.

(iv)Declare the petitioner herein as the Returned Candidate for No.222, Tenkasi Assembly Constituency for the Tamil Nadu Assembly Elections, 2021.

(v)Direct the respondents to pay the cost of this Election Petition.

For Petitioner :Mr.T.V.Ramanujam
Senior Counsel for
Mr.B.Arvind Srevatsa

For Respondents :Mr.V.Arun for
Mrs.R.Revathy for R1
R2 to R18- No appearance

ORDER

The Election Petition is filed by the unsuccessful candidate Mr.Selva Mohandas Pandian, who contested from Tenkasi Assembly



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Constituency in the General Election held during the month of April 2021. He lost to the the first respondent by a margin of 370 votes.

2. The relief sought in the Election Petition are:-

(i) Declare the election of the Returned Candidate namely, Mr.S.Palani Nadar, the 1st respondent herein in No.222 Tenkasi Assembly Constituency to be void.

(ii) Order re-verification and re-count of all votes polled by Postal Ballots in No.222 Tenkasi Assembly Constituency.

(iii) Order re-count of all votes polled by Electronic Voting Machines covered under Counting Round Nos.28,29 and 30 in No.222, Tenkasi Assembly Constituency.

(iv) Declare the petitioner herein as the Returned Candidate for No.222, Tenkasi Assembly Constituency for the Tamil Nadu Assembly Elections, 2021.

(v) Direct the respondents to pay the cost of this Election Petition.



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3. The reasons for seeking the above relief as found in the petition are capsulised below:-

(i)The votes polled by EVMs in the 408 Polling Stations for No.222, Tenkasi Assembly Constituency, were counted in 30 Rounds of Counting Centre. The Round-wise break up of votes polled by EVMs was uploaded on the website of the Election Commission of India. Till the counting of Round No.27 of EVM votes, the Returning Officer did not commence the counting of postal ballots. The petitioner's Chief Election Agent, Mr.K.P.Kumar Pandian, raised an objection that the votes polled by postal ballots ought to be counted first, as per Rule 54-A of the Conduct of Elections Rules, 1961. At the completion of the Round No.27, the petitioner was leading by 2,918 votes.

(ii)At around 3.30 p.m., the Retuning Officer stopped the counting of EVM votes and directed the counting of votes polled by postal ballots. As per Rule 60, the counting process shall be continuous and should not be stopped in between without any reason. The Returning Officer in an



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arbitrary manner, did not take any action based on the objection raised by the Chief Election Agent, Mr.K.P.Kumar Pandian, of the petitioner and continued the counting of postal votes stopping the counting of EVM votes.

(iii)In the Statement of Postal Ballots, it is stated that the total number of voters under Postal Votes at No.222 Tenkasi Assembly Constituency is 3330. It is stated that 2530 postal votes were received up to 30.04.2021 and 47 votes were received on 01.05.2021 and the total number of Postal Votes polled is mentioned as 2577 votes. In the Compiled Statement dated 01.05.2021 of Postal Ballots under the category of Absentee Voters, the total number of votes received is mentioned as 384 votes. The total number of votes received is mentioned as 384 votes. The total number of votes polled by postal ballot is 2961 (2577+384).

(iv)At the time of counting of postal ballots, several postal ballots did not contain the attestation and the seal of the Gazetted Officer and the same ought to have been rejected. Some of the postal ballot contained two



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tick marks, or the vote recorded by mark was indistinct and ambiguous.

The Petitioner's Chief Election Agent Mr.K.P.Kumar Pandian, immediately raised an objection, but the Returning Officer refused to entertain the objection in an arbitrary and illegal manner, in violation of Rule 54-A (5), (6) (7), (8) and (9) of the Conduct of Elections Rules, 1961.

(v)At the completion of the Round No.27, the Petitioner herein had secured 81029 votes and the 1st Respondent had secured 78,111 votes. The petitioner was leading by 2,918 votes. As seen from the round-wise vote break up of votes polled by EVMs, at the completion of Round No.28, the petitioner had secured a total of 83,979 votes and the 1st respondent had secured 82,357 votes. At the end of round No.29, the Petitioner had secured 87,827 votes and the 1st respondent had secured 86,978. In fact, at the completion of Round No.30, the petitioner had secured a total of 88,271 and the 1st respondent had secured 87,706. At the end of counting of EVM votes in 30 Rounds, the petitioner was leading by 565 votes, ahead of the 1st respondent.



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(vi) At that stage, the Returning Officer declared the 1st respondent as the returned candidate by stating that the 1st respondent had secured 1609 postal votes and the petitioner has secured 674 postal votes, thereby the total votes secured by the petitioner is 88,945 and the total votes secured by the 1st respondent is 89,315 votes.

(vii) The counting of votes conducted on 02.05.2021 by the Returning Officer is in blatant non-compliance of Section 100(1)(d)(iii) and 100(1)(d)(iv) of the Representation of People Act, 1951 and the Conduct of Elections Rules, 1961. The non-compliance has materially affected the result of the election in so far as it concerns the returned candidate. The petitioner raised objection in writing dated 02.05.2021 and made a request for re-count of votes polled by EVMs and votes polled by postal ballot, in accordance with Rule 63 of the Rules, 1961. However, the Returning Officer refused to receive the objection from the petitioner and in a hurried manner declared the 1st respondent as elected.

4. S.Palani Nadar, the successful candidate, who is the first



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respondent in the Election Petition has filed counter statement setting out the following reasons for which the Election Petition has to be dismissed.

(i) The main challenge to the election of the first respondent is that there were improper reception of votes in favour of the first respondent in violation of the provisions of Representation of People Act, 1951. The grievance of the petition is that the postal votes were not taken up for counting first and when taken up for counting, invalid votes were accepted and valid votes were rejected. Without any specific incident the above bald claim made and such claims are untenable in law. In fact, the election petitioner's own documents would prove neither violation nor discrepancy in counting of votes including postal ballots, rejected votes, difference of margin votes and each round of votes obtained by each candidate. The total number of votes and margin of votes were tallied correctly and there is neither disparity nor discrepancy in winning margin of votes between the first respondent and the election petitioner. Hence, the election petition is devoid of merits, frivolous, vexatious and particularly, no cause of action had been arisen for filing this election



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petition. The election petitioner does not disclose a cause of action or his petition makes out any triable issue.

(ii) The entire statement does not contain any material facts in concise manner as to how, where, when, how much, and the time of improper reception of void votes and what are the provisions of the Constitution of India, Representation of People Act, 1951, the Conduct of Election Rules 1961 and other Orders of Election Commission of India. Further, the election petitioner has not given any material facts as to how and what was the nature of violation or non-compliance of provisions of the Constitution of India, Representation of People Act, 1951, the Conduct of Election Rules, 1961 and Orders of Election Commission of India. Since the election petitioner is unable to mention precisely or concisely about the violation of particular provisions of election laws.

(iii) The vague and bald allegation that there were several irregularities in the counting process without pointing precisely the irregularity with material facts in support of the allegation is not in compliance with Section 83(1)(a) of the Representation of People Act,



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1951.

(iv)The petitioner who rely on electronic document for the particulars regarding the votes polled, vote secured by the candidates round-wise etc., are not authenticated by a certificate under Section 65B of the Evidence Act. The documents downloaded from the website of ECI are secondary evidence which mandatorily require certificate under Section 65B of the Indian Evidence Act. The Chief Agent of the election petitioner during the counting process or soon after declaration of result raised objection orally or in writing regarding the counting of postal ballots. In fact, there is no violation of Section 54A of the Representation of People Act,1951 in counting the postal votes.

(v)Counting of votes commenced at 8.00 a.m with counting the postal ballots, and only after an hour, the counting of EVM votes started. The representation dated 03.05.2021, to CEO, TN, Observer, DEC, Tenkasi District, RO, Tenkasi Constituency are belated, bald and lack concise and précised statement of violation in counting the request for recounting not substantiated with specific details. The petitioner does not



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disclose how the date of postal ballots upto 01.05.2021 materially affected the result of the election. There are two set of data in respect of postal ballots. One for service votes, polling staff (Polling personnel, Police Personnel and Micro Observers) Postal ballots for one group of absentee voters. The another set of data regarding absentee voters, those who are above 80 years old, persons with disability, essential service and Covid 19 affected voters. No dispute raised by the Election Petitioner regarding those two data at the time of counting. These two categories of postal ballots received upto 7.00 a.m, on the day of counting i.e. 02.05.2021. The guideline in the Hand Book for the Returning Candidate mentioned in para 15.15.4.15 complied. The substantial compliance of reverification of the postal ballots received was done. No reason available to indicate the manner of counting materially affected the election of Returned candidate. Hence, the Election Petition deserve to be dismissed with costs.



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5. Based on the pleadings, the following Issues were framed:-

(1)Whether the Returning Officer improperly received void postal ballots?

(2)Whether there was violation of Rule 54-A in counting the postal ballots?

(3)Whether there was embellishment in the numbers of postal ballots received for Constituency No.222, Tenkasi Assembly?

(4)Whether there is discrepancies/ mismatch in respect of Form No.20(Result Sheet) uploaded in the website of the Election Commission of India and the manual Form 20 issued by the Returning Officer?

(5)Whether petition documents 7,8,9,10 &11 seeking re-count sent beyond the time prescribed under Rule 63(2)?

(6)Whether the election petitioner is entitled to be declared as the returned candidate for No.222, Tenkasi Assembly Constituency for the Tamil Nadu Assembly Election 2021?

(7)Whether the election petitioner is entitled to the relief a direction, directing re-count of all votes polled by Electronic Voting Machines (EVM) covered under Counting Round Nos.28, 29 and 30 in No.222, Tenkasi Assembly Constituency?



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6. On the side of the petitioner, S.Selva Mohandas Pandian (Election Petitioner) was examined as PW-1 and Mr.K.Selvakumaran (Counting Agent for postal votes representing the election petitioner) was examined as PW-2. Totally 16 documents were relied and marked as Exs.P1 to P16. On the side of the respondent, two witnesses viz., Mr.P.Subbiah (Chief Election Agent) and Mr.V.Raja (Counting Agent of the 1st respondent) were examined as RW-1 and RW-2 and marked one document as Ex.R1. On issuance of subpoena, three official witnesses viz., Mr.N.Ramachandran (Returning Officer), Mr.S.Venkatesh (Assistant Returning Officer) and Mrs. D.Murugaselvi (Assistant Returning Officer) were examined as CW-1, CW-2 and CW-3. Three documents Ex.C1 to Ex.C3 were marked.

7. For rest of the respondents, there is no representation except the Election Commission of India which filed a petition to delete the 18th respondent.



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8. On both side, in addition to the elaborate oral arguments made by the Learned Counsels, detailed written statements also submitted citing the judgements in their favour.

9. The substantial part of the arguments advanced by the learned counsels centred around the violation of the instruction issued by the Election Commission of India in the Hand Book for Returning Officer.

10. The learned Senior Counsel appearing for the petitioner submitted that the Returning Officer had grossly violated the instruction 15.15.4.15 which says, in case of victory margin is less than the postal ballot/invalid votes, the Returning Officer is mandated to recount the postal ballots and videograph the recounting process. Admittedly, the Returning Officer had not exercised this process.



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11. The learned counsel appearing for the first respondent in response submitted that the said instruction 15.15.4.15 found in the Hand Book published by Election Commission of India in the month of February 2019 was soon modified vide, proceedings No.470/2019/SDR dated 18.05.2019. In the light of the modified instruction, only invalid postal votes need to be reverified not all the postal ballots be recounted. The term reverification and recounting are not one and the same. They connote different process. The witnesses had deposed that reverification was done in the presence of Observers. Hence, there is no violation which will materially affect the result.

12. The learned counsel appearing for the first respondent referring the instruction No.15.15.4.15 in the Hand Book of the Returning Officer issued by the Election Commission of India published as Doc.No.23, February 2019 as well as the modified instruction vide proceedings dated 18.05.2019, reiterated that the modified instruction



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does not mandate recounting of entire postal ballots in case of victory margin is less than the total postal votes.

13. For easy reference the instruction before and after modification is extracted below:-

Instruction No.15:15:4.15 as found in the Hand Book for

Returning Officer:-

“15.In case the victory margin is less than total number of postal ballots received then there shall be a mandatory re-verification of all postal ballots. In the presence of Observer and the RO all the postal ballots rejected as invalid as well as the postal votes counted in favour of each and every candidate shall once again be verified and tallied. The Observer and the RO shall record the finds of re-verification and satisfy themselves before finalizing the result. The entire proceeding should be video-graphed without compromising the secrecy of ballot and the video-cassette/CD should be sealed in a separate envelop for future reference”. (emphasis added)



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14. The Election Commission vide, proceedings No.470/2019/EDR, dated 18.05.2019 modified the above instruction and the amended instruction reads as below:-

“2.With the introduction of ETPBS and casting of postal ballot by election duty staff at the facilitation centre, the number of postal ballot papers for counting has gone up considerably. Further, with the requirement of mandatory QR code reading for the ETPBS, the postal ballots counting will now require more time. Moreover, there is a mandatory VVPAT slips count of five polling Stations per Assembly segment in addition to the cases of VVPAT count that may be required on account of other reasons, such as CU not being cleared after mock poll, the CU not displaying the result at the time of counting etc.

3.In view of the above, the Commission has reviewed the above referred instructions and the modified instructions are as follows:-

(i)The instruction that the penultimate round of EVM counting should be taken up only after completion of Postal Ballot counting is withdrawn. Accordingly, the EVM counting can go on irrespective of the stage of Postal Ballot counting. Once the EVM counting is completed, the VVPAT slips counting can start as per the prescribed procedure for counting VVPAT slips.



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(ii)The Commission's instruction for mandatory re-counting of all postal ballot papers on the ground that the margin of victory is less than the number of postal ballot has been revised to the effect that where the margin of victory is less than the number of Postal Ballot papers rejected as invalid at the time of counting, all the rejected Postal Ballot papers shall be mandatorily re-verified by the Returning Officer before declaration of result. Whenever, such re-verification is done, the entire proceedings should be video-graphed as per the instructions in paragraph 7 of the Commission's letter No.470/2009/EPS dated 21/01/2009, referred to above."

(emphasis added)

15. Based on the above arguments, arose the question whether the Hand Book for Returning Officer, which is designed to give information and guidance needed for optimal functioning of a Returning Officer, will fall within the meaning of law; Whether the guidance found in the Handbook for Returning Officers are mandatory. If it is mandatory, whether any infraction of the guidance will give a cause of action to interfere the election result under Sections 80, 80A, 81, 82, 83, 84, 98(b),(c) r/w Section 100, 100(1)(d)(iii), 100 (1)(d)(iv) and 101 of the



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Representation of the People Act, 1951 read with the Conduct of Election Rules, 1961 and the Madras High Court (Election Petitions) Rules 1967.

16. To buttress his submission that instructions found in the Hand Book issued by Election Commission of India is binding and have the force of law, the learned Senior Counsel for the petitioner relied upon the following judgment:-

Arikala Narasa Reddy v. Venkata Ram Reddy Reddygari and another reported in ***[(2014) 5 SCC 312]*** (para 32) in which the Hon'ble Supreme Court has observed:

32. It is a settled legal proposition that the instructions contained in the Handbook of Returning Officer are issued by the Election Commission in exercise of its statutory functions and are therefore, binding on the Returning Officers. Such a view stands fortified by various judgements of this Court in *Ram Sukh v. Dinesh Aggarwal* and *Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil*. Instruction 16 of the Hand Book deals with cases as to when the ballot is not to be rejected. The Returning Officers are bound by the Rules.



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17. To contra to the above submission, the learned counsel for the 1st respondent admitting that the instructions are binding and to be followed in letter and spirit, the omission or violation alleged *ipso facto* will not give a cause of action, unless the omission materially affects the result. Since the petitioner is vague and necessary material facts how the omission had affected the result is wanting, the petition under Section 100(1)(d)(iv) of the Act is not maintainable. In support of his submission he relied upon ***Ram Sukh v. Dinesh Aggarwal reported in [(2009) 10 SCC 541]*** (para 23) which says;

“23. There is no quarrel with the proposition that the instructions contained in the Handbook for the Returning Officers are issued by the Election Commission in exercise of its statutory functions and are, therefore, binding on the Returning Officers. They are obliged to follow them in letter and spirit. But the question for consideration is whether the afore-extracted paragraphs of the election petition disclose material facts so as to constitute a complete cause of action. In other words, the question is whether the alleged omission on the part of the Returning Officer *ipso facto* “materially affected” the election result. It goes without saying that the averments in the said two paragraphs are to be read in conjunction with the preceding paragraphs in the election petition. What is stated in the preceding



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paragraphs, as can be noticed from Grounds (i) and (ii) reproduced above, is that by the time specimen signature of the polling agent was circulated 80% of the polling was over and because of the absence of the polling agent the voters got confused and voted in favour of the first respondent. In our opinion, to say the least, the pleading is vague and does not spell out as to how the election results were materially affected because of these two factors. These facts fall short of being “material facts” as contemplated in Section 83(1)(a) of the Act to constitute a complete cause of action in relation to the allegation under Section 100(1)(d)(iv) of the Act. It is not the case of the election petitioner that in the absence of his election agent there was some malpractice at the polling stations during the polling.”

18. Thus, the Hon'ble Supreme Court has clearly affirmed the proposition that the instructions contained in the Handbook for the Returning Officers are issued by the Election Commission in exercise of its statutory functions. Those instructions are to be followed in letter and spirit. For entertaining petition under Section 100(1)(d)(iv) of the Act, there must be pleading to *prima facie* satisfy the violation had material affected the outcome of the result.

19. In the case in hand, the pleadings and the testimony of the



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election petitioner before the Court, reveals that though he was not present at the counting centre on 02.05.2021, the averments about the events happened on 02.05.2021 at the counting centre are on the information given by his Chief Agent, Mr.Kumar Pandian and based on the particulars furnished in writing by the Returning Officer. The discrepancies in the data provided by the RO in writing to the candidates and the data uploaded in their Websites is admitted by RO during the cross examination. He claims that it is clerical error. The evidence placed before this court further indicates the errors are in the total number of voters in the Constituency and total number of votes polled. There is error in total number of postal ballots received and the total number of invalid/rejected votes. Hence, undoubtedly, these errors go to the root and materially affects the result particularly when the victory margin is 370 votes.

20. The Learned Counsel for the first respondent harped on the point that, the objections regarding violation in the counting process



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allegedly raised by Kumar Pandian his Chief Agent not supported by any written document. The Returning Officer who was examined as CW1 also had categorically said that , he did not receive any written objection from Kumara Pandian.

21. From the deposition of CW-1, we find that RO admits that there was some oral objections during the counting process. He in the cross examination admits that he received Ex.P10 objection from the Election Petitioner on 05.05.2021, but he could not take action, since the results were declared by EC and DEO. To the specific question put to the Returning Officer by the learned counsel appearing for the first respondent, whether the postal ballot Agent of the Election Petitioner, Mr.K.Selvakumar, gave any objection at the time of signing Ex.C1 or at the time of declaring the result of the postal ballots, the Returning Officer (CW-1) had answered in negative. However, to the question, whether he received any objection in the course of counting of postal ballots, the Returning Officer had answered in affirmative. He had conceded that



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regarding doubtful votes representatives of the candidates had raised certain objections and the same was informed to him by his Assistant Returning Officer.”

22. Whereas PW-2 [Mr.Selvakumar] the Counting Agent for the postal ballots representing the election petitioner had deposed that “the counting of postal ballot started at 08.00a.m and simultaneously, the counting of votes in EVMs also started. All the postal ballots were brought into the counting centre and they were counted in parts. Some of the postal ballot did not contain the ARO signature and in some cases, the envelope was not sealed. Such kind of votes were kept aside as we had raised objections. The counting continued and the votes for which they had raised objections were kept aside to be decided at the end of counting.” In the cross examination, PW-2 had for the question what was his specific objection regarding the postal ballot, the witness had answered, his objection was that the postal ballots which did not contain the ARO's signature and the envelope which were found unsealed should



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be rejected and not to be taken up for counting.

23. Mr.Subbiah (RW-1), the Chief Election Agent of the Returned Candidate (1st respondent) in his chief examination for the question did any one raise any objection during counting of postal ballots, his response, “when I went there (i.e counting centre for postal ballots) my party agents had raised objections to the election officials in cases where ink was seen on both sides, the tick mark was not clear or when there were doubt tick marks. Those votes were kept separately as doubtful votes”. His response was “The counting officer at the postal ballots table requested the Returning Officer at 06.00 p.m, to clear the doubtful votes. Thereafter, the Returning Officer, Election Observer, myself as the chief agent of the 1st respondent and chief agent of the election petitioner and other agents went into the counting centre for postal ballots. The Returning Officer took each of the doubtful votes and showed it to all the agents present there and explained and clarified the doubtful votes as to why they were valid or invalid and segregated them accordingly as valid



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and invalid votes.

24. RW-1(Mr.P.Subbiah) to the question what happened after the decision on doubtful votes, he has responded as below:-

“After the doubtful votes were decided, the Election Observer and Returning Officer asked the counting officials to count the postal ballots. Thereafter, counting of postal ballots started. The postal ballots cast for each candidate was divided into bundles of 50s and they were taken up for counting. After the counting was completed, the Election Observer asked the counting official to announce the results of the postal ballots”. These answers were elucidated from his own witness (RW-1) during the chief examination.

25. In the cross examination by the learned counsel appearing for the Election Petitioner, this witness (RW-1) had answered that the segregation of postal ballots went till 12.30 p.m counting of postal ballots started between 05.00 p.m and 06.00 p.m.



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26. Mr.V.Raja (RW-2), the counting agent for the first respondent assigned for the postal ballot centre, in chief, has said, “At 8.00 a.m., the counting of votes commenced. At first, the postal ballots were divided into bundles of 50. Subsequently, each cover was opened. The big cover contained a Declaration Form and a smaller envelope. The officials, after checking whether the serial number of the bigger envelope and the Declaration Form matched, showed it to the agents. They checked for the name, signature and attestation on the Declaration Forms and showed it to the agents. If the officials found any problem in the Declaration Form or if the agents raised any objections, those votes were kept separately. When the Declaration Form was found correct, the smaller envelopes were opened. The vote in the smaller envelope was checked for which candidate it was cast and was shown to all the agents. In cases where the agents raised objections, the votes were kept aside. The valid vote was placed in the box corresponding to the candidate's name it was cast”.



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27. RW-2 had further deposed that, the postal votes were tied into bundles of 50 each. This process continued till 06.00 p.m After the votes were segregated, the Returning Officer was brought in. The Returning Officer scrutinised the doubtful votes that were kept aside and segregated them as valid and invalid votes. The votes that were declared as valid were put into the boxes for each of the corresponding candidate. The decision of the Returning Officer was accepted without any objection from all the agents.”

“The votes secured by each candidate were counted. After the counting of votes, the observer was brought in. The observer asked the Returning Officer to verify whether the votes secured by each candidate were correct. After verification, the votes counted were found correct and there was no change from the result of the first counting. After that, they announced the votes secured by each candidate. The same was brought in writing and the signatures of all the agents were obtained”. This witness was examined in chief on 30.03.2023, after the Returning Officer



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(CW-1), who was examined on 12.12.2022 and 11.01.2023. Hence he had been tutored to improvise and embellish the facts which are not spoken by the official witnesses.

28. Neither the Returning Officer nor RW-1, the Chief Agent of the first respondent, in their testimony had said that after the Returning Officer scrutinised the doubtful votes, the observer/s asked the Returning Officer to verify whether the votes secured by each candidate were correct. In fact, the Returning Officer (CW-1) to the question put by the Court did he recount or reverify the postal ballots, the Returning Officer (CW-1) had answered that he counted thrice on his own. Also, he had answered that he did not recount after the victory margin was ascertained. The Returning Officer admits that he did not comply with the mandate instruction in para 15.15:4.15 of the Hand Book of the Returning Officer.

29. In this petition, one of the relief's sought is to declare the election of the returned candidate namely, S.Palani Nadar the first



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respondent herein to be void.

Section 100(1) of the Representation of the People Act, 1951:-

100. Grounds for declaring election to be void.—

[1]Subject to the provisions of sub-section (2) if 2[the High Court] is of opinion—

(a).....

(b).....

(c).....

(d)that the result of the election, in so far as it concerns a returned candidate, has been materially affected

—

(i)by the improper acceptance or any nomination,
or

(ii)by any corrupt practice committed in the interests of the returned candidate 5[by an agent other than his election agent], or

(iii)by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv)by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, 2[the High Court] shall declare the election of the returned candidate to be void.] 6[(2)] If in the opinion of 2[the High Court], a returned candidate has been guilty by an agent other than his election agent, of any corrupt practice 7[***] but 2[the High Court] is satisfied—



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(a)that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and 8[without the consent], of the candidate or his election agent; 9[***]

(c)that the candidate and his election agent took all reasonable means for preventing the commission of corrupt 10[***] practices at the election; and

(d)that in all other respects the election was free from any corrupt 11[***] practice on the part of the candidate or any of his agents, then 12[the High Court] may decide that the election of the returned candidate is not void.”

The High Court shall declare the Election of the Returned candidate to be void.

30. Section 83 of the Representation of the People Act, 1951 deals with the formate of the Election Petition and it reads as below:-

“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



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practice that the petitioner alleges including as full a statement as possible of the names 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: 2[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.”

31. The Hon'ble Supreme Court in *Ashraf Kakkur v. V.Abdul Dhader* reported in *[(2014) AIR SCW 4913]* had held that furnishing of facts in a compendium manner amounts to conscious statement of material facts. In the present petition under consideration, the facts furnished by the election petitioner capsulised at paragraph No.3 (i) to (vii) of the earlier part of the order satisfies the said requirement and therefore, the contention of the learned counsel appearing for the first



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respondent that, the election petitioner suffers conscious statement of facts has to be rejected out rightly.

32. The contention of the learned counsel appearing for the first respondent that, failure to comply the instruction 15.15.4.15 had not materially affects the result to order recount or unless a request for recount is made, the Returning Officer is not bound to recount the votes do not hold water. Whether the unsuccessful candidate asks for reverification or not, it is mandatory on the part of the Returning Officer to re-verify all the rejected postal ballot papers before declaration of the result and whenever such reverification done, the entire proceedings shall be videographed as per the instructions in paragraph No.7 of the Commission's letter No.470/2009/EPS, dated 21st January, 2009.

33. The judgement relied by both the rival parties, without any doubt, has held that instruction contained in the Hand Book of Returning Officer, are issued by the Election Commission of India in exercise of its statutory function and therefore binds the Returning Officers.



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34. The instruction to re-verify the postal ballot papers which are rejected as invalid at the time of counting, becomes mandatory when the margin of victory is less than the number of postal ballots rejected as invalid. This instruction has a purpose and meaning. To avoid unnecessary doubt and dispute, the Election Commission has mandated the Returning Officer to videograph the process of the reverification of invalid votes and after reverification result has to be declared. Earlier, for the entire postal ballots the exercise of recounting was to be done. Later after taking note of the fact that there is huge increase in voters opting for postal ballots, the instruction got modified by restricting reverification of rejected votes alone. The Returning Officer is mandated to undertake the exercise of reverification, whenever the victory margin is less than the rejected votes. It has to be done on his own and needless for objection in writing.

35. In this case, the witnesses on the side of the petitioner as



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well as the first respondent and the Court witnesses admits that the counting process stopped after the 27th round of EVM. There was commotion and objections. They were asked to take up the counting of Postal ballots. Then, the votes which kept apart as doubtful were scrutinised by the Returning Officer. The counting of postal ballots resumed and postal ballots result was first announced thereafter, the counting of EVM from 28th round resumed.

36. Ex.C1 is Form-17C, Part II-Result of Counting. This document is signed by the Counting Supervisor and it is dated 02.05.2021. CW-3 [Mrs.D.Murugaselvi], Assistant Returning Officer, in-charge of the counting of postal ballots, had deposed that she has prepared Ex.C1 the date found in the first column i.e. ETPBS was given by the Assistant Returning Officer, in-charge of ETPBS and the second column i.e. postal ballots was filled up by her based on the counting of postal ballots in her presence and the third column is the sum of columns one and two. The first signature found in Ex.C1 is her signature and she



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does not know, who is the second signatory. Going by her testimony, only 2490 postal ballots received by her for counting.

37. Ex.C3 is the Register maintained for the receipt of the postal ballots. A perusal of this Register (Ex.C3) indicates that from 29.03.2021, the RO started receiving the postal ballot covers. The number of postal ballot covers received each day is entered in this register. As per this Register, the total number of postal ballot covers received by post till 01.05.2021 was 1483. On the date of counting i.e. on 02.05.2021, 9 postal ballot covers been received. Therefore, the total number of postal ballots received as per Ex.C3 is only 1492. The same Register also contains details about the number of postal ballot covers received at Facilitation Centre in person and by post. This part of Ex.C3 gives the details about the postal ballot covers received from Polling Personnel, Absentees voters above 80+ and a person with disability (PWD) etc. Till 01.05.2021, the total number of postal ballot covers received so received is shown as 1341. The total number of covers



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received under both the categories is shown as 2824. On the date of polling i.e. on 02.05.2021, the covers received is shown as 9.

38. The entries found in the second part of Ex.C3 which provides the details about the votes received at Facilitation Centre and collected from the Special Team indicates that it is a consolidated statement of the postal ballot covers received under both the categories. In Ex C-3, the abstract of the total number of postal ballot covers is shown as 2833. Out of which, 2490 accepted as valid vote, 336 votes were rejected and 7 votes were held invalid. The figure found in the Register (Ex.C3) and the figure given in Form-17C, which is marked as Ex.C1, does not tally. The abstract of the postal ballot covers received as found in Ex.C3 and signed by the Returning Officer (CW-1) gives the following break up data, date wise:-

Date	Details	No. of the covers received
26.03.2021	Polling Personnel	387
30.03.2021	Absentees votes by 80+ and a person with disability votes	317



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Date	Details	No. of the covers received
31.03.2021	Police Facilitation Centre	177
	Absentees voters by 80+ and PWD voters	67
01.04.2021	Police Personnel	84
03.04.2021	Postal covers received from the third round of training	309
	Total	1341
	Covers received through post	1492
	Total	2833

39. The extract of total postal ballot covers received before counting as found in Ex.C3 is contrary to Form-17C (Ex.C1). The next page to the extract contains the number of votes secured by each of the candidates from out of the postal ballots. This again does not say anything about 99 ETPBS votes mentioned in Form-17C. As per Form 17C (Ex.C1) total number of valid postal ballots includes of ETPBS is 2589. In Ex.C1, Form-17C, the successful candidate S.Panai Nadar has secured 1609 votes and the election petitioner has secured 674 votes. Whereas in Ex.C1, where CW1 the Returning Officer has signed the total number of postal votes secured by successful candidate Palani Nadar is



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1581. The vote secured by Selva Mohandas Pandian is 645. Two contradictory documents have been placed before this Court by the Returning Officer (CW-1) and the Assistant Returning Officer (CW-3). Both were not in a position to explain this Court how this discrepancies has crept. .

40. The learned Counsel appearing for the first respondent made all his efforts to reconcile the discrepancy but in vain. At this juncture, it is also pertinent to record certain answers given by the Returning Officer which would show that he neither understood the procedure and guidelines given to him by the Election Commission of India nor followed it by default.

Question :Do you know the date on which the Final List of Voters was notified?

Answer :Do not remember.

Question :Do you know the total number of voters as per the Final List of Voters for No.222, Thenkasi Assembly Constituency?



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Answer :I have not brought the records pertaining to this.

Question :Can you confirm how many postal ballots were issued to service voters?

Answer :371 requests were received, out of which one was rejected as not eligible and 370 were issued. The postal ballots that were received were 137 after casting their vote.

Question :What was the last date and time of you to receive the postal ballots?

Answer :02.05.2021 at 08.00 a.m. The number of postal ballots received at the facilitation centre was 957 and 1483 were received by post.

Question :Did you receive any postal ballots on 02.05.2021, the day of counting?

Answer :I received 14 postal ballots. I do not have the records for the same.

Question :Do you know the total number of postal ballots counted by you on 02.05.2021?



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Answer :The total number of postal ballots counted was 2490.

Question :After the completion of counting of postal ballots, did you prepare the list of accepted and rejected votes and get the signature of the counting agents?

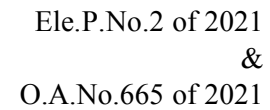
Answer :Yes. The ARO has signed it and has given it. I am producing the original of Form 17C from the file in which the counting supervisor as well as the agents of the candidates, who were present, signed. I as Returning Officer have also affixed my sign in the said Form 17C produced and the same is marked as Ex.C1.

Question :Do you know the number of NOTA votes in postal ballots?

Answer :Since there is no column of NOTA in postal ballots, there is no votes for NOTA.

Question :Is it correct to state that in both Exs.P13 and P15, there is a column for NOTA in postal votes recorded and 13 votes have been recorded against NOTA?

Answer :Yes



Question :Is it correct to state that in both Exs.P13 and P15,



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there is a column for NOTA in postal votes recorded and 13 votes have been recorded against NOTA?

Answer :Yes

Question :In Ex.P13, the total number of electors in the Assembly Constituency is mentioned as 2,92,168 and in Ex.P15, it is mentioned as 2,92,538. Therefore, I put it to you, there is a difference in the total number of electors mentioned in Ex.P13 and Ex.P15.

Answer :The number of voters mentioned in Ex.P13 is the correct number of voters in the Assembly Constituency of Tenkasi.

Court Question:Why there is a discrepancy in the total number of votes mentioned in Ex.P13 and Ex.P15.

Answer :It is a clerical error.

Court Q :Is that the only error in Ex.P15 or there is any other error in the entries found in Form 20 marked as Ex.P15.

Answer :There is no other error. I am producing Form 21-E. It contains the total number of votes secured by each candidate and the



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declaration of the winning candidate. The said Declaration Form is marked as Ex.C2.

41. Form-20 (Final Result Sheet) as furnished by the Returning Officer to the Election Petitioner is Ex.P15. The Final Result uploaded in the ECI website and down loaded from the Election Commission website by the petitioner is Ex.P13. The details pertaining to the number of votes recorded on postal ballot papers in found in Ex.C1, This is the form signed by ARO, Murugaselvi (CW3), the Counting Agent of the candidates and the Returning Officer CW-1. This form tally with the particulars furnished in Ex.P13. Whereas the particulars furnished Ex.P15 regarding postal ballot votes includes 382 rejected votes and it shows that the total number of postal ballots is 2971. CW-1[Returning Officer] tried to justify the omission to mention the rejected votes in Form 21 as found in their website by saying that there is no column for rejected votes in the said Form. However, it is pointed out that there is a column in the Form 20 as exhibited in Ex.P13. He takes umbrage of the Election



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Commission by saying Election Commission of India had instructed not to mention rejected votes. But, there is no written communication to that effect. When he was cross examined by the learned counsel appearing for the Election Petitioner on 12.12.2022, the Returning Officer had deposed that on the date of counting he received 14 postal votes. Twenty days later, when he was cross examined by the learned counsel appearing for the first petitioner on 11.01.2023, he had deposed that he received 9 postal votes on the date of counting. To the question put by the learned counsel appearing for the first respondent, what is the total number of postal ballots received from all categories prior to the commencement of counting? the Returning Officer has answered that he received 2970 postal ballot covers. Out of which, 2589 votes were found to be valid votes. If his oral testimony is true, then it goes contrary to the entries found in Ex.C3 abstract. He has signed below the extract which shows that the total number of postal ballots covers received is 2833.

42. The Returning Officer admits that, at the request of the first



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respondent Agent he stopped the counting of EVM between 27th and 28th round and came to the postal ballot counting centre to scrutinise the doubtful votes. After that the counting of postal ballots continued and result of the postal ballots declared. The Stoppage of EVM counting is not necessary as per the guidelines, but he has obliged the agents of the first respondent and had stopped the counting of EVM votes.

43. Regarding the doubtful votes and invalid votes, which were received through post, the Assistant Returning Officer in charge of counting of the postal ballots was cross examined. She had deposed that the total number of postal ballots received was 2971. The Assistant Returning Officer, who was in charge of scrutinise the declaration form in the postal ballots, opened the cover and segregated it into valid and invalid votes. The valid votes were bundled in 50's and given to her. She open the postal ballots cover and showed it to the agents against which the candidate vote was cast and then she put it in the box corresponding to the candidate symbol. She had deposed that about 50 votes were kept



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aside as doubtful votes. The segregation of votes into valid and invalid and doubtful got completed at 7.00p.m According to her 382, postal ballot votes were declared as invalid. To the Court question, whether she was able to see what was happening in the EVM counting Centre from the postal ballots counting Centre? She has answered as below:-

“No. But at around 6.00 p.m., there was commotion at the EVM counting centre for withholding the counting of EVMs till the completion of postal ballots counting. The Returning Officer told the EVM counting supervisor and the postal ballots counting supervisor that, the EVM can be counted only after the completion of the counting of postal ballots.”

Question :Did any recounting of postal ballots take place?

Answer :No

Question :Would it be correct to state that the total number of postal ballots viz. 2971 could not have been announced based on Ex.C1?

Answer :Yes

44. To the question, are you aware that in case the difference in



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the margin of victory is lesser than the total number of postal ballots, the postal ballots have to be reverified and recounted? The Returning Officer CW-1 had answered that he do not know and he has specifically admitted that he has not recounted the postal ballot after the victory margin was ascertained. He admits that the counting of EVM votes was stopped during the 28th round or 29th round since the counting of postal ballot was not completed till then. Thereafter, they continued the counting of postal ballot and after its completion, they resumed the counting of EVM votes. These are the some of the answers given by the Returning Officer which exposes the fact that he was not placing with the Election Conduct Rules and Guidelines. Further, the error in the discrepancies in the number of voters in the said constituency, the number of votes polled and the number of postal ballot covers received and the number of rejected postal votes/ the number of invalid votes were not consistent in their records maintained.

45. The material irregularity found from the records and the



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evidence given by the witnesses can be re-capsulised as below:-

As per the Returning Officer (CW-1) evidence the postal ballots received at the Facilitation Centre was 957 in person and 1483 were received by post. He received 14 postal ballots on the date of counting ie. On 02.05.2021. Contrarily Ex.C3, the Register maintained in the course of Election, the extract indicates that the number of postal ballot covers received from the Facilitation Centre and by a Special Team is 1341. The number of postal ballot covers received through post is 1492. Thus, the total number of postal ballot covers received is 2833. This extract found in Ex.C3 signed by the Returning Officer CW-1.

46. When the Returning Officer asked about the exact number of postal ballots received from all the categories, he had stated that he received 2970, out of which, 2589 votes were found to be valid votes. While referring to the declaration of result, Form-21E marked as Ex.C2, the total number of rejected votes is shown as 382. Whereas, Ex.C3



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Register, the Returning Officer signed the extract of postal ballots details and in the extract, it is stated that the total number of postal ballot received is 2833, the valid postal ballot votes is 2490, rejected votes is 336, invalid votes is 7. Thus, the Register in Ex.C3, which contains the day to day receipt of postal ballots both from post as well as from the Facilitation Centre indicates that the total number of postal ballots cover received is 2833. The Returning Officer (CW-1) says the total number of postal ballot received is 2970. CW-3 had deposed that the total number of postal ballots received is 2971, but, in the register (Ex.C3) account for only 2833 votes available.

47. While the rejected votes/invalid votes is only 343 as per the Register (Ex.C3), the declaration Form (Ex.C2) indicates that the rejected votes is 382. In this regard, it is also relevant to see the deposition of the Election Agent representing the first respondent as well as the Assistant Returning Officer in charge of the postal ballots counting. According to



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RW-2, V.Raja, the Counting Agent of the first respondent, about 500 doubtful votes were kept aside while counting the postal ballots. D.Murugaselvi (CW-3) Assistant Returning Officer had deposed that around 50 votes were kept aside as doubtful votes.

48. This Court. on further perusing Ex.C3, finds that on the date of polling, the Returning Officer has received two bags from the Postal Department. One bearing No.SP BAG EBT7007834684-Total number of Articles (03). Another bag bearing No.L BAG LBT6002517015-Total Number of Articles (07). In the acknowledgement Slip, Postal Ballot Special Bag ML, Tirunelveli RMS/2A Dated 01.05.21, the Returning Officer has received and signed on 02.05.2021. Therefore, from this slip, it could be seen that on the date of polling, the Returning Officer has received (3+7), totally 10 postal ballot covers. This is not in consonance with the evidence given by the Returning Officer (CW-1), who at the first instance had deposed he received totally 14 postal ballots cover on the date of counting. Later altered his stand and said he received only 9



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covers on that day. Both found wrong in the light of the acknowledgements slips referred above. In this regard the witnesses. RW-2 (Mr.Raja), who is the counting Agent of the first respondent had deposed that on the date of counting 10 votes were received from the postal department and the total number of postal ballot is 2971. Contrarily, Ex.C3[Register] discloses, only 9 votes received on 02.05.2021. In this connection, it is worth to refer Ex.P4 and Ex.P5, which contains statement of postal ballots. Both are dated 01.05.2021. This exhibit provides particulars about postal ballots received till 01.05.2021. One exhibit is for absentee voters and another exhibit is for service personnel, polling staff, micro observers and police personnel. As per these two exhibits for 222-Tenkasi Assembly Constituency, totally 957 votes been received from the Facilitation Centre and 1483 votes received by post. Totally 2577 votes received as on 01.05.2021.

49. Ex.P5 is the compiled Statement of Postal Ballots in the category of Absentee Voters received. As on 01.05.2021 it is 384 votes.



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Ex.P4 and Ex.P5 are two documents downloaded by the Election Petitioner from the website of Election Commission of India. He has also accompanied a Certificate of Section 65-B of the Indian Evidence Act, 1872. That apart, the Returning Officer examined as CW-1 had shown these two documents and he has compared with the originals held by him and admits that it is the copy of the original. Therefore, as per the original documents and the entry found in Ex.P4 and Ex.P5, the total number of postal ballot covers received till 01.05.2021 is 2961. On the date of polling two postal slip acknowledged by the Returning Officer indicates that 10 postal vote covers were received. However, the Register (Ex.C3) indicates only 9 votes, 7 from unregistered post and 2 from registered post were received. Contrarily, the Returning Officer had deposed that he received 14 postal ballot covers on the date of the counting.

50. Neither the data uploaded by the Election Commission of India nor the oral evidence of the Returning Officer (CW-1) and the



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Assistant Returning Officer(CW-3) tally with the day to day entry made in the register Ex.C3 for receiving the postal ballot covers. As already observed, the extract found in Ex.C3 indicates that till counting, the Returning Officer has received only 2833 votes and out of which, 336 rejected and 7 votes declared invalid. The figures found in Ex.R2 does not tally with the figures found in Exs.P4, P5 and Ex.C1-Form 17C.

51. On scrutiny of the document and from the above discussion two facts emerges without any iota of doubt. First, The Returning Officer has not complied the mandatory guidelines found in para 15.15.4.15 in the Hand Book of the Returning Officer. Next, contrary to the mandate found in para 15.15.4.15 and clarification given by the Election Commission of India vide, communication dated 18.05.2021, he had stopped the counting of EVM between around 27th and 28th and it is stopped on the objection of the agents of the returned candidate.

52. In addition to that, as per the Declaration Form-21E, which



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is marked Ex.C2, the victory margin between the returned candidate and the election petitioner is 370. The total number of rejected vote is 382. There is discrepancy and uncertainty regarding total number of postal ballot received and total number of valid postal ballots.

53. CW-3 candidly admits that at about 06.00 p.m., there was a commotion in the EVM counting centre and therefore, the counting was stopped at EVM Centre and the counting at postal ballot centre commenced. Both the above violation of the mandatory provision by the Returning Officer has materially affected the result of the returned candidate. The total number of postal ballot received itself is in contradiction and doubtful due to variation in Ex.C3 Register and Exs.P4 and P5, coupled with the testimony of the Returning Officer. That apart, total number of invalid votes and rejected votes also in contradiction with the entries found in Ex.C3 and Ex.P15. The omission to mention invalid vote in Ex.P13-Form 20-Final Result Sheet Part-I uploaded in the website of the Election Commission of India also not properly explained by the



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Returning Officer and whatever explanation he attempted to offer is childish and contrary to the document Ex.P13. When there is a specific column for number of rejected votes in the format, the Returning Officer has recorded '0' Zero but in Ex.P15 he has recorded the number of rejected votes as 382. Whereas in the Manual register maintained regarding day to day receipt of the postal ballots and the extract of the result indicates that only 2833 postal ballots were received out of which 336 votes rejected and 7 votes invalid.

54. One of the contention raised by the learned counsel appearing for the first respondent is that, till declaration of the result, the election petitioner did not give any representation, objecting the result and whatever stated in his objection, which marked as Ex.P9 to Ex.P11 not only belated but bereft of details.

55. In the light of the facts and evidence placed and the discussions made above, the submissions of the learned counsel



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appearing for the first respondent cannot be countenance since the election petitioner has stated that his agent made objection at the counting centre itself and the objections were not considered by the Returning Officer and therefore, the next day i.e. on 03.05.2021 he sent a representation to the authorities concerned including the Returning Officer. The contention of the representation specifies that there is contradiction in the data. Invalid votes been accepted and taken for counting at the end of the 27th around. The postal ballots were taken up for counting and before that, the Returning Officer left the counting centre and returned after 25 minutes. He has requested for video graph of the recounting of postal ballots and till then, the announcement of the result is kept in abeyance. When the Returning Officer was asked about this representation, he has answered that since result already declared he did not act upon the representation. It is not his case that the allegation made against him about the manner in which the postal ballot votes counted is incorrect.



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56. This Court being conscious of the legal position that in the absence of positive proof of material effect on the result of the election of the returned candidate, the election must be allowed to stand and the Court should not interfere with the election on speculation and conjectures.

57. The burden of proving the material effect on the result of election is always on the election petitioner challenging the validity of the election of the returned candidate.

58. To emphasis the above legal principles, the following judgments relied on by the learned counsel appearing for the 1st respondent :-

1. Shiv Charan Singh v. Chandra Bhan Singh [1988(2)SCC 12];
2. Uma Ballav Rath(Smt.) v. Maheshwar Mohanty (Smt) and others [1999(3)SCC 357];
3. Ram Sukh v. Dinesh Aggarwal [2009(10)SCC 541];



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- 4.Kalyan Kumar Gogoi v. Ashutosh Agnihotri and another [2011(2) SCC 532];
- 5.Kalyan Singh Chouhan v. C.P.Joshi [2011(11) SCC 786];
- 6.Mangani Lal Mandal v. Bishnu Deo Bhandari [2012(3)SCC 314]; and
- 7.Jitu Patnaik v. Santan Mohakud and others [2012(4)SCC 194].

59. After going through the judgements vis-a-vis the evidence, it is obviously clear that the Returning Officer has failed to re-verify the invalid votes in the postal ballots. There is a clear case established by the petitioner that the Returning Officer has not maintained proper records for receiving the postal ballots and the records, which are submitted before the Court is contrary to each other. It does not indicate the correct number of postal ballots received category-wise. The Register Ex.C-3 which is maintained for recording the receipt of postal ballots is more authenticated since it is kept in the course of election and records day to day receipts. This Register (Ex.C3) and Ex.P4 and Ex.P5 and Ex.C1



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gives different figures of total postal ballot received, valid postal ballots, invalid postal ballots and rejected votes. To cap all Ex.P13 does not mention the total invalid postal votes at all..

60. The election petitioner contends that till 27th round the petitioner was leading. The irregularity and violation occurred only after 03.00 p.m, when the results of other constituencies in the general election was in favour of the party to which the returned candidate belongs. Therefore, he pray for recounting of EVM votes from the round 28th to 30th. Though the petitioner has made out the case, the evidence placed before this Court does not disclose strong reason to hold that there was irregularity in the counting of EVM votes from round 28th onwards. Therefore, the prayer for recount of all votes polled by EVM Machine covered under counting rounds No.28,29 and 30 is declined. In the result, Issue framed are answered as below:-

The Hand Book for Returning Officer is issued by the Election Commission of India in exercise of the Statutory function. They are



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issued for effective conduct of the Election and any infraction of the instruction, if materially affects the result, the Court is empowered to interfere with it. In this case, though the victory margin is less than the number of postal votes declared as invalid, the Returning Officer was not aware of this mandatory instruction and failed to re-verify the invalid votes. The oral and documentary evidence not consistent about the that the number of postal votes received and the number of reject/invalid votes. The numbers are apparently manipulated to declare the first respondent as successful candidate. The infraction squarely attracts Section 100(1)(d) (iv) of the Representation of the People Act, 1951.

(i)Issue No.1: Whether the Returning Officer improperly received void postal ballots?

From the evidence as discussed above, Ex.C3, Register reveals that only 2833 postal ballot covers were received. Whereas Ex.P4 and Ex.P5 for 222, Tenkasi Assembly Constituency says 2577 postal ballots covers other than the absentee voters were received by the Returning Officer till 01.05.2021 and 384 votes received from the absentee voters as on



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01.05.2021. On the date of the Election, the postal slip kept along with Ex.C3 indicates, totally 3+7 postal ballots cover received. Whereas the entries found in Ex.C3 indicates that only 9 votes received on 02.05.2021. Contrary to these two records, the Returning Officer has deposed that on that day, he received 14 postal ballots. The counting Agent of the first respondent had deposed that on that day, 10 postal ballots received. Thus there is clear discrepancies In the total number of postal ballots received till 01.05.2021 as well as on 02.05.2021. . While the Register Ex.C-3 shows a lesser number of postal ballots received and it contains day to day break up the postal ballots received, the consolidated statement provided under Ex.P4 and Ex.P5 does not tally with the Register maintained (Ex.C3). That apart, Form-17C which is marked as Ex.C1, is contrary to the final result. Hence, it is very clear case of improper receipt of postal ballots. Therefore, Issue No.1 is answered in affirmative.

(ii)Issue No.2:- Whether there was violation of Rule 54-A in counting the postal ballots?



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Apart from the witnesses for the petitioner, the Agent of the first respondent as well as the Assistant Returning Officer admits that, there is objections regarding the validity of the postal ballots. Those doubtful votes were segregated and kept separately for the decision of RO. While the Agent for the first respondent had deposed that, there were about 500 doubtful votes, and they were kept aside for the Returning Officer's decision. The Assistant Returning Officer, who was in charge of counting the postal ballots had deposed that only about 50 votes were doubtful votes and was kept aside for RO decision. She is not sure the number of votes sent to her table for counting. She from the records states that 2971 postal ballots were received. However, Form-17C (Ex.C1) in which she has signed the total number of valid votes received is shown as 2589, which includes NOTA votes. This statement according to the witness, excludes the invalid votes. RW-1, the Returning Officer had deposed that the total invalid postal votes is 382. Section 54 A of the Conduct of Elections Rules, 1961 lay down the procedure for counting of votes received by post. For convenience say, the above Rule is extracted below:-



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54A. Counting of votes received by post.—

(1)The returning officer shall first deal with the postal ballot papers in the manner hereinafter provided.

(2)No cover in Form 13C received by the returning officer after the expiry of the time fixed in that behalf shall be opened and no vote contained in any such cover shall be counted.

(3)The other covers shall be opened one after another and as each cover is opened, the returning officer shall first scrutinise the declaration in Form 13A contained therein.

(4)If the said declaration is not found, or has not been duly signed and attested, or is otherwise substantially defective, or if the serial number of the ballot paper as entered in it differs from the serial number endorsed on the cover in Form 13B, that cover shall not be opened, and after making an appropriate endorsement thereon, the returning officer shall reject the ballot paper therein contained.

(5)Each cover so endorsed and the declaration received with it shall be replaced in the cover in Form 13C and all such covers in Form 13C shall be kept in a separate packet which shall be sealed and on which shall be recorded the name of the constituency, the date of counting and a brief description of its content.

(6)The returning officer shall then place all the declarations in Form 13A which he has found to be in



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order in a separate packet which shall be sealed before any cover in Form 13B is opened and on which shall be recorded the particulars referred to in sub-rule (5).

(7)The covers in Form 13B not already dealt with under the foregoing provisions of this rule shall then be opened one after another and the returning officer shall scrutinise each ballot paper and decide the validity of the vote recorded thereon.

(8)A postal ballot paper shall be rejected— 2[(a) if it bears any mark (other than the mark to record the vote) or writing by which the elector can be identified; or] 3[(aa)] if no vote is recorded thereon; or

(b)if notes are given on it in favour of more candidates than one; or

(c)if it is a spurious ballot paper; or

(d)if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established; or

(e)if it is not returned in the cover sent along with it to the elector by the returning officer.

(9) vote recorded on a postal ballot paper shall be rejected if the mark indicating the vote is placed on the ballot paper in such manner as to make it doubtful to which candidate the vote has been given.

(10)A vote recorded on a postal ballot paper shall not be rejected merely on the ground that the mark indicating the vote is indistinct or made more than once,



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if the intention that the vote shall be for a particular candidate clearly appears from the way the paper is marked.

(11)The returning officer shall count all the valid votes given by postal ballot in favour of each candidates, record the total thereof in the result sheet in Form 20 and announce the same.

(12)Thereafter, all the valid ballot papers and all the rejected ballot papers shall be separately bundled and kept together in a packet which shall be sealed with the seals of the returning officer and of such of the candidates, their election agents or counting agents as may desire to affix their seals thereon and on the packet so sealed shall be recorded the name of the constituency, the date of counting and a brief description of its contents.]

From both CW-1(Returning Officer) and CW-3(Assistant Returning Officer, in-charge of counting the postal ballots), there is no clarity whether the procedure mention above was followed scrupulously while counting the postal ballots. Specifically there is no answer available regarding who decided about defective votes and when and by whom the decision regarding defective votes finally arrived or how many postal vote covers sent to the Assistant Returning Officer's table for counting.



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Further, witnesses uniformly admits that there was objection regarding the validity of the votes and the doubtful votes were kept aside for scrutiny and decision. CW-3 Assistant Returning Officer, had deposed that to her table, only the postal ballots cover which were found with valid Declaration Form sent to her table. She is not clear about how many postal votes, which were not taken up for counting for want of proper declaration. Neither CW-1 the Returning Officer has stated about the postal votes which were not taken up for counting for want of proper declaration or other defects mentioned in Rule 54 A of the Election Conduct Rule, 1961.

CW-3 had deposed that about 50 postal ballots were found invalid during the course of counting. However, the Final Result declaration form indicates 382 postal votes were found rejected. If in the course of counting only about 50 votes were rejected, then nearly 332 votes should have been found defective for improper declaration or for other reasons. However, the Register Ex.C3 indicates that, 336 votes were rejected and 7 votes alone were found invalid. From total 2833 postal covers received,



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343 votes were rejected/invalid. This figure contradicts with the final declaration which says the total postal ballots is 2970. CW-3, the ARO of the counting table says the total postal votes is 2971. Valid votes including NOTA 2589. RO explains one vote found mutilated hence not taken up for counting. If so whether that vote was ignored or classified under defective or invalid could not be ascertained from the records or testimony of the witnesses. Therefore, it is obvious Rule 54-A of the Conduct of Elections Rules, 1961 grossly violated during the counting of postal ballots. Hence, Issue No.2 is answered in affirmative.

(iii) Issue No.3: Whether there was embellishment in the numbers of postal ballots received for Constituency No.222, Tenkasi Assembly?

It has been elaborately discussed above, the total number of postal ballots of all category received till 02.05.2021 is only 2833 as per Ex.C3. Whereas in Ex.P13 the Returning Officer has informed that totally 2589 votes recorded and 'zero' vote rejected. In Ex.15, RO had certified totally 2971 postal ballots votes received, out of which 382 votes rejected. A



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clear embellishment of postal ballots received is established on comparing the data furnished by the Election Commission regarding the total postal ballots received and found valid when the entries in the Register Ex C-3 is compared.

This Court could see the material difference in the entries made in Ex.C3 and Form 20, 17C and 21-E. The Register, which is maintained at the Returning Officer office, from the date of Code of Conduct come into force, contains the details about the postal ballots received on each date either by post or in person. This the authenticated record maintained in the course of conduct of election. When this register shows totally 1341 votes received from election duty personnel, senior citizen 80+, a person with disabled, police personnel and 1492 votes received from the post from the other categories what is found in Ex.P4 and Ex.P5 is a different number, that is 2577 votes received from eligible voters other than 384 votes received from the absentee voters. In view of the said embellishment, Issue No.3 is answered in affirmative.

(iv)Issue No.4:- Where there is discrepancies/mismatch in



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respect of Form No.20 (Result sheet) uploaded in the website of the Election Commission of India and the manual Form 20 issued by the Returning Officer?

Ex.P15 is the Form-20 Final Result Sheet uploaded in the website of the Election Commission. Ex.P13 Manual Form issued by the Returning Officer. The Returning Officer has candidly admitted the data found in these two documents varies and there is an error in it. The discrepancy and mismatch between these two documents in normal course may not be view as serious error and could have been ignored. But, in the case in hand, a serious doubt about the rejection of the postal ballots been raised and the doubt is substantiated by the discrepancies and mismatch of data in all the records. Since the discrepancies and mismatch materially affect the result owing to the fact that the victory margin is 370 votes and the rejected votes as per Ex.P13 is shown as zero. Whereas under Ex.P15 the final result show the rejected vote as 382 and much contrary to these two documents, in Ex.C3, rejected vote is shown as 336 and invalid votes as 7, totally, 343 votes. Therefore, this



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issue is also answered in affirmative.

(v) Issue Nos.5 and 7:- The written representation by the Election petitioner reporting about irregularity in counting admittedly sent by post only on 03.05.2021. The Returning Officer, who was examined as CW1, admits that he received this representation. He has categorically denied to the suggestion that the Election Agent of the petitioner made objection at the time of counting. The election petitioner not able to furnish the copy of the so called written representation. Therefore, it is strongly contended by the learned counsel appearing for the first respondent that the representation which has been marked as Ex.P7 to Ex.P12 were made belatedly and therefore, the request for recount cannot be entertained, in view of Rule 63(2) of the Conduct of Elections Rules, 1961.

Rule 63(2) of the Conduct of Elections Rules, 1961 reads as below:-

Rule 63(2): After such announcement has been made, a candidate or, in his absence, his election agent or any of his counting agents may apply in writing to the



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returning officer to re-count the votes either wholly or in part stating the grounds on which he demands such re-count.

According to the learned Senior Counsel appearing for the election petitioner, the Agent of the election petitioner made objection at the time of counting itself soon after completion of counting, but there is no documentary proof to that effect since RO refused to receive it. Hence, objections were sent by post on the next day of the counting and receipt of the objection is admitted by the Returning Officer, when the statute prescribes that the objection must be in writing after completion of counting and the Returning Officer records result in Form 20. Obviously, in this case, the written objection sent by post is after declaration of the result which has happened in the late night of the 2nd May 2021. This may be a probable reason to decline recount of votes insofar as votes recorded in EVM. Whereas, the reason to recount the postal ballots stands on a different footing and even if there is no request for recount, as per the instruction in para 15.15.15, the Returning Officer has to re-verify the postal ballots declared as invalid since the victory margin is less than



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the invalid votes. For reverification and video graph the process in entirety is not on the request of the candidate but should have been done on his own by the Returning Officer. In this case, the Returning Officer admits that he did not reverify the postal ballots or invalid votes of the postal ballots after ascertaining the victory margin is less than the invalid votes.

It is well settled salutary principle that if a statute provides for something has to be done in a particular manner then it has to be done in that manner and no other manner. In the instant case, the Returning Officer been instructed by the Chief Election Commission that wherever the margin of victory is less than the principle of postal ballot papers rejected as invalid at the time of counting, all the rejected postal ballot papers shall be mandatory reverified before declaration of result and whenever such reverification is done, the entire proceedings should be video graphed.

The learned counsel appearing for the first respondent tried to distinguish and make out a difference between reverification and



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recounting. No doubt, these two terms connote different meaning. As far as this case is concerned, mere reverification will not suffice. Reverification necessary should follow recounting also, since it is proved that there is irregularity and discrepancies in total number of postal ballots received and taken for counting. Mere reverification will not cure the violation committed by the Returning Officer. Recounting of all the postal ballots alone will make clear all the un-answered queries regarding the postal ballots. Hence, the submission made by the learned counsel appearing for the first respondent is rejected as unsustainable.

Gross violation of the mandatory provision during the counting of Postal Ballots is well established by the election petitioner. He has also further established that the Returning Officer has not maintained the records properly in respect of the total postal ballots received and total postal ballots rejected and reason for rejection. Though CW-1 had claimed that on his own, he recounted the postal ballots thrice, he admits that those counting were done prior to ascertaining the victory margin. His evidence that he recounted the postal ballots thrice, is not



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corroborated but contracted by the testimony of CW-2 who had deposed that there was no reverification or recounting of postal ballots. In view of this Court, as far as the counting of postal ballots are concerned, for the reason stated above, Rule 63(2) of the Conduct of Elections Rules, 1961 will not be a bare but in so far as the prayer for counting EVM votes for the rounds 28th, 29th and 30th the failure on the part of the election petitioner/his agent to make out case for recount dis-entitle the relief seeking counting of EVM round 28th, 29th and 30th. Therefore, Issue Nos.5 and 7 are answered accordingly.

(vii)Issue No.6: Secrecy of ballot is sacrosanct and cannot be allowed to be violated on suspicion or on frivolous reasons. Ordering recount is not to make a roving enquiry to fish out points, but must be on unshakeable reasons. Interfering the election result by Tribunal must be exception and be on proven facts which have material effect on the result. The *Hon'ble Supreme Court in Bhabhi v. Sheo Govind & Ors. Reported in [1976 SCC (1) 687]* has laid down the following conditions:-

(1) That it is important to maintain the secrecy



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of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

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

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

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

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

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.”



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If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper.

These directions of the Hon'ble Supreme Court have been meticulously applied in this case and after hearing the learned counsels appearing for both the parties and having perused the records and the testimony of the witnesses, the Court arrive at an irresistible conclusion that the inspection of the ballot papers received through post is necessary and imperative to ascertain the failure of the Returning Officer not following the mandatory instruction of ECI has not materially affected the result. The victory margin and total postal ballots rejected qua discrepancies in the postal votes received and counted warrants recount of entire postal ballots.

56. In the light of the above discussions, ***the Election Petition is partly allowed with cost of Rs.10,000/- to the Election Petitioner***



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payable by CW-1, who was functioning as the Returning Officer at the relevant point. The District Election Officer is directed to nominate a competent officer for recount of the postal ballots received for the Assembly election of No: 222 Tenkasi Assembly Constituency, Tamil Nadu held during the month of April 2021 and counted on 02/05/2021. The District Collector, Tenkasi, is directed to provide all necessary arrangement for recounting the postal ballots. The exercise of recounting to be completely video-graphed. Based on the out come of the recounting of postal ballots, the returning officer shall declare the result. The recounting of postal ballots to be commenced and completed within a period of 10 days from today. During the course of recounting, the candidates or one of his representative shall be permitted to be present in the counting table. Consequently, connected Original Application is closed.

05.07.2023

Index:yes
Speaking order/non speaking order
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Witnesses were examined on the side of the petitioner:-

PW-1 - Mr.S.Selva Mohandas Pandian
PW-2 - Mr.K.Selvakumar

List of Exhibits were marked on behalf of the petitioner:-

Ex.P1	Downloaded copy of the final result sheet in Form 20 for No.222 Tenkasi Assembly Constituency in the Tamil Nadu Legislative Assembly Elections, 2016 uploaded by the Election Commission of India on the official website.
Ex.P2	Downloaded copy of the Press note dated 26.02.2021 bearing No.EC1/PN/16/2021 issued by the Election Commission of India
Ex.P3	Downloaded copy of the Roundwise break up of votes polled by EVMs uploaded on the website of the Election Commission of India
Ex.P4	Photocopy of the complied statement of the postal ballots dated 01.05.2021 issued by the Returning Officer/18 th respondent.
Ex.P5	Original complied statement of postal ballots dated 01.05.2021 in the category of absentee voters issued by the Returning Officer.
Ex.P6	Downloaded copy of the Result sheet uploaded on the website of the Election Commission of India in respect of Tenkasi Assembly Constituency in the Tamil Nadu Legislative Assembly Elections, 2021
Ex.P7	Office copy of the letter dated 03.05.2021 sent by Selva Mohandas Pandian to the Election Commission of India
Ex.P8	Office copy of the letter dated 03.05.2021 sent by Selva



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	Mohandas Pandian to the Tamil Nadu State Election Commission.
Ex.P9	Office copy of the letter dated 03.05.2021 sent by Selva Mohandas Pandian to the District Election Officer along with the acknowledgement card.
Ex.P10	Office copy of the letter dated 03.05.2021 sent by Selva Mohandas Pandian to the Returning Officer of the Tenkasi Assembly Constituency, Election Commission of India along with the acknowledgement
Ex.P11	Office copy of the letter dated 03.05.2021 sent by Selva Mohandas Pandian to the Election Observer of the Tenkasi Assembly Constituency.
Ex.P12	Reply letter dated 19.05.2021 sent by the District Election Officer, Tenkasi, to Ex.P9 by marking a copy to Selva Mohandas Pandian.
Ex.P13	Downloaded copy of Form 20 Final Result Sheet Part-1 for No.222 Tenkasi Assembly Constituency uploaded on the website of the Election Commission of India.
Ex.P14	Office copy of the letter dated 11.06.2021 sent by Selva Mohandas Pandian to the Returning Officer.
Ex.P15	Certified copy of the Form 20 Final Result Sheet Part 1 for No.222 issued by the Returning Officer dated 14.06.2021 along with covering letter.
Ex.P16	Certificate filed under Section 65B of the Indian Evidence Act, 1872 with respect to the electronic documents, which are marked as Exs.P1, P2,P3, P6 and P13.

Witnesses were examined on the side of the respondent:-

RW-1 - Mr.P.Subbiah
RW-2 - Mr.V.Raja



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List of the exhibit was marked on the side of the respondent:-

Ex.R1 :Certified copy of the proceedings issued by the Returning Officer with regard to the appointment of counting personal in respect of the Thenkasi Assembly Constituency 06.04.2021 in ROC No.A5/840/ 2021.

Witnesses were examined on the side of the Court:-

CW-1 Mr.N.Ramachandran
CW-2 Mr.S.Venkatesh
CW-3 Mrs.D.Murugaselvi

On the side of the Court, the following documents were marked:-

Ex.C1 :Original of Form 17C
Ex.C2 :Declaration Form 21-E
Ex.C3 :Register



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DR.G.JAYACHANDRAN,J

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