

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 18.12.2017

PRONOUNCED ON: 05.01.2018

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Election Petition No.7 of 2016 & O.A. No.750 of 2017

N.R. Dhanapalan

Petitioner

vs.

1 A. Soundara Rajan

2 R. Prakash

3 N. Raj

4 P.Vetrivel

5 S. Suresh

6 M. Mahendran

7 K. Mallika

8 K. Vasantha Kumari

9 S. Vengadesan

10 M. Venkatesh Perumal

11 S. Vetri Thamizhan

12 K. Kamaraj

13 R. Karthikeyan

14 B. Kumaran

15 G. Kothandan

16 R. Saravana Perumal

17 P. Saravanan

- 18 A. Sivarajalingam
 - 19 L. Susithra
 - 20 D. Sundara Raman
 - 21 V. Subramani
 - 22 S. Narendira Kumar
 - 23 S. Narayanasamy
 - 24 S. Parthiban
 - 25 J. Praveen Kumar
 - 26 R. Manikandan
 - 27 A. Manivannan
 - 28 G.R. Mohammed Yousuff
 - 29 S. Mohan
 - 30 P. Raja
 - 31 N. Viji
 - 32 S. Jayaraj
 - 33 The Returning Officer
No.12, Perambur Assembly Constituency/
District Revenue Officer
Perambur
Chennai
- Respondents

Election Petition filed under Sections 80 to 84, 100(1)(b)(d)(ii)(iii)(iv), 101 and 123 of the Representation of the People Act, 1951, and Rules 54, 63 and 66-A of the Conduct of Election Rules, 1961 and Rules of Madras High Court Election Petition Rules, 1961, to:

a declare the election of the Returned Candidate, viz., P.Vetrivel, the fourth respondent in respect of No.12, Perambur Legislative Constituency in the election held on 16.05.2016 in which results have been declared on 19.05.2016 as void;

b direct the 33rd respondent to re-count all the postal votes for No.12, Perambur Legislative Constituency for the election held on 16.05.2016;

c direct the 33rd respondent to re-count all votes for No.12, Perambur Legislative Constituency in the election held on 16.05.2016;

d declare that the petitioner is duly elected in respect of No.12, Perambur Legislative Constituency in the election held on 16.05.2016, which results have been declared on 19.05.2016 and

e direct the fourth respondent to pay costs of this petition.

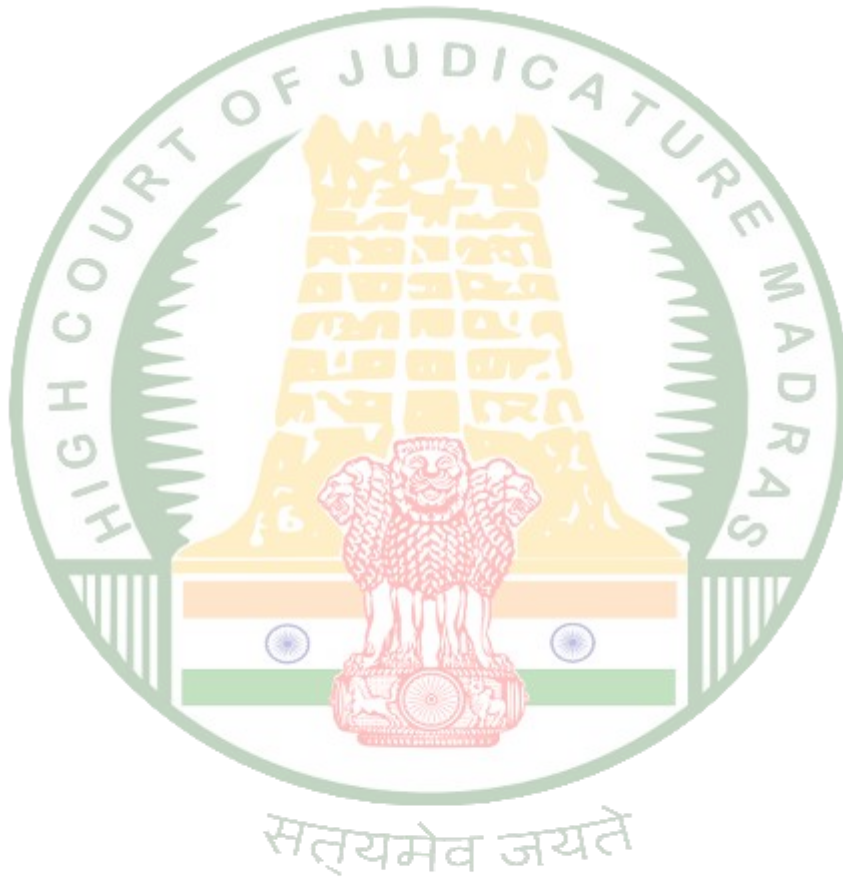
For Election Petitioner Mr. Sunder Mohan
for M/s. Manivasagam Associates

For R4 Mr. N. Raja Senthoo Pandian &
Mr. C. Subramanian

For R33 Mr. Niranjana Rajagopalan
for M/s. G.R. Associates

ORDER

For the sake of convenience, the petitioner and the fourth respondent are referred to as the Election Petitioner and the Returned Candidate respectively.



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2 The facts admitted by both sides are as under:

a While the Election Petitioner contested on the DMK ticket with "Rising Sun" symbol from 12, Perambur Legislative Assembly Constituency in the 2016 general election to the Tamil Nadu State Assembly, the Returned Candidate contested on the AIADMK ticket with "Twin Leaf" symbol from the same constituency.

b The last date for filing of nomination papers was 29.04.2016; the date of poll was 16.05.2016 and the counting of votes was on 19.05.2016.

c After the counting of votes, the Returning Officer declared that the Returned Candidate had secured 79,974 votes and the Election Petitioner had secured 79,455 votes.

d The Returned Candidate was declared the winner by a margin of 519 votes.

3 Challenging the election of the Returned Candidate, the Election Petitioner has filed the present election petition.

4 Case of the Election Petitioner:

a that the Returned Candidate has indulged in threatening and bribing the voters;

b that the Returned Candidate was planning to indulge in booth-capturing and on coming to know of it, the Election Petitioner has given a complaint dated 15.05.2016;

c that the Returned Candidate and his agents were canvassing in all the booths and influencing voters on the date of election;

d that the Returned Candidate was distributing gifts to voters;

e that on 14.05.2016, just opposite M.K.B. Nagar Police Station, there was distribution of cash to the voters which was objected to by the agents of the election petitioner and

police were informed, who dispersed the party workers of the Returned Candidate by lathi charge;

f that the Returned Candidate gathered around 500 persons in S.K. Mahal in Meenambal Salai, Perambur on 16.05.2016 with a *mala fide* intention to spoil the peaceful polling and for influencing and threatening the voters;

g that the votes recorded by the booth agents in Part I of Form-C did not tally with the total votes recorded by the EVM and entered in Part II of Form 17-C;

h that on the date of counting, i.e., 19.05.2016, in Loyola College building, there were 21 rounds of counting and the Election Petitioner was leading upto the 19th round, but, suddenly, the Returned Candidate's agents Saravanan and Lakshmi Narayanan picked up quarrel with the counting officers and stopped the counting process for 15 minutes and this was taken advantage of by the Returned Candidate to manipulate the EVM in his favour;

i that the box containing the postal votes was carried by one Saravanan, an agent of the Returned Candidate and the votes were manipulated;

j that the Returning Officer should have followed Paragraph 15.5.5 of the Handbook for the Returning Officer, 2014 (for brevity "the Handbook") and should have re-counted the postal ballots, since the victory margin was only 519 votes, which is less than the total number of postal votes received, viz., 775.

5 In effect, the election petition was filed on the following three grounds, viz.,

- corrupt practice;
- discrepancies in Part I and II in Form 17-C; and
- improper counting of postal votes.

6 The Returned Candidate filed counter statement denying the allegations levelled by the Election Petitioner and putting the Election Petitioner into strict proof of the allegations made by him. He also contended that:

a the Election Petitioner had failed to specify the details of the alleged irregularities like tampering with the EVMs, etc.; and

b neither the Election Petitioner nor his counting agents had raised any suspicion about the genuineness of the counting process and after having lost in the election, the Election Petitioner has made unsubstantiated allegations.

7 On these pleadings, this Tribunal framed the following issues on 12.10.2017:

“1 Whether the petitioner is entitled for the relief of declaration declaring the election of the returned candidate, namely, P. Vetrivel, the fourth respondent herein in respect of No.12, Perambur Legislative Constituency in the election held on 16.05.2016 in which result have been declared on 19.05.2016 as null and void?

2 Whether the petitioner is entitled for the relief of direction directing the Returning Officer to re-count all the postal votes for No.12, Perambur Legislative Constituency for the election held on 16.05.2016?

3 Whether the petitioner is entitled for the relief of direction directing the Returning Officer to recount all votes for No.12, Perambur Legislative Constituency in the election held on 16.05.2016?

4 Whether the petitioner is entitled for relief of declaration to declare that the petitioner is duly elected in respect of No.12, Perambur Legislative Constituency in the election held on 16.05.2016, which results have been declared on 19.05.2016?

5 Whether the fourth respondent, the Returned Candidate has committed corrupt practice by threatening the voters and had influenced the voters by offering money and unlawfully distributing gifts?

6 Whether is it fatal to the election in view of the Presiding Officers not recording the number of votes as per voting machine in Form No.17 Part I as well as Form 17C (Part I) in various polling booths?

7 Whether the counting process was properly carried out in the manner known to law?

8 Whether is it mandatory in the eye of law that in case where the victory margin is less than the total number of postal ballots received, then there should be a mandatory re-verification of all postal ballots?

9 Whether the counting process was illegal and was in violation of Rule 54(A) of the Conduct of Election Rules, 1961?

10 What other relief the petitioner is entitled to?"

8 On the side of the Election Petitioner, the Election Petitioner examined himself as P.W.1, G. Santhanam as P.W.2 and R.Sivakumar as P.W.3 and marked Exs.P.1 to P.46. On the side of the Returned Candidate, neither any witness was examined nor any document marked.

9 The Election Petitioner (P.W.1), in his evidence, stated that he received information from one G. Santhanam, a party worker that the Returned Candidate was distributing cash to voters in M.K.B. Nagar; that the Returned Candidate had gathered his henchmen in S.K. Mahal at Meenambal Salai in Muthamizh Nagar on 16.05.2016 (date of election) for the purpose of canvassing and intimidating voters and that he had given a

that the Returned Candidate is preparing to indulge in booth-capturing and requesting the Election Commission of India to take appropriate action. He marked photocopies of Form 17-C relating to 40 polling stations (Exs.P.3 to P.42) in order to show that there are discrepancies in Part I and Part II of Form-C. Of course, the learned counsel for the Returned Candidate objected to the marking of Exs.P.3 to P.42 on the ground that the same were photocopies and hence, they were marked subject to objections.

10 G. Santhanam was examined as P.W.2 and in his evidence, he stated that he worked for the Election Petitioner in the 2016 general election and that he gathered information from the local people that the Returned Candidate is planning to indulge in booth-capturing on the election day; on 14.05.2016, opposite M.K.B. Nagar Police Station, there was a big crowd and people were saying that cash was being distributed to voters; hence, he rang up to his advocate, who, in turn, sent an S.M.S. to the police, pursuant to which, police came and dispersed the crowd. He further spoke about the life threat to the Election Petitioner from the workers of the Returned Candidate. He stated that he gathered information about this from the local people.

11 R. Sivakumar was examined as P.W.3 and he stated that he worked for the Election Petitioner in the 2016 Assembly election; on 16.05.2016, he went to one of the booths and saw a huge gathering of

AIADMK workers in S.K. Mahal; he informed his advocate, who, in turn, informed the police and the police came and dispersed the crowd; at the end of counting of Round No.19, the Election Petitioner was in the lead; similarly, from Round No.2 to Round No.16 also, when cumulatively added, the Election Petitioner was leading; at the end of Round No.19, two persons, viz., Lakshmi Narayanan and Saravanan of AIADMK were creating problem and so, the Returning Officer stopped the counting for fifteen minutes; at the end of the counting process, he made an oral request to the Returning Officer to re-count the postal votes, since the victory margin was less than the total number of postal votes; the Election Petitioner also gave a representation on that day, i.e., 19.05.2016, to the Returning Officer; the signature of the polling agents in Part I of Form 17-C relating to Ex.P.28 is not available and in Part I of Form 17-C (Ex.P.39), the signature of only one polling agent is available and that signature is not that of his party agent; in Part I of Form 17-C (Ex.P.40) relating to polling station no.261, signature of polling agents is not available. Marking of these documents were objected to by the learned counsel for the Returned Candidate on the ground that there were no pleadings to that effect in the election petition. In the cross-examination, R. Sivakumar (P.W.3) stated that he was not the polling agent of the Election Petitioner.

12 This Tribunal heard the arguments of both sides.

13 Section 83 of the Representation of the People Act, 1951 (for brevity "the R.P. Act") reads as follows:

"83 Contents of petition:

(1) An election petition --

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

b shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the 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:

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 of annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

Thus, to sustain the allegations relating to corrupt practice, it is essential for the Election Petitioner to plead the material facts.

14 Mr. Sunder Mohan, learned counsel representing Mr. Manivasagam, learned counsel on record for the Election Petitioner placed strong reliance upon the judgment of the Supreme Court in **Virender Nath Gautam vs. Satpal Singh and Others [(2007) 3 SCC**

617] and submitted that the Election Petitioner has pleaded the basic facts in the election petition which is *facta probanda* and that he is not required to plead as to how he proposes to prove those facts which are *facta probantia*.

15 To appreciate his submissions, it may be necessary to extract the relevant pleadings from the election petition. Paragraph 7 of the election petition reads thus:

“7. The petitioner submits that during the course of election, the 4th respondent through his agent and henchmen had been canvassing in all booths. In each and every booth, they have been influencing the voters, damaging and spoiling the very democratic polling on 16.05.2016. This has been communicated to the Election Observer, to the 33rd respondent and the police officials. However, no action has been taken.”

In the above paragraph, there are no material facts, except stating that the henchmen of the Returned Candidate were canvassing in all the booths.

Paragraph no.8 of the election petition reads thus:

“8 On 14.05.2016, just opposite to MKB Nagar Police Station, there was a cash distribution to the voters. At the time, the petitioner's agent and the party people went and objected the cash distribution by the fourth respondent and his henchmen and a complaint to the police by dialling phone no.100 was made. The police patrol from MKB Nagar Police Station came to the spot. However, instead of taking action against the opposite party, who were disbursing money, the police have forcibly lathi charged the innocent people and safeguarded the opposite party. The police sent all the party people outside and made a drama as if they are going to seize the money inside the premises. Sending all the people outside, the police rushed inside the premises. After some time, they came with empty hands informing that nothing is found inside the premises. This would show that the police officials are

very much helping the 4th respondent in their illegal activities of disbursing money.”

In the above paragraph, the petitioner has not given the name of any individual who was either found distributing cash on behalf of the Returned Candidate or has named any beneficiary of the Returned Candidate's largesse. Even the time of the incident has not been furnished.

Paragraph 10 of the election petition reads thus:

“10. The petitioner submits that not before the polling the vote, but also during the course of polling the vote on 16.05.2016, the opposite party and his henchmen did canvassing the vote from the voters in all the booths. The petitioner has also made a complaint in this regard particularly complaint through SMS by his advocate. As submitted earlier, the Election Observer, police officials and the 33rd respondent remained as silent spectators to the fourth respondent and his agent. . . .”

The aforesaid allegation also is general in nature to the effect that in all the booths, the Returned Candidate and his henchmen were canvassing for votes. In short, the Election Petitioner has not given the names of persons whom he found to be canvassing.

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16 Coming to the evidence of the three witnesses examined on the side of the Election Petitioner, none of them has given any particulars about the alleged corrupt practice. Law mandates the disclosure of material facts in the election petition, because, only then, the contesting respondent will be able to effectively answer the charges. In this case, the

allegations in the election petition are vague and the evidence of the witnesses with regard to corrupt practice is far from satisfactory. Therefore, this Tribunal holds that the Election Petitioner has failed to prove that the Returned Candidate had indulged in corrupt practice. Even in **Virender Nath Gautam** (supra) relied upon by Mr. Sunder Mohan, the Supreme Court, at paragraph no.35, has held as under:

“35. All “material facts” must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.”

17 Mr. Sunder Mohan, learned counsel for the Election Petitioner, relied upon the judgment in **Mahendra Pal vs. Ram Dass Malanger and Others [(2000) 1 SCC 261]**, wherein, the Supreme Court had reversed the order of dismissal of the Election Petition passed by the High Court on the ground that the pleadings lacked the necessary material particulars. But, in the same judgment, in paragraph 7, the Supreme Court has held as follows:

“7. Failure to plead even a single *material fact* leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6 Rule 16 of the Code of Civil Procedure.”

In the instant case, the relevant paragraphs in the Election Petition have been set out above in order to show that only vague and general

allegations have been made without any material facts.

18 The next ground on which the Election Petitioner sought to unseat the Returned Candidate is via Section 100 (1)(d)(iv) of the R.P. Act. Mr.Sunder Mohan, learned counsel for the Election Petitioner submitted that there are discrepancies in Part I and Part II of Form 17-C, inasmuch as, the EVM numbers in one instance was differing and column no.6 in Part I of Form 17-C have been left blank. He assiduously took this Tribunal through some of the Form 17-Cs in support of his contention.

19 To appreciate his argument, it may be necessary to understand the scope of Form 17-C. In this regard, it would be useful to extract Section 46 of the R.P. Act and Rule 49-S of the Conduct of Election Rules, 1961 which read thus:

“46. Appointment of polling agents:

A contesting candidate or his election agent may appoint in the prescribed manner such number of agents and relief agents as may be prescribed to act as polling agents of such candidate at each polling station provided under Section 25 or at the place fixed under sub-section (1) of Section 29 for the poll.”

49-S Account of votes recorded:

(1) The Presiding Officer shall at the close of the poll prepare an account of votes recorded in Form 17-C and enclose it in a separate cover with the words “Account of Votes Recorded” superscribed thereon.

(2) The Presiding Officer shall furnish to every polling agent present at the close of the poll a true copy of the entries made in Form 17-C after obtaining a receipt from the said polling agent therefor and shall attest it as a true copy.”

20 In every polling station, there will be a Presiding Officer and every candidate will be entitled to appoint a polling agent who will sit in the polling booth and keep a track of the voting process. At the end of the day, the Presiding Officer will give to each of the polling agents Part I of Form 17-C containing the number of votes polled. In Part I of Form 17-C, the polling agent should also sign. Likewise, in the counting hall, the counting agents of every candidate will be present near the counting tables and they will have with them, Part II of Form 17-C. They will be required to verify the number of the EVMs and tally it with Part I of Form 17-C in their possession. After the counting process is over, the Counting Supervisor will issue Part II of Form 17-C signifying the number of votes polled for each candidate recorded in the EVM. Part II of Form 17-C will also contain the signatures of the counting agents of the candidates. This is done in order to ensure that the counting process has been done in the presence of the counting agents of the contesting candidate so that there cannot be any allegation that the votes were not properly counted.

21 In order to sustain the allegation that the votes were not properly counted, it is imperative for the Election Petitioner to plead that the violation of the rules had materially affected the result of the election insofar as it concerns the Returned Candidate as mandated by Section 100(1)(d) of the R.P. Act. Unfortunately, the Election Petitioner has not

pleaded this at all. Of course, it is not necessary for the Election Petitioner to extract verbatim the provisions of Section 100 (1)(d), *ibid* and include it as a pleading. However, it is essential that the material facts pleaded by him should show that improper filling up of Form 17-C had resulted in materially affecting the result of the election. At this juncture, the question posed by this Tribunal to the Election Petitioner in this regard is worthy of reproduction:

“Court Questions:

In all the polling stations, my polling agents were there and during counting also, my counting agents were there and after the results were declared, I collected photocopies of Ex.P.3 to Ex.P.42 only from them.”

Obviously, Part I and II of Form 17-C will be available only with the polling agent and counting agent of the Election Petitioner. It is for the Election Petitioner to plead specifically with reference to each Form 17-C relating to a polling station and state who was his polling agent and whether the said polling agent had signed in Part I of Form 17-C and if he had not signed, why he had not signed. Only then, it will be possible for the Returned Candidate to rebut the plea of the Election Petitioner and adduce evidence to contradict the plea of the Election Petitioner. It is only the Election Petitioner who will know the names of his polling agents and counting agents and therefore, the burden under Section 106 of the Evidence Act is on the Election Petitioner to plead and prove as to how and why his polling agents did not sign in Form 17-C. In the absence of pleading and proof, this Tribunal cannot merely draw an inference that there was improper

counting of votes to favour the Returned Candidate.

22 Mr. Sunder Mohan, learned counsel appearing for the Election Petitioner relied upon the judgment in **Chhedi Ram vs. Jhilmit Ram and others [(1984) 2 SCC 281]** in support of his contention that even if it is not specifically pleaded as required under Section 100(1)(d) of the R.P.Act, yet, if the evidence shows that there are discrepancies, then, this Tribunal can draw an inference that the election of the Returned Candidate has been materially affected. He placed reliance upon the following paragraph of the judgment in **Chhedi Ram** (supra):

"2. . . . If the number of votes secured by the candidate whose nomination was rejected is not disproportionately large as compared with the difference between the number of votes secured by the successful candidate and the candidate securing the next highest number of votes, it would be next to impossible to conclude that the result of the election has been materially affected. But, on the other hand, if the number of votes secured by the candidate whose nomination was improperly accepted is disproportionately large as compared with the difference between the votes secured by the successful candidate and the candidate securing the next highest number of votes and if the votes secured by the candidate whose nomination was improperly accepted bears a fairly high proportion to the votes secured by the successful candidate, the reasonable probability is that the result of the election has been materially affected and one may venture to hold the fact as proved...."

23 In the aforesaid case, the constituency was a reserved constituency and one Moti Ram, who was a Kahar by caste, contested as if he belonged to Gond caste (which is a Scheduled Caste) and secured 6,710 votes. The winner Jhilmit Ram secured 17,822 votes and Chhedi Ram, the runner up secured 17,449 votes. Thus, the difference between Jhilmit Ram

and Chhedi Ram was 373 votes. Chhedi Ram filed election petition on the ground that the Returning Officer had improperly accepted the nomination paper of Moti Ram and that had Moti Ram not contested, there is every likelihood of a major chunk of the votes obtained by Moti Ram coming into his kitty. Only in that context, the Supreme Court has held so. Whereas, in the instant case, the Election Petitioner wants to set aside the election of the Returned Candidate on the ground of discrepancies in the entries in Part I and II of Form 17-C. In both these forms, the polling agents and the counting agents of the Election Petitioner were required to sign. In most of the forms, the signature of the polling agents and counting agents are available. The Election Petitioner himself does not know who were his polling agents and counting agents.

24 Mr. Sunder Mohan submitted that in Part I of Form 17-C (Ex.P.28) relating to polling station no.176, no polling agent has signed; similarly, in Part I of Form 17-C (Ex.P.39) relating to polling station no.256, signature of only one polling agent is there and that R. Sivakumar (P.W.3) has stated that the said signature is not that of their party agent; and in Part I of Form 17-C (Ex.P.40) relating to polling station no.261, there is no signature of polling agent.

25 Factually, what Mr. Sunder Mohan submits is correct, viz., that there is no signature in those three documents. But, as stated above, it is

for the Election Petitioner to say who were his polling agents in polling station nos.176, 256 and 261 and why they did not sign in Part I of Form 17-C. Only then, the Returned Candidate would be able to defend his case.

26 Mr. Sunder Mohan submitted that copies of these exhibits were furnished to the Returned Candidate along with the copies of the election petition and therefore, the Returned Candidate cannot be heard to say that he was not put on notice about this. This Tribunal is not able to countenance the said submission for the reason that supposing the Returned Candidate had remained *ex parte* and not contested this Election Petition at all, can this Tribunal set aside his election based on the absence of signature of polling agents in the three Form 17-Cs relating to three polling stations? The answer to this question is an emphatic "No" because Form 17-C *per se* cannot affect the results of the poll. It is only intended to ensure that the Presiding Officer in the polling station and the Counting Supervisor in the counting hall do not act in a discreet manner. In the absence of alleging and proving that the particular polling officer or the particular Counting Supervisor had colluded with the Returned Candidate and had ensured that the polling agents and counting agents of the Election Petitioner were not permitted to sign in Part I and Part II of Form 17-C, this Tribunal cannot set aside the election of the Returned Candidate on the ground of discrepancies in Form 17-C.

27 Lastly, Mr. Sunder Mohan contended that since the victory margin was only 519 votes, the Returning Officer should have followed Paragraph 15.5.5 of the Handbook and should have re-counted the postal votes.

28 Paragraph 15.5.5 of the Handbook is profitably extracted hereunder:

“15.5.5 In order to ensure proper watch over the counting process, the Commission has decided that the Observers shall be provided a table and a chair next to the table of the Returning Officer instead of providing a separate room for them. The seating arrangements of counting supervisors, counting assistants and micro-observers should be made in a sequence. They should not be allowed unnecessarily to roam here and there in the counting hall.”

29 To buttress his submission that the Returning Officer should have followed the Handbook, Mr. Sunder Mohan placed reliance upon the following portion of the judgment in **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygary and another [(2014) 5 SCC 312]**:

“32. It is a settled legal proposition that the instructions contained in the Handbook for 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 judgments of this Court in *Ram Sukh v. Dinesh Aggarwal* [(2009) 10 SCC 541] and *Uttamrao Shivdas Jankar v. Ranjitsinh Vijaysinh Mohite Patil* [(2009) 13 SCC 131]. Instruction 16 of the Handbook deals with cases as to when the ballot is not to be rejected. The Returning Officers are bound by the Rules and such instructions in counting the ballot as has been done in this case.”

30 In the case at hand, the total number of postal votes were 775 out of which 551 votes were secured by the Election Petitioner and the

Returned Candidate secured only 156 votes. Therefore, the counting agents of the Election Petitioner did not raise any objection with regard to postal votes at the time of counting. After the announcement of results, it is the case of the Election Petitioner that he made an oral complaint to the Returning Officer. He admitted that he had not given any written complaint to the Returning Officer. However, he has stated that he has given a complaint on 19.05.2016 to the Chief Electoral Officer which is marked as Ex.P.45. In the opinion of this Tribunal, the Chief Electoral Officer has no role to play and it is only the Returning Officer who has got the power to entertain representations and decide as to whether a re-count is necessary in a given case.

31 In **Ram Sukh vs. Dinesh Aggarwal [(2009) 10 SCC 541]**, the Supreme Court has held as follows:

“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. . .

24. It needs little reiteration that for the purpose of Section 100(1)(d)(iv), it was necessary for the election petitioner to aver specifically in what manner the result of the election insofar as it concerned the first respondent was materially affected due to the said omission on the part of the Returning Officer. Unfortunately, such averment is missing in the election petition.”

vs. Sanatan Mohakud & Others [(2012) 4 SCC 194], it has been held by the Supreme Court in unequivocal terms that the Handbook is only a book for guidance and failure to follow it without anything more will not give cause of action to maintain the election petition. Further, it is to be borne in mind that a judgment of the Supreme Court should not be read as Eculid's theorem. This Tribunal has to see the context in which the Supreme Court had given such an observation in **Arikala Narasa Reddy** (supra). In **Arikala Narasa Reddy** (supra) relating to re-count of the ballot papers, the matter had gone to the Supreme Court twice and the Supreme Court has held in paragraph 14 and 15 as under:

“14. Before the court permits the re-counting, the following conditions must be satisfied:

- (i) The court must be satisfied that a prima facie case is established;
- (ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;
- (iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;
- (iv) An opportunity should be given to file objection; and
- (v) Secrecy of the ballot should be guarded.

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15. This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been “materially affected”. There can be no dispute to the settled legal proposition that “as a rule relief not founded on the pleadings should not be granted”. Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering re-counting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for declaring the election to be void. The order of re-counting can be passed only if the petitioner sets out his case with precision supported by averments of material facts. (Vide *Ram Sewak Yadav v. Hussain Kamil Kidwai* [AIR 1964 SC 1249], *Bhabhi v. Sheo Govind* [(1976) 1 SCC 687 : AIR 1975 SC 2117] and *M. Chinnasamy v. K.C. Palanisamy* [(2004) 6 SCC 341].)”

In the aforesaid case, there was a recrimination petition before the Supreme Court and therefore, each of the disputed ballot papers was examined and the Supreme Court held that both the parties had received equal number of votes. Therefore, lots were drawn under Section 102 of the R.P. Act and Arikala Narasa Reddy was declared as the victor. Only in such a peculiar circumstance, the Supreme Court held so in paragraph 32 extracted above. However, in the case at hand, the Election Petitioner has not passed the mandates laid down in paragraphs 14 and 15 of **Arikala Narasa Reddy** (supra) which have been extracted above.

33 In view of the foregoing discussion, this Tribunal is of the view that this election petition is devoid of merits and is accordingly dismissed as being devoid of merits. No costs.

34 On behalf of the Election Commission of India, O.A.No.750 of 2017 has been filed for striking off the Returning Officer from the array of respondents, by placing strong reliance upon Section 82 of the R.P. Act and the law laid down by the Supreme Court in **Jyoti Basu and others vs. Debi Ghosal and others [(1982) 1 SCC 691]**.

35 The learned counsel on either side fairly conceded the position. However, this Tribunal did not pass any separate orders in the said Original Application, because, that would have resulted in delay in the proceedings as the Registry would be required to carry out corrections and amendments in the pleadings. Hence, O.A. No.750 of 2017 is closed.

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P.N. PRAKASH, J.

cad

To

- 1 The Speaker
Tamil Nadu Assembly
(Through Secretary
Tamil Nadu Legislative Assembly Constituency
Chennai – 600 002
- 2 The Election Commission of India
Through the Secretary, New Delhi



Election Petition No.7 of 2016

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