

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 23RD DAY OF AUGUST 2017

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

O.A. No.170 of 2017

IN

Election Petition No. 7 of 2016

ELP No.7 of 2016

&

OA.NO.170 OF 2017

N.R.Dhanapalan,

S/o.Rathinam,

No.35, Ramasamy Street,

Valasaravakkam,

Chennai 600 087.

Party-DMK Symbol Rising Sun ... Petitioner/Applicant

-VS-

1.A.Soundara Rajan,

New No.21, Old No.2/1, Kamaraj Street,

Kolathur, Chennai 600 009.

2.R.Prakash,

No.54, 4th Street,

Sharma Nagar, Vyasarpadi,

Chennai 600 039.

3.N.Raj,

No.225, C.Kalyanapuram 1st Cross Street,

Vyasarpadi,

Chennai 600 039.

4.P.Vetrivel,

No.10/24, Divanbhadur Shanmugam Street,

A.K.Samy Nagar, Secretariat Colony,

Kilpauk, Chennai 600 010.

5.S.Suresh,

No.20/20, Veerapandi Nagar 2nd Street,

I Cross Street, Choolaimedu,

Chennai 600 094.

6.M.Mahendran,

No.9, S.S.Puram, B Block,

Purasawalkam, Chennai 600 007.

7.K.Mallika,

No.41, Chinnathambi Street,

Vyasarpadi,

Chennai 600 039.

- 8.K.Vasanth Kumari,
No.11, Kamarajar Salai,
Ayanavaram, Chennai 600 023.
- 9.S.Vengadesan,
No.29, Kamarajar Salai,
Kodungaiyur,
Chennai 600 118.
- 10.M.Venkatesh Perumal,
No.91, 5th Street,
Sharma Nagar Quarters,
Vyasarpadi, Chennai 600 039.
- 11.S.Vetri Thamizhan,
No.207, 3rd Street, Shasthri Nagar,
Vyasarpadi,
Chennai 600 039.
- 12.K.Kamaraj,
No.12, Krishnaswamy Koil Street,
Vyasarpadi, Chennai 600 039.
- 13.Karthikeyan R.
No.86/NA, Annai Sathya Nagar,
Porur, Chennai 600 087.
- 14.Kumaran B.
No.6, Union Carbide Colony,
12th Street, Ward No.1,
Kodungaiyur, Chennai 600 118.
- 15.G.Kothandan,
Old No.7, New No.6/7,
Gopalapuram, Perambur,
Chennai 600 011.
- 16.R.Saravana Perumal,
No.2/3F, Ethiraj Samy Koil Stret,
Erukkanchery,
Chennai 600 118.
- 17.P.Saravanan,
88A, Azhariri samy Street,
Periyar Nagar,
Vyasarpadi, Chennai 600 039.
- 18.A.Sivarajalingam,
No.10/10, East STreet,
C.S.I.Mission, Kannirajapuram,
Ramanathapuram 623 135.
- 19.L.Susithra,

No.8/1, 7th Kattabomman Street,
Kodungaiyur, Chennai 600 118.

20.D.Sundara Raman,
No.22/30, Rama Arangannal 2nd Street,
New Washermanpet, Chennai 600 081.

21.V.Subramani,
No.8/16, 5th Street,
Vinoba Colony, Tondiarpet,
Chennai 600 081.

22.S.Narendira kumar,
No.15/8, 4th Street,
Stanley Nagar, C.B.Road,
Chennai 600021.

23.S.Narayanasamy,
No.174/100, Karunanidhi Nagar,
3rd Street, Tondiarpet, Chennai 600 081.

24.S.Parthiban,
No.58, Seniamman Nagar,
Tondiarpet, Chennai 600 081.

25.J.Praveen Kumar,
No.27/2, New Boag Road,
Kannamapet, T.Nagar, Chennai 600 017.

26.R.Manikandan,
Old No.38, New No.46, B Block,
Ezhil nagar 5th Street,
Kodungaiyur, Chennai 600 116.

27.A.Manivannan,
No.144, Melpatti Ponnappan Street,
Sanjay Nagar,
Vyasarpadi, Chennai 600 039.

28.G.R.Mohammed Yousuff,
No.4/620, 91st Street,
Muthamizh Nagar, Kodungaiyur,
Chennai 600 118.

29.S.Mohan,
No,61, Sundaram Pillai Nagar,
Tondiarpet, Chennai 600 081.

30.P.Raja,
No.42/19, Rajaji Street,
Perambur, Chennai 600 011.

31.N.Viji,
No.8/15/8, Devaraj Street, MGR Nagar,
Chennai 600 078.

32.S.Jayaraj,
No.21, F Block, Seniammal Koil,
TNSCB Quarters,
Tondiarpet, chennai 600 081.

33.The Returning Officer,
No.12, Perambur Assembly Constituency,
District Revenue Officer,
Perambur Chennai. ... Respondents/Respondents

This Original Application praying that this Hon'ble Court be pleased to permit the petitioner to file the Verification Affidavit in Election Petition No.7 of 2016.

The above Original Applications having been heard on 11.08.2017 along with Election Petition before this Court in the presence of Mr.M.Manivasagam, advocate for M/s.M.Manivasagam Associates, advocates for the Applicant/Election Petitioner and Mr.N.Raja Senthoo Pandian, Advocate for the 4th respondent/4th respondent and Mr.Niranjana Rajagopalan, advocate for M/s.G.R.Associates, advocates for the 33rd respondent/3rd respondent herein; and upon reading the Judges Summon and affidavit of Mr.N.R.Dhanapalan filed herein, and the Counter Affidavit of P.Vetrivel, filed herein, and this court having stood over for consideration till this date and coming on this day before this court for orders in the presence of the above said advocates,

The Court made the following order:

Heard.

2. The applicant herein is also the petitioner in the

Election Petition. This application is filed by the election petitioner who was unsuccessful in contesting the election for No.12, Perambur Legislative Constituency held on 16.05.2016. In the said election, after the votes were counted on 19.05.2016, the 4th respondent was declared as elected.

3. This petitioner filed the Election Petition and presented the same before this Court on 01.07.2016, which was received by the Assistant Registrar (O.S.-II) of this Court. The petition presented was verified by the petitioner and it also contained a list of documents. Due stamp duty was paid and it was also accompanied by the vakalat filed by the counsel for the petitioner. The Registry, after scrutinizing the petition and documents, found that it was in conformity with the requirements of law and rules and numbered it as Election Petition 7 of 2016.

4. This Court admitted the election petition on 12.08.2016 and ordered notice to the respondents. On 11.11.2016, publication was also ordered on the unserved respondents. Pursuant to the order passed by this Court, publication was effected and the proof of service was also filed. The same was noted by this Court when the matter was called on 14.02.2016.

5. The 4th respondent in the election petition as well as in this application filed his counter statement dated 27.01.2017. In that statement, though he denied the

allegations made by the Election Petitioner, he did not raise any issue regarding the fact that the petitioner did not file any verification affidavit as required under Order VI Rule 15(4) of the Civil Procedure Code. However, the matter stood posted on 20.01.2017 and it was further adjourned to 17.03.2017 at the request of the counsel for the petitioner.

6. It was during this period that the applicant herein took out Judges Summons under Order XIV Rule 8 of the O.S.Rules r/w Section 83 of the Representation of the People Act, 1951 [for short "R.P. Act"] for the purpose of permitting them to file a verification affidavit in support of the election petition in E.P.No.7/2016. Along with the Judges Summons, an affidavit of the Applicant dated 09.02.2017 was also filed. In paras 2 & 3 of the said affidavit, the following averments were made by the applicant:

"2.I humbly submit that I have presented the above Election Petition on 01.07.2016. However, due to oversight the Verification Affidavit required under Order VI R 15(4) of CPC was not presented along with the Election Petition. The Verification Affidavit was made ready on the day itself, however due to oversight the office could not present the same along with the Election Petition."

"3. I humbly submit that though I have verified the Election Petition in the prescribed manner, it is necessary for me to file the Verification Affidavit separately. Further I am advised to submit the non

filing of the Verification Affidavit it is not a fatal to the proceedings and it is only curable defect."

7. In this application, the contesting respondent, viz., the fourth respondent, took notice and filed a counter affidavit dated 11.08.2017 opposing the application. It was his stand that as per Section 83 of the R.P.Act r/w the relevant rules of procedure, the Verification Affidavit ought to have been filed along with the Election Petition and it is mandatory.

8. The counsel on both sides were heard on this application on 11.08.2017 and orders were reserved on the same day.

9. The short question that arises for consideration is whether the action of the Election Petitioner in not filing the Verification Affidavit along with the Election Petition is a curable defect or whether the requirement is mandatory and this Court has no other option except to dismiss the Election Petition itself for the non-compliance of the said rule. Further, when the Applicant having realised the defect and filed the Verification Affidavit and has taken out a Judges Summons with a supporting affidavit, whether this Court has power to receive at this stage the Verification Affidavit stated to have been made ready even at the time of filing of the Election Petition and due to

oversight, the same could not be filed.

10. In this case, the Election Petitioner wants to unseat the election of the 4th respondent on grounds of corrupt practices set out under Section 123 of the R.P.Act. In the case of a trial for determining as to whether a candidate had indulged in corrupt practices, Section 86 (5) of the R.P.Act gives certain guidelines to the Election Tribunal (presently the High Court) and the said Section reads as follows:-

"86 (5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition."

11. A reading of the above provision shows that the Court cannot be technical in such matters and the object of a trial in an election petition is that it must be fair and effective. It is only in cases where prejudice can be caused to a candidate who got elected, the Court must not order such amendments. In the present case, the trial is yet to commence. The parties have understood their respective cases and therefore, the question of the elected candidate being prejudiced does not arise. Further, by filing of the Verification Affidavit, the applicant is not introducing any new case. It is only the question of a

lapse in complying with the legal requirement. Therefore, what has to be decided herein is, whether this Court can entertain an application at this stage and receive the Verification Affidavit so as to remove the procedural defect and this question is no longer *res-integra*. The Supreme Court has dealt with similar cases earlier and it may be apposite to set out the same hereunder.

12. Mr.M.Manivasagam, the learned counsel for the applicant, placed strong reliance upon the judgment of the Supreme Court in **Umesh Challiyill Vs. K.P.Rajendran** [2008 (11) SCC 740] wherein, at para 13, it was observed as follows:-

"Learned counsel for the respondent has tried to justify and support the order of the learned Single Judge and submitted that in fact these objections were raised by the respondent in his counter affidavit and the appellant had sufficient opportunity to have cured them and in that connection, learned counsel for the respondent pointed out that the election petition was presented on 22.6.2006 and the first date of hearing was on 30.8.2006. The appellant should have cured these defects but the same was not done. Therefore, there was no option with the learned Single Judge but to dismiss the election petition. We fail to appreciate this argument of the learned counsel for the respondent for the simply reason that how can the appellant who bona fide felt that his election petition in all respects is complete will entail such a serious consequence of dismissal of the election petition on such minor omissions. In case, the learned Single Judge found that the election petition was not in the format then after recording his finding, learned Single Judge should have given an opportunity to the appellant to amend or cure certain defects pointed out by the Court. It may be relevant to mention, these

are not the grounds mentioned in [Section 86](#) of the Act for dismissal of the election petition. But nonetheless even if it is to entail serious consequence of dismissal of the election petition for not being properly constituted, then too at least the appellant should have been given an opportunity to cure these defects and put the election petition in proper format. But learned Single Judge in stead of giving an opportunity has taken the easy course to dismiss the election petition which in our opinion, was not warranted."

13. Further, such questions have been gone into by the Supreme Court even before and after the decision in **Umesh Challiyill** (supra). In **R.P. Moidutty vs P.T. Kunju Mohammad & another** [(2000) 1 SCC 481], it was observed as follows:-

"As observed by the Supreme Court in *F.A. Sapa etc.etc. vs. Singora and others* AIR 1991 SC 1557, the object of requiring verification of an election petition is to clearly fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. However, the defect of verification is not fatal to the petition; it can be cured [see: *Murarka Radhey Sham Ram Kumar vs. Roop Singh Rathore and Ors.* AIR 1964 SC 1545, *A.S. Subbaraj vs. M. Muthiah* 5 ELR 21]."

14. In **G.Mallikarjunappa & another Vs. Shamanur Shivashankarappa & Others** [(2001) 4 SCC 428], it was held to be a curable defect and the following observations are worth reproducing:-

"Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit

is a curable defect. What other consequences, if any, may follow from an allegedly 'defective' affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."

15. In construing the scope of Sections 83 and 86 of the R.P. Act, the Supreme Court, in its decision in **Ajay Maken vs Adesh Kumar Gupta & Another [(2013) 3 SCC 489]**, held as follows:-

"This is a ministerial act. There is no scope for any further inquiry for the purpose of Section 86 to ascertain the deficiency, if any, in the election petition found with reference to the requirements of Section 83 of the R.P. Act which is a judicial function. For this reason, the non-compliance of Section 83, is not specified as a ground for dismissal of the election petition under Section 86."

16. In **G.M.Siddeshwar vs Prasanna Kumar [(2013) 4 SCC 776]**, a three Judge Bench of the Supreme Court, to which, a reference was made by a two Judge Bench (see **G.M.Siddeshwar vs Prasanna Kumar [(2013) 4 SCC 799]** reviewed all the previous decisions (some of which are referred to above) and finally, in paragraph no. 62 applied the concept of substantial compliance and also held it was a curable defect. The relevant passage from the said paragraph reads as under:-

"Applying these principles to the facts of the present case, it seems quite clear that the affidavit filed by Prasanna Kumar in compliance with the requirements of the proviso to Section 83(1) of the Act was not an integral part of the election petition, and no such case was set up. It also seems quite clear that the affidavit was in substantial compliance with the

17. As already held, trial is yet to commence in this Election Petition and the 4th respondent cannot be said to be prejudiced by the receiving of Verification Affidavit filed by the applicant. The objections raised by the contesting respondent are hereby overruled.

WITNESS, THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 23RD DAY OF AUGUST 2017.

DATED THIS THE DAY OF 2017

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

cns - 30.08.2017

OA.NO.170 OF 2017

in

ELP.NO.7 OF 2016

ORDER

DATED:23/08/2017

THE HON'BLE MR. JUSTICE

P.N.PRAKASH

FOR APPROVAL: 31/08/2017

APPROVED ON : 01/09/2017