

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 6TH DAY OF JUNE 2017

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

O.A.Nos.885 and 886 of 2016

in

Election Petition No. 5 of 2016

ELP No.5 of 2016

Dr.K.Krishnasamy, M.D.,
Founder - President,
Puthiya Tamilagam Party,
Candidate - 217 Ottapidaram(SC) Assembly
Constituency,
No.2/34, V.Gangadar Street,
Nungambakkam,
Chennai 600 034.

.... Petitioner

-VS-

1.Sundararaj, R.
S/o.S.Rajendran,
No.9/237, Anna Salai,
Muppulivetti Village,
Ottapidaram Post and Taluk,
Thoothukudi District 628 401.

2.Arumuga Nainar.S.
S/o.K.Shanmugavel,
No.3/71-11, Therku Street,
Muthaiahpuram,
Thoothukudi District 628 005.

3.Santhana Kumar.A.
S/o.Appavoo,
No.5E/48, Muniasamy Nagar,
Thoothukudi District 628 005.

4.Muthukrishnan.T.
S/o.Thangavelu,
No.138, Kattudan Kadu (va.ki)
Mangalagiri, Block No.2,
Thoothukudi District.

5.Murugaperumal.R.
S/o.Ramaiah,
No.3/61-A, North Street,
Akkanaiyakan Patti,
Ottapidaram Taluk,
Thoothukudi District.

6.Poovani Murugan.B
S/o.Balaiah,
No.26-10E-1,
Magizhchipuram,
Anna Nagar 12th West,
Thoothukudi District - 628 008.

7.Jeyaraman,
S/o.Thekkān,
No.37E, Andakondan Kudisai Area,
Anna Nagar, Thennur,
Trichy.

8.Murugan.G.
S/o.Ganapathi,
No.9/123A, Colony Street,
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9.Balakrishnan.A
S/o.M.Arumugam,
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10.Paulraj.M.
S/o.Muniasamy,
No.3/104, West Street,
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11.Perumal.V.
S/o.Vadivel,
Old No.1-37A, New No.1-62-1,
Dhalavaipuram,
Thoothukudi District.

12.The Returning officer,
217-Ottapidaram (SC) Assembly Constituency,
Ottapidaram,
Thoothukudi District.

13.The District Election Officer/District Collector,
Thoothukudi,
Thoothukudi District. ...Respondents

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O.A.No.885 of 2016

This Original Application praying that this Hon'ble Court be pleased to strike out the pleadings in paragraphs 3 to 35 of the Election Petition.

O.A.No.886 of 2016

This Original Application praying that this Hon'ble Court be pleased to reject the Election Petition No.5 of 2016 as not maintainable.

These Original Applications having been heard on 11.04.2017 in the presence of Mr.B.Kumar, Senior Counsel for M/s.S.Senthil, N.C.Ashok Kumar, K.C.Panneer Selvam, advocates for the applicant/1st respondent and Mr.N.L.Rajah, Senior Counsel for M/s.J.Saravanel, B.S.Ajeetha, V.Pushkala, L.Kavitha, P.Kalpana, advocates for the 1st respondent/Election petitioner and Mr.Niranjan Rajagopalan, advocate for the 12th and 13th respondents herein and upon reading the Judges Summons and Common affidavit of R.Sundarraaj and Common counter affidavit of K.Krishnasamy the Election petitioner 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

the above said advocates and this Court having observed that the facts narrated by the election petitioner

are sufficient enough to proceed with the trial by making out a cause of action and this Court is of the view that the applicant has not made out a case for either striking off the pleadings or rejection of the election petition and

It is ordered as follows :-

(1) That the Original Application Nos.885 and 886 of 2016 in ELP.No.5 of 2016 be and are hereby dismissed.

(2) That there shall be no order as to costs.

WITNESS, THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 06TH DAY OF JUNE 2017.

sd/-
ASSISTANT REGISTRAR
Original Side - II

//CERTIFIED TO BE TRUE COPY//

DATED THIS THE DAY OF 2017

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COURT OFFICER (O.S.)

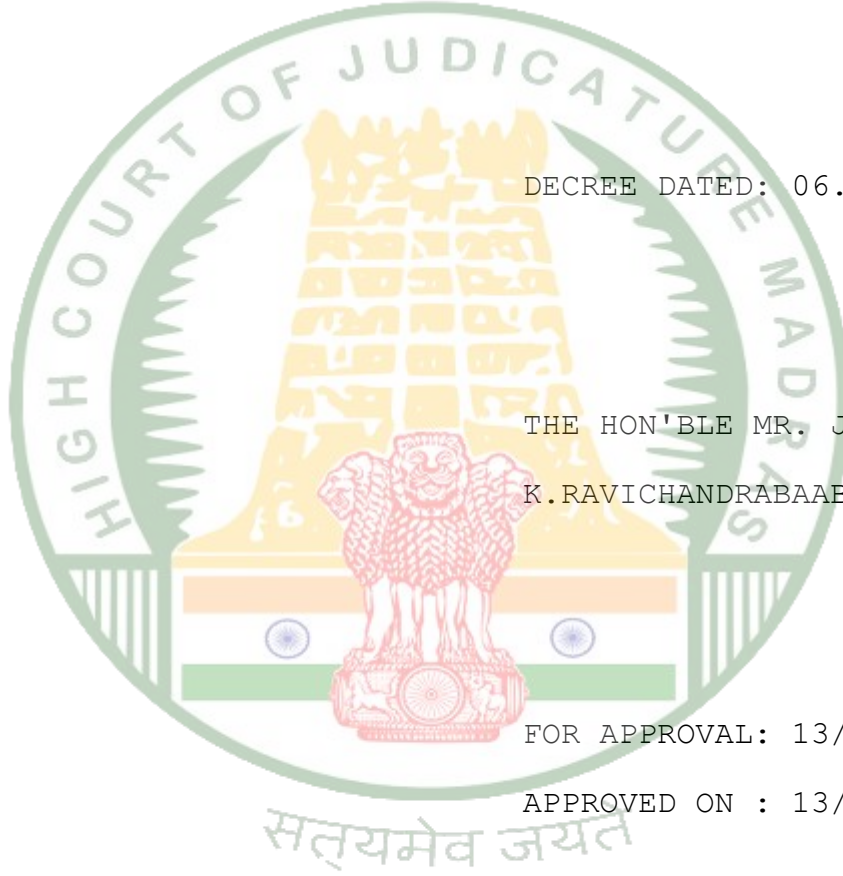
From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.

cns.12/06/2017

O.A.Nos.885 & 886 of 2016

IN

ELP.NO.5 OF 2016



DECREE DATED: 06.06.2017

THE HON'BLE MR. JUSTICE
K.RAVICHANDRABAABU

FOR APPROVAL: 13/06/2017

APPROVED ON : 13/06/2017

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The Court made the following order :-

The applicant in both these applications is the first

<https://hcservices.ecourts.gov.in/> Respondent/Returned Candidate in the election petition.

The first respondent herein as the election petitioner

challenged the election of the applicant herein from No.217 Ottapidaram (SC) Assembly Constitution (Tamilnadu) in the election held on 16.05.2016, as null and void and consequently to declare him as duly elected member of the said constituency.

2.The following are the grounds of challenge in the election petition:

(a) More than 1750 postal votes are missing and not taken for counting and thus, the same has materially altered the result of the election.

b) The Returned Candidate misused the Government machinery;

c) The 13th respondent misused his power in favour of the returned candidate;

d) The distribution of cash to the voters by the AIADMK cadres took place and was not prevented by the election officials, which amounts to corrupt practice.

e) The Returned Candidate suppressed information regarding his disqualification.

f) The Returned Candidate has entered into lease for mining in respect of the lands with the Government of Tamilnadu and thus, he being a Government Contractor, is disqualified from contesting the election.

3.The applicant/first respondent filed these two applications one for striking out the pleadings in paragraph 3 to 35 of the election petition and the other

for contesting the election petition itself as not maintainable.

4.The contentions of the applicant, which are common, in support of these applications are as follows:

The election petition does not make out any ground under the Representation of the People Act, 1951. No material facts are pleaded, as mandatorily required under Section 83 of the said Act. The election petition does not disclose any cause of action. The election petitioner has neither pleaded any facts nor pleaded full particulars of the allegation of corrupt practice. The allegations made in paragraph Nos.3 and 4 of the election petition are self serving allegation and nothing to do with the relief sought for in the election petition. In paragraph No.5, a general and vague allegation has been made without there being any material facts or full particulars. A bald allegation of corrupt practice is liable to be struck down. The election petitioner did not give the correct number of valid votes secured by him. The so called representation dated 18.03.2016 to the Election Commission of India, said to have been made by the election petitioner, has not been filed along with the election petition. Therefore, the allegation that the Election Commission of India did not take any action cannot be maintained. The allegations made against the election officials are vague without any truth in it. The election petitioner has not substantiated the allegation by pleadings with full particulars about the alleged mal administration. These allegations are invented for the first time in this election petition. The letter

dated 07.06.2016 is by way of an after thought. Regarding the allegation in respect of the postal ballot votes, it is not known under what basis the election petitioner has made such allegation. He has not made any complaint regarding the so called missing of postal ballot papers. He never raised any allegation before the Returning Officer regarding non counting of postal ballots. It is raised as the first time in the election petition. No material documents have been produced before this Court to substantiate those allegations. The margin of victory of the returned candidate is so high and the postal ballots as a factor would not have any effect on the result of the election. The allegation made at paragraph No.11 regarding the collection of approximate 240 postal votes from police battalion is without any material facts and that the election petitioner himself is not sure about the allegation. The allegation regarding non compliance of various provisions of conduct of election rules made in paragraphs 12 to 19 are without material facts. There is no material to allege missing of 1750 postal ballot votes. The allegation in this aspect is only a futile imagination and thus, based on such imagination, the election petition cannot be maintained. No complaint was lodged by the election petitioner nor his agent to the Returning Officer in this regard. The allegation regarding the misuse of Government machinery is also without material facts and full particulars. Except making vague statement, nothing

has been pleaded with material details and particulars. These allegations are without any basis. The allegation that the 13th respondent misused the power in favour of the Returned candidate is again a self serving and vague allegation. Regarding the allegation of corrupt practice, viz., distribution of cash to the voters, the election petitioner has not given any particulars as to who has bribed the voters and whom the cash has been allegedly distributed. The date and time and the place of alleged corrupt practice is not given in the election petition. Even from the document No.3, it is not known to whom the complaint has been made. Even otherwise, no names of the persons, who have allegedly distributed the money and the persons, who have allegedly received the money is given. No evidence can be let in without the pleadings and the election petitioner cannot have a roving enquiry to these vague allegations. The allegation made at paragraph No.28 that the returned candidate concealed his property and the income derived from the quarry are all false and contrary to the records. The quarry has been operated by the father of the returned candidate and not by the returned candidate. The returned candidate has not made any statement contrary to the truth in respect of the lands in Survey Nos.621/1 and 629/2B in Ottapidaram Village and Taluk. The returned candidate disclosed details of these lands in Form 26 and therefore, there is no suppression of any facts. The returned candidate do not have subsisting

contract with the government for supplying of goods to the Government or for execution of the work undertaken by the Government and hence, he is not disqualified under section 9(A) of the said Act. The election petitioner has not filed affidavit as prescribed in Form 25 read with Rule 94-A of the Conduct of Election Rules. There is no specific pleading in the Election Petition about the alleged violation of any direction or instruction of Election Commission of India. A mere non compliance or breach of the constitution or the statutory provision by itself does not result in invalidating the election and it must be stated that such breach or non observance resulted in affecting the result of the election of the returned candidate.

5. The first respondent/election petitioner filed a common counter affidavit wherein it is stated as follows:

Reading of the election petition will show that the grounds for seeking to set aside the election of the returned candidate has been stated under various heads with sufficient pleading of material facts, which can be tested only after conduct of a full fledged trial and not on the basis of conjectures and surmises. Section 83 of the said Act requires a concise statement of the material facts. A complete reading of the election petition will disclose that the election petitioner has stated the required particulars and facts to substantiate the allegation.

Non filing of the representation dated 18.03.2016 cannot be a reason to set aside the election petition. It is not correct to say that the petitioner did not raise the issue of non accounting of postal ballots before the Returning Officer. Valid objections were placed which were overruled by the Returning Officer. The contention of the petitioner regarding the postal ballots does not merit acceptance since the postal ballots have to be examined by this Court independently and arrived at a finding on the fraud that has taken place. The election petitioner has clearly stated the manner in which the returned candidate herein has indulged in corrupt practices. Necessary documents and pleadings have been placed in paragraph Nos. 23 to 27. The sufficiency or otherwise of proof of such allegations are to be seen only after a full fledged trial. The general denial made by the returned candidate do not make any case for striking of the pleadings nor rejecting the election petition. The material facts and particulars which together constitute the facts to be proved, must be kept clearly distinguished from each other. The material facts would mean all the basic facts constituting the particular corrupt practice alleged. In an election petition, whether a particular fact is material or not depends on the nature of the charge levelled and the special circumstances of the case. 'Particulars' on the other hand, are the details of the case set up by the party and therefore, "material particulars" would mean all

the details which are necessary to simplify, define and embellish the material facts already pleaded in the election petition. On this basis, it will be seen that all the material facts constituting the charges against the returned candidate were stated in the election petition. The failure of the pleadings to disclose reasonable cause of action is distinguishable from the absence of full particulars. So long as the claim discloses some cause of action or raises some questions fit to be decided only by this Court, the mere fact that the case is not likely to succeed is no ground for striking it out. The pleadings in the election petition are not frivolous and vexatious and therefore, they cannot be struck off.

6. Mr.B.Kumar, learned senior counsel appearing for the applicant, after reiterating the contentions raised in these applications in detail and inviting this Court's attention to the averments made in the election petition, submitted as follows:

The election petitioner did not furnish material particulars as required under section 83(1)(a) of the said Act. If there is no sufficient compliance under Section 83 (1)(a), the High Court shall dismiss the election petition as contemplated under Section 86(1) of the said Act. Vague allegations are to be struck down. The election petitioner filed a document in page No.37 of the typed set of papers, wherein his own agent signed, showing the total postal

ballots received as 1256, rejected - 44 and valid votes - 1212. These particulars are not given deliberately in the election petition. Therefore, the allegations made regarding the missing of postal ballots apart from being vague, un-understandable and imaginary, are to be eschewed in full. Regarding the allegation that the postal votes obtained from a police battalion, no specific details are given. Therefore, the returned candidate will not be in a position to answer such bald allegation. The averments made at paragraphs 14, 15, 16 and 18 are vague allegations. Regarding the allegation of misuse of Government machinery, the complaints referred to are not marked as copies to the election petition and no specific allegations are made. Regarding the allegation of corrupt practice, the pleadings must be with higher degree. The averments made in this aspect do not satisfy either Section 83(1)(b) or Section 123(A). The Returned Candidate is not operating the quarry and therefore, Section 9(A) is not attracted. Even otherwise the contract is for mining in patta land and therefore, such contract will not fall under the purview of disqualification as contemplated under Section 9(A) of the said Act.

7. In support of the above submissions, the learned senior counsel Mr.B.Kumar relied on the following decisions:

(i) In **2009 (10) SCC 541 (Ram Sukh v. Dinesh**

Aggarwal), it has been observed at paragraph No.24 as follows:

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.

(ii) In **2012(4) SCC 194 (Jitu Patnaik v. Sanatan Mohakud and others)**, it has been observed at paragraph Nos.53 and 54 as follows:

53. The pleading of material facts with regard to suppression of 319 votes in Para 7(D) is also incomplete as it has not been disclosed as to who suppressed 319 votes; who was the counting agent present on behalf of the election petitioner at the time of counting; how 319 votes were suppressed and why re-counting was not demanded. Moreover, there is no expression pleading as to how the result of the election has been materially affected by less counting of 319 votes.

54. In *Samant N. Balkrishna v. George Fernandez* while dealing with the requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure, this Court, inter alia, exposited the legal position that omission of even a single material fact leads to an

incomplete cause of action and statement of claim becomes bad.

(iii) In **1986 (Suppl) SCC 315 (Azhar Hussain v. Rajiv Gandhi)**, it has been observed at paragraph Nos.8, 9 and 11 as follows:

8. The argument is that inasmuch as Section 83(1) is not adverted to in Section 86 in the context of the provisions, on-compliance with which entails dismissal of the election petition, it follows that non-compliance with the requirements of Section 83(1), even though mandatory, do not have lethal consequence of dismissal. Now it is not disputed that the code of Civil Procedure (CPC) applies to the trial of an election petition by virtue of Section 87 of the Act. Since CPC is applicable, the court trying the election petition can act in exercise of the powers of the Code including Order 6 Rule 16 and Order 7 Rule 11(a).

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9. The fact that Section 83 does not find a place in Section 86 of the Act does not mean that powers under the CPC cannot be exercised.

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11. In view of this pronouncement there is no escape from the conclusion that an election petition can be

summarily dismissed if it does not furnish cause of action in exercise of the powers under the Code of Civil Procedure. So also it emerges from the aforesaid decision that appropriate orders in exercise of powers under the Code of Civil Procedure can be passed if the mandatory requirements enjoined by section 83 of the act to incorporate the material facts in the election petition are not complied with.

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(iv) In **2012 (3) SCC 236 (Markio Tado v. Takam Sorang)**, it is observed at paragraph No.22 as follows:

22. To begin with, one must note that in an election petition, one has to plead the material facts at the outset, and he failure to plead the same is fatal to the election petition. For reference one may see the judgment of a bench of three judges of this Court in *Hari Shanker Jain v. Sonia Gandhi*. Besides no evidence can be led on a plea which is not raised in the pleadings and no amount of evidence can cure the defect in the pleadings as held in para 7 of *Ravinder Sing v. Janmeja Singh*.

(v) In O.A.No.748 of 2012 and O.A.No.5 of 2013 in Election Petition No.8 of 2011 dated 16.09.2013, this Court

<https://hcservices.ecourts.gov.in/hcsservices/> has observed at paragraph Nos.23.2 and 24.4 as follows:

23.2. In so far as the allegation with regard to the distribution of freebies to the voters is concerned, except by making a vague allegation, the election petitioner has not given any material particulars and details as to whom those freebies were given. Though it is stated that the first respondent himself distributed such freebies, there is no specific details of the recipients of the same except by vaguely stating "the voters". It is not the case of the election petitioner nor it is so averred in the election petition that the returned candidate had distributed freebies to all the voters. When that being so, the election petitioner should furnish specific details with dates and events as well as the names of persons, who said to have received those freebies from the returned candidate. It is also stated that apart from the returned candidate, his election agent and party workers also distributed freebies to the voters. Here again, no specific details are given about the names of those agents and party workers who have allegedly distributed the freebies. Likewise, except saying the voters as recipients, the election petitioner has not given specific name and the details with dates and events. Thus, in my considered view, the allegation made with regard to the distribution of freebies at paragraph 6 is undoubtedly a vague allegation without

material particulars and consequently the same would not give a cause of action for the election petitioner to file the election petition.

...

...

24.4 In paragraph No.7 of the election petition, it is alleged that the election petitioner came to know from his party workers and the voters that arrangements were being made by the returned candidate, his election agent and his relatives to distribute cash to the voters as a bribe. Though the election petitioner has stated in the very same paragraph that he has presented a complaint on 8.4.2011 to the Election Observer, the Superintendent of Police, Tuticorin and also to the District Election Officer, Tiruchchendur, the fact remains that he has only stated in the election petition that the returned candidate was preparing to distribute cash to voters. Thus, it is clear from such averment that the returned candidate has not in fact distributed cash to the voters. Even according to the election petitioner, he made a complaint to the officials and the Police only to prevent distribution of cash to the voters. Therefore, according to the election petitioner, the alleged preparation to distribute cash is a corrupt practice. Even to establish such allegation, the petitioner has not stated with details as

to who are the actually intended recipients except by saying that the voters as the proposed recipients. It is also not stated with names and details of the election agent, relatives of the returned candidate, who, according to the election petitioner, attempted to distribute cash to the voters. Thus, such general averments contained in paragraph 7 is first of all an allegation of an attempted corrupt practice and not with actual commissioning of the same and even for establishing such attempted corrupt practice no material particulars with details are furnished by the election petitioner. Hence, I am of the view that paragraph 7 of the election petition also does not disclose the cause of action and consequently, the same is liable to be rejected.

(vi) In **2006 (2) SCC 682 (Shrikant v. Vasantrao)**,

it is observed at paragraph Nos. 12 and 22 as follows:

12. Section 9-A only disqualifies persons having a subsisting contract with the State Government either for supply of goods or for execution of any works undertaken by that Government, but does not disqualify persons who have such contracts with any local or other authority nor disqualifies persons having subsisting contracts with the State Government if such contracts are not for supply of goods or for execution of any works undertaken by the State Government.

(vii) In **1988(Suppl) SCC 580 (Dewan Joynal Abedin v. Abdul Wazed alias Abdul Wazad Miah)**, at paragraph Nos.16 and 17 it has been observed as follows:

16. An analysis of Section 9-A of the Act shows that only in two cases a person would be disqualified if he has entered into a contract with the appropriate government in the course of his trade or business which is subsisting on the date of scrutiny of nomination. They are (i) when the contract is on for supply of goods to the appropriate government and (ii) where the contract is for the execution of any works undertaken by that government. If a contract belonging to either of the two categories is subsisting on the date of the nomination, the person will be disqualified for being chosen as a member.

.....

17. Unless the contract in question is one which clearly falls under Section 9-A of the Act, it would not be proper to hold that the person who is a party to the contract is disqualified for being chosen as a member to the State legislature.

(viii) In **2004 (6) SCC 341 (M.Chinnasamy vs.**

K.C.Palanisamy) it has been observed at paragraph No.15 as follows:

15. It is not in dispute that in relation to an election petition, the provisions of the Code of Civil Procedure apply. In terms of Order 6 Rule 2 of the Code of Civil procedure which is in pari materia with clause (a) of sub-section (1) of Section 83 an election petition must contain concise statement of material facts. It is true as contended by Mr. Mani that full particulars are required to be set forth in terms of clause (b) of sub-section (1) of Section 83 of the Act which relates to corrupt practice. The question as to what would constitute material facts would, however, depend upon the facts and circumstances of each case. It is trite that an order of re-counting of votes can be passed when the following ingredients are satisfied: (1) if there is a prima facie cause; (2) material facts therefor are pleaded; (3) the court shall not direct re-counting by way of roving or fishing inquiry; and (4) such an objection had been taken recourse to.

8. Per contra, the learned senior counsel Mr. N.L. Raja, appearing for the first respondent/election petitioner submitted as follows:

Under Section 83 of the said Act, only a concise statement is required. Even otherwise under Section 86(5),

the election petition can be amended. Therefore, the

dismissal is not the requirement. All the material facts are pleaded and the evidence in support of such averments need not be pleaded. The election petitioner lost by 493 votes and therefore, the number of votes is significant. The facts pleaded in the election petition can be proved only by way of conducting the trial, also by summoning register of postal ballots. The affidavit filed in support of these applications does not disclose any grounds for rejection of the election petition.

9. In support of his submissions, the learned senior counsel relied on the following decisions:

(i) In **2009 (10) SCC 541 (Ram Sukh v. Dinesh Aggarwal)**, it has been observed at paragraph No.13, 15 and 16 as follows:

13. The phrase "material facts" has neither been defined in the Act nor in the Code and, therefore, it has been understood by the courts in general terms to mean the entire bundle of facts which would constitute a complete cause of action. In other words, "material facts" are facts upon which the plaintiff's cause of action or the defendant's defence depends. (See *Mahadeorao Sukaji Shivankar v. Ramaratan Bapu.*) broadly speaking, all primary or basic facts which are necessary either to prove the cause of action by the plaintiff or the defence by the defendant are "material facts". Material facts are

facts which, if established, would give the petitioner the relief asked for. But again, what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down.

....

15. At this juncture, in order to appreciate the real object and purport of the phrase "material facts", particularly with reference to election law, it would be appropriate to notice the distinction between the phrases "material facts" as appearing in clause (a) and "particulars" as appearing in clause (b) of sub-section (1) of Section 83. As stated above, "material facts" are primary or basic facts which have to be pleaded by the petitioner to prove his cause of action and by the defendant to prove his defence. "Particulars", on the other hand, are details in support of the material facts, pleaded by the parties. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. Unlike "material facts" which provide the basic foundation on which the entire edifice of the election petition is built, "particulars" are to be stated to ensure that the opposite party is not taken by surprise.

16. The distinction between "material facts" and "particulars" and their

requirement in an election petition was succinctly brought out by this Court in *Virender Nath Goutam v. Satpal Singh* wherein C.K.Thakker, J., stated thus: (SCC pp.631-32, para 50)

"50. There is distinction between *facta probanda* (the facts required to be proved i.e. material facts) and *facta probantia* (the facts by means of which they are proved i.e. Particulars or evidence). It is settled law that pleadings must contain only *facta probanda* and not *facta probantia*. The material facts on which the party relies for his claim are called *facta probanda* and they must be stated in the pleadings. But the facts or facts by means of which *facta probanda* (material facts) are proved and which are in the nature of *facta probantia* (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue."

(ii) In 2007(3) SCC 617 (*Virender Nath Goutam v. Satpal Singh*), it has been observed at paragraph No.54 as follows:

54. The High Court dismissed the petition *inter alia* on the ground that paras 8(i) to (iv) lacked in material particulars. Apart from the fact that the law does not require material particulars even in respect of allegations of corrupt

practice but only full particulars and if they are lacking, the petition can be permitted to be amended or amplified under Section 86 of the Act, in the instant case, clause (b) of Section 83(1) had no application and the petition has been dismissed by the High Court by applying wrong test.

(iii) In **2017 SCC Online SC 59 (Kuldeep Singh Pathania vs. Bikram Singh Jaryal)** it has been observed at paragraph No.7 to 9 as follows:

7. It appears, the High Court committed a mistake in the present case, since four out of the six issues settled were taken as the preliminary issues. Two such issues actually are relatable only to Order VII Rule 11 of the Code, in the sense those issued pertained to the rejection at the institution stage for lack of material facts and for not disclosing a cause or action. Merely because it is a trial on preliminary issues at the stage of Order XIV, the scope does not change or expand. The stage at which such an enquiry is undertaken by the court makes no difference since an enquiry under Order VII Rule 11(a) of the code can be taken up at any stage.

8. Thus, for an enquiry under Order VII Rule 11(a), only the pleadings of the plaintiff-petitioner can be looked into even if it is at the stage of trial of

preliminary issues under Order XIV Rule 2 (2). But the entire pleadings on both sides can be looked into under Order XIV Rule 2(2) to see whether the court has jurisdiction and whether there is a bar for entertaining the suit.

9. In the present case, the issue relates to an enquiry under Order VII Rule 11(a) of the Code, and hence, there is no question of a preliminary issue being tried under Order XIV Rule 2(2) of the Code. The court exercised its jurisdiction only under Section 83 (1) (a) of the Act read with Order VII Rule 11(a) of the Code. Since the scope of the enquiry at that stage has to be limited only to the pleadings of the plaintiff, neither the written statement nor the averments, if any filed by the opposite party for rejection under Order VII Rule 11(a) of the Code or any other pleadings of the respondents can be considered for that purpose.

(iv) In **1982 (3) SCC 487 (Roop Lal sathi v. Nachhattar Singh Gill)**, it has been observed at paragraph No.26 as follows:

26. There is distinction between 'material facts' and 'particulars'. The words 'material facts' show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the

statement or plaint becomes bad.

(v) In **1994 (2) SCC 392 (Mohan Rawale v. Damodar Tatyaba)**, it has been observed at paragraph Nos. 12 to 19 as follows:

12. Further, the distinction between "material facts" and "full particulars" is one of degree. The lines of distinction are not sharp. "Material facts" are those which a party relies upon and which, if he does not prove, he fails at the time.

13. In *Bruce v. Odhams Press Ltd.*.. Scott L.J. Said: "The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad." The purpose of "material particulars" is in the context of the need to give the opponent sufficient details of the charge set up against him and to give him a reasonable opportunity.

14. Halsbury refers to the function of particulars thus:

"The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs. Thus function has been variously stated, namely either to

limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required."

15. In Bullen and Leake and Jacob's "Precedents of Pleadings" Edn. at p. 112 it is stated:

"The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises and incidentally to save costs. The object of particulars is to 'open up' the case of the opposite party and to compel him to reveal as much as possible what is going to be proved at the trial, whereas, as cotton L.J. has said, 'the old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial'."

16. The distinction between 'material facts' and 'particulars' which together constitute the facts to be proved - or the *facta probanda* - on the one hand and the evidence by which those facts are to be proved - *facta probantia* - on the other must be kept clearly distinguished. In *Philipps vs. Philipps*, Brett, L.J. said:

" I will not say that it is easy to express in words what are the facts which must be stated and what matters need not be stated. ... The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle C.J. Expressed it in this way. He said that there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon the expression of opinion of Erle C.J. that Rule 4 [now Rule 7(1)] was drawn. The facts which ought to be stated are the material facts on which the party pleading relies."

17. Lord Denman, C.J. in *Williams v. Wilcox* said:

"It is an elementary rule in pleading that, when a state of facts is relied it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegations."

18. An election petition can be rejected under Order VII Rule 11(a) CPC if it does not disclose a cause

of action. Pleadings could also be struck out under Order VI Rule 16, *inter alia*, if they are scandalous, frivolous or vexatious. The latter two expressions meant cases where the pleadings are obviously frivolous and vexatious or obviously unsustainable.

19. We have considered the submissions of the learned counsel on both sides. We are not persuaded to the view that the order of the High court on this aspect of the controversy calls for interference. The High Court was right in its view that there was a triable issue arising out of the pleadings. The second contention, in our opinion, is insubstantial.

(vi) In **1998 (1) SCC 416 (Ashwani Kumar Sharma v. Yaduvansh Singh)**, it has been observed at paragraph No.7 as follows:

7. Failure to plead even a single material fact would lead to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off. But if material particulars are lacking, they may be supplied at a later date. Respondent 1 relies upon this distinction in support of his plea that the election petition is liable to be dismissed for non-disclosure of material facts. The election petition, however, is required to contain a concise statement of material facts, this being equivalent to a cause of action. The entire evidence in

support of such material facts is not required to be set out.

(vii) In **1999 (3) SCC 267 (D.Ramachandran v. R.V.Janakiraman)**, it is observed at paragraph No.8 as follows:

8. It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter.

(viii) In **2003 (11) SCC 448 (Bidesh Singh v. Madhu Singh)**, it has been observed at paragraph Nos. 7 and 8 as follows:

7. The jurisdiction of the tribunal in terms of Section 86 is limited. The election petition, it is trite, cannot be dismissed at the threshold even for non-compliance with Section 83 of the act. In *Vijay Laxmi Sadho (Dr) v. Jagdish* this court has stated the law in the following terms: (SCC p.251, para 9)

"9. An election petition is liable to be dismissed in

limine under Section 86(1) of the Act only if the election petition does not comply with either the provisions of 'Section 81 or Section 82 or Section 117 of the act'. The requirement of filing an affidavit along with an election petition in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the act. Thus an election petition is liable to be dismissed in limine under Section 86 of the Act, for the alleged non-compliance with the provisions of Section 83(1) of the Act or of its proviso. What other consequences, if any, may follow from an allegedly 'defective' affidavit, is 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."

8. It is not a case where respondent 1 contended that the allegations made in the election petition were vague which would cause prejudice to him in the matter of filing written statement. Even if such a case had been made out, the Tribunal must remember the difference

between the requirement of pleading as regards an election petition based on/under Section 100(1)(d)(iii) and an election petition based on Section 100(1)(b) of the Representation of the People Act, 1951. in case an election petition based on Section 100(1)(d)(iii) is concerned, the election petitioner is required to set out the material facts and particulars inasmuch as to make out a prima facie case for inspection or scrutiny of the ballot papers. Where the Tribunal finds that the material facts set out in such an election petition are lacking, the election petitioner is entitled to supply necessary material facts and particulars under Order 17 of the code of civil Procedure. The question as to whether the election petitioner was estopped and precluded from raising the contentions in his election petition are regards the validity or otherwise of the 258 ballot papers, in our considered opinion, was a matter which could have been gone into only at the trial. The election petition could have been allowed or dismissed by the tribunal having regard to the provisions contained in Section 100(1)(e) of the Act only after a full-dress trial and upon giving an opportunity to the parties to examine themselves and/or their witnesses in support of their respective cases.

P.Neeradha Reddy), it has been observed at paragraph No.5 as follows:

5. Rejection of the plaint under Order 7 Rule 11 of CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be so by the court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plant is wholly immaterial. It is only if the averments in the plaint *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial.

10. Heard, the learned senior counsels appearing on either side and perused the respective pleadings of the parties and the Case Laws cited in support of their contentions.

11. The first respondent in the Election Petition is the applicant in both these applications. He is the returned candidate in respect of the Ottapidaram Assembly Constituency. He filed these applications for rejecting the Election Petition as not maintainable and to strike out the pleadings in paragraph Nos. 3 to 35 of the Election Petition. The contentions of the applicant and the grounds raised by him in both these applications are common and one and the same. Hence, both the applications are heard and decided hereunder in common.

12. The main Election Petition is filed by the 1st respondent in these applications, challenging the election of the applicant herein. The following are the grounds raised by the Election petitioner to set aside the election.

(a) More than 1750 postal votes are missing and not taken up for counting, which has materially altered the result of the election.

(b) Misuse of Government machinery by the returned candidate.

(c) The District Election Officer/ District Collector, who is the 13th respondent herein, misused his power in favour of the returned candidate.

(d) Distribution of cash to the voters, which amounts to corrupt practice.

(e) Suppression of information by the returned candidate in respect of the quarry operated by him which disqualifies him from contesting the election.

(f) Disqualification of the returned candidate, since he entered into a Government contract and thus, he is debarred from contesting election as per Section 9-A of the Representation of the People Act, 1951.

13. It is the contention of the applicant herein that the pleadings in the Election Petition do not satisfy the mandatory requirement of Section 83 of the said Act, since material facts and full particulars have not been pleaded. It is also the contention of the applicant that the election petition does not disclose any cause of action. In other words, the applicant contends that his election cannot be set aside based on bald and vague allegations.

14. O.A.No.885/2016 is filed under Order VI Rule 16 of C.P.C, dealing with striking out the pleadings. It reads as follows:

Striking out pleadings - The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading -

(a) which may be unnecessary, scandalous, frivolous or vexatious, or

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or (c) which is otherwise an abuse of the process of the Court.

15. O.A.No.886/2016 is filed under Order VII Rule 11

C.P.C. which deals with rejection of plaint. It reads as follows:

Rejection of plaint - The plaint shall be rejected in the following cases: -

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon papers insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9.

(Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.)

Now, this Court has to find out as to whether the pleadings in the Election Petition will fall under the scope and ambit of the above said provisions of law so as to reject/ strike out the same, as claimed by the applicant.

16. It is well settled that an Election Petition is not an action at common law, nor in equity. Therefore, the

material facts and full particulars and adduce evidence to substantiate those contentions. But at the same time, it is to be noted that the defence in the Election Petition, on the merits, cannot be taken into consideration while considering the application seeking for rejection of the Election Petition under Order VII Rule 11 C.P.C. or under Order VI Rule 16 C.P.C. What is to be seen is as to whether the Election Petition discloses a cause of action with material facts and full particulars. The correctness or otherwise of those material facts and particulars has to be gone into and decided only after conducting a full fledged trial and certainly not at the stage of considering the application under Order VII Rule 11 or Order VI Rule 16 C.P.C. It is well settled that in an election Petition a party cannot seek a roving enquiry. The material facts with full particulars are essential and they have to be substantiated by adducing evidence. I myself considered the above aspect in detail in O.A.No.748/2012 and O.A.5/2013 in ELP.No.8/2011 dated 16.08.2013, by following the various decisions of the Apex Court.

17. Keeping the above principle in mind, this Court has to find out as to whether the present Election Petition discloses material facts and full particulars and whether those material facts and particulars, disclose a cause of action.

18. Let me proceed one by one on the grounds raised in the Election Petition.

19. The first ground is that more than 1750 postal votes are missing and that they were not taken up for counting, which according to the election petitioner, has materially altered the result of the election. At paragraph Nos. 10 to 19, the election petitioner has dealt with those facts and particulars. A careful perusal of the averments made in those paragraphs would undoubtedly show that it is his clear and categorical case that more than 1750 postal votes are missing and they are not taken up for counting, which has materially altered the result of the election. It is his contention that more than 3500 postal votes were there, out of which, only 1256 votes were received by the election officials. The above averments of the election petitioner is sought to be rejected by the applicant by contending that the petitioner has not made any complaint regarding the so called missing of postal ballot papers and no material documents have been produced before this Court to substantiate those allegations. It is also contended by the applicant that the election petitioner was not sure about the allegation regarding 240 postal votes obtained from the police battalion. The learned Senior Counsel appearing for the applicant wanted to rely on one of the documents filed by the election petitioner to contend that only 1256 postal ballot votes were received in total

and not more than that as contended by the election petitioner. I have already pointed out that what is to be seen at this stage is as to whether the election petitioner has pleaded the material facts and full particulars. The correctness or otherwise of such averments cannot be gone into at this stage, based on the rival contentions of the returned candidate. Certainly, it has to be gone into and decided only after conducting a full fledged trial. Insofar as the allegation regarding the postal ballots are concerned, I find that the detailed averments made in paragraph Nos.10 to 19, that too, providing certain material facts and figures of the postal ballots, are sufficient to proceed further with enquiry of the election petition. Therefore, they cannot be brushed aside as not disclosing the material facts and full particulars. Needless to say that it is for the election petitioner to substantiate such contentions by adducing evidence and it is for the returned candidate to disprove such allegations by making his counter pleadings and adducing evidence in support of such pleadings. Therefore, I am of the view that the averments regarding the postal ballots at paragraph Nos.10 to 19, cannot be rejected or struck off at the threshold.

20. The next ground deals with the allegation regarding

misuse of Government machinery. At paragraph No.20, the election petitioner has specifically pleaded that during the

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election campaign, some Intelligence Wing of Police Personnels were illegally deputed to collect and pass information about the election petitioner's day to-day campaign work and that they had illegal contact with the returned candidate by passing on information through SMS, Whats app and Voice call. The election petitioner has also specifically named three of such persons, namely, Senthilmurugan, Vijayakumar and Thirumeni, allegedly indulging in those illegal assignment. It is specifically pleaded by the election petitioner that these persons are Police officials of Intelligence Department of the State Police. A careful perusal of the above allegations made at paragraph Nos.20 and 21 would certainly show that the election petitioner has made certain material facts with particulars regarding the allegation of misuse of Government machinery. No doubt these allegations are to be proved by the election petitioner by adducing convincing evidence. Contra contentions raised by the returned candidate denying these allegations cannot be gone into at this stage, as it is to be decided after trial. Therefore, I find that the averments contained in paragraph Nos.20 and 21 are not liable to be either rejected or struck off.

21. The next ground of challenge is that the District Election Officer/ District Collector, who is the 13th respondent herein, has misused his power in favour of the returned candidate. Regarding the above allegation, the

election petitioner has contended at paragraph No.22 that at Booth No.44, on the instruction of the District Election Officer/ District Collector, the police unnecessarily made lathi charge on the voters on the polling date at about 4.00 p.m. and prevented the people from casting their votes with an intention to prevent the votes to be polled in his favour. Thus, it is contended by the election petitioner that out of 1026 votes, only 676 persons casted their votes and the others were prevented. Therefore, it is the contention of the petitioner that this has resulted in substantial number of votes not being polled, which if polled, would have materially altered the result of the election. Here again, the election petitioner has given the details of the place, time and day on which the alleged incident had taken place, that too, by pin pointing the allegation against the District Election Officer/ District Collector. The election petitioner has also given the facts and figures of the total votes to be polled and the votes that were actually polled. I do not think that these allegations can be brushed aside as the one without material facts and full particulars. As already stated supra, the election petitioner has to prove these contentions by adducing material evidence. But at any event, these averments cannot be brushed aside at the threshold.

22. Now, let me consider the allegation regarding the corrupt practice, namely distribution of cash to the voters.

At paragraph No.23 to 27 the Election petitioner has dealt with the details of such corrupt practice. It is his specific contention that though several complaints have been lodged regarding distribution of cash to the voters by specifically giving the name and place of distribution, none of the Election officials acted strictly to curtail such illegal activities. It is the case of the election petitioner that the Election officials facilitated the AIADMK cadres to distribute the cash freely without any interruption. Though such general averments were initially made at paragraph No.23, later in the very same paragraph, the election petitioner has specifically mentioned the name of one Shanmugavel, Union Chairman of AIADMK party and a particular place namely, Sathiya Hotel by making a specific allegation that bulk amounts were transferred at the said place under the leadership of the said person to the AIADMK party cadres for distributing to the individual voters. He further stated at paragraph No.24 that with the support of District Election Officer/ District Collector, money was freely distributed through ambulance and two wheelers in Puthiyamputhur, Tharavaikulam, Mappillaioorani, Checkkarakudi, Athimarapatti, Pudhukkottai TNHB Colony Unit I & II.

23. A careful perusal of the above averments made by

the Election petitioner in respect of the allegation of corrupt practice would certainly indicate that they cannot

be brushed aside as the one without material facts or particulars. When the petitioner has made allegation by naming a specific individual and also alleged that the District Election Officer/ District Collector had supported the distribution of cash to the voters with specific details of place at which it took place, this Court is of the view that those details would certainly fall within the scope and ambit of "material details" and "particulars".

24. At this juncture, it is to be stated with strong emphasis that the Court should not adopt a hyper technical approach of considering the pleadings regarding the corrupt practice, more particularly, when such allegation is of bribing the voters. Too many technical objections or questions raised by the elected candidate against such pleadings of the election petitioner, should not be encouraged and allowed to stand in the way of the Court to find out the correctness or otherwise of the said allegation. It goes without saying that a free and fair election of the people's representatives is the back bone of the democracy and hence, such process shall not be allowed to be meddled with or polluted by persons engaged in such corrupt practice. They shall not be allowed to escape through some loop holes in the pleadings. It is also to be noted that now a days so many innovative methods are being carried out to corrupt the voters in so many ways by persons who want to succeed at any cost. The definition of corrupt

practice as provided under The Representation of the People Act, as such, may not be sufficient to cover all such unscrupulous acts and therefore, it has to be treated only as illustrative and not exhaustive. Bribing the voters in any form should be dealt with iron hand. Therefore, the questions raised with too many technical objections against the allegation of corrupt practice should not block the way of the Court to find out the truth, since such technical objections, if allowed to sustain, may only pave an escape route for the persons who really indulged in such corrupt practice. At the same time, as already stated supra, it is for the election petitioner to prove such allegations with concrete evidence. Therefore, the correctness or otherwise of such allegations can be gone into only after conducting full trial and not at this stage of considering the application filed under Order VII Rule 11 or Order VI Rule 16 C.P.C. Therefore, I find that the averments contained in paragraph Nos.23 to 27 cannot be rejected or struck off.

25. Let me consider the next two grounds which are in fact interlinked with each other. They deal with the alleged disqualification of the returned candidate on the reason that he was holding a Government contract which disqualifies him from contesting the election as contemplated under Section 9-A of the said Act. The Election Petitioner has dealt with the above allegations at paragraph Nos.28 to 30.

It is contended by him that the returned candidate entered into a lease for mining with the Government of Tamil Nadu

and however, he conveniently suppressed those facts while filing the declaration. Therefore, it is the contention of the election petitioner that the returned candidate, apart from being guilty of suppression of material facts, is also liable to be disqualified for having undertaken the works of the Government by way of entering into such contract. No doubt, it is contended by the returned candidate that he is not having any existing contract with the Government and only his father is carrying on quarrying operation after taking the lands for lease from the returned candidate and there is no contract with the Government to execute any work or supply of any goods to the Government so as to warrant disqualification under Section 9-A of the said Act.

26. A perusal of those allegations and counter allegations would show that they are not to be considered and decided either way at the threshold, that too, while deciding the application filed under Order VII Rule 11 C.P.C., since it is for the parties to adduce evidence in support of their rival contentions, so as to enable this Court to come to a just and proper conclusion in respect of the above allegations. Undoubtedly, that has to happen only after conducting the trial and not before that. Therefore, I do not think that the applicant herein is entitled to seek for rejection of the Election Petition merely by stating that the allegations made by the Election Petitioner are against the facts. It is well settled that while considering the application filed under Order VII Rule 11

C.P.C. what is stated in the plaint alone should be looked into to find out as to whether those averments disclose material facts and particulars and consequently, based on the same whether a cause of action exists to proceed further with the process of law. Certainly, the counter allegations or the averments made by the first respondent cannot be a deciding factor while considering the application filed under Order VII Rule 11 C.P.C.

27. No doubt, the learned senior counsel for the applicant relied on one set of the above referred Case Laws to contend that the election petition is liable to be rejected at the threshold. Equally the learned senior counsel for the election petitioner relied on another set of the above referred case laws to contend that the averments made are sufficient to proceed further. Needless to say that a decision of a particular case depends upon the facts and circumstances of such case. Hence, to find out as to whether the averments made in a particular case disclose material facts and full particulars or not, certainly, the Court has to look into the facts and circumstances of such case and come to a conclusion as to whether those averments are material facts disclosing full particulars. Hence, such conclusion would be based on the satisfaction of the Court on the averments so made. Therefore, the result of such test will always depend upon the consideration of entire averments made in each and every individual case.

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28. I have already pointed out as to what are the

material facts narrated by the election petitioner in respect of each grounds and also expressed the satisfaction that they would constitute the material facts and particulars, sufficient enough to proceed further with the trial. No doubt, the general proposition that the election petitioner should disclose the material facts and full particulars, should be kept in mind, while dealing with these type of matters. As this Court has come to the conclusion that the facts narrated by the election petitioner are sufficient enough to proceed with the trial by making out a cause of action, I do not think that these applications deserve any merit.

29. Thus, I am of the firm view that the applicant has not made out a case for either striking off the pleadings or rejection of the election petition. Therefore, both the applications are dismissed. No costs.

WITNESS, THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS, AFORESAID THIS THE 06TH DAY OF JUNE 2017.

sd/-

ASSISTANT REGISTRAR
Original Side - II

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DATED THIS THE DAY OF 2017

COURT OFFICER (O.S.)

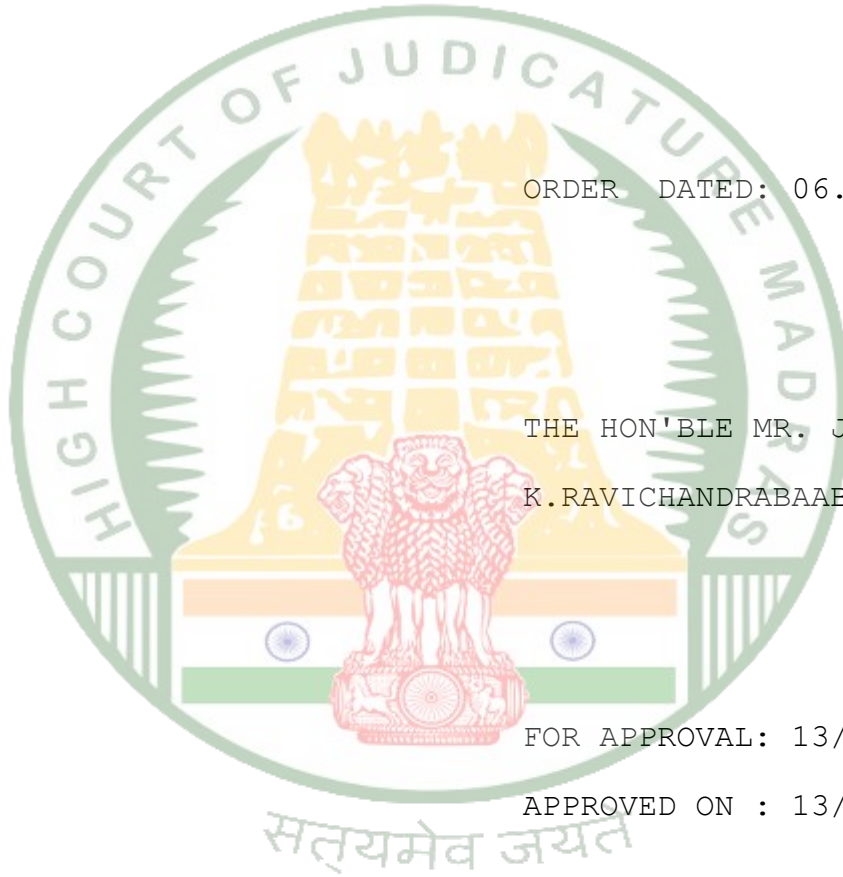
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cns.12/06/2017

O.A.Nos.885 & 886 of 2016

IN

ELP.NO.5 OF 2016



ORDER DATED: 06.06.2017

THE HON'BLE MR. JUSTICE
K.RAVICHANDRABAABU

FOR APPROVAL: 13/06/2017

APPROVED ON : 13/06/2017

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