

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.02.2020

CORAM :

THE HON'BLE MR.A.P.SAHI, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.3216 of 2020

K.Devadass

.. Petitioner

Vs

- 1 State of Tamilnadu
Rep by the Secretary to Government
Rural Development and Panchayat Raj Department
Secretariat
Chennai - 600 009.
- 2 The State Election Commissioner
Tamil Nadu State election Commission
Jawaharlal Nehru Road
Jai Nagar, Koyambedu
Chennai - 600 106.
- 3 The District Collector
Tiruvannamalai District
Tiruvannamalai.
- 4 The Returning Officer /
Block Development Officer
Tiruvannamalai Panchayat Union
Tiruvannamalai - 606 601.

5 M.Kalaivani

.. Respondents

PRAYER: Petition under Article 226 of the Constitution of India seeking issuance of a writ of Declaration, Declaring that Rule 67(1)(c) of the Tamil Nadu Panchayats (Elections) Rules, 1995 is null and void and consequently the election of the fifth respondent as the President of Adaiyur Village Panchayat, Tiruvannamalai - 606 604 declared under the said Rule on 2.1.2020 is also null and void.

For Petitioner

: Mr.M.Radhakrishnan

For Respondents

: Mr.V.Jayaprakash Narayanan
State Government Pleader
for respondents 1, 3 and 4

ORDER

(Order of the Court was made by The Hon'ble Chief Justice)

Can there be a legally and constitutionally sustainable law to select one out of two, who have been equally chosen by popular will, through a draw of lot is the issue raised in this petition where the relief sought is to declare Rule 67(1)(c) of the Tamil Nadu Panchayats (Elections) Rules, 1995 (for brevity, "the 1995 Rules") as invalid and ultra vires, as it is founded on an irrational logic of luck, being opposed to the democratic principles of the very rule itself that provides for election by votes and exercise of franchise by the electorate, and not by mere chance or addition of an imaginary uncast vote.

2. Learned counsel for the petitioner, while describing the rule to be irrational, urged that there was no declaratory law in the form of a precedent available on the issue at least of the Madras High Court and, therefore, the rationality of the rule should be tested and should be declared to be constitutionally invalid being violative of Article 14 of the Constitution of India.

3. The election for the office of President of Adaiyur Village Panchayat in the District of Tiruvannamalai was held on 27.12.2019. There were five candidates, including the petitioner - Mr.K.Devadass and the fifth respondent - Mrs.M.Kalaivani. It is not the case of the petitioner that there were any irregularities in the election, either in the casting of votes or in the counting process. It is admitted that both the candidates aforesaid polled 905 votes each at the hustings coupled with one postal ballot each to their credit. Thus, both of them got 906 votes resulting in a tie.

4. The Returning Officer, the fourth respondent, accordingly took recourse to Rule 67(1)(c) read with Rule 67(2)(c) of the 1995 Rules and drew a lot. The lot fell in favour of the fifth respondent and, accordingly, in terms of the said rule she was deemed to have received an additional vote and consequently was declared elected as President of the Village Panchayat.

5. Rules 67(1)(c) and 67(2)(c) of the 1995 Rules are extracted herein under:

"Rule 67(1)(c): If there is an equality of votes between two or more contesting Candidates, and the addition of one vote will entitle any of these Candidates to be declared elected, the Returning Officer shall decide between these Candidates by lot and the Candidate on whom the lot falls shall be deemed to have received an additional vote. The Returning Officer shall then declare the result accordingly.

Rule 67(2)(c): If there is an equality of votes between two or more contesting Candidates, the Returning Officer should follow the procedure laid down in clause (c) of sub-rule (1)."

6. In this background, the petitioner having participated in the elections, having secured equal number of votes as the fifth respondent and the fifth respondent having been declared elected on the draw of lots, has after the conclusion of the election proceedings now turned around to challenge the vires of the very rule itself, which might not have been challenged by him had he been successful in the draw of lots.

7. Learned counsel for the petitioner contends that a rule that surrenders itself to chance, instead of any rational procedure informed by reason, ought not to be followed and he, therefore, contends that the only best option open is to hold a re-election. The contention is that if votes have been cast in favour of the candidates in equal measure, then creating an imbalance by a legal fiction, that too which is irrational, is violative of Article 14 of the Constitution of India, inasmuch as it fundamentally affects and prejudices the right of the petitioner to represent the village panchayat as the President thereof. The deprivation is on account of a mere chance dependent upon the luck of either of the candidates and, therefore, such uncertainty in itself makes the rule irrational as it does not represent the certain choice of the electorate. Consequently, a democratic process cannot be allowed to be converted into a game of chance through a statutory provision, as it promotes arbitrariness, taking away the very expression of free choice by the voters having been validly made in favour of a candidate, through an imaginary vote by tilting the scales by deployment of a chance mechanism under legal cover. It is in this background that the learned counsel contends that the rule aforesaid should be struck down as ultra vires.

8. Learned counsel for the State vehemently opposing the said logic advanced contends that the results of an election cannot be challenged by taking recourse to and under the cover of a challenge raised to the vires of a rule to which the petitioner had already acquiesced. It is urged that if the statute provides for adopting a procedure which is equally advantageous to the petitioner and the fifth respondent, it cannot be said to be so irrational so as to make it unacceptable. The procedure being pragmatic and practical cannot be termed as irrational. It is urged that the petitioner having participated in the entire process and having failed to get himself crowned as the President cannot now be permitted to raise this challenge, as even otherwise such a provision in the wisdom of the legislature has been found to be an equitable and just provision to dissolve an impasse that may arise in a rare case. The provision, therefore, enuring to the benefit of either of the candidates receiving equal number of votes cannot be said to be arbitrary merely because one of the candidates has been declared elected. The legislature has taken care of making provisions that are beneficial and congenial for the declaration of results allowing the people to have a person of their choice by a method that has stood the test of time for long and in view of this acceptability, any element of arbitrariness, much less manifest arbitrariness, is clearly ruled out. He, therefore, contends that the provision is not promoting any game of chance, but is rather facilitating a chance to a candidate having equal support of the electorate to occupy an elected office, the selection whereof is by a procedure prescribed by a statute and is not based on the whim and fancy of the Returning Officer. This element of luck or chance is equally available to both the candidates who have received equal number of votes and, therefore, does not create any disadvantageous situation so as to make the rule arbitrary or prejudicial in a way to declare it ultra vires.

9. The challenge raised is basically on the premise that the impugned Rule is not based on any sustainable democratic principle, as it is founded on uncertainty and unpredictability, leaving the fate of a democratically elected candidate to sheer personal luck and is, therefore, a rule of chance that negates the concept of choice by franchise. The argument is that the drawing of a lot and then converting the lot into a vote in favour of one candidate, does not amount to casting of a vote which is the only mode of election prescribed. Even otherwise, election by draw of lots is not an exercise of franchise, but an artificial procedure of selection and not a procedure of direct election.

10. Lawyers bask under the "glorious uncertainty of law (Sheridan)", as "it is always probable that something improbable may happen (Logan E. Bleckley, American Jurist)". That is why they can predict the unpredictable and unknown course of events. But, society needs certainty and exactitude of law.

11. To meet the above challenge raised, it would be correct to assume that the right of a voter to elect a President of his choice in a Village Panchayat is not by chance or by the play of dice. It is an exercise of the right of franchise by casting a vote physically expressing one's will secretly or in some cases openly to elect a person of his choice. Thus, the drawing of a lot is nowhere akin to any such exercise of a right of franchise. The expression of a choice by a voter is based on his personal perception as to who will be able to lead them or implement certain preferred policies of the majority. This also takes us to the expression of general will by the electorate through this method and, therefore a draw of lot cannot be equated to this methodology in a democratic set up in a direct election. Thus, this exception to the direct election method for drawing of a lot on equality of votes can be described as a method of selection where an element of chance is involved and which may be dependent upon the luck of one of the candidates.

12. The conversion of such a lot being drawn in favour of a candidate is by fiction under the impugned Rule, and is treated as an addition of one vote deemed to have fallen in the share of the candidate in whose favour the lot has been drawn. It is thus a deemed vote on the drawing of the lot and is, therefore, not a vote cast, but a vote added to declare a particular candidate successful in whose favour the lot has been drawn.

13. The question raised is as to whether this method is undemocratic, unjust or so manifestly arbitrary that it impinges upon the fundamental rights guaranteed under Article 14 of the Constitution of India or is otherwise violative of any other constitutional or legal provision. This also brings in the issue of the wisdom of the legislature in making such a provision and its acceptability in a democratic process.

14. Theoretically, the methodology of chance and luck has been embraced by the legislature, by providing a solution in a situation where two candidates secure an equal number of votes. By an addition of one vote, it seeks to establish good luck through an odd number to declare the election results in favour of the candidate in whose favour the lot is drawn. The existence of an additional vote and its worth is caused by this exercise

and then it is deemed to be an additional vote. It does appear to reason that such a vote has neither been polled nor has been really cast by any voter physically, but it is still a vote that has come into existence by operation of law and is not an imagination. It is the generation of one vote by this device that is added in order to conclude the results and attach finality to the elections. It is a conscious exercise of the legislative will through a law to resolve a tie and is not a game or recreation for gamble or pleasure. The purpose is to install and give life to an electoral impasse.

15. The question is can such a provision be held to be valid and rational? To us, it appears that the legislature was conscious of such situations and, therefore, in order to provide a workable and operational system, and to avoid further uncertainty by prolonging the process through fresh elections, thought it appropriate to provide an additional vote amongst those who had secured equal number of votes by the draw of a lot. This wisdom of the legislature is in one way a logical solution by viewing the situation where two candidates have been equally found to be fit by the electorate to represent them as the Village Head. The voter's interest being equally divided also amounts to reposing equal confidence in both the candidates. It, therefore, cannot be said that one is inferior or superior to the other and, hence, democracy in its republican way is directly reflected through an exercise of franchise, where both the candidates have been selected by an equal strength of voters. Numerically they are not rejected, but have been selected in equal measure for being elected. They are, therefore, equally competent to represent and if the law, through the fictional method, after an exercise of draw of lots, plays the role of final arbiter, the same does not amount to negating the choice of the majority. The method, therefore, cannot be said to be anti-democratic or purely fortuitous or casual. It may appear to be unequal if this is taken to be mere chance or sheer luck, as the Roman Poet Ovid said "Chance dispenses life with unequal justice". On the other hand, we may remember Ralph Waldo Emerson, who said "Shallow men believe in luck, strong men believe in cause and effect". We should not forget that here chance is not by way of providence, but by man-made law to govern himself. In this context, it would be apt to quote Voltaire, who said "Chance is a word void of sense; nothing can exist without a cause".

16. The cause here is the reception of equal number of votes by two candidates. The circumstance may be fortuitous because of it's impact in favour of one after its outcome, but the cause is a right of exercise of franchise resulting in equal

number of votes cast under a legally adopted method of casting of votes. It is here that we have to turn to the pronouncements of the Apex Court and the settled law that the right to get elected or represent people is a statutory right and not a fundamental right. Reference be had to the following extract of the Apex Court judgment in the case of Jyoti Basu v. Debi Ghosal, reported in (1982) 1 SCC 691:

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation."

The following observations of the Apex Court in the case of Kuldeep Nayar v. Union of India, reported in AIR 2006 SC 3127 are also worth mentioning:

"Even without going into the debate as to whether right to vote is a statutory or Constitutional right, the right to be elected is indisputably a statutory right, i.e., the right to stand for elections can be regulated by law made by Parliament. It is pure and simple a statutory right that can be created and taken away by Parliament and, therefore, must always be subject to statutory limitations."

17. The right to elect a person of one's choice is the democratic principle that gives the voter his freedom to cast a vote in favour of a candidate of his choice. In a method of secret ballot, the certainty is declared only after the ballots are counted and, therefore, the chance of being elected or not elected prior to that is indeterminate. The methodology of the election is statutorily ordained and is cast in a manner that has to reflect fairness.

18. It is not the case of either of the parties that the elections have not been fair or the method of holding of the elections has been unfair. It is the method of the declaration of the result after the casting of final votes that has been questioned in the present proceedings. There can be other working solutions to the aforesaid problem as suggested by the petitioner, namely there can be a fresh election. Apart from this, if two people have been equally chosen by the people to represent them, they can be allowed to work on a 50:50 tenure basis. There can be another possible method of a second

opportunity of votes being allowed to be cast by the voters who had not been able to cast their votes on the date of the elections before the counting of ballots. But, all this is in the realm of the wisdom of the legislature to formulate a method so as to make it workable. The legislature, in order to remove uncertainty and to bring about finality, thought that in such a situation the draw of lot at the time of declaration of result by the Returning Officer would ease out the problem.

19. In the present context, since there is only one post, there cannot be a declaration of a joint winner like in a race or in the pursuit of academics or even in the giving away of a prize. The very nature of a singular office, therefore, necessitates the existence of a method in order to terminate the proceedings and allow the system to function. To us, it appears that there is no lack of confidence of the electorate, inasmuch as the confidence has been expressed equally in both the candidates by an equal number of voters. This logic is further supported by another illustration that if in a multi-contested election, where there are many candidates, if the successful candidate gets less than 50% of the votes polled and is yet elected, can it be said that the people have not reposed confidence in him? The obvious answer in a democratic process is that the person getting the maximum number of votes is declared to be elected.

20. In the instant case, the optimum number of votes have been polled in favour of two people. This is supported by a theoretical principle known as "equi-optimality". It is a form of horizontal equity and, therefore, in order to choose one of the successful candidates, the legislature has provided for a rule that can be described to be supported by the dynamics of a decision making process. The procedural value which brings about a substantive outcome and is utilitarian in nature, therefore, indicates a legislative intent that must be sustained, as it provides an equal opportunity to both the candidates to get declared elected after having been selected with equal number of votes. The candidates are, therefore, not in a position to declare themselves as having been elected, and hence the legislature has come out with a method to grant this opportunity of getting elected by a method which has no malice and is neither tailored in a way that can be termed as disadvantageous. In our opinion, it is equally advantageous to both the candidates. This would be a meaning-seeking approach to uphold the validity of the rule, without much addiction to reason. A decision by draw of lots, therefore, is neither disproportionate nor arbitrary, as it gives an equal portion of opportunity to both the candidates through a legally formalized method and

which in no way either affects the statutory rights of a candidate or the constitutional rights of either the voters or the candidates.

21. The exercise through the impugned Rule proceeds on a theory of probability ending up in a firm possibility which is not unpredicted. The drawing of lot brings about a positive success in favour of one candidate and is not something purely unexpected. To the contrary, the Rule ensures that the drawing of lot ends in the selection of one candidate. There is, therefore, a predictability with the certainty of the selection of one candidate out of the two. Such an elimination process through a legal contrivance cannot be said to be a sheer gamble that culminates either in a mishap or a hazard. One of the candidates may, upon the turn of events after a lot has been drawn, experience a disappointment, but the same is not failure of democracy. It is true that the voters have the right to decide and not a Government Officer. The decision is, however, not by the Government Officer, but is in accordance with the Rule, the lot whereof is drawn as per the procedure prescribed. The Officer, therefore, has no role except to evidence the draw of lot. The lot is being drawn amongst the two names of the candidates who have secured equal number of votes. There is no third intervention. The outcome of the draw may give rise to a possible sense of injustice or a feeling of defeat to one candidate in spite of having secured an equal support of the voters, but this exercise is merely a ranking of an option amongst the two candidates who had garnered an equal support. This legal option is neither abhorrent to reason nor can be termed as purely imaginative, inasmuch as it involves a physical selection out of two real names of the candidates who have secured equal number of votes. The draw, therefore, cannot be counted only as an imaginary or a fictional vote, but is generated by the operation of law through an exercise conducted under the impugned Rule. The same does not promote gambling of results, but converts a possibility or probability into reality, thereby bringing certainty in an uncertain situation. To our mind, the legislature is empowered and legally competent to devise such a method, which can neither be termed as unjust nor arbitrary, so as to attract the wrath of Article 14 of the Constitution of India. The result may be unfavourable to one, but is not hostile to law. The implementation of the Rule, therefore, cannot be abandoned and the law does not lose its dignity if it is interpreted to serve public good. The aforesaid logic cannot be said to be indifference to law or based on some imperfect understanding.

22. To arrive at this conclusion, we have also drawn support from several judgments that we have come across and throw light on the subject.

23. The first decision is of the Madras High Court in the case of S.P. Shanmugasundaram v. Marudachala Gounder and others, reported in 1963 (1) MLJ 291, where a Division Bench found that when there is a tie and a chit is to be drawn, then the person in whose favour the chit has been drawn has a right to be declared as a successful candidate and he cannot be eliminated by the Returning Officer. The Court, while interpreting Rule 17 of the Rules framed under the Madras Panchayat Act, 1958 held that the action of the Returning Officer was not bona fide and he had misread the rule by adopting a procedure contrary to the purpose engrained therein. While deliberating, the Court approved of the reasoning given by the learned Single Judge who observed as under:

"Jagadisan, J., has explained the background of the procedure that is generally adopted in deciding the election in the case of equality of votes, in the following words:

"A tie between the candidates caused by equality of votes results in a stalemate. Neither of them can be declared elected. A fresh election would involve time, labour and money and there is no certainty that there will not be a tie again. Some device has to be adopted to declare one of them as elected. Invariably a special rule is prescribed to govern such a situation. The Returning Officer must forthwith decide between the tied candidates by lot and proceed as if the candidate on whom the lot falls had received an additional vote. In England under S. 2 off the Ballots Act, 1872 (now repealed) the Returning Officer could give a voting either orally or in writing when an equality of votes is found. But now under the present law, the decision has to be by lot. The candidate on whom the lot falls should be deemed to have received the additional vote."

To put it briefly, the decision of the result by mere count of votes having proved ineffectual to ascertain the verdict of the electorate, a law prescribes another mode, a decision by chance to resolve the tangle. Casting of lots is a favourite

device adopted in elections to secure the chance decision. Normally the person in whose favour the lot is drawn is given an additional vote which secures him thereby a superiority in the number of votes secured and enables him to win the election. In Parker's Election Agent and Returning Officer (9th Edn.) it was stated at page 214 thus:

"Where an equality of votes is found to exist between any candidates and the addition of vote would entitle any of the candidates to be declared elected the Returning Officer shall forthwith decide between the candidates by lot and proceed as if the candidate on whom the lot fell had received an additional vote. No particular method of deciding by lot's is prescribed and the Returning Officer may adopt any method in doing so that he considers, suitable. The provision is mandatory and binding alike on the Returning Officer and the candidate".

The Court further went on to deal with this theory and quoted an English case referred to in Halsbury's Laws of England in the following words:

"In Simond's Halsbury's Laws of England, 3rd Edn. Vol. 14, page 142, paragraph 245, dealing with the case it is stated,

"When after the counting of the votes (including any recount) is completed an equality of votes is found to exist between any candidates, and the addition of a vote would entitle any of those candidates to be declared elected the Returning Officer must forthwith decide between those candidates by lot and proceed as if the candidate on whom the lot falls had received an additional vote."

The footnote to this passage refers to case, Fryer v. Harris, (1955) Times 30th July, where the Returning Officer spun a coin to decide when the votes were equally divided between the candidates, the successful candidate. It was held that the method of deciding by lot was good."

The Court further observed that has been approved by the Apex

Court in the pronouncements referred to herein above, as follows:

"An election is a creature of the statute, the process of election will have to conform strictly to rules in that behalf. Where there are specific rules in regard to any matter, there will be no room for any discretion being exercised or a new method being adopted by the Returning Officer."

The reasons that impelled the Division Bench to approve of such a Rule are clearly and visibly available today, even after half a century of the said verdict, which we heartily adopt.

24. The next decision that we have come across is in the case of University of Poona and others v. Shankar Narhar Ageshe and others, reported in (1972) 3 SCC 186, where the Apex Court in paragraph (20) observed as under:

"20. Determination by lot in case of equality of votes is neither a principle of universal application nor is it a common law principle. It is only permissible when there is a specific statutory provision to that effect. In the absence of a statutory provision the method of decision by lot is not resorted to when there is other rational method."

The aforesaid judgment, therefore, makes it clear that in the absence of a statutory provision, the decision by draw of lots may be chance, but if a specific statutory provision is in place, then such a method is permissible in law.

25. The third decision is in the case of Laxmi Chandra v. Mawana Sahkari Ganna Vikas Samiti Ltd. and others, reported in 1989 AWC 1116, where a Division Bench of the High Court of Allahabad, while dealing with a similar provision under the U.P. Co-operative Societies Rules, while commenting upon the role of an Election Officer in adopting the procedure of draw of lots, referred to the meaning of the words "lot" and "chance" and observed as under in paragraphs (9) to (11):

"9. The question that arises for consideration in this case is as to whether the Election Officer while drawing lots could decide as to how the decision will be arrived to after drawing lots or this had to as provided by the Rules itself.

10. For deciding the aforesaid question it will be useful to refer to the meaning of word 'Lot' and 'Drawing lot' as has been given in some English

Dictionaries. History and the meaning of the word 'lot' and 'drawing lot' has been given in "A New English Dictionary on Historical principles" edited by Sir James A.H. Murray (1908 Edition). According to the meaning given in the aforesaid dictionary 'Lot' means "An object (app. usually a piece of wood) used in a widely diffused ancient method of deciding disputes, dividing plunder or property, selecting persons for an office or duty etc. By an appeal to chance or the divine agency supposed to be concerned in the results of chance. In abstract sense it means "The casting or drawing of lots, or the use of any equivalent process to obtain a decision." It has alphabets stated that the ancients knew that election by lot was the most democratic of all modes of appointment. The only remaining possibility is either the lots or the decision of some external will."

11. In the Chambers Twentieth Century Dictionary 1980 edition, the meaning of the word "Lot" has been given as follows:

An object, as a slip of wood, a straw, drawn or thrown out from among a number in order to reach a decision by chance.

Cast or draw lots is said to mean to draw from a set alike in appearance in order to reach a decision."

The Court went on to hold that the procedure adopted by the Election Officer in that case cannot be said to be against the basic principle of chance and, ultimately, dismissed the petition.

26. The next decision is of a learned Single Judge of the Kerala High Court in the case of Padmanabhan v. State of Kerala and others, reported in 2000 (2) KLJ 878, where we find it to be supporting the reasons enunciated by us herein above. Paragraphs (3) to (5) of the said decision are extracted herein under:

"3. Section 79 of the Act springs into action when there is tie. It may be that the margin between two candidates at times will be too slender, but when there is a majority the defeated candidate may not be able to contend that in view of the slenderness of the margin of votes the mandate of the

electorate was to see that he also should be given privileges equal to a successful candidate. The statute provides for a practical approach in the case of a tie whereunder lots are drawn and depending upon the outcome a person is deemed to have got an additional vote. This is not a provision which is exclusively incorporated in the Panchayat Raj Act. It is a well accepted method of procedure in the matter of elections under the Representation of Peoples Act and also to other bodies and Corporations where election is a method for selection of candidates. The petitioner has only a right to vote in an election but in the matter of deciding as to who should represent a constituency or a ward the law prescribes the method which is easy and practicable and it cannot be treated or termed as opposed to fairness. The petitioner's suggestion in this case is that an election may be ordered or both the candidates are to be declared as elected. It does not sound sensible. The petitioner's contention that his fundamental rights guaranteed under Article 19 of the Constitution of India stands violated also appears to be an empty, far fetched plea and has not been substantiated.

4. There might be an element of arbitrariness in the method suggested by statute. But life itself at times throws challenges, on the border lines of arbitrariness. I can see Section 79 only as a piece of law, which is least objectionable, to come over a situation of impasse. The principle of casting vote is not alien to election; it is resorted to, so as to get across lawlessness. Lots, or spin of coin may decide the fate of an aspirant, but when circumstances conspire, the above is accepted as a democratic, civilised method.

5. Guide for Meetings and Organisations by N.E.Renton (1961, Sweet & Maxwell) states that at common law, there is no casting vote, and an equality of voting means the motion is defeated. But if the Rules give the Chairman a casting vote, he usually casts it so as to preserve the status quo. Here Section 79 clearly makes provision to take over the situation, and if one vote is sufficient to tilt the balance in favour of a candidate, the Returning Officer is authorised to

draw lots and the process of election thereby is completed. The procedure is the least objectionable, compared to what is suggested by the petitioner. The petitioner may note that even according to his averments, there are at least 380 voters in the Panchayat who had not gone to the polling station on the date of the poll. That may be for various reasons. If the contention of the petitioner is examined, it will be seen that a person who secures 543 votes in fact gets the support of less than 36% support of the villagers. But by a fiction he is treated as the representative of the whole villagers. There has to be a rational approach in these matters, and arithmetical precision or stiff logic will find themselves out of place. In that view, section 79 cannot be considered as interfering with the fundamental right of the petitioner. I see no reason to interfere in the matter. The Original Petition is dismissed."

27. The said decision in *Padmanabhan v. State of Kerala and others* (supra) was approved of by a Division Bench of the Kerala High Court in the case of *Murali Vengath v. Kanakkari Grama Panchayat and others*, reported in 2001 (1) KLJ 693, where, while interpreting Section 79 of the Kerala Panchayat Raj Act, 1994, it was held as under in paragraphs (5) to (7):

"5. Despite the above legal position, we may also incidentally refer to the merits of the contentions; though it is now well settled that once election is conducted the remedy of any aggrieved person is not under Art. 226 of the Constitution of India. Sections 79 and 104 of the Kerala Panchayat Raj Act read as follows:

79. Equality of votes.- If, after the counting of the votes is completed, an equality of votes is found to exist between any candidates, and the addition of one vote will entitle any of those candidates to be declared elected, the returning officer shall forthwith decide between those candidates by lot, and proceed as if the candidate on whom the lot falls had received an additional vote.

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"104. Procedure in case of an equality of votes.- If during the trial of an election petition it appears that there is an equality of votes between any candidates at the election and that the addition of one vote would entitle any of those candidates to be declared elected, then-

(a) any decision made by the returning officer under the provisions of this Act, shall insofar as it determines the question between those candidates, be effective also for the purposes of the petition; and

(b) in so far as that question is not determined by such a decision the court shall decide between them by lot and proceed as if the one on whom the lot then falls had received an additional vote.

Thus it can be seen that the statute has incorporated provisions that in the event of equality of votes, for the purpose of declaring one candidate as successful, one of them has to be given an additional vote and that additional vote is decided on the basis of lot. It is interesting to note that in *Eyre v. Milton Proprietary Ltd.*, 1936 1 Ch. 244, the true meaning of the expression 'shall be determined by ballot' was held to be 'shall be determined by lot' while construing a provision under the Companies Act. According to Lord Wright, the Master of the Rolls, the expression 'by ballot' means a secret vote and as the circumstances warranted a draw by lot.

6. The legislature thought it fit and reasonable to take recourse to such a mode in order to get over a situation of impasse. It is interesting to note that even on analysing the prayers of the appellant one has to adopt such a mode by lot at one stage. It is the suggestion of the appellant that in the event of securing equal number of votes the term should be divided equally between or among the candidates who secured equal number of votes. Obviously, if those candidates are not agreeable to decide as to their turn, the only mode available to decide the respective turn is to draw a lot. Thus it cannot be said that such a mode is unreasonable.

7. Yet another suggestion of the learned counsel for the appellant is to take recourse to Sec. 150 of the Kerala Panchayat Raj Act which reads thus:

150. Special elections.- If at a general election or bye-election no person is elected to fill the vacancy a fresh election shall be held within three months after the general election or bye-election, as the case may be, for such vacancy on such day as the State Election Commission may fix.

It needs no explanation that it is a provision contemplated in the exigency of no one getting elected to fill up the vacancy. The situations dealt with under Secs. 79 and 104 of the Act are not the situations where none is elected. Those are situations where from among the candidates 'voted' who is to be selected as elected in the event of candidates securing equal number of votes, by adding one vote. Certainly the returning officer cannot be given a casting vote which is an accepted mode of taking decision by the Chairman of a Meeting exercising a second or casting vote in the event of equal number of votes between the contesting candidates or rival contentions. (Ref. Shackleton on The Law and Practice of Meetings, Sixth Edition, Part IV). Sections 65 and 102 of the Representation of Peoples Act, 1951 also deal with situations and procedures where the candidates securing equal number of votes. Therein also in unmistakable terms it is held that the candidate in whose favour the lot falls will be deemed to have secured an additional vote and that person would be declared as the winning candidate. It is not creation of an artificial vote as contended by the appellant. The legislature in its wisdom thought of averting the heavy burden on the exchequer in conducting re-election as far as possible and thought it fit to declare one among them as elected by giving them an additional vote which is to be determined on the basis of lot. We do not think that the said provision is in any way unreasonable. It does not in any way violate the provisions of the Citizenship Act either. The contention that the additional vote is not that of a citizen but that of an artificial person is too farfetched and wild.

Obviously, it is not as if an artificial person casts a vote so as to tilt the ballot; but it is only a situation of breaking a tie which is a universally accepted practice in such situations. The learned counsel then contended based on N.E. Renton (1961, Sweet & Maxwell) "Guide for Meetings and Organisations" that in the event of securing equal number of votes it is common law principle that the motion should be taken as defeated and there is no casting vote. That was a situation dealing with adoption of resolution in a meeting. An election on the basis of expression of the will of people by ballots cannot be equated with such a situation. It has also to be noted that no citizen casts two votes so as to get over the impasse and for that matter the returning officer also does not decide the result of the election. On the basis of the statutory power which is already held by us as reasonable the returning officer only decides the result by drawing a lot. In that view of the matter also none of the contentions of the appellant has any merit."

The Division Bench came to the conclusion that this was a valid system, legally permissible, to allow the addition of a vote on the draw of lot in the process of declaring a candidate having been elected after receiving an equal number of votes.

28. The last decision that we could lay our hands on is yet another Division Bench judgment of the Allahabad High Court in the case of Tikam Singh v. State of U.P. And others, reported in 2011 4 AWC 3527 (All). In that case, while resorting to the provision of drawing of lots, the Returning Officer had asked a minor girl of five years to take out one slip out of two containing the names of two candidates who had secured equal number of votes in a panchayat election. The Division Bench went on to compare similar rules existing in other statutes, including the Representation of Peoples Act, 1951, and also dealt with the Division Bench judgment of the Madras High Court in the case of S.P.Shanmugasundaram v. Marudachala Gounder and others (supra). The Division Bench then relying on the Supreme Court cases of Jyoti Basu v. Debi Ghosal (supra) and Kuldip Nayar v. Union of India (supra) held that to contest an election or to get declared in an election as having been elected is neither a fundamental right nor a common law right and is a statutory right regulated by statute. After having extensively quoted the Madras High Court judgment in S.P.Shanmugasundaram v. Marudachala Gounder and others (supra), on facts the case was distinguished in paragraph (23) and then by relying on the

judgment in the case of University of Poona and others v. Shankar Narhar Ageshe and others (supra), proceeded to dismiss the writ petition in a challenge raised to the method of drawing of lots.

29. In the instant case, the petitioner himself took a chance of facing the draw of lots and having failed to secure the lot in his favour, has now challenged the very Rule that provides for drawing of lots. This challenge has been raised after elections. It could have given rise to an election dispute to be raised before an appropriate forum, but since the vires of the Rule itself has been questioned and that was the only challenge raised, we entertained the writ petition and for the reasons given herein above, we find no merit in the contention that Rule 67(1)(c) read with Rule 67(2)(c) of the 1995 Rules is ultra vires either to the provisions of the Act or to the democratic principles of the holding of an election by exercise of right of franchise or even ultra vires Article 14 of the Constitution of India.

30. The question as to whether there can be an alternative method to resolve the dispute is for the legislature to decide and not for the Court to suggest.

The petition is, accordingly, dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To:

- 1.The Secretary to Government
State of Tamilnadu
Rural Development and Panchayat Raj Department
Secretariat
Chennai - 600 009.
- 2.The State Election Commissioner
Tamil Nadu State election Commission
Jawaharlal Nehru Road
Jai Nagar, Koyambedu
Chennai - 600 106.

3.The District Collector
Tiruvannamalai District
Tiruvannamalai.

4.The Returning Officer /
Block Development Officer
Tiruvannamalai Panchayat Union
Tiruvannamalai - 606 601.

+lcc to Mr.M.Radhakrishnan, Advocate SR.11035
+lcc to the Government Pleader SR.11432

W.P.No.3216 of 2020

PM(CO)
CB(21/02/2020)



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