BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 03.02.2020

DELIVERED ON : 06.02.2020

CORAM

THE HONOURABLE MR.JUSTICE M.DURAISWAMY

AND

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

W.P(MD)Nos.183 of 2020 & W.M.P(MD)Nos.119, 121, 283 & 284 of 2020
AND
W.P(MD)No.385 of 2020 & W.M.P(MD)Nos.296 & 297 of 2020

W.P(MD)No.183 of 2020:

M.Devi ... Petitioner

Vs.

1.The Tamil Nadu State Election Commissioner,
Jawaharlal Nehru Road,
Koyambedu,
Chennai - 600 106.

2.The District Collector,
Office of the District Collector,
Sivagangai District,
Sivagangai.

3.The Election Officer/
Block Development Officer,
Sakkottai Panchayat Union,
Sivagangai District.

4.A.Priyadharshini

5.Malathi,
The Election Officer/
Block Development Officer,
Sakkottai Panchayat Union,
Sivagangai District. ... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Declaration to declare that the second Form 25 Certificate, dated 02.01.2020, issued by the third respondent declaring the fourth respondent as elected as President of Sankarapuram Village Panchayat, Sakkottai Panchayat

Union, Sivagangai District, is null and void and unconstitutional and against the Tamil Nadu Panchayats Act and Tamil Nadu Panchayat Election Rules.

For Petitioner : Mr.T.V.Ramanujam
Senior Counsel
for Mr.M.Saravanan

For Respondents : Mr.Raja Karthikeyan for R.1

Mr.K.Chellapandian
Additional Advocate General
assisted by
Mr.VR.Shanmuganathan
Special Government Pleader for R.2 & R.3
Mr.M.Vallinayagam
Senior Counsel
for Mr.P.Thilak Kumar for R.4

* * * * *

W.P(MD)No.385 of 2020:

M.Devi ... Petitioner

Vs.

1.The Tamil Nadu State Election Commissioner,
Jawaharlal Nehru Road,
Koyambedu,
Chennai - 600 106.

2.The District Collector,
Office of the District Collector,
Sivagangai District,
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Sivagangai District.

4.A.Priyadharshini

5.Malathi,
The Election Officer/
Block Development Officer,
Sakkottai Panchayat Union,
Sivagangai District. ... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari to call for the records pertaining to the impugned order passed by the third respondent in Na.Ka.No.A6/464/2018, dated 03.01.2020 and quash the same.

For Petitioner : Mr.T.V.Ramanujam
Senior Counsel
for Mr.M.Saravanan

For Respondents : Mr.Raja Karthikeyan for R.1

Mr.K.Chellapandian
Additional Advocate General
assisted by
Mr.VR.Shanmuganathan
Special Government Pleader for R.2 & R.3
Ms.Chitra Sampath
Senior Counsel
for Mr.J.Anandhakumar for R.4

* * * * *

COMMON ORDER

M.DURAISWAMY,J.

W.P(MD)No.183 of 2020 has been filed by the petitioner - M.Devi, to issue a writ of Declaration to declare the second Form 25 Certificate, dated 02.01.2020, issued by the third respondent declaring the fourth respondent as elected as President of Sankarapuram Village Panchayat, Sakkottai Panchayat Union, Sivagangai District, as null and void and unconstitutional and against the Tamil Nadu Panchayats Act, 1994 and Tamil Nadu Panchayat (Election) Rules, 1995.

2. W.P(MD)No.385 of 2020 has been filed seeking to issue a Writ of Certiorari to call for the records pertaining to the impugned order passed by the third respondent in Na.Ka.No.A6/464/2018, dated 03.01.2020 and quash the same.

3. Since the issues involved in both the writ petitions pertaining to the election to the post of President of Sankarapuram Village Panchayat, Sakkottai Panchayat Union, Sivagangai District, are common, both the writ petitions are disposed of by this common order.

4. The petitioner - M.Devi and the fourth respondent - A.Priyadharshini contested in the local body elections for the post

of President of Sankarapuram Village Panchayat, Sakkottai Panchayat Union, Sivagangai District and according to the petitioner, the fourth respondent is a very close associate of the ruling party. The election was conducted on 30.12.2019 and out of the total number of 22,599 eligible voters, 11,906 votes were polled in the Panchayat Election. On 02.01.2020 at 12.30 p.m., the third respondent, who is the Returning Officer of the Panchayat, started counting the votes polled and at about 08.00 p.m., the third respondent declared the petitioner as the successful candidate.

5. According to the petitioner, since the fourth respondent created commotion by shouting and pushing the others in the presence of the second respondent - District Collector, Sivagangai District and the Election Observer, the third respondent verified the votes polled and reaffirmed her earlier decision declaring the petitioner as successful candidate. According to the petitioner, she had secured 5,871 votes and the fourth respondent had secured 5,809 votes, i.e., 62 votes more than the fourth respondent. Thereafter, the third respondent had also issued a certificate under Form 25 declaring the petitioner as elected as the President of Sankarapuram Village Panchayat, Sakkottai Panchayat Union, Sivagangai District. According to the petitioner, after receiving the certificate, she left the counting centre at 01.00 a.m., on 03.01.2020. Further, the petitioner has stated that on 03.01.2020 at about 06.00 a.m., she was informed by some of the villagers that the third respondent had issued another Certificate in Form 25 to the fourth respondent at 05.00 a.m., on 03.01.2020, declaring the fourth respondent as the successful candidate.

6. The petitioner has also alleged that due to pressure from the higher authorities and politically influential ruling party leaders, the third respondent had abused her powers and illegally issued second Form 25 Certificate declaring the fourth respondent as successful candidate.

7. The petitioner has also stated that all the newspapers carried the news that she was elected as President of Sankarapuram Village Panchayat, Sakkottai Panchayat Union, Sivagangai District. In these circumstances, the petitioner has filed the above writ petition seeking to quash the order passed by the third respondent dated 03.01.2020, cancelling her Form 25 Certificate and for declaration to declare the Form 25 Certificate issued by the third respondent in favour of the fourth respondent as null and void.

8. The fourth respondent has filed the counter affidavit wherein she has stated that mere issuance of declaration under Form 25 without completing the mandatory requirements under Rule 64(1) and (2) of the Tamil Nadu Panchayats (Election) Rules, 1995, will not entitle the writ petitioner to have advantage of illegal declaration in her favour. Further, she has stated that the mistake

committed by the Assistant Returning Officer in preparing the Form 20 and Form 22, was set right by issuing a fresh Certificate on 03.01.2020 by the Returning Officer. Further, the fourth respondent contended that the Returning Officer has not issued Form 23 to the petitioner and that in the absence of Form 23, the Certificate issued under Form 25 was rightly cancelled by the Returning Officer and a fresh Certificate was issued to the fourth respondent declaring her as successful candidate for the post of President of Sankarapuram Village Panchayat, Sakkottai Panchayat Union, Sivagangai District.

9. The second respondent - District Collector, Sivagangai District, has filed a counter affidavit wherein he has stated that Form 22 was issued in favour of the writ petitioner stating that she had secured 5,524 votes and the fourth respondent had secured 5,224 votes including the postal votes. Further, he has stated that the Election Observer, who happened to be present in the same campus, visited the spot and made an enquiry and found that the votes in respect of two booths bearing Nos.48 and 49 were not counted and directed the Assistant Returning Officer to count the votes in respect of the said two booths. Further, he has stated that after counting of the votes at 04.00 a.m., on 03.01.2020, it was found that the writ petitioner had secured 5,808 votes and the fourth respondent had secured 5,871 votes including the postal votes and thus, a fresh Form 25 Certificate was issued in favour of the fourth respondent and an order dated 03.01.2020 was also passed cancelling the Form 25 Certificate issued to the writ petitioner. Further, the second respondent has stated that a new Form 25 Certificate was issued to the fourth respondent at 05.00 a.m., on 03.01.2020. According to the second respondent - District Collector, the issuance of second Form 25 Certificate in favour of the fourth respondent is proper.

10. Heard the submissions of the learned Counsel on either side and perused the materials available on record.

11. Mr.T.V.Ramanujam, learned Senior Counsel appearing for the petitioner, in support of his contentions, relied upon the following judgments:

(i) In ***Sohan Lal v. Babu Gandhi and others*** reported in ***(2003) 1 Supreme Court Cases 108***, the Honourable Supreme Court held as follows:

> "12.Thus after declaration of results, the Returning Officer has no power either to direct recount or to change the results of the election. Once the result is declared, the only remedy of an aggrieved party is an Election Petition under Section 122."

(ii) In ***M.Kumaresan v. The State Election Commissioner*** reported in ***2012 (2) CTC 68***, this Court held as follows:

"8. The short question that arises for consideration is as to whether the Returning Officer is entitled to modify the declaration once made in favour of a candidate and to issue a set of fresh Forms in favour of another candidate on the ground of arithmetical or clerical error.

9. In the Affidavit filed by the Fourth Respondent in support of his vacate stay Petition, he has admitted that after the counting was over on 21.10.2011, the Writ Petitioner was declared elected. In para-11 of his Affidavit, the Fourth Respondent has also conceded the fact that after the counting of votes, Form Nos.22, 23 & 25 were issued in favour of the Writ Petitioner. But according to the Fourth Respondent, a representation was made thereafter by the Fifth Respondent herein to the District Collector, pointing out arithmetical error in the calculation sheet. According to the Fourth Respondent, the Second Respondent forwarded the representation to the Third Respondent and the Third Respondent perused the original records and found out clerical and arithmetical mistakes. Therefore, according to the Fourth Respondent, the declaration issued in favour of the Writ Petitioner was cancelled and the cancellation was affixed in his residence on 22.10.2011 and a fresh declaration was issued in favour of the Fifth Respondent.

10. The mistakes which necessitated the cancellation of declaration in favour of the Petitioner, according to the Respondents 4 & 5, are (i) that double entries were found for Booth Nos.4, 6, 2, 8 & 14; (ii) that in respect of Booth No.76, only 301 votes were polled, out of which the Writ Petitioner secured 140 votes, but the same was wrongly indicated as 1,490 votes; and (iii) that the votes polled in Booth Nos.99 & 102 were not at all included in Form No.22.

11. The contention of the learned Special Government Pleader and the learned Counsel for the Fifth Respondent is that when an error apparent on the face of the record is detected by the Returning Officer before much damage could be done, the Returning Officer is not powerless to withdraw the declaration already made and re-issue fresh Forms to the successful candidate. According to them, the mistakes in this case, were apparent on the face of the record and these mistakes did not require any

detailed enquiry. Therefore, they were obliged to correct these mistakes.

12. I have carefully considered the above submissions. Fortunately, there is no dispute about two facts viz., (i) that the Writ Petitioner was declared as the successful candidate and that Forms 22, 23 & 25 were issued in favour of the Writ Petitioner in the first instance and (ii) that in supersession of such a declaration, a fresh one was sought to be made in favour of the Fifth Respondent. In the light of these admitted facts, the only question to be considered is as to whether the Returning Officer has any power at all to cancel the declaration once made and to re-issue fresh Forms.

13. The Tamil Nadu Panchayats (Elections) Rules, 1995, issued in exercise of the powers conferred by Sections 11, 20, 32 & 57 of the Tamil Nadu Panchayats Act, 1994, are a complete Code in itself, in so far as the election to Panchayats are concerned. Part III of the said Rules contains a detailed procedure for the preparation and publication of Panchayat electoral rolls. Part IV contains Rules relating Notification of election and nomination of candidates. Part V contains elaborate procedure for the conduct of the poll. Part VI relates to the counting of votes. This Part details the steps to be taken by the Returning Officer. We are not concerned in this case with the matters covered by Rules 60 to 63. Therefore, I do not advert to them.

14. As per Rule 64(2), the Returning Officer should prepare a result-sheet in Form 22, after completion of counting and entering the same in Part II of Form 20. Thereafter, the Returning Officer is obliged in terms of Rule 66(1) to make an announcement. Under Rule 66(1), a contesting candidate or his agent is entitled to seek the Returning Officer for a recount. However, the request should be made after the announcement, but before the declaration of the result of the election.

15. In this case, it is not the contention of the Returning Officer or the Fifth Respondent that any request for recounting was made by the Fifth Respondent in terms of Rule 66(1), after the announcement was made after preparation of the result sheet in Form No.22, but before the declaration of the result of the election.

16. Sub-Rule (5) of Rule 66 makes it clear

that after the total number of votes polled by each candidate has been announced under sub-rule (1), the Returning Officer should complete and sign the result sheet in Form No.22. Rule 66(5) also states that thereafter, no Application for a recount should be entertained.

17. Rule 67 elaborates the procedure for declaration of result of election. Under Clause (a) of sub-rule (1) of Rule 67, the Returning Officer should declare after completion of scrutiny and counting of votes, the candidate who secured the highest number of votes as duly elected. Thereafter, he must complete and certify the return in Form No.23 and send the signed copy thereof to the District Election Officer and the State Election Commission. Under Clause (b) of the very same sub-rule, the Returning Officer should also affix a copy of the declaration made under Clause (a) in his office as well as in the office of the District Panchayat or Panchayat Union.

18. Sub-rule (2) of Rule 67 prescribes the very same procedure in the case of election of President of Village Panchayats. Sub-rule (1) relates to the election of members of the District Panchayat. We are concerned in this case only with Rule 67(1).

19. A careful reading of Rule 67(1)(a) & (b) shows that the moment the Returning Officer completes and certifies the return in Form No.23, he is obliged to do two things viz., (i) to send a copy thereof to the District Election Officer as well as to the State Election Commission and (ii) to affix a copy of the declaration in his office as well as in the office of the District Panchayat. Once this declaration is made, even this Court does not have the power to interfere with such a declaration and it is for the person aggrieved by such a declaration to invoke the remedies available under Section 259 before the Election Tribunal. Therefore, Rule 67(1) does not give any leverage or scope for the Returning Officer to withdraw a declaration once made and a certificate of return once issued in Form No.23.

20. As a matter of fact, after the certification of the return in Form No.23 and the affixture of the declaration as per Rule 67(1)(b), the Returning Officer is mandated to do certain things for the disposal of ballot papers under Rule 68 of the Rules. I am making a reference to Rule 68

just for the purpose of showing that the Returning Officer's role gets reduced after the affixture of the declaration, to that of a person winding up the whole process. This is why Rule 69(1), mandates the Returning Officer to forward without any delay in Form No.25, the name of the duly elected candidate to the State Election Commission and the District Election Officer to enable the latter to publish the same in the District Gazette. As a matter of fact, the declaration of results made in Form No.23 & Form No.25 is for the purpose of completion of the formality to ensure that the name of the elected candidate is published in the Gazette. Rule 69(1) obliges the Returning Officer to issue Form No.25 "without delay". Therefore, the Returning Officer should actually switch over to the hands off mode, the moment Form No.25 is issued to a person. Thereafter the question of the elected members taking oath, is found in Section 70-A. The Returning Officer is not in any way concerned with the same. His role is over with the forwarding of Form No.25 under Rule 69(1).

21. If a Returning Officer is made entitled to review either Form No.25 sent in terms of Rule 69(1) or to review Form No.23 issued in terms of Rule 67(1), it would amount to conferring a power which is not recognised to be in existence either in the Act or in the Rules. When the set of rules provide a complete Code, the Returning Officer cannot assume to himself any residuary or inherent powers to withdraw any declaration made or any Form already issued by him. Therefore, the act done by the Returning Officer in seeking to withdraw Form Nos.22,23 & 25 issued in favour of the Petitioner and to issue a set of fresh Forms in favour of the Fifth Respondent, is completely in violation of the statutory Rules.

22. In ***P.K.K. Shamsudeen v. K.A.M. Mappillai Mohindeen***, 1989 (1) SCC 526, the Supreme Court went to the extent of holding that "*even if the recount disclosed that the elected candidate had not secured highest number of votes, the result of the election cannot be disturbed if the order of recount itself is invalid*". Thus the Courts have always safeguarded the purity of the entire election process and recognised the sanctity of declaration of results once made.

23. In ***Sohan Lal v. Babu Gandhi***, 2003 (1) SCC 108, the Returning Officer orally declared one Sohan Lal to have won the election. But when the

official declaration was made, it was shown that one Babu Gandhi had won. A recounting was ordered and Sohan Lal was found to have won. Therefore, the Returning Officer corrected the mistake and declared Sohan Lal to have won. On a Writ Petition filed by Babu Gandhi, the High Court remanded the matter back. The Returning Officer again ordered recount and again declared Sohan Lal to have won. A second Writ Petition was filed by Babu Gandhi, which was allowed following the decision of the Supreme Court in ***Ram Rati v. Saroj Devi,*** 1997 (2) CTC 753 (SC): 1997 (6) SCC 66, in which it was held that unless a party first applied to the Returning Officer for recounting, neither the Tribunal nor the Court can direct recounting. But when Sohan Lal took the matter on Appeal to the Supreme Court, a Bench of two Judges had reservation about the principles laid down in ***Ram Rati*** case and hence, the matter was referred to a 3 Member Bench. The 3 Member Bench held in Sohan Lal that *"after the declaration of results, the Returning Officer had no power either to direct recount or to change the results of the election."* Once the result is declared, the only remedy of an aggrieved party is to file an Election Petition. The Tribunal may order recount depending upon the evidence. But the Returning Officer has no power to change it.

24. A contention was raised by Mr.R.Vijayakumar, learned Counsel for the Fifth Respondent that it was the Fifth Respondent who was sworn as the elected member on 25.10.2011 and that the petitioner who filed the Writ Petition on 28.10.2011, cannot unseat a person, who is already sworn in as an elected member.

25. But unfortunately for the Fifth Respondent, it was the Petitioner who had a valid declaration in terms of Form No.23 & Form No.25. Any declaration issued in Form No.23 or 25 subsequent to the issue of the very same Forms to the Petitioner, have no force or authority in the eye of law. The Forms issued to the Fifth respondent are of no consequence and they are no more than a mere nullity. Therefore, if a person, who did not have a valid Form No.23 or Form No.25 is sworn in, it will not confer any benefit upon such person. Hence, the above contention is also rejected."

(iii) In ***K.Munusamy v. The State Election Commissioner,***

Tamil Nadu State Election Commission reported in ***2008 (1) CTC 762***, wherein this Court held as follows:

> "13. Rule 68 very specifically speaks that once the Returning Officer issued declaration certificate, the package of ballot papers, whether counted or rejected, cancelled or unused, the sealed package containing the declaration and the marked copy of the electoral roll shall retain in his custody or deposit in the custody of the officer. Those packets shall not be inspected or produced except under the orders of election or other competent Court. In this case, it is admitted by the 3rd Respondent in paragraph 2 of his counter that he had issued declaration certificate in Form No.25 and thereafter entertained recounting application of the fourth respondent which is patently illegal. Even the consent of the candidates for recounting after declaration cannot cure it."

12. Mr.M.Vallinayagam, learned Senior Counsel appearing for the fourth respondent in W.P(MD)No.183 of 2020, relied upon the judgment of the Honourable Supreme Court in ***Mohinder Singh Gilll v. Chief Election Commissioner*** reported in ***AIR 1978 SUPREME COURT 851***, wherein it is held as follows:

> "39. Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Art.324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. Myriad may be, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism- instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the,

action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the men as much as on the Great National Parchment. Secondly, When a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra (1958) SCR 308 : (AIR 1957 SC 896) and Harishankar (1955) 1 SCR 380 : (AIR 1954 SC 465) discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well-established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud,J. (at p.2465 of AIR 1975 SC):

> "But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power."

40. The learned Additional Solicitor General brought to our notice rulings of this Court and of the High Courts which have held that Art. 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation. Ordering a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Art. 324-provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. While we repel Sri Rao's broadside attack on Art. 324 as confined to what the Act has conferred, we concede that even Art. 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order."

13. Ms.Chitra Sampath, learned Senior Counsel appearing for the fourth respondent in W.P(MD)No.385 of 2020, in support of her contentions, relied upon the unreported judgment of the Division Bench of this Court in ***S.Vijayakumar v. The Returning Officer, Semusigapuram Village Panchayat, Rajapalayam Panchayat Union, Virudhunagar District and others*** [W.A.No.2598 of 2001, decided on 06.10.2003], wherein the Division Bench of this Court held as

follows:

"3. Rule 67 of the Tamil Nadu Panchayats (Elections) Rules, 1995 in sub-rule 3(a) provides thus:

"In the case of election of member of Village Panchayats, after Returning Officer has completed the scrutiny and counting of votes, he shall declare elected, its candidate or candidates, as the case may be, to whom the largest number of valid votes have been given and complete and certify the return in Form 24 and send the signed copy to the District Election Officer and the State Election Commission."

(The other parts of that Rule are not set out as they are not necessary).

4. Form 26 is to be issued only to the person to whom the largest number of valid votes had been given. If such a Form is given to a person who has not polled the largest number of valid votes, such a person does not acquire a indefeasible right to be regarded as person elected, solely on the strength of issue of Form 26 under Rule 69.

5. In order to be regarded as the elected candidate, the person should have polled the highest number of votes. Form 24 is to be first prepared in which the number of votes polled by each of the candidates is required to be set out. Form 26 which is to be given to the elected candidate, must be given only to the person who has polled the largest number of votes and whose name is found in Form 24 along with the number of votes polled by him. The error committed by the Returning Officer in giving Form 26 to a person who has polled the highest number of votes, is not a Form on which the recipient can rely, to claim the status of an elected member of the Panchayat.

6. In this case, error was realised on the same day on which the counting was done, the writ petitioner was informed of the error and the details which are required to be set out in Form 24, had been incorporated in the letter that was sent to him on the same day.

7. The submission made by learned counsel for the appellant that even in such cases, the only remedy is by way of election petition under Section 258 of the Tamil Nadu Panchayats Act, cannot, having regard to what has been stated earlier, be accepted. Section 258 of the Act no doubt requires that the election of a member shall not be called into question except by an election petition. Here, what has been done is not

> the calling into question the election of any member. What has been done is to recall the certificate given to a person who was not entitled to receive the same, having regard to the number of votes polled and who was not entitled to be regarded as the elected member. It is only when having regard to the number of votes polled, a person is declared as the elected member and given the certificate, the provisions of Section 258 are attracted.
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> 8. Recalling of the certificate erroneously given to the writ petitioner who had not received the highest number of votes, was therefore perfectly in accordance with law. We do not find any merit in the writ appeal and the same is dismissed. No costs."

14. On a careful consideration of the materials available on record and the submissions made by the learned Counsel on either side, the only issue involved in the present writ petitions, is whether the third respondent - Returning Officer has got powers to cancel the Form 25 Certificate issued to the petitioner declaring her as the successful candidate and issuing a fresh Form 25 Certificate in favour of the fourth respondent declaring her as the successful candidate?

15. It is not in dispute that the third respondent - Returning Officer issued Form 25 Certificate to the petitioner on 02.01.2020 which is evident from the proceedings of the Returning Officer, dated 03.01.2020 which is impugned in W.P(MD)No.385 of 2020. It was claimed by the respondents that certain votes were omitted to be counted before the issuance of Form 25 Certificate declaring the petitioner as the successful candidate and there was a mistake committed by the Returning Officer or the people involved in the counting process and the declaration was issued in Form 25 Certificate without proper counting of votes. According to the respondents, to set right the said mistake, the Returning Officer had issued another Form 25 Certificate in favour of the fourth respondent.

16. The learned Additional Advocate General appearing for the respondents 2 and 3 had enclosed the Form 22, Form 23 and Form 25 Certificate issued in favour of the petitioner. The learned Additional Advocate General also enclosed Form 22, Form 23 and Form 25 Certificate issued in favour of the fourth respondent.

17. On a perusal of the first Form 22, dated 02.01.2020 issued in favour of the petitioner, it could be seen that the petitioner had secured 5,524 votes, whereas the fourth respondent had secured 5,224 votes. Similarly, in Form 23 dated 02.01.2020, also, it has been mentioned that the petitioner had secured 5,524 votes and the fourth respondent had secured 5,224 votes, but,

strangely, in the said Form 23, the Returning Officer has not mentioned the name of the petitioner in spite of the fact that she had secured more number of votes than the fourth respondent. Whereas in the other Form 22, dated 03.01.2020, it has been mentioned that the petitioner had secured 5,808 votes and the fourth respondent had secured 5,871 votes. In the other Form 23, dated 03.01.2020 also, it has been mentioned that the petitioner had secured 5,808 votes and the fourth respondent had secured 5,871 votes. In the said Form 23, the name of the fourth respondent has been mentioned by the Returning Officer. The non-mentioning of the name of the petitioner in Form 23, dated 02.01.2020, has not been explained by the respondents. When the Returning Officer found that the petitioner had secured more number of votes, she should have mentioned the petitioner's name in Form 23, but for the reasons best known to her, she has not mentioned any name and left it blank. Subsequent to the issuance of Form 22 and Form 23, dated 02.01.2020, Form 25 Certificate was also issued in favour of the writ petitioner. Thereafter, on 03.01.2020, another Form 25 Certificate was issued in favour of the fourth respondent.

18. On a perusal of Form 23 issued in favour of the fourth respondent, it could be seen that the though the Returning Officer had signed the said Form 23 on 02.01.2020 itself, the same was issued only on 03.01.2020. Similarly, in Form 25 Certificate, the date has been mentioned in two places as 02.01.2020 and the same were corrected as 03.01.2020.

19. As already stated, the second respondent - District Collector in his counter affidavit, has stated that the counting was finished at 04.00 a.m., on 03.01.2020 and a fresh Form 25 Certificate was issued to the fourth respondent at 05.00 a.m., on 03.01.2020. When it is the stand of the second respondent - District Collector that counting was completed at 04.00 a.m., on 03.01.2020 and Form 25 Certificate was issued at 05.00 a.m., on 03.01.2020, how the Returning Officer had signed Form 22 on 02.01.2020 itself declaring the fourth respondent as the successful candidate and also issued Form 25 Certificate in favour of the fourth respondent typing the date as 02.01.2020 which was subsequently corrected as 03.01.2020, has not been explained by the respondents. That apart, the Election Observer had forwarded a letter to the third respondent - Returning Officer at 01.00 a.m., on 03.01.2020 for counting the votes in respect of booth Nos.48 and 49 based on a representation given by the fourth respondent dated 02.01.2020.

20. On a perusal of the representation given by the fourth respondent, she has only stated that there was some confusion in the counting the votes and therefore, the votes should be recounted. The relevant portion of the representation of the fourth respondent, dated 02.01.2020, reads as under:

"நான் ஊராட்சி மன்ற தலைவர் பதவிற்கு போட்டி இட்டேன். வாக்கு எண்ணிக்கையில் குளறுபடி ஏற்பட்டதால் என் வாக்கை மறுபடியும் வாக்கு எண்ணி, நியாயமாகவும், நேர்மையாகவும் எனது உண்மையான வாக்கை எண்ணித்தரும்படி மிக தாழ்மையுடன் கேட்டு கொள்கிறேன்."

[extracted as such]

But, the Election Observer in his letter, dated 02.01.2020, to the Returning Officer, has given very many details which were not stated in the two sentence representation given by the fourth respondent. It is also relevant to extract hereunder the contents of the letter of the Election Observer to the Returning Officer:

"On the representation from Mrs.A.Priyadharshini, I came to the counting hall for Sangarapuram Panchayat checked by the counting tablewise list. It was found that in totalling vote 444 votes belonging to booth no.48w and 401+8 votes in 49M, 465+41 votes belonging to 49F totalling 1359 votes has not been added to the result sheet arrived. Further, without checking the mistakes in totalling of votes and missing votes in few booths in total hurriedly result was announced which was object at the same time by the opposite candidate Priyadharshini, which objection was going on the candidate was taken away by Mrs.Devi as per the eyewitness Mr.B.Arun, D.S.P. Therefore, I am of the opinion some foulplay has been emphasized. As such, I recommend for recounting as all the votes polled and counted for Village Panchayat Sangarapuram was found without by the A.R.O., Mrs.Parvadavardini. This decision has been arrived after 3 hours of checking all the list and ballots available in the counting centre."

[extracted as such]

21. In a Democratic Country like, India, the people expect the officials to remain neutral. Once Form 25 Certificate is issued, the Returning Officer becomes *functus officio* and she has no power to entertain any application for recount as per Rule 66 of the Tamil Nadu Panchayats (Election) Rules, 1995 which deals recounting of votes. The said Rule reads as follows:

"**66. Re-count of votes.-** (1) After the completion of the counting and recording in **Form 22** the total number of votes polled by each Candidate under sub-rule (2) of Rule 64, the Returning Officer shall announce the same. After such announcement and before the declaration of the result of the election, a contesting Candidate or in his absence his election Agent, may apply in writing to the Returning Officer for a re-count of all or any of the votes already counted stating the grounds on which he demands such re-count.

(2) On such application being made, the Returning Officer shall decide the matter and may allow the application in whole or in part, or may reject it in toto if it appears to him to be frivolous or unreasonable.

(3) Every decision of the Returning Officer under sub-rule (2) shall be in writing and contain the reasons therefor.

(4) If the Returning Officer decides under sub-rule (2) to allow an application either in whole or in part, he shall-

(a) count the votes again in accordance with his decision;

(b) amend the result sheet in **Form 22** to the extent necessary after such re-count; and

(c) announce the amendments so made by him.

(5) After the total number of votes polled by each Candidate has been announced under sub-rule (1) or under sub-rule (4) of this Rule, the Returning Officer shall complete and sign the result sheet in **Form 22** and no application for a re-count shall be entertained thereafter:

Provided that no step under this sub-rule shall be taken on the completion of the counting until the Candidates or the election Agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule (1)."

22. Rule 66(5) of the Tamil Nadu Panchayats (Election) Rules, 1995, makes it very clear that the Returning Officer has no power to entertain an application for recount after she had signed Form 22.

23. The ratio laid down in the judgment of this Court in ***M.Kumaresan v. The State Election Commissioner*** (cited supra), squarely applies to the facts and circumstances of the present case. That apart, the Honourable Supreme Court in ***Sohan Lal v. Babu Gandhi and others*** (cited supra), held that after declaration of results, the Returning Officer has no power either to direct recount or to change the results of the election. Further, the Honourable Supreme Court held that once the result is declared, the only remedy of an aggrieved party is by way of an Election Petition.

24. Even assuming that the Returning Officer had issued Form 25 Certificate in favour of the petitioner wrongly, the remedy open to the fourth respondent is only to file an Election Petition under Section 258 of the Tamil Nadu Panchayats Act, 1994. After issuance of Form 22, Form 23 and Form 25 Certificate, the third respondent - Returning Officer is not having any power to set aside the Form 25 Certificate. The third respondent - Returning Officer will become

functus officio after issuance of Form 25 Certificate.

25. In the unreported judgment of the Division Bench of this Court in ***S.Vijayakumar v. The Returning Officer, Semusigapuram Village Panchayat, Rajapalayam Panchayat Union, Virudhunagar District and others*** (cited supra), Form 26 under Rule 69 of the Tamil Nadu Panchayats (Election) Rules, 1995, was issued in spite of the fact that the candidate who secured less number of votes was given Form 26 Certificate. In such circumstances, the Division Bench of this Court found that recalling of the certificate erroneously given to the writ petitioner who had not received the highest number of votes, was correct.

26. In the case on hand, the Returning Officer originally declared that the writ petitioner had secured the highest number of votes. Subsequently, she had given another Form 22 and Form 23 stating that the fourth respondent had secured the highest number of votes and issued another Form 25 Certificate. Therefore, the ratio laid down in the judgment of the Division Bench of this Court cannot be equated with the case on hand and hence, the said judgment is not applicable to the present case.

27. Since the facts and circumstances of the case in the judgments relied on by the learned Senior Counsel appearing for the fourth respondent differ from the case on hand, the same are not applicable.

28. Further, in the case on hand, the third respondent - Returning Officer had admitted that he issued a declaration in Form 25 Certificate and thereafter, entertained recount application of the fourth respondent which is patently illegal. Even the consent of the candidate for recounting after declaration under Form 25 Certificate, is not permissible. The unsuccessful candidate can only file an Election Petition under Section 258 of the Tamil Nadu Panchayats Act, 1994. In the case on hand, the third respondent - Returning Officer had taken the role of a District Court in cancelling the election of the writ petitioner after issuance of Form 25 Certificate.

29. The respective learned Counsel appearing for the respondents have not pointed out any provision or rule under the Tamil Nadu Panchayats Act, 1994 or under the Tamil Nadu Panchayats (Election) Rules, 1995, to substantiate that the Returning Officer has got powers to cancel the Form 25 Certificate issued in favour of the writ petitioner and issue a fresh Form 25 Certificate in favour of the fourth respondent.

30. In the light of the judgment of the Honourable Supreme

Court in ***Sohan Lal v. Babu Gandhi and others*** reported in ***(2003) 1 Supreme Court Cases 108*** and the judgment of the Division Bench of this Court in ***M.Kumaresan v. The State Election Commissioner*** reported in **2012 (2) CTC 68**, we are of the considered view that Form 25 Certificate, dated 03.01.2020, issued by the third respondent – Returning Officer, in favour of the fourth respondent and also the impugned order dated 03.01.2020 passed by the third respondent – Returning Officer, cancelling the Form 25 Certificate issued to the writ petitioner, are liable to be set aside and accordingly, the same are set aside.

31. In the result, both the writ petitions are allowed. In case of the fourth respondent aggrieved over the election of the writ petitioner, it is open to her to file an Election Petition under Section 258 of the Tamil Nadu Panchayats Act, 1994. No costs. Consequently, all the connected writ miscellaneous petitions are closed.

Sd/-

Assistant Registrar (P AND A)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

rsb

To

1.The Tamil Nadu State Election Commissioner,
Jawaharlal Nehru Road,
Koyambedu,
Chennai – 600 106.

2.The District Collector,
Office of the District Collector,
Sivagangai District,
Sivagangai.

3.The Election Officer/
Block Development Officer,
Sakkottai Panchayat Union,
Sivagangai District.

+1 CC to M/s.P.THILAK KUMAR, Advocate (SR-5037[F] dated 06/02/2020)

+1 CC to M/s.SPL GP (SR-5105[F] dated 06/02/2020)

+3 CC to M/s.N.C ASHOKKUMAR, Advocate (SR-4930[F] dated 06/02/2020)

+1CC TO MR.J.ANANDKUMAR, ADVOCATE, SR NO.5036

W.P(MD)Nos.183 of 2020
& W.M.P(MD)Nos.119, 121, 283 & 284 of 2020
AND
W.P(MD)No.385 of 2020
& W.M.P(MD)Nos.296 & 297 of 2020
06.02.2020

KK/06.02.2020/20P-10C