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O.A.No.600 of 2022
in
Ele.P.No.2 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :13.09.2022

Pronounced on :16.09.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Original Application No.600 of 2022
in
Election Petition No.2 of 2021

S.Palani Nadar

.. Applicant/1st respondent

/versus/

- 1.S.Selva Mohandas Pandian
- 2.K.M.Udhayakumar
- 3.S.Chandrasegar
- 4.S.Sureshkumar
- 5.R.Selvakumar
- 6.R.Thirumalaimuthu
- 7.S.Mohamed
- 8.K.Mugundhan
- 9.R.Vincentraj
- 10.M.Jeganathan
- 11.J.Arokkiya Prabhu
- 12.Doctor S.Karuppasamy
- 13.A.Palanikumar
- 14.P.Palanimurugan



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15.A.Madasamy
16.R.Ramesh
17.M.Reegankumar

18.The Returning Officer,
No.222, Tenkasi Assembly Constituency,
The Revenue Divisional Officer,
Tenkasi 627 811.

.. Respondents/
Respondents 2 to 18

Prayer: This Application has been filed under Order 14, Rule 8 of Original Side Rules r/w Rule 12 of Rules of the Madras High Court Elections 1967 and r/w Section 151 of C.P.C to order for Chief Examination of the Election Petitioner afresh in accordance with the Order 18, Rule 5 of Civil Procedure Code, 1908 and eschew the proof affidavit already filed by the petitioner before this Court pending disposal of the Election Petition.

For Applicant :Mr.R.Viduthalai, Senior Counsel for
Mrs.R.Revathy

For Respondents :Mr.B.Arvind Srevatsa for R1



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ORDER

The first respondent in the Election Petition is the applicant herein.

2. The Election Petition is filed to declare the election of the applicant as void and to order for re-count the postal ballots as well as all the votes polled by EVM during the 28th, 29th and 30th round of counting in the Tenkasi Assembly Election held on 06.04.2021 and consequentially declare the petitioner as the returned candidate for the Tenkasi Constituency.

3. After completion of service of notice and pleadings, this Court framed issues on 01/08/2022 and posted the matter for trial on 30/08/2022. The Election Petitioner/First Respondent herein, appeared in person and mounted the witness box. He filed his Proof Affidavit in lieu of Examination-in-Chief and produced 16 documents, which were marked as



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Ex.P-1 to Ex.P-16 in the presence of the learned counsel appearing for the First Respondent/applicant herein. While marking certain documents, objections raised and this Court has recorded the objections and received those documents subject to admissibility and proof as the case may be. At the request of the first respondent, the cross examination of the Election Petitioner (PW-1) was adjourned to 07/09/2022. Though PW-1 was present on that day, at request of the first Respondent/Applicant herein, the petition was again adjourned to 13/09/2022 for cross examination of PW-1.

4. At this juncture, the present application filed to order for Chief Examination of the Election Petitioner afresh in accordance with the Order XVIII Rule 5 of C.P.C. and eschew the proof affidavit already filed by the Election Petitioner.

5. Mr.R.Viduthalai, the Learned Senior Counsel representing the applicant/first respondent made persuasive submissions that the orders



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passed in the election petition are appealable under Section 116-A of the Representation of the People Act, 1951. While so, Order XVIII Rule 5 of the Code of Civil Procedure mandates evidence in appealable cases should be taken down in the language of the Court in writing by, or in the presence and under the personal direction and superintendence of, the Judge or from the dictation of the Judge directly on a typewriter, or if the Judge, for the reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge. Therefore, the proof affidavit filed in lieu of the chief examination has to be eschewed.

6. According to the Learned Senior Counsel, trial is re-enacting the sequence of events before the Court as close to reality as possible. To ensure that the trial as far as possible is nearer the reality, the witness to be testified on oath, by examining him in Chief, Cross and Re-Examination as sequenced in the Indian Evidence Act, 1872. It is therefore, very necessary that when a witness come before the Court and speaks about the past event,



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a sense of solemnity is instilled on him, so that he do not deviate from reality while recapitulating as to what exactly had happened earlier. The applicant will have the advantage of prosecuting the deponent for any falsehood made on oath. The ill of doctoring the fact on advice or tampering facts could be avoided, if the witness is asked to give his testimony on oath. Therefore, Proof Affidavit in lieu of the recording the examination of chief under Order XVIII Rule 4 of CPC is not permissible, in view of Order XVIII Rules 5 and 13 of CPC.

7. The Learned Counsel appearing for the Election Petitioner/the first respondent herein, submitted that the application is filed only to delay the due process. The arguments in respect of the application of Order XVIII Rule (4) and (5) of C.P.C examined adequately by the Courts in India since Order XVIII Rule 4 inserted in the Code by way of Amendment and came into force in the year 2002. The Hon'ble Apex Court has held that Rules (4) and (5) of Order XVIII of the Civil Procedure Code to be read harmoniously



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and it should be giving purposeful meaning to the Rule (4). Thus, the procedure of receiving Proof Affidavit in lieu of Chief Examination has come into vague and practised all through out the country for nearly two decades.

8. The Learned Counsel for the Election Petitioner/first respondent submitted that no written counter is necessary to this application which is filed bereft of merit and with oblique motive to delay. The plain reading of Section 87 the Representation of the People Act, 1951, the High Court Original Side Rules and Order XVIII of CPC in the light of the judicial pronouncements of the Apex Court, without any doubt would confirm the procedure of accepting Proof Affidavit in all cases whenever the witness is required to give his evidence. The applicant can no way claim to be prejudiced by allowing the proof affidavit in lieu of chief examination. In case of any falsehood in the affidavit is proved later, his right to prosecute for perjury is not curtailed. If there is anything in the proof



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affidavit beyond the pleadings, it may be exposed while cross examining the witness. The opportunity to re-enacting the event is not taken away by any means, by admitting proof affidavit. In the course of cross examination of the witness can be testified about the facts, he has mentioned in the proof affidavit and recreate the desired close to reality atmosphere.

9. The Learned Senior Counsel appearing for the applicant drawing inspiration from the observations made by the Courts in the following judgments, sought his application to be allowed.

(1)F.D.C Ltd., –vs- Federation of Medical Representatives Association of India: [AIR 2003 Bom 371];

(2)Ameer Trading Corporation Ltd. –vs- Shapoorji Data Processing Ltd: [(2004) 1 SCC 702].

(3)Kailash –vs- Nanhkku and another: (2005) 4 SCC 480.

(4)Mrs.Kavitha Mahesh –vs- Chief Election Commissioner unreported judgement of the Karnataka High Court in (Election Petition No:7/2008, dated 12th January 2011).



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10. The Learned Counsel for the Election Petitioner/First Respondent herein submitted that the election petitioner does not feel shy to give evidence in chief, though law does require a proof affidavit in lieu of Chief to be sufficient. Even today the Election Petitioner is ready to mount the witness box and give ocular evidence in chief and also ready to subject himself for cross examination. However, to dispel the erroneous preposition law canvassed by the applicant, he as the officer of the Court, is bound to place the law on this point, hence, the below submissions.

(a) Section 87 of the Representation of People Act, 1951 states that Election Petitions filed under the Representation of People Act 1951, subject to the provisions of the Act and Rules made thereunder, has to be tried by court as nearly as may be in accordance with the procedure applicable under CPC and the provisions of the Indian Evidence Act, is deemed to apply in all aspects to the trial of an election petition.

(b) Order XVIII Rule 4 of CPC mandates in every case, the examination- in-chief of a witness shall be on affidavit. Since this rule was



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inserted substitution the earlier Rule (4), certain ambiguity while reading the amended Rule 4 and existing Rule 5 of Order XVIII of CPC arose. In the said context, the Hon'ble Supreme Court in *Ameer Trading Case (cited supra)* as early as in the year 2003 (18/11/2003) had clarified that Order XVIII Rule 5 of C.P.C., cannot be read as an exception to Order XVIII, Rule 4, both the Rules are required to be harmoniously construed. The Hon'ble Apex Court has concluded that presence of a party during examination of chief is not imperative. If any objection is taken to any statement made in the affidavit, the attention of the witness can always be drawn, while cross examining.

11. Heard the learned Senior Counsel appearing for the applicant and learned counsel appearing for the respondent. The law and judicial pronouncement read.



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12. For better appreciation of the rival submissions, the relevant provisions of law are extracted below:-

Order XVIII, Rule 4 : Recording of evidence:

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit.

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may



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be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of Rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule.]



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Order XVIII Rule (5): How evidence shall be taken in
appealable cases:-

In cases in which an appeal is allowed, the evidence of each witness shall be,—

(a) taken down in the language of the Court,—

(i) in writing by, or in the presence and under the personal direction and superintendence of, the Judge, or

(ii) from the dictation of the Judge directly on a typewriter; or

(b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the Court in the presence of the Judge.]

Order XVIII Rule (13): Memorandum of evidence in
unappealable cases:-

In cases in which an appeal is not allowed, it shall not be necessary to take down or dictate or record the evidence of the witnesses at length; but the Judge, as the examination of each witness proceeds, shall make in writing, or dictate directly on the typewriter, or cause to be mechanically recorded, a memorandum of the substance of what the witness deposes, and



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such memorandum shall be signed by the Judge or otherwise authenticated, and shall form part of the record.]

13. As per the Representation of the People Act, 1951, election petitioner calling in question any election ought to be presented within 45 days from the date of election and it shall contain a conscious statement of the material facts on which the petitioner realises. The same shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure for the verification of pleadings. In case, the petitioner alleges any corrupt practice, the petitioner shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice.

14. As far as the present Election Petition is concerned, the same is filed alleging improper reception of votes, which are void, by postal votes and by non-compliance with the provisions of the Constitution of India. The violation of Rule 54-A of the Conduct of Election Rules, 1961 is alleged discrepancies and mismatched between the Form-20 result sheet



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uploaded on the website of the Election Commission of India and Form-20 results sheet issued by the Returning Officer is alleged and the petition is duly verified as contemplated under the Representation of the People Act, 1951. The verifying affidavit under Order VI, Rule 15(a) of the Code of Civil Procedure is also accompanied.

15. Chapter III of the Representation of the People Act, 1951 lays down the procedure for trial of the Election Petition. Section 86 (6) and (7) of the Representation of the People Act, 1951 reads as below:-

“86 Trial of Election Petitions:- (6)The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which



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the election petition is presented to the High Court for trial.”

16. Thus, the Act makes ample clear that the trial of the Election Petition should be concluded as expeditiously as possible, preferably within 6 months from the date of presentation of the petition.

17. Section 87 of the Representation of the People Act, 1951 reads as below:-

87. Procedure before the High Court – (1)

Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits;

Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition



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or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(2) The provisions of the Indian Evidence Act, 1872 (1 of 1972), shall, subject to the provisions of this Act, be deemed to apply in all respects to the trial of an election petition.]

18. By virtue of the powers conferred by Article 225 of the Constitution and the Letters Patent of the High Court of Judicature at Madras, 1865, the High Court has issued Rules of practice and procedure to be observed in all matters coming before the High Court in the exercise of its jurisdiction under Section 80A of the Representation of the People Act, 1951, which cited as **“Rules of the Madras High Court-Election Petitions, 1967”** wherein at Rule 12, it is stated that, “subject to the forgoing Rules and to the extent they are not inconsistent with the provisions of the Act, the Rules of the High Court, 1956 (Original Side), shall, as far as practicable, be observed in all Election Petitions and all



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applications taken in respect of them”. While reverting back to Madras High Court, 1956 (Original Side), the said Rule does not prohibit the receipt of proof affidavit in lieu of Chief Examination of the witnesses being present and recorded.

19. Thus, from these provisions, which governs the procedure of trial of Election Petition, nowhere this Court finds any legal impediment for accepting proof affidavit in lieu of chief examination.

20. The learned Senior Counsel appearing for the applicant strenuously argued and canvassed to apply the “doctrine of incorporation” and read the provisions of the Representation of the People Act, 1951, which requires the petition to be verified, satisfying the facts, which are of the personal knowledge of the deponent and which are through his believe. He therefore contended that the witness has to be examined in chief by presenting himself. In the opinion of this Court, the points canvassed by the



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applicant were already answered by the Hon'ble Apex Court and by this Court long ago and it is no more *res integra*. In ***Ameer Trading Corporation Ltd., v. Shapoorji Data Processing Ltd. reported in (2004) SCC 702***, the Hon'ble Supreme Court has concluded as below:-

“33.The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examining him. The defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court.

34.Applying the aforementioned principles of



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interpretation of statute, we have no doubt in our mind that Order 18 Rules 4 and 5 are required to be harmoniously construed. Both the provisions are required to be given effect to as Order 18 Rule 5 cannot be read as an exception to Order 18 Rule 4.”

21. In this judgment, the Hon'ble Supreme Court has considered ***F.D.C. Limited v. Federation of Medical reported in [AIR 2003 Bom.371]*** which is relied and cited by the learned Senior Counsel appearing for the applicant. In so far ***Kailash v. Nanhku and others*** reported in ***[(2005) 4 SCC 480]*** relied upon by the applicant, it deals with the limitation prescribed under Amended Civil Procedure Code for filing written statement in an Election Petition. In the said context, the Hon'ble Supreme Court has framed the following three questions:-

5.Three questions arise for decision:-

(1)Whether Order 8 Rule 1 CPC is applicable to the trial of an election petition under Chapter II of the Act?

(2)Whether the rules framed by the High Court governing the trial of election petitions would override the



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provisions of CPC and permit a written statement being filed beyond the period prescribed by Order 8 Rule 1 CPC?

(3) Whether the time-limit of 90 days as prescribed by the proviso appended to Rule 1 of Order 8 CPC is mandatory or directory in nature?

and the Hon'ble Supreme Court answered his questions as below:-

“46. We sum up and briefly state out conclusions as under:-

(i) The trial of an election petition commences from the date of the receipt of the election petition by the court and continues till the date of its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition, affording opportunity to the defendant to file a written statement. The availability of such power in the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and rules made for purposes of that Act and a resort to the provisions of CPC is not called for.

(ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity



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and technicality. The rules of procedure contained in CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

(iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the rules of procedure contained in CPC on the other hand, the former shall prevail over the latter.

22. In the opinion of this Court, the judgment of the Karnataka High Court rendered in ***Mrs.Kavitha Mahesh v. Chief Election Commissioner, Election Commissioners, Election Commission of India and others in Ele.P.No.7 of 2008 dated 12.01.2011*** and relied by the applicant counsel, it has no persuasive value, since the judgment has failed to consider the judgment of the Hon'ble Supreme Court rendered in *Ameer Trading Corpn. Ltd. cited supra*.



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23. As far as High Court of Madras is concerned, a similar issue came up before the Hon'ble Mr.Justice T.Mathivanan, in ***Kavitha v. I.Nallaponnu and another reported in [2014 -4 L.W. 532]***, which is also in connection with an Election Petition in which the Court has categorically held :-

“**13.**On coming to the instant case on hand, it is apparent that P.W. 3 has filed his proof affidavit and he is yet to be cross-examined. Even, according to the revision petitioner/first respondent, it is presumed that the fact, which are set-forth in the proof affidavit of P.W. 3, have not been set-forth in the election original petition by the first respondent/petitioner. The revision petitioner/first respondent is entitled to test the veracity of the proof affidavit filed by P.W. 3 during the course of his cross-examination and that right is not taken away from him. Further, he is entitled to confront with P.W. 3, with any other document or facts, which he is proposed to put before him during his cross-examination. But, without adopting the settled legal principles, it may not be fair on the part of the Court to scrap the proof affidavit, which is not yet subjected to cross-examination. If it is done so, it would be against the public policy and would amount to travesty of justice.”



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24. Again in *D.Komala v. S.D.Ramalingam* reported in *[Manu/TN/7162/2021]*, the Hon'ble Justice Selvi P.T.Asha, after analysing the object and reason for incorporating Order XVIII Rule 4 of C.P.C., vis-a-vis its impact on Order XVIII Rule 5 on relying upon the judgment of the Hon'ble Supreme Court rendered in *Ameer Trading Corporation Limited v. Shapoorji Data Processing Ltd.*, cited *supra*, has concluded that the following proposition emerges on considering the application of Order XVIII Rule 4 and Order XVIII Rule 5 of C.P.C., in respect of receiving proof affidavit for examination of chief:-

25. Therefore, on consideration of the above provisions and the Judgments cited *supra*, the following propositions emerge:

"(a) Under Order XVIII Rule 4(1), the examination in Chief shall be on affidavit and advance copies shall be served on the opposite side.

(b) However, where documents are sought to be filed and relied upon the proof and admissibility of these documents



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shall be subject to orders of Court which clearly indicates that the documents can be filed and marked only upon the witness getting into the witness box before the Court.

(c) Rule 5 details how an evidence should be taken in cases which are appealable.

(d) Rule 13(4) details how documents admitted in evidence have to be endorsed.

(e) Rule 8 talks about the memorandum to be written and signed by the Judge in case evidence is not taken down in writing/on his dictation/recorded mechanically by the Judge in appealable cases.

(f) Rule 13 talks about the memorandum in the case of non-appealable cases."

26. The statistics as on 15.09.2022 regarding election petitions pending in this Court indicates 18 election petitions are pending. The oldest election petition, which is pending in this Court, is of the year 2014. In so far as the General Election for this State held in the year 2021, 14 election petitions were filed and out of 14 petitions, 9 petitions are still pending. This statistics is extracted above to show that though the Representation of the People Act, 1951 envisages to complete the trial within 6 months from



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the institution of the petition and the Election Petition can be instituted only within 45 days from date of the declaration of the result, those election petitions are hardly disposed of within 6 months. The person, who is declared elected desires the status quo and delay the progress of the trial as far as possible and also succeed. The above statistics also indicates five petitions out of 18, the term of the office has already expired. The outcome of those five petitions will be only academic and not going to serve any purpose.

27. As pointed out earlier, the Representation of the People Act, 1951, envisages speedy trial of Election Petition to be concluded preferably within 6 months from its institution. The object and reason for incorporating Order XVIII Rule 4 of C.P.C., is to expedite the trial. The Original Side Rules framed by the High Court regarding Election Petition indicates, the High Court Original Side Rules to be followed as far as practical. The Madras High Court Original Side Rules enables receiving proof affidavit in



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lieu of chief examination of witnesses. Therefore, when there is no legal impediment for receiving proof affidavit in lieu of chief examination and it is in tune with the intention of the Legislature that trial of election petition should be disposed of as expeditiously as possible, preferably within 6 months of its institution, the present petition filed with illusory and imaginary reasons is liable to be dismissed. Since in view of this Court, this petition is filed only to drag the proceedings, it is liable to be dismissed with exemplary costs.

28. Accordingly, this Original Application is dismissed with cost of Rs.25,000/- (Rupees Twenty Five Thousand only) payable to the first respondent/Election Petitioner herein within a period of 7 days from today. On payment of the cost, the applicant can exercise his privilege of cross examining PW-1.



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To :

The Returning Officer, No.222, Tenkasi Assembly Constituency,
The Revenue Divisional Officer, Tenkasi 627811.



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DR.G.JAYACHANDRAN,J.

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delivery Order made in
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