



C.R.P.(MD)No.3395 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.03.2024

CORAM

THE HON'BLE MR.JUSTICE G.ILANGO VAN

C.R.P.(MD)No.3395 of 2023
and C.M.P.(MD).No.17520 of 2023

Rajeswaran

... Petitioner/5th Respondent

Vs.

1.R.Murali Manohar

... 1st Respondent/Petitioner

2.Shoba

3.Saraswathy

4.Mohamed Anwar Husain

5.Pon Rathinaselvan

6.Kumaragurubara Athithan

7.Essakimuthu

8.The Returning Officer
Block Development Officer,
Thiruchendur Panchayat Union,
Thoothukudi District.

9.The District Collector,
Thoothukudi District,
Collectorate,
Karampallam,
Thoothukudi.

... 2 to 9 Respondents/
1 to 4 & 6 to 9 Respondents



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PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair order and decreetal order passed in Election O.P.No.10 of 2020 dated 04.12.2023 on the file of the I Additional District Court, Thoothukudi.

For Petitioner : Mr.S.Meenakshi Sundaram,
Senior Counsel for Mr.T.Arivukumar

For Respondents : Mr.R.Subramanian for
Mr.M.Saravanan for R1

: No Appearance for R2 to R7

: Mr.A.Sivanupandian for R8 & R9
Government Advocate (Civil)

ORDER

Challenging the fair and decreetal order passed in Election O.P.No.10 of 2020, dated 04.12.2023, on the file of the I Additional District Court, Thoothukudi, this revision has been filed.

2.The facts in brief:

2.1.The first respondent herein namely Muralimanohar contested Kayamozhi Village President Election, which was held on 27.12.2019. Respondents 2 to 7 and the petitioner were the rival contestants. He was allotted with Bell symbol. Respondents 2 to 7 and



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the petitioner were allotted with various symbols as detailed in the petition, which is not relevant for consideration now.

2.2.The total wards in the Village Panchayat is 9. Total number of Villagers are 4579. The number of Villagers also detailed in the petition, which are also not relevant material for reconsideration now. The Elections were held in various places as detailed in the petition. The counting was held on 02.01.2020 at St. Susai Higher Secondary School, Adaikalapuram.

2.3.The petitioner and his agents were present at the counting centre. The counting began at 08.00 a.m. on 02.01.2020. The election was conducted for various posts namely Union Councillor, District Panchayat Councillor, Village President, Panchayat Ward members, etc., All the voted Ballot papers were placed in the same ballot box.

2.4.The Election Officer allowed the Election petitioner, other candidates and the agents at about 03.00 p.m. Even before that the



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ballot boxes were found opened. Votes for various posts were segregated. The votes polled for the Kayamozhi Village Panchayat President were kept separate. The counting of votes completed at 05.00 p.m. The first respondent was declared as Winner by a margin of 51 votes and he was asked to wait outside to get the Certificate of Declaration. But, at about 06.00 p.m., the Election Officer declared that the 5th respondent Rajeswaran, who is the petitioner herein, won the Election by a margin of one vote. On hearing the same, the first respondent was very shocked and surprised. He was told that he secured 1070 votes, whereas the 5th respondent secured 1071 votes.

2.5.The Election Officer ought not to have made a second declaration. On enquiry, he was told that postal votes were counted now only. So he gave a petition to the Election Officer for recounting. But that was straight away rejected and declared the results that the 5th respondent i.e., the petitioner herein won the Election.

2.6.He demanded the consolidated statement of the details. He was allowed to take photographs of the consolidated statement in his



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cellphone. On going through the statement he found various alterations, corrections, etc., He also came to know that the votes were counted at the whims and fancies, by the Election Officer. With motive, the Election Officer declared 5th respondent as a winning candidate.

2.7. So he strongly pleads and suspects that there is a foul play. Serious irregularity was committed by the Election Officer. So he sent a detailed representation dated 03.01.2020, that was not considered. So he filed W.P.(MD).No.510 of 2020, that was dismissed with a direction to approach the Election Court or Tribunal. Hence, the above said Election Original Petition came to be filed.

2.8. On the above said grounds, he seeks recounting of votes, consequently, declaring that the election of all or any of the returning candidates as void and further declaration that the candidate who secured highest votes be declared as duly elected.

3. Election Petition was contested by the contesting respondents by filing counter.



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3.1.The 5th respondent namely Rajeswaran, who is the petitioner herein, filed his counter stating that there was no illegality or irregularity committed by the Election Officer. The actual votes polled were counted properly. Simply because he was defeated by a margin of one vote, no recounting can be ordered. It is also denied that he gave a request for recounting before the Election Officer. There is no necessity for the 8th respondent, namely, the Election Officer to act in favour of the 5th respondent. In fact after hearing the result, the petitioner congratulated the 5th respondent and went away. But, later only due to ill advise, the representation seems to have been sent.

3.2. Counting for six rounds took place in front of the petitioner and his agents. For each and every round results were shown to the agent and the petitioner and even announced in the speaker. At that time, there was no objection by any one. Even the ballot boxes were opened only in the presence of the candidates.

3.3.Similarly, the 8th respondent also filed their counter. They denied the allegations made in the petition. The petitioner holds



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only 1070 votes, whereas, the 5th respondent hold 1071 votes. The petitioner was also present when the certificate was issued to the 5th respondent. It is also denied that the postal votes were counted only after the petitioner went outside. At the time of declaration of the results, there was no objection on the side of the petitioner. The petition dated 02.01.2020, was also not received by the official respondents.

3.4.No alterations or corrections are made in the consolidated statement. There was no chance for any illegal appropriation of votes. There is no necessity for the 8th respondent to show any favour to the 5th respondent. Election was conducted by following proper Rules and Procedure. There is no illegality or irregularity in conducting the elections.

4.The Election Court namely the I Additional District Judge, Thoothukudi, conducted the enquiry and on the side of the petitioner three witnesses have been examined, 16 documents were marked. On the side of the respondents 5th respondent was examined as RW1 and the Block Development Officer, Tiruchendur, was examined as RW2. No



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document was marked on the side of the respondents.

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5.At the conclusion of the enquiry, the Election Court was of the view that proper counting was not undertaken by the Election Officer. Two votes which were polled were not counted. Those two votes are capable of tilting the balance in either way. Moreover, it also pointed out that there are some irregularities in conducting the Election process. So finally it ordered recounting of election ballot papers, within a month and declare the person who secured the highest votes. Dissatisfied over the result, this revision petition has been filed by the 5th respondent namely Rajeswaran.

6.Heard both sides.

7.Before we go into other aspects, the maintainability of the prayer as framed in the petition was objected by the revision petitioner. Even though this point was raised at the conclusion of the argument process, it must be taken up first for consideration, since it goes to the root of the Election Petition.



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8.As mentioned above in the Election Petition, the respondent has drafted the prayer in the following.

“a)directing recounting of votes for the post of President of Kayamozhi Village Panchat held on 02.01.2020 and consequently, declaring that the election of all or any of the returned candidates as void and further declaring the candidate, who may secure highest votes, has been duly elected.

b)directing the contesting respondents to pay the cost of the proceedings to the petitioner”

9.Reading of this prayer shows that he wants recounting of the votes for declaring that election of all or any of the returned candidates is void. Secondly, to declare that the candidates, who secures highest votes as elected.

10.According to the learned counsel for the revision petitioner, the main prayer is for recounting and the second prayer is only for declaration of the election of returned candidates as void and last for declaring that person who secures highest votes as elected.



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11.This according to him, is not proper way of seeking relief. The main prayer cannot be for recounting. According to him, recounting is not permissible. So he relied upon Section 259 of the Tamil Nadu Panchayat Act, 1994. According to him, if at all the grounds that are made by the respondent will attract Section 259 (4) of the Act, recounting of votes is not prescribed as ground for declaring the elections to be void. He would straight away rely upon the judgment of the Honourable Supreme Court made in the case of ***Dharmin Bai Kashyap Vs. Babli sahu and others*** reported in (2023) 10 SCC 461, wherein it has been held as follows:

“There is hardly any need to reiterate the trite position of law that when it comes to the interpretation of statutory provisions relating to election law, jurisprudence on the subject mandates strict construction of the provisions. Election contest is not an action at law or a suit in equity but purely a statutory proceeding, provision for which has to be strictly construed. The petitioner having failed to make any application in writing for re-counting of votes as required under Section 80 of the Nirvachan



Niyam, 1995, and having failed to seek relief of declarations as required under Rule 6 of the Rules of 1995, the Election Petition filed by the petitioner before the Sub Divisional Officer (R) seeking relief of re-counting of votes alone was not maintainable.”

12.This according to the learned counsel for the revision petitioner squarely applies to the present prayer also.

13.Per contra, the learned counsel for the first respondent would submit that there is a clear prayer in the petition to declare the election of returned candidates as void. Even though there is jumping of the prayers, only substance of the prayer must be taken into account and not the order and the serial, by which, the prayers are made. So according to him, the prayer is perfectly valid, though it is sought in the reverse direction.

14.Simply because it has been drafted in reverse direction, it cannot be thrown out stating that it is not in consonance with the statutory provision. Only the substance must be taken into consideration.

What he wants is that the election of the returned candidate is void. The



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reason for this declaration according to him will be found out that there is irregularity in counting. So the votes must be recounted. The person who secures highest votes must be declared. I find that the technical error pointed out by the revision petitioner at the last leg of argument may not be sustainable. I do not want to be carried away by the manner in which the prayer has been drafted by the petitioner. So this argument is rejected.

15. Now another primary argument that was raised by the learned Senior Counsel for revision petitioner is that the pleadings in the petition also does not satisfy the requirement of law as set out by the Honourable Supreme Court in a judgment in the case of ***M.Chinnasamy Vs. K.C.Palanisamy*** reported in ***2004 (6) SCC 341***. This Judgment is often quoted judgment in various orders. That was followed by this Court in the case of ***M.Kalavathy Vs. K.Chitra and others*** reported in ***2008 - 4 - L.W.65***, wherein, it has been held as follows:

“17. Again in M. Chinnasamy Vs. K.C. Palanisamy and Others, the Supreme Court reiterated the Rule of pleadings as required for a Court to order recount. It is seen from paragraph-6 of the



decision of the Apex Court in that case, that the election petitioner made allegations of irregularities in the counting of votes, category-wise. He alleged that 750 votes cast in his favour were rejected due to inadvertent thumb impression, 250 votes were rejected due to the rubber stamp impression of the Polling Officer, 1500 votes were rejected as they were cast on the border, 5000 votes were rejected on the ground that wrong instrument was used by the voter and 300 postal votes were rejected. After considering Section 83(1)(a) of the Representation of People Act, which is in pari materia with Section 258(4) (a) and (b) of the Tamil Nadu Panchayats Act and referring to Order VI, Rule 2, CPC, the Supreme Court elicited four ingredients necessary for ordering a recount, in paragraph-15 as follows:

- (1) Whether there is a prima facie case?*
- (2) Whether material facts are pleaded?*
- (3) That the Court shall not direct recounting by way of roving or fishing enquiry; and*
- (4) That such an objection had been taken recourse to.*

The Supreme Court also made it clear that a recount shall not be ordered merely because the margin of votes is narrow. In so far as the



pleadings are concerned, the Supreme Court said as follows:

“18. The parties are bound by the said rule of pleadings and verification thereof having regard to the fact that an election may not be set aside on hyper technical grounds although no factual foundation therefore had been laid in the pleadings as the elected candidate may not have any hand therein. So far as requirement of pleadings in a case where a direction of re-counting of ballot papers has been prayed for, the Court must proceed cautiously and with circumspection, having regard to the requirement of maintaining secrecy of ballot papers. It is not disputed that the counting was done at four centres. It is further not disputed that the material facts, as regards as to which category of irregularities as enumerated in the election petition occurred at which centre and at what time, had not been pleaded. The details as regards tables at which such objections were raised have further not been disclosed, nor had the names of the counting agents been disclosed. The very basis of the election petition centres around the objections of the chief election agent of the election petitioner dated 6.10.1999 (Ext.P-9). We have set out the said



objections in extenso hereinbefore. A bare perusal thereof would clearly show that the allegations contained therein are absolutely vague and lack material particulars. Details as regards commission of alleged irregularities polling station wise, assembly segment wise, polling counter wise or table wise had not been disclosed. The same by itself goes to show that the chief election agent of the election petitioner did not raise any objection before the Returning Officer and the counting staff as and when such irregularities were purported to have been found out. It may be relevant to note that even the said agent of the election petitioner had not been examined, inter alia, on the ground that he after declaration of the election result has changed sides.”

27. Had the election petitioner in his pleadings, as noticed hereinbefore, disclosed the details of the names of polling stations, counting centres, tables, particulars of round of the counting of votes in relation whereto alleged irregularities had taken place under all the four categories and basis of material facts and particulars, the High Court, if finds that the election petitioner has made out a prima facie case for scrutiny of ballot papers and re-count, may direct re-count of ballot papers in respect of the said votes only



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and not the entire votes.

18. Again in paragraph-44, the Supreme Court emphasised the need for a high degree of proof in the following words:

“44. The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to provide the allegations was on the election petitioner. The degree of proof for issuing a direction of re-counting of votes must be of a very high standard and is required to be discharged See Mahender Pratap Vs. Krishan Pal and Others(2003(1) SCC 390)”.

16.By pointing out this judgment the revision petitioner would submit that the highest decree of proof is required for recounting of votes. Evidence must be satisfactorily let in and pleadings must also be with correct particulars. Here according to him, it has been simply stated that he was asked to stand out to get the certificate of declaration, namely, winning. Thereafter, second declaration was made. With regard to the counting of votes also there is no specific or particular plea as to the appropriation of votes. He wants to make a fishing enquiry by



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making out recounting of votes. According to the learned counsel for the petitioner, the pleas made in the petition are also contrary to his own evidence and the representation that was made by him allegedly on 02.01.2020.

17.The learned senior counsel for the petitioner was taking me that the pleadings, etc., to the above said improvements. Now we will take up the representation that was made by the petitioner on the next date. Even though the official respondents deny that such a representation was received, now it is also marked on his side at the time of evidence. What has stated in the petition or representation as the case may be is that during the counting, he was in a returning position, he was asked to stay out without showing the postal vote. It was told that they have to count the postal vote. After that, he was declared as elected. Later only he was informed that Rajeswaran secured 1071 votes, whereas, he secures only 1070 votes. There is some malpractice in the counting of votes. On the next day namely on 03.01.2020 he sent another representation stating that he made a request for recounting to the Election Officer. But it was not properly responded by him. Quite contra to this, he has made some



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averments in the petition, which according to the learned counsel for the petitioner is nothing but improvements. No doubt that there is some improvements from representation dated 02.01.2020 up to the stage of the filing the petition. We need not be carried away by this sort of impression. Only the substances of the pleadings in this matter must be taken into consideration. Now what he says that the original declaration was made that he won the election. Later only he announced that some other candidate was elected. According to him, postal votes are not counted in their presence. Even the ballot box was not opened in their presence, the request made by him for recounting is also rejected without any reason. To such an extent we can take up the pleadings. We need not be carried away with the improvements made by the petitioner in the petition. So the contradiction between the pleadings and evidence of PW2 and the contradiction between the evidence of PW2 and Ex.P6 need not be taken into account at all.

18.Per contra the learned counsel for the first respondent would submit that the pleadings must be confined only to the material facts and not to the particulars of each and every minor details. According to him,



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what has been pleaded in the petition is sufficient for the Election Court to decide.

19. So I am of the considered view that arguments on the side of the petitioner is only weak point.

20. So with this two preliminary objections, now we go into other important aspect of request for recounting. This is much argued on both sides.

21. The learned counsel for the private respondent would submit that there is a violation of Rule pertaining to the counting of postal ballot papers. Rule 61 of the Tamil Nadu Panchayats (Election) Rules, reads as under.

“61. Counting of postal ballot papers and scrutiny and opening of ballot boxes.- (1) The Returning Officer shall first deal with the postal ballot papers forwarded to him under Rule 52 as specified below:-

(a) No cover referred to in Rule 52 received by the Returning Officer, after the expiry of the time



fixed in that behalf, shall be opened and no vote contained in any such cover shall be counted.

(b) The outer covers shall be opened one after another and the election duty certificates and declaration under Rule 52 contained therein shall be collected together, counted and sealed in a separate packet.

(c) The inner covers containing the marked ballot papers shall, then, be opened one after another and the voters counted. If the declaration is not found or has not been duly signed or is otherwise substantially defective, that inner cover shall not be opened and after making an appropriate endorsement thereon, the Returning Officer shall reject the ballot paper contained therein.

(2) The ballot boxes relating to each of the polling stations shall, then, be taken up for counting. The Returning Officer may in his discretion have the ballot boxes used at more than one polling station opened and their contents counted simultaneously.

(3) Before any ballot box is opened at a counting table, the counting Agents present at the table shall be allowed to inspect the paper seal and other seals on the ballot box and satisfy



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themselves that they are intact.

(4) The Returning Officer shall satisfy himself that none of the ballot boxes has, in fact, been tampered with.

(5) In the Returning Officer is satisfied that any ballot box has, in fact, been tampered with, shall not count the ballot papers contained in that box and shall follow the procedure laid down in Rule 57 in respect of that polling station.

(6) (a) If a fresh poll is held under Rule 57, the Returning Office shall, after completion of that poll recommence the counting of votes on the date, at the time and place which have been fixed by the District Election Officer in that behalf and of which notice has been previously given to the contesting Candidates and their election Agents.

(b) The provision of this part shall apply, so far as may be, to such further counting.

(7) The Returning Officer shall allow the Candidates and their Agents reasonable opportunities to inspect, without handling, all ballot papers which in his opinion are liable to be rejected under Rule 63. He shall endorse on every ballot paper which he rejects, the letter 'R' and the ground of rejection in abbreviated form either in his own handwriting or by means of a



rubber stamp and shall initial such endorsement.

(8) he shall verify the ballot paper account submitted by the Presiding Officer under sub-rule (4) (a) of Rule 58.”

22.By pointing out this he would submit that since the Returning Officer has dealt with the postal ballot papers after the counting of regular votes, the election itself is liable to be set aside.

23.Per contra the learned counsel for the revision petitioner would submit that it is only an irregularity and it will not vitiate the entire election process.

24.Now it is admitted by the respondent No.8 that postal ballot papers were counted only subsequent to the regular votes. So the question which arises for consideration is whether the above said violation of the Rule caused any prejudice to the parties or caused counting process vitiated and that violation is capable of tilting the balance in favour of the contestants.



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25. There is a little bit confusion with regard to the number of votes polled in the postal ballot. The first count reads that it is 8. Later it is corrected as 7. Again it is stated that one is missing. But the information received by the private respondent namely the winning contestant shows that only 7 postal ballot papers were polled. So ignoring this statement of accounts prepared by the Returning Officer, since it has been submitted by the learned counsel for the Revision Petitioner that as calculation mistake occurred in every event, that may not be given any importance at all. Only the final vote counts must be taken into account.

26. Now whatever it may be, there is violation, but that violation is not capable of tilting the balance to any one. It can be termed only as irregularity and not illegality, vitiating the entire voting process. So that contention on the part of the respondent No.1 is also not acceptable.

27. At what stage the request for recounting should be made is a matter of serious issue which arises in several cases. According to the learned Senior counsel for the revision petition, Rule prescribes that before the declaration of the result, the request for recounting must be



made, if not, no consideration can be made. For that purpose he would rely upon Rule 66 of the TN Panchayats (Election) Rules, 1995, which reads as under.

“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 therefore.

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



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(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).”

28. So, by pointing out this Rule, he would submit that after the announcement of the total number of votes by each candidate as per Sub Rule 2 of Rule 64 and before the declaration of the results, the candidate or his agent must make an application in writing. He would rely upon several judgments on this ground.



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29. For better understanding of the issue, as declared by various Courts, we can take up the judgments in chronological manner. The first judgment cited is ***Sundaram Vs. Vadivelu*** reported in ***1999 (1) CTC 92***, wherein, it is declared that it must be before the declaration of the result and not after that. That judgment was taken on in the form of ***C.A.No. 6543 of 1999*** before the Honourable Supreme Court, in ***Vadivelu Vs. Sundaram*** reported in ***2000 (IV) CTC 302***, wherein, the above said view of this Court was confirmed. It was pointed out by the Honourable Supreme Court that basic principle that preservation of the secrecy of the ballot is a sacrosanct one. That should not be broken unless there is a *prima facie*, genuine need is made out. So the person who wants the matter to be recounted must make out a *prima facie* case of a high standard of probability and with substantial and acceptable evidence. It is also pointed out that the Election petitioner must make out a case that because of the illegality or irregularity, the result of the election is materially affected.

30. But the things turned away in the case of ***Sophan Lal Vs. Babu***



Gandhi and Others reported in **AIR 2003 Supreme Court 320**, hither to the courts were following the judgment of the Honourable Supreme Court rendered in **Smt.Ram Ratj V. Saroj Devi and others** reported in **AIR 1997 SC 3072**, that judgment was rendered by the Honourable Two Judges Bench. The correctness of the above said judgment was doubted by another two Judges Bench. So the matter was referred to a Full Bench. The Honourable Supreme Court was dealings with **Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam**. The relevant portions are extracted hereunder.

“13.In this case, as stated above, the Appellant had been orally told that he had won. He only came to know that Respondent No. 1 had been declared elected after the result was declared. At this stage, he could not have approached the Returning Officer for recount. The only remedy, therefore, available to the Appellant was to file an Election Petition.

14.In view of Section 122 and the rules, we are unable to agree with the ratio laid down in Ram Rati's case. It is not correct to hold that, in an election petition, after the declaration of the result, the Court or Tribunal cannot direct recounting of votes unless the party has first applied in writing



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for recounting of votes. There is no prohibition in the Act or under the rules prohibiting the Court or Tribunal to direct a recounting of the votes. Even otherwise a party may not know that the recounting is necessary till after result is declared. At this stage, it would not be possible for him to apply for recounting to the Returning Officer. His only remedy would be to file an Election Petition under Section 122. In such a case, the Court or the Tribunal is bound to consider the plea and where case is made out, it may direct recount depending upon the evidence led by the parties. In the present case, there was obvious error in declaring the result. We, therefore, hold that the ratio laid down in Ram Rati's case is not correct.

31.The judgment of the earlier view was over ruled. By pointing out the same, the learned counsel for the respondent would submit that the reasoning of the Honourable Full Bench decision sounds reason because, according to him, only after the declaration of the results, on going through the consolidated statement of votes, which was taken by him through his mobile phone, it came to his notice that several manipulations, corrections, were carried out in the statement. So



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according to him it naturally created suspicion in mind which according to him cannot be said to be unfounded.

32.The next question which arises for consideration is whether the Madhya Pradesh Panchayat Raj Rule 76 is in *pari materia* with the Tamil Nadu Panchayat Act.

33.This was considered by this Court in Judgment in the case of ***Patti Ochan Vs. K.Murugan and others*** reported in **2011 (3) CTC 834**, wherein it has been held as follows:

“18. Therefore, an Application in writing to the Returning Officer, may not really be a condition precedent for the Election Petitioner to seek recounting of votes. In this regard, Rule 76 of the M.P. Panchayats Elections Rules, which fell for consideration in Ram Rati's case, is almost similar to Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995. Both these Rules make use of the expression "apply in writing". Therefore, the decision in Sohan Lal clinches the issue that even in the absence of a request in writing to the Returning Officer, there is no prohibition for the



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Court or the Election Tribunal to order recounting of votes.”

34.This judgment fixes the issue. The judgment of the Honourable Full Bench squarely applies to the Tamil Nadu Panchayats Act also. So no more discussion on this point is required, if made, it will amount to unnecessary loading this judgment with extra observations.

35.Now coming to the facts of this case, it is the case of the petitioner that the request for recounting was made to the Election Officer immediately, but was not considered. But, absolutely no material is placed by the petitioner to show that such a request was made. If really the request was immediate, he would not have congratulated the elected candidate namely this revision petitioner. So it is seen that request was not made immediately by Murali Manohar. It has been made only on the next day. It is not a bar or prevent the petitioner to make a request. So that plea is not available to the revision petitioner now.

36.Now coming to the next point of the necessity of recounting or on what basis the above said request can be made is a matter of deep



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consideration.

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37.As pointed out by this Court in the preamble portion of the order the main reason for the trial Court namely the Election Tribunal to order recounting is non counting of two polled votes. I can make elaboration on this point by extracting the finding of the Election Tribunal. In para 20 of the order is dedicated to this point.

20.மா.சா.ஆ.2 ஆவணத்தின்படி பார்க்கின்றபோது தேர்தலில் பதிவு செய்யப்பட்டுள்ள மொத்த வாக்குகள் மற்றும் அஞ்சல் வாக்குகள் ஆகியவை சேர்த்து 3090 வாக்குகளில் செல்லாத வாக்குகள் 101 யை கழித்தால், மீதமுள்ள வாக்குகள் 2989 ஆகும். ஆனால், மா.சா.ஆ.12 மற்றும் மா.சா.ஆ.11 ஆவணத்தின்படி, அந்த தேர்தலில் பதிவு செய்யப்பட்டுள்ள வாக்குகளில் 2987 வாக்குகள் மட்டுமே, எண்ணப்பட்டு, கணக்கில் எடுத்துக்கொள்ளப்பட்டு, மேற்படி முடிவானது அறிவிக்கப்பட்டுள்ளது. அதாவது, வாக்குச் சாவடி எண்.37AVல் பதிவு செய்யப்பட்ட 1 வாக்கும், 39 AVல் பதிவு செய்யப்பட்ட 1 வாக்கும், மேற்படி வாக்கு எண்ணிக்கையின்போது கணக்கில்



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எடுத்துக்கொள்ளப்படாமல் இருந்துள்ளது என்பதனை,
அறிய முடிகிறது.

38.One vote each polled in booth No.37AV and 39AV were not counted and taken into account at the time of counting.

39.Reasoning for this finding is that the total number of votes polled and counted does not tally. We will discuss about this point in the later portion of the order. Now suffice to say that that was the finding of the trial Court. Whether the above said finding is based on record, whether it has been validly brought on evidence by the election petitioner are the matters which arise for consideration.

40.Before that one important observation has to be made against the returning officer and the District Collector, Tuticorin. As mentioned in the preamble portion, documents were produced only by the petitioner. Those documents are in the form of the copies supplied to them at the time of polling. With regard to the counting statement except the photo copy, which allegedly permitted to be taken by the Election Officer, no



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other document or records were produced by the Election officer, namely the 8th respondent in the original petition. That was deliberately avoided, in spite of a direction issued by the Election Court to produce the election records. When it was pointed out to me I called upon the learned Government Pleader as to how such an attitude can be exhibited by the Public Officers when irregularity or illegality in the counting is alleged. It is the duty of the Election Officer to produce all the documents which are available with him and assist the Court in finding out the real facts. When public Officers themselves fail to respond to the Court directions then they ought to have been proceeded in a fitting manner not only judicially but also on the administrative side. Nothing it, appears has happened.

41. But, the learned Government Pleader produces the copy of the Form No.20, which contains II Part also, wherein, we find that it is mentioned that one vote each is missing. This was objected by the respondent by stating that this is manipulated and nothing but an attempt on the part of the Election Officer to fill up the lacuna.



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42.Now whatever it may be as mentioned, the Election Officer and the District Collector ought to have responded to the Election Court properly. They have failed. Now they produce their documents as official records that was also objected by the private respondent stating that after the election process is over, the records must be submitted to the District Collector in safe custody. So according to them the custody of the documents is also improper. But from whose custody the learned Government Pleader produced the records is beyond the enquiry to be made by this Court. When the Government Pleader is representing the District Collector and the Returning Officer, the records produced by him, the custody of the documents and records cannot and should not be doubted.

43.Now, whatever it may be, the trial Court was handicapped due to the non availability of the official records. It tried its level best to find out the solution to the issue based upon the documents produced by the petitioner and the oral evidence.

44.Another disturbing fact is that the 8th respondent who is the



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Election Officer during the relevant time did not come to the box and give particulars about the process of counting etc. facts. Had he been examined himself as the party many thing whould have been brought on record. This Court is also handicapped without the best possible evidence.

45.The contesting parties may make allegations and counter allegations etc., But the official respondents are duty bound to co-operate with the Court in this regard. With this observation, we may go further. The problem in relying upon the official records produced by the learned Government Pleader is that without proper evidences and without giving opportunity to both sides either to corroborate or contradict or confront the official and private parties, it may not be proper on this part of the Court also to make any decision at this point on the basis of these documents. Remanding the matter back will not serve the purpose, since it will take another long time to decide the issue.

46.First we will take up Form No.20, copy of the same produced by the petitioner marked as Ex.P2. The trial Court has extracted the



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particulars of Form No.20. So it reads that in all the 8 polling booths the total votes polled are 3082. Postal votes were counted as 7. So in all total votes polled comes to 3089. Out of the total votes polled 100 votes were in valid. The balance is 2989. As per the Form No.20 provided to the respondent except Booth No.36AV and 39AV total votes counted tallied. In the polling Booth 37AV as per the Form 20 provided to the petitioner total number of votes polled is 556. In the Form No.22 it has been mentioned as 555. Similarly, in Booth No.39AV, the total number of votes polled is 446, but in the Form No.22 the total number of votes is mentioned as 445. So two votes were left uncounted. The learned Additional Government Pleader has submitted that the above said two votes are missing at the time of counting.

47. With regard to the missing of votes, the learned counsel for the first respondent would rely upon Rule 62, in contrary to the arguments advanced by the revision petitioner. Rule 62 reads as follows:

“62. Destruction or loss of ballot papers at the time of counting.- (1) If at any time before the counting of votes is completed, ballot papers used at a polling station are unlawfully taken out to the



custody of the Returning Officer or accidentally or intentionally destroyed or lost or damaged or tampered with to such an extent that the result of the poll of that polling station cannot be ascertained, the Returning Officer shall forthwith report the matter to the

2[District Election Officer, State Election Officer and the State Election Commission].

(2) Thereupon, the District Election Officer shall after taking all material circumstances into account either,-

43[(a) direct that the counting of votes shall be stopped, declare the poll at that polling station to be void, appoint the date and fix the hour for taking the fresh poll at that polling station and notify the date so appointed and hour so fixed in such a manner as he may deem fit; or].

(b) 44[if satisfied that the outcome of a poll at that polling station will not in any way affect the result of the election,] the District Election Officer shall issue such direction to the Returning Officer as he may deem proper for resumption and completion of the counting and for the further conduct and completion of the election to which the votes have been counted.

(3) Provision of these Rules shall apply to every



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such fresh poll as they apply to the original poll.”

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48. So according to the learned counsel for the first respondent, this also been violated.

49. But as mentioned above, the question of missing votes were not either informed to the parties or by the 8th respondent before the Election Court by producing Form No.20 Part II. So that is why as mentioned above the Election Court recorded a finding that two votes were not counted.

50. So the question which arises for consideration is whether this also vitiates the election process. There is no record to show that the missing of votes were intimated to the District Election Officer and there is no recording either by the Returning Officer or by the District Election Officer that those missing of votes will not affect the result of the election. So why this Rule is violated by the 8th respondent is not explained by him, since he has not appeared before the Election Court.



51. Whether these materials would satisfy the requirement of law as set out in the case of ***Sadhu Singh Vs. Darshan Singh***, reported in **2006 (6) SCC 255**, which was relied in the case of ***Patti Ochan Vs. K.Murugan and others*** reported in **2011 (3) CTC 834**, wherein it was held that the following factors are relevant for directing recounting:

- “a) Prima facie case must be established;*
- b) material facts must be pleaded station irregularities in counting of votes;*
- c) a roving and fishing inquiry shall not be directed by way of an order for recounting or votes;*
- d) an objection to the said effect should be raised;*
- and*
- e) secrecy of ballot papers should be maintained.”*

52. It is contended that *prima facie* materials are brought on record to show that counting was not properly undertaken.

53. To counter this, learned Government Pleader produced Form No.20, which contains two parts and submitted that first part will be provided to the candidate or his agent as per Rule 58(4) of the Tamil Nadu Panchayats (Election) Rules. At the time of counting they must



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bring back them and at the time of counting only the second part will be filled up. The election petitioner failed to bring the copies supplied to them. So now they cannot blame the officials.

54. But as mentioned above, the copy of the Form No.20 is produced before this Court, which contains the part II also filled up, wherein, I have found that one vote each is missing in two booths. Now, by producing those documents, the official respondents want to establish that two votes were missing from the ballot boxes. And as I mentioned above, this explanation cannot be taken at the revisional stage. It ought to have been made at the time of enquiry before the election Court, as to what happened to the missing votes, all those things must be brought on record.

55. On that point the learned Senior counsel for the revision petitioner would heavily rely upon the observation that has been made by this court in *M.Kalavathy Vs. K.Chitra and others* reported in **2008 - 4 - L.W.65**. A similar situation arose in that matter also. In that case 19 votes were missing. Similar to this case, election were held on the very



same day in the very same respective booths for various posts also. The relevant portions are extracted hereunder:

“41. But, it may not be sufficient for a Court to order recount for atleast 2 reasons which I shall discuss in the following paragraphs.

42. Reason 1: Assuming that a recount is ordered on the ground that 19 votes are unaccounted for, it is not known as to how a recount will enable the concerned authorities to find out those 19 votes. If the averments contained in the election petition are accepted in total, it would mean that 9513 ballot papers were distributed but only 9494 ballot papers were collected. The annexure "A" and annexure "B" to the election petition merely show that 9513 votes were distributed to the electors and the counting produced only a tally of 9494 votes. A recount may not produce a different tally, since as per Rule 51(2) every elector is issued with one ballot paper which contains a serial number. He is supposed to go to the voting compartment, make a mark on the ballot paper and then fold the ballot paper so as to conceal his vote and then insert the folded ballot paper into the ballot box kept for that purpose. Rule 51(4) prohibits an elector from



being allowed entry to a voting compartment when another elector is there. All the ballot papers and counterfoils are serially numbered as per Rule 49(3) and issued one by one to the electors. Thus, there is no chance for an elector to receive more than one ballot paper since the ballot papers and the counterfoils are serially numbered and the agents of the contesting candidates are present when ballot papers are issued to the electors. There is also no possibility of two or more ballot papers getting stuck together since each ballot paper is folded before being inserted into the ballot box.”

56.Further, it was held that

“45. Therefore even in respect of missing votes, the material produced by the election petitioner is not sufficient enough to order recount. Looked at from another angle, it could be appreciated that a recount could be ordered by the Court only in respect of the votes polled for the election to the post of President, as we are now concerned only with the post of President of the Panchayat. Since the true copy of Part-I of Form 20 is not produced by the election petitioner



(despite the entitlement of her agent to the same by virtue of Rule 58(4)(b)) and since what is contained in Part-II of Form 20 is found in Form 22 filed as Ex.R.1, it has to be presumed that even a recount will produce only 9494 votes and nothing more. Probably if the votes polled for the post of President as well as the posts of Members of the Panchayat are all recounted, it may be possible to see if those 19 votes got mixed up with the votes for the Members of the Panchayat. In other words, to locate those 19 votes, it is not enough if a recount is ordered in respect of the votes polled for the post of President. It may be necessary to order a recount of the votes polled for all the posts. Such a recount is not what is contemplated under the Rules. A recount, even if ordered, could be confined only to the particular post in question and it cannot be with respect to all the posts, in order to locate the votes unaccounted for with regard to one post.

46. It must be borne in mind that right from Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others, , the Supreme Court emphasised the need for secrecy with regard to the ballot papers. Such secrecy can be disregarded in exceptional circumstances pointed out by the Supreme Court.



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But it could only be confined to the post in question and a recount of the votes polled in respect of all the posts, for the purpose of an enquiry in respect of one post, would negate the principle of secrecy.

47. In any event, the election petitioner did not plead in his election petition that these 19 votes got mixed up with the votes polled in respect of the other posts. Therefore a recount of the votes polled in respect of all the posts, in order to trace the 19 missing votes relating to the post of President is neither legally feasible nor factually warranted.”

57. In view of the above said, now the learned counsel for the revision petitioner would submit that the exercise that was permitted by the Election Court is unworkable in nature. We will deal this matter in the later portion of the order.

58. It was also observed in para 40 that with regard to the missing of votes pleadings cannot be expected to be made with the cent percent



mathematically. Para 40 reads as under.

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“40. As a matter of fact, all the decisions of the Supreme Court which I have referred to above, dealt with a variety of irregularities in the counting of votes. None of the cases dealt with by the Supreme Court, which we have discussed above, was concerned about a case of missing votes. Therefore the precision that could be expected in the pleadings, of an election petitioner with regard to missing votes, cannot be as razor sharp, as it could be in respect of the other irregularities.”

59. Be that as it may, it was pointed out that it is the duty of the Election Officer to produce all the documents otherwise adverse inference can be drawn. Only Form No.20 first part were provided to the candidates and not the second part. Second part will be carried out in Form No.22. Second part in Form No.20 will reveal the actual ballot papers found in the ballot boxes. Here as mentioned above that particular was denied not only to the candidates, but also to the Court to know how many votes were missing in the ballot boxes. So it was pointed out finally in that matter that even if recounting order is made it is not possible, since because for several positions the election was held. So



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recounting must be ordered for all the positions. Such a course is not available.

60. But in that case there was concrete document before the Court that 19 votes were missing. But in the circumstances recounting may not yield any result and cannot be proper also. But here as mentioned above that particulars were denied by the official respondents to have the benefit of perusal of the Form 20 Part II.

61. The learned counsel for the respondent would submit that there is no explanation on the part of the Election Officer as to non counting of those two votes. Certainly recounting can be ordered, if the uncounted two votes are found in the ballot boxes, which may or may not tilt the balance in one way or other and fresh declaration can be made.

62. This submission was made by the respondent on the ground that the copy produced by the learned Government Pleader before this Court as mentioned above is a manipulated one and does not even contain the signature of the competent authorities provided under Rules.



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So I am of the considered view that based upon documents now produced before this Court, the order passed by the trial Court should not be upset.

63.The recounting may give answer as to the number of ballot papers available now. If the extra papers namely two ballot papers are available in the ballot boxes that may also be counted. If the two ballot papers are not available in the ballot boxes then the result will be the same. So I am of the considered view that the Election Court has taken a probable view other than that the other way is not possible now.

64.In view of the above said findings, I find that absolutely no illegality is committed by the Election Court, namely I Additional District Court, Thoothukudi. This revision fails. Accordingly, this civil revision petition stands dismissed. Let the recounting be made and announcement of result as ordered by the Election Court be made within a period of one month from today. No costs. Consequently, connected miscellaneous petition is closed.

07.03.2024



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Index : Yes / No

Internet : Yes / No

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Note: Issue order copy on 08.03.2024.

To

- 1.The I Additional District Judge, Thoothukudi.
- 2.The Section Officer,
E.R.Section/V.R.Section,
Madurai Bench of Madras High Court, Madurai.

Copy to

- 1.The Returning Officer
Block Development Officer,
Thiruchendur Panchayat Union,
Thoothukudi District.
- 2.The District Collector,
Thoothukudi District,
Collectorate,
Karampallam,
Thoothukudi.



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G.ILANGOVAN,J.

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