

(2005) 08 MAD CK 0118

In the Madras High Court

Case No : Election Petition No's. 1 and 2 of 2004

N. Rajagopalan

APPELLANT

Vs

R. Danushkodi Adithan and Others
M. Arumugam Vs
K.G. Shanmuganathan and Others

RESPONDENT

Date of Decision : 02-08-2005

Acts Referred:

Conduct of Elections Rules, 1961 — Rule 15, 4A
Constitution of India, 1950 — Article 324
Government of Union Territories Act, 1963 — Section 14, 4
Representation of the People (Amendment) Act, 2002 — Section 169
Representation of the People Act, 1951 — Section 10, 100, 100(1), 100(2), 125A

Citation : (2005) 08 MAD CK 0118

Hon'ble Judges : M. Chockalingam, J

Bench : Single Bench

Advocate : T.V. Ramanujam, for C. Anandaramani and Pitty Parthasarathy, in Elec. P. No. 1/2004 and R. Selvakumar, in Elec. P. No. 2/2004, for the Appellant; R. Thiagarajan, for M. Muthappan and S. Muthukumar for 1st Respondent and M.R. Raghavan, for Respondents 14 and 15 in Elec. P. No. 1/2004 and for Respondents 15 and 16 in Elec. P. No. 2/2004, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—This order shall govern both the election petitions in Election Petition Nos. 1 and 2 of 2004. In the order both the 15th respondent in Election Petition No. 1/2004 and the 16th respondent in Election Petition No. 2/2004 will be referred to as Returni Officer.

2. The petitioners have filed these petitions challenging the election of the returned candidate namely the 1st respondent herein, from No. 36, Tirunelveli Parliamentary Constituency, State of Tamil Nadu, in the Election held on 10.5.2004 to the House people.

3. The case of the petitioner in Election Petition No. 1/2004 can be stated thus:

(a) The parliamentary election was held on 10.5.2004. As per the notification dated 16.4.2004 issued by the Returning Officer, the nomination papers have to be filed between 16.4.2004 and 23.4.2004, the scrutiny of the nomination papers has to be completed on 24.4.2004, and the last date for withdrawal of the nomination paper was fixed on 26.4.2004. Accordingly, the petitioner filed his nomination papers as an independent candidate. The respondents 1, 2 and 3 filed nomination papers as party candidates representing Indian National Congress, AIADMK and Bahujan Samaj Party respectively, while the respondents 4 and 5 have filed nomination papers as Janatha Party (United) and Janatha Party respectively. The respondents 6 to 13 have filed their nomination papers as independent candidates.

(b) The three nomination papers filed by the first respondent on 21.4.2004, were not in conformity with the Rule 4-A as contemplated under the Conduct of Election Rules 1961, Section 33-A of the Representation of the People Act 1951, and the orders passed in Ref. No. 3/ER/2003/JS-II dated 27.3.2003, by the Election Commission of India. On a requisition made by the petitioner on 22.4.2004 requesting the Returning Officer to supply the copy of the nomination forms filed by the 1st respondent, the Xerox copies of the same were furnished to him. On verification, it was found that the 1st respondent has not enclosed the two affidavits along with the nomination papers as required under the Act. On further requisition, the 1st respondent gave a reply dated 22.4.2004 stating that the first respondent and one Mohan Kumara Raja have not filed the affidavits and the annexure-I along with the nomination papers at the time of its presentation. But, surprisingly, the Returning Officer called upon the first respondent to furnish the affidavits prescribed by the Election Commissioner, by his communication dated 21.4.2004. This would demonstrate the fact that the 1st respondent has not filed Form No. 26 and Annexure-I along with his nomination form.

(c) The Returning Officer has no jurisdiction to scrutinise the entire nomination paper on the date of filing of the nomination papers except verification of the name, age and the voters list. Traversing beyond his jurisdiction, the Returning Officer issued the said written communication to the first respondent. Pursuant to the said communication, the first respondent furnished those particulars on 23.4.2004 after expiry of time for filing nomination papers, which were received by the Returning Officer. The action of the Returning Officer is uncalled for and unwarranted.

(d) The petitioner filed his objection and requested the Returning Officer to reject the nomination papers of the first respondent on the ground that the same was not in order. However, without any enquiry, the Returning Officer rejected the objection by his order dated 24.4.2004. The Returning Officer overruled the objection by quoting some provisions of law. The action of the Returning Officer is against the statutory order dated 27.3.2003 of the Election Commission and the dictum laid down by the Supreme Court in *Union of India (UOI) Vs. Association for Democratic Reforms and Another*, .

(e) The Law Commission in its 170th report made recommendation for debarring candidates from contesting an election if charges have been framed against them by a Court in respect of certain offences and necessity for a candidate seeking to contest election, to furnish details regarding criminal cases if any pending against him. It has also been recommended that true and correct statement of assets owned by the candidate, his/her spouse and dependent relation should be disclosed. Since the recommendations of the Law Commission and the Vohra Committee have not been implemented, a writ petition was filed in C.W.P. No. 7257 of 1999 on the file of the High Court, Delhi, for a writ of mandamus directing the Election Commission to implement the reports. The said writ petition was dismissed on 2.11.2000; but a direction was given to the Election Commission in that regard. Aggrieved over the same, the Union of India filed an appeal in Civil Appeal No. 7178 of 2001 on the file of the Supreme Court. The Supreme Court by a judgment dated 2.5.2002 modified the order of the High Court and directed the Election Commission to call for information on affidavit by issuing necessary orders in execution of its powers under Article 324 of the Constitution of India from each candidate seeking election to parliament or a State legislature as a necessary part of nomination paper furnishing information as to the conviction or discharge of the candidate in criminal offences if any, as to whether the candidate is accused in any pending case of any offence punishable with imprisonment for two years or more, as to the assets of a candidate and of his/her spouse and that of dependents and as to the liabilities of the candidate.

(f) Pursuant to the judgment of the Supreme Court, the Election Commission passed an order on 28.6.2002. The President of India on 24.8.2002 promulgated the Representation of People (Amendment) Ordinance 2002 (4/2002) to amend the Representation of people Act by inserting Sections 33-A, 33-B and 125-A and amending Section 169 of the Representation of People Act 1951. Section 33-B of the said ordinance rendered the Election Commission's order dated 28.6.2002 ineffective. However, the Government of India issued corresponding notification dated 3.9.2002 to amend the Conduct of Election Rules 1961, to give effect to the aforesaid ordinance. Three writ petitions came to be filed before the Supreme Court challenging the constitutional validity of the presidential ordinance dated 24.8.2002. The Supreme Court by its judgment dated 13.3.2003 declared Section 33-B of the amended Act as illegal, null and void and also issued further direction to the Election Commission to issue revised instructions to ensure implementation of Section 33-A with some restrictions. Consequently, the Election Commission issued a revised order dated 27.3.2003. A reading of Clause (1) of the said order coupled with the direction issued by the Supreme Court dated 2.5.2002 and Section 33-A of the Act, would go to show that filing of affidavits in Form No. 26 and Annexure I by every candidate at the time of filing his nomination paper is mandatory, and non filing or any deviation or violation of the same would invalidate the nomination papers of that candidate.

(g) There cannot be any guidelines or instructions contrary to the mandatory

provisions. The Returning Officer issued a Hand Book for candidates for their benefit. The guidelines issued as to the information about conviction if any is contrary to order dated 27.3.2003 as well as the judgment-dated 2.5.2002 passed by the Supreme Court. If the nomination papers were filed, the candidates have no authority or locus-standi to insert any papers. The Returning Officer has no authority or jurisdiction to call upon the candidate to fill up the lacuna in order to validate the nomination papers at the time of scrutiny. Even assuming that affidavits are filed at a later stage before the scrutiny of the nomination at the instruction of the Returning Officer, such affidavits cannot be accepted. Knowing fully well that the first respondent's nomination papers were not in order, the Returning Officer has issued written instruction to the first respondent, and the same has to be rejected. The action of the Returning Officer is unconstitutional, unjustified, unreasonable, excessive exercise of jurisdiction, arbitrary in nature and amounts to doing favouritism to a particular candidate.

(h) Contrary to the Clause 10(c) of the Hand Book, the Returning Candidate erred in accepting the nomination papers of the first respondent as "in order". The Returning Candidate instead of following the procedure prescribed u/s 33-A(3) of the presentation of People Act, 1951, permitted the first respondent to furnish the copies of the affidavits at the time of scrutiny. It is clear that the mandatory provisions of the Act have not been followed while accepting the nomination papers of the first respondent. In such circumstances, the Returning Officer should have rejected the nomination papers of the 1st respondent. In view of the unlawful procedure adopted by the Returning Officer, the first respondent has come out as a successful candidate; otherwise, he would be disqualified to contest the election. By this partisan attitude of the Returning Officer, the entire election process in respect of No. 36, Tirunelveli Parliamentary Constituency is vitiated by various irregularities, which materially affected the result of the election. There was flagrant violation of implementation of the provisions of the Representation of People Act and Rules framed thereunder and the Conduct of Election Rules. Hence, this petition.

4. The petitioner in Election Petition No. 2 of 2004, who was one of the voters, has reiterated the averments as found in Election Petition No. 1 of 2004.

5. The first respondent in Election Petition No. 1/2004 contested the petition on the following grounds:

(a) He filed his nomination papers on 21.4.2004 in accordance with the provisions of the Representation of the People Act 1951, the conduct of Election Rules 1961, and also the orders of the Election Commission of India. The necessary affidavits to filed along with the nomination papers were filed on 23.4.2004 well before the expiry of the time fixed for the filing of nomination namely 3.00 P.M. on 23.4.2004. The question of liability for rejection of the nomination papers would arise only at the time when the nomination papers were taken up for scrutiny, and at that point of time, if the affidavits contemplated by the order of the Election Commission dated 27.3.2003 are not

available, then the nomination papers are liable to rejection. Any nomination filed upto 3.00 P.M. on 23.4.2004 is a valid one. The affidavits could also be filed within that time. In the instant case, he filed the affidavits within time. The affidavits were displayed by the Returning Officer in the Notice Board. The petitioner having the benefit of the same, filed his objections on 24.4.2004. In such circumstances, the petitioner is estopped from contending that the nomination of the first respondent was not valid for non-furnishing of the required affidavit.

(b) No portion of the Rules framed by the Election Commission on 27.3.2003, stipulates that if the nomination papers are not accompanied by the affidavit concerned, then the nomination papers are liable to be rejected even at the time when the nominee papers are filed. The stage for finding out whether the nomination papers are liable to rejection for non-furnishing of the affidavit concerned would be only at the time of scrutinizing of nomination papers and not earlier. There is no bar to the Returning Officer pointing out the absence of the affidavits since Rule 15 of the Book for Candidates Guidance and Benefits makes it clear that if the informations required in the form of affidavit, are not furnished along with the nomination papers, then it has to be furnished before the date and time fixed for scrutiny of nomination. The Returning Officer considered the objection raised by the petitioner and found that the furnishing of the affidavit has been done in accordance with the Rule.

(c) As per the Rule, a duty is cast upon the Returning Officer to bring to the notice of the candidate the absence of the affidavit along with the nomination papers immediately on the filing of nomination, and the candidate should be asked to file affidavit by the date fixed for scrutiny. The nomination filed by the first respondent is in conformity with the provisions of the Representation of People Act, the Conduct of Election Rules and also the orders passed by the Election Commission of India. The fact that the petitioner did not raise any objection before the Returning Officer at the time of scrutiny of the nomination shows that he had no valid objection. The Returning Officer has jurisdiction to look into the nomination papers when filed as otherwise he cannot comply with the direction in the Hand Book of Returning Officer. It is mischievous to allege that on receipt of a communication from the Returning Officer, the first respondent produced the affidavits on 23.4.2004 after the expiry of time for filing nomination papers. The Returning Officer has not shown any favouritism to the first respondent. The order of the Returning Officer is not in violation of the provisions of the Representation of the People Act 1951 or any Rule made therein or any order of the Election Commission of India.

(d) There is nothing illegal or improper in the approach of the Returning Officer calling upon him to file the affidavits, accepting the affidavit filed by him and rejecting the objections raised by the petitioner. The said act of the Returning Off is not contrary to Section 33-A(3) of the Representation of the People Act or Rule 4-A of the Conduct of Election Rules or the order dated 27.3.2003 of the Election

Commission. There is no violation of any of the provisions of the order dated 27.3.2003 in the filing of the nomination by the first respondent and the furnishing of the required affidavits. The petitioner has not properly and correctly appreciated the order of the Election Commission dated 27.3.2003. The petitioner having filed his nomination accepting the very same guidelines, cannot now turn round and urge that the guidelines are contrary to the said order. There is no prohibition under the order dated 27.3.2003 of the Election Commission prohibiting the filing of any other paper forming part of the nomination before the expiry of the time limit fixed for filing of nominations.

(e) The power of the Returning Officer to receive nomination papers before the expiry of the time limit fixed, therefore, includes all incidental powers to give effect to the power to receive the nomination. The reference to the power to reject the nomination in Section 10(o) of the Hand Book for the candidates would arise only at the time of scrutiny of the nomination, and if at that point of time, the required affidavits are not furnished, then the nomination is liable to rejection and not otherwise . The procedures contemplated under the Representation of the People Act and also the order dated 27.3.2003 of the Election Commission, have been complied with by the first respondent.

(f) It is relevant to note that the petitioner in his objections dated 24.4.2004 before the Returning Officer, did not point out that there was no display of the affidavit by the Returning Officer. The acceptance of the nomination of the first respondent by the Returning Officer is in order and cannot be attacked by invoking the provisions of the Representation of the People Act or the Conduct of Election Rules or the order of the Election Commission dated 27.3.2003. The entire election process had been done in accordance with law and is not vitiated by any irregularities as alleged by the petitioner. There is no irregularity committed by the Returning Officer. Under the circumstances, the election petition is liable to be dismissed.

6. The first respondent in Election Petition No. 2/2004 has made the very same allegations as found in Election Petition No. 1/2004.

7. The respondents 2 to 13 in Election Petition No. 1/2004 and the respondents 2 to 6 and 8 to 14 in Election Petition No. 2/2004 have not appeared, and hence, they are set ex-parte.

8. The following issues were framed in Election Petition No. 1 of 2004:

(1) Whether the nomination paper filed by the first respondent is valid as per Rule 4-A of Election Rules 1961 and 33-A of the Representation of People Act, 1951?

(2) Whether the nomination paper is valid without annexure of Form No. 26 along with the nomination paper?

(3) Whether the act of the 15th respondent calling for affidavit and Form No. 26 from the 1st respondent is with jurisdiction and as per law?

(4) Whether the nomination paper of the 1st respondent is contrary to Section 33-A(3) of the Representation of the People Act, Rule 4-A of the Conduct of the Election Rules, 1961, and against the statutory order made in No. 3/ER/2003/JS-II, dated 27.3.2003?

(5) Whether the nomination paper of the 1st respondent accepted by the 15th respondent, is legal and sustainable in law?

(6) Whether the nomination paper without furnishing the entire particulars containing in Form 26 along with annexure I and affidavits, is sustainable under the Representation of People Act, 1951?

(7) Whether the petitioner is entitled for the declaration of the election of the first respondent as void, for the reasons stated in the petition?

(8) To what relief the petitioner is entitled to?

9. The following issues were framed in Election Petition No. 2 of 2004:

(1) Whether the nomination paper filed by the first respondent is valid as per Rule 4-A of Election Rules 1961 and 33-A of the Representation of People Act, 1951?

(2) Whether the nomination paper is valid without annexure of Form No. 26 along with the nomination paper?

(3) Whether the act of the 16th respondent calling for affidavit and Form No. 26 from the 1st respondent is with jurisdiction and as per law?

(4) Whether the nomination paper of the 1st respondent is contrary to Section 33-A(3) of the Representation of the People Act, Rule 4-A of the Conduct of the Election Rules, 1961, and against the statutory order made in No. 3/ER/2003/JS-II, dated 27.3.2003?

(5) Whether the nomination paper of the 1st respondent accepted by the 16th respondent, is legal and sustainable in law?

(6) Whether the nomination paper without furnishing the entire particulars containing in Form 26 along with annexure I and affidavits, is sustainable under the Representation of People Act, 1951?

(7) Whether the petitioner is entitled for the declaration of the election of the first respondent as void, for the reasons stated in the petition?

(8) To what relief the petitioner is entitled to?

10. By consent of both sides, both the election petitions were taken up together for enquiry. The Returning Officer by name R. Thambidurai was examined as C.W.1. A letter issued by C.W.1 on 22.4.2004, was marked as Ex.C1. Ex.P1 is the certified copy of the objections raised by the petitioner in Election Petition No. 1/2004, at the time of scrutiny of nomination on 24.4.2004. Ex.P2 is the certified

copy of the order passed by C.W.1 on 29.4.2004.

11. Advancing the arguments on behalf of the petitioner in Election Petition No. 1/2004, the learned Senior Counsel Mr. T.V. Ramanujam, would submit that the petitioner has sought for a declaration that the order of the Returning Officer accepting the nomination papers of the first respondent is illegal and consequently, the election of the first respondent is void; that the Returning Officer should have rejected the nomination papers submitted by the first respondent; that there was improper reception of the nomination papers filed by the first respondent, by the Returning Officer, which has materially affected the result of the election; that Section 33-A of the Representation of People Act is more relevant to the present facts of the case, since it mandates that the candidate or his proposer as the case may be, should at the time of delivering to the Returning Officer, the nomination paper under sub-section (1) of Section 33 also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1); that Rule 4-A of the Conduct of Election Rules 1961, would make it clear that the candidate at the time of delivering to the Returning Officer, the nomination paper under sub-section (1) of Section 33 of the Act, should also deliver to him an affidavit sworn by the candidate before a Magistrate of the first class or a notary in Form 26; that the employment of the expression "shall" in Section 33-A(2) would indicate that it is mandatory, and hence, the non-compliance of Section 33-A(2) would vitiate the entire proceedings, and as such, there would be improper reception of the nomination papers if the affidavit was not delivered at the time of delivery of the nomination papers to the Returning Officer; that it is pertinent to point out that Section 33-A was introduced after the judgment of the Apex Court to the effect that the electorate should know the antecedents of the candidate; that in the instant case, it is an admitted fact that the first respondent submitted the nomination paper on 21.4.2004 to the Returning Officer; that at the time when he submitted the nomination paper, he did not deliver the affidavit in the format as contemplated by Section 33-A(2) of the Act; that Form 26 gives the format of the affidavit to be furnished before the Returning Officer under Rule 4-A of the Conduct of Election Rules 1961; that the heading to Annexure-I reads "an affidavit to be furnished by the candidate along with the nomination paper before the Returning Officer"; and that in the instant case, the fact that the first respondent has not filed an affidavit along with the Annexure-A before the Returning Officer at the time when he delivered the nomination paper on 21.4.2004, is not disputed by the first respondent.

12. Added further, the learned Senior Counsel that the Returning Officer has been examined in the case as C.W.1, who admits in his evidence that at the time of the filing of the nomination paper, the first respondent did not file Form 26 and sworn a affidavit; that the petitioner gave a petition on 22.4.2004 requesting the Returning Officer to furnish him a copy of the affidavit in Form 26 and the Annexure-I and the sworn affidavit by the first respondent along with the nomination papers, and for that, the Returning Officer sent a reply on

22.4.2004; that the said witness has stated that the candidate should file Form 26 before 11.00 A.M. on 24.4.2004 for scrutiny; that it is pertinent to point out that the Returning Officer has no jurisdiction to do so ; that the observation of the Returning Officer in Ex.C1 that as per the guidelines of the Election Commission, it could be done like that, was contrary to law; that the Election Commission cannot issue any guideline contrary to the statutory provisions envisaged in Section 33-A(2) of the Act; that Section 33-A(2) of the Act and Rule 4-A of the Conduct of Election Rules 1961, are mandatory which would make it clear that Form 26 and the sworn affidavit and Annexure-I have to be necessarily filed along with the nomination papers; that the election petitioner filed his objections dated 24.4.2004 under Ex.P1, and for that, the Returning Officer passed an order dated 24.4.2004 relying upon paragraph 4.5(3) of Chapter IV of the Handbook for candidates; that the hand book for candidate has no statutory powers, and apart from that, the Returning Officer could not rely upon the handbook issued for the candidates; that even assuming that there are guidelines found therein, those guidelines have got to be ignored, since the statutory provisions alone would prevail, and under the circumstances, the Returning Officer should have rejected the nomination papers because the nomination paper was not accompanied by the affidavit in Form 26 and Annexure-I; that the reception of the same was in violation of the mandatory provisions u/s 33-A of the Act and Rule 4-A of the Conduct of Election Rules; that since the above fact was admitted, no oral evidence became necessary; that the evidence through C.W.1 and Exs.C1, P1 and P2 were available; that a perusal of the evidence of C.W.1 and Exs.C1 and P2 would clearly indicate that there was improper reception of nomination paper of the first respondent, and hence, the election of the first respondent is void; that the Returning Officer without rejecting the nomination paper, has improperly allowed the first respondent to give the affidavit in Form 26 and Annexure-I later and to contest in the election, which action was void ab-initio; that when the action of the Returning Officer was nullity and void ab-initio, it is clear that the result of the election has been materially affected; and that the fact that the result of the election has been materially affected would be very clear on the face of it, because the entire proceedings are non-est in the eye of law.

13. Advancing the further arguments, the learned Senior Counsel would submit that the non-compliance of Section 33-A(2) of the Act is not mentioned as a ground u/s 36 of the Act, and this cannot be a ground since Section 36 is not exhaustive, and it did not give the expression "notwithstanding anything contained in Section 33-A", and hence, Section 33-A is not complied with; that there is no nomination paper in the eye of law at all and that cannot be called as a nomination paper, and the same goes to the root of the matter; that the affidavit in question cannot be filed according to the convenience of the candidate even after filing the nomination papers in view of the wordings contained in Section 33-A(2) of the Act; that in the instant case, the Returning Officer has called upon the candidate to file the affidavit; that it is not for the Returning Officer to cure a

defect which is incurable, and thus, the order of the Returning Officer justifying his illegality, is in gross violation of Section 33-A(2) of the Act and Rule 4-A of the Conduct of Election Rules; that in paragraph 16 of the said order of the Election Commission dated 27.3.2003, it is clearly stated that every candidate at the time of filing his nomination paper shall furnish full and complete information in regard to the matters required in form with Annexure-I, and it also says that the non-furnishing of the affidavit by any candidate shall be considered to be violation of the order of the Supreme Court, and the nomination of the candidate concerned shall be liable to rejection by the Returning Officer at the time of scrutiny of the nomination; that paragraph 19 of the said order of the Election Commission dated 27.3.2003 would make it clear that all the Returning Officers should ensure that the copies of the affidavit prescribed therein by the Election Commission, should be delivered to the candidates along with the forms of nomination papers as part of the nomination paper, and thus, it was a clear violation of the mandatory provisions u/s 33-A of the Representation of People Act 1951 read with Rule 4-A of the Conduct of Election Rules 1961, and under the circumstances, there was no nomination in the eye of law, and the entire proceedings were void; that the affidavit in Form 26 and Annexure-I subsequently filed, cannot form part of the nomination paper originally filed by the first respondent; that the nomination papers cannot be filed in parts from time to time or in installments, and thus, the entire proceedings are void and non-est and void ab-initio, since there was no nomination in the eye of law; that there was improper reception of the nomination paper, which has materially affected the result of the election of the first respondent; that by improper acceptance of the nomination papers, the name of the first respondent was mentioned as a contesting candidate for the said constituency, and because of that, he got votes; that he was not entitled to contest in the election at all because there was no nomination at all; that in any event, his nomination papers should have been rejected, and those votes obtained by him have to be ignored and could not be counted; that based on the nomination which should have been rejected, the election so far as the returned candidate was concerned, has been materially affected, and if the nomination has been rejected, he would not have any vote, and thus, the votes obtained by the first respondent have got to be necessarily ignored, and hence, the petitioner is entitled for the relief.

14. In order to substantiate the contentions, the learned Senior Counsel for the petitioner relied on the following decisions:

- (1) AIR 1954 SC (Rattan Anmol Singh v. Atma Ram and Ors.);
- (2) Brijendralal Gupta and Another Vs. Jwalaprasad and Others, ;
- (3) Pashupati Nath Singh Vs. Harihar Prasad Singh, ;
- (4) AIR 1969 SC 605 (Vishwanatha Reddy v. Konappa Rudrappa Nadgouda and Anr.);
- (5) Khaji Khanavar Khadirkhan Hussain Khan and Others Vs. Siddavanballi

Nijalingappa and Another, ;

(6) Dharam Singh Rathi Vs. Hari Singh, M.L.A. and Others, ;

(7) Kaviraj Bhupender Nath Gupt and Another Vs. Union of India (UOI) and Others, ;

(8) Brundaban Majhi Vs. Jagateswar Mirdha, ;

(9) Birad Mal Singhvi Vs. Anand Purohit, ;

(10) (1999) 4 SCC (K. Venkatachalam v. A. Swamickan and Anr.);

(11) Union of India (UOI) Vs. Association for Democratic Reforms and Another, ;

(12) Shaligram Shrivastava Vs. Naresh Singh Patel, ;

(13) Case No. Appeal (Civil) 5841 of 2002 (Harikrishna Lal v. Babu Lal Marandi) and

(14) People's Union for civil Liberties (PUCL) and Others Vs. Union of India (UOI) and Another,

15. The learned Counsel appearing for the petitioner in Election Petition No. 2/2004 has adopted the arguments advanced by the learned Senior Counsel for the petitioner in Election Petition No. 1/2004 and would submit that the petitioner is entitled to the relief.

16. Vehemently opposing the contentions of the petitioners' side, the learned Senior Counsel Mr. R. Thiagarajan, appearing for the first respondent in both election petitions would submit that the first respondent filed the nomination paper on 21.4.2004 that the necessary affidavit required to be filed, were filed on 23.4.2004; that the competent authority namely the Returning Officer, received the affidavits and has disseminated the same as required under the Act and Rules; that the scrutiny of the nomination papers had taken place on 24.4.2004; that in obedience of the orders of the Supreme Court dated 13.3.2003 in People's Union for civil Liberties (PUCL) and Others Vs. Union of India (UOI) and Another, , the Election Commission of India has made a detailed order on 27.3.2003 in exercise of its powers under Article 324 of the Constitution of India containing the norms and modalities to carry out and give effect to the directions of the Apex Court; that the Election Commission by the said order has prescribed an affidavit in a prescribed form to be filed by each candidate at the time of filing his nomination paper; that the consequences of violation on the part of the candidate to furnish such affidavit has also been spelt out in para 16(3) of the order; that the said order dated 27.3.2003 of the Election Commission would further go to show that if any candidate fails to file an affidavit along with the nomination papers, he should be reminded to do the needful by the Returning Officer by a written memorandum; that a standard draft of such reminder is also shown in Annexure-A to that order; that the reminder was also directed to be issued immediately to the candidate or his proposer presenting the nomination

paper; that it was only by virtue of the above order dated 27.3.2003 of the Election Commission, the Returning Officer has pointed out the absence of the affidavit to the first respondent; that Section 36 of the Representation of the People Act refers to the grounds on which a nomination can be rejected; that the right to information contained in Section 33-A of the Act, was not referred to as one of the grounds in Section 36 on which the nomination could be rejected; that if it was the intention of the legislature that the non-furnishing of the affidavits contemplated by the order dated 27.3.2003 of the Election Commission, would result in the rejection of the nomination paper, then Section 36 of the Act would have been amended including the non-compliance of Section 33-A as one of the grounds for the rejection of the nomination, and hence, it would be quite clear that the non-furnishing of the affidavit along with the nomination paper contemplated in the order dated 27.3.2003, but supplied before the last date and time fixed for filing of nomination, was valid in law; that in the present case, the first respondent has furnished the necessary affidavit before 3.00 P.M. on 23.4.2004; that the petitioner in Election Petition No. 1/2004 has also filed the objections on 24.4.2004 at the time of scrutiny of the nomination, and the same has also been overruled.

17. Added further, the learned Senior Counsel that there was no illegality committed by the Returning Officer in bringing to the notice of the first respondent the absence of the affidavit when the nomination papers were filed, since the order dated 3.2003 of the Election Commission, clearly provides that if the affidavits were not filed along with the nomination paper, then that candidate should be reminded to do the needful by the Returning Officer; that no papers much less the affidavit referred to, were filed on 23.4.2004 after the time for filing of the nomination paper was over; that even the objection filed by the petitioner in Election Petition No. 1/2004 before the Returning Officer, did not support his case; that the Returning Officer had the necessary jurisdiction by virtue of the orders of the Election Commission dated 27.3.2003 to look into the nomination paper when filed by the candidate, as otherwise, he could not comply with the directions as contained in the order dated 27.3.2003; that there was no prohibition under the provisions of the Representation of the People Act or the order dated 27.3.2003 of the Election Commission, prohibiting the filing of any paper forming part of the nomination paper before the expiry of the time fixed for filing the nomination; that at the time when the nomination papers were taken up for scrutiny on 24.4.2004, nothing was found wanting in the nomination paper of the first respondent; that the question of non-furnishing of the affidavit and the consequent violation of the order of the Election Commission warranting rejection of nomination paper by the Returning Officer, would arise only at the time of scrutiny of the nomination; that it is not the case of the petitioners that at the time when the nomination papers were taken up for scrutiny, anything was warranting so far as the first respondent was concerned; that the petitioners have also not shown that the result of the election insofar as it concerns the first respondent, has been materially affected, and under the circumstances, the

petitioners do not make out any ground for rejection of the nomination as contemplated by the Act, and hence, both the petitions have got to be dismissed.

18. As could be seen above, these two election petitions have been brought forth challenging the election of the first respondent u/s 100(1)(d)(i) of the Representation of the People Act, 1951, on the grounds that the order of the Returning Officer dated 24.4.2004 accepting the nomination papers of the first respondent in respect of Tirunelveli Parliamentary constituency, is improper, invalid and illegal and the consequent election of the returned candidate namely the first respondent, is void.

19. As per the averments made in the pleadings, the following admitted facts would emerge:

The election to Tirunelveli Parliamentary Constituency in the State of Tamil Nadu was held on 10.5.2004. The Returning Officer announced the election date as well as the date for filing of the nomination papers and scrutiny of the same by way of a notification on 16.4.2004. According to the notification, the nomination papers were to be filed between 16.4.2004 and 23.4.2004. The scrutiny of the nomination papers were to be conducted on 24.4.2004, and the last date for withdrawal of the nomination papers was fixed on 26.4.2004. The election was to be held on 10.5.2004. Pursuant to the above notification, the petitioner in Election Petition No. 1 of 2004 filed his nomination paper as an independent candidate, while the respondents 1, 2 and 3 filed their nomination papers as party candidates, on 21.4.2004. The petitioner in Election Petition No. 1/2004 made a requisition on 22.4.2004 requesting the Returning Officer to supply the copy of the nomination forms presented by the first respondent, and the Returning Officer accordingly, furnished the xerox copy of the same on 23.4.2004. The first respondent has not enclosed the affidavit in Form 26 and Annexure-I along with the nomination papers while presenting the nomination papers on 21.4.2004. The Returning Officer by his communication dated 21.4.2004 called upon the first respondent to furnish the affidavits prescribed by the Election Commission in its order No. 3/ER/2003/JS-II dated 27.3.2003 before the date of scrutiny of the nomination papers. The first respondent filed the same on 23.4.2004. The petitioner in Election Petition No. 1/2004 filed his objections on 23.4.2004 at the time of scrutiny of the nomination papers, and the Returning Officer has considered the objection petition of that petitioner and overruled the same stating that the act of the candidate in not filing the affidavit in Form No. 26 and Annexure-I along with the nomination papers on 21.4.2004 and furnishing the same before the date of scrutiny could not be construed as a violation of the direction of the Election Commission of India issued in para 4.5(3) of Chapter IV of the Hand Book for candidates, and further the Returning Officer was to see whether the disqualification subsisted on the date fixed for scrutiny in deciding whether a person was disqualified to contest the election.

20. Both these election petitions came to be filed to avoid the election of the first respondent u/s 100(1)(d)(i) of the Representation of the People Act 1951.

Section 100 of the Act enumerates the grounds for declaring the election to be void. 100(1)(d)(i) reads as follows:

"100. Grounds for declaring election to be void (1) Subject to the provisions of Sub-section (2), if the High Court is of the opinion

(a) that on the date of his election a returned candidate was not qualified or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected-

(i) by the improper acceptance of any nomination."

21. In the instant case, the petitioners have sought a declaration that the election of the first respondent is void on the ground that the result of the election insofar as it concerns the first respondent, had been materially affected by the import acceptance of his nomination by the Returning Officer. Hence, this Court has to necessarily look into whether the petitioners have pleaded and adduced sufficient proof that the election insofar as it concerns the first respondent, has been materially affected by the improper acceptance of his nomination, and in other words, whether the petitioners have made necessary and requisite averments in the pleading as to the improper acceptance of the nomination and that the result of the election insofar as it concerns the first respondent has been materially affected, and adduced necessary proof therefore.

22. A reading of the phrase "if the High Court is of the opinion" employed in Section 100(1) of the Act would qualify not only Clause (a), but also Clause (d) under which the petitioners seek to avoid the election of the first respondent. Before decide he question whether the nomination has been properly or improperly accepted by the Returning Officer, it would be necessary for this Court to determine as a preliminary issue, whether the candidate was disqualified on the date of scrutiny of the nomination papers, because if the candidate was disqualified, his nomination could not be said to have been properly accepted by the Returning Officer. On the other hand, if the candidate was not disqualified, his nomination would have to be regarded as properly accepted by the Returning Officer. Hence, the determination of the question has to be done by the Court on the same principle for determining the question u/s 100(1)(a). If the successful candidate cannot be said to be disqualified at the time of election, he cannot be said to be disqualified on the date of scrutiny of the nomination papers. In the instant case, it is not the case of the petitioners that the first respondent suffered any disqualification at the time of scrutiny.

23. In order to come out successful in these election petitions, the petitioners have to necessarily plead and prove apart from the improper acceptance, the fact that the result of the election was materially affected. The first contention put forth the petitioners' side that there was improper acceptance of the nomination papers of the first respondent cannot be countenanced for more reasons than one. As a result of the judgment of the Apex Court reported in (Union of India (UOI) Vs. Association for Democratic Reforms and Another, , the provisions u/s 33-A and 33-B of the Representation of the People Act came to be introduced by the Amendment Act of 2002. The validity of Section 33-B was challenged, and the same was declared as invalid and unconstitutional in People's Union for civil Liberties (PUCL) and Others Vs. Union of India (UOI) and Another, , wherein the Apex Court has observed as follows:

"The legislative provision should be such as to promote the right to information to a reasonable extent, if not to the fullest extent on details of concern to the voters and citizens at large. While enacting the legislation, the legislature has to ensure that the fundamental right to know about the candidate is reasonably secured and information which is crucial, by any objective standards, is not denied. It is for the constitutional Court in exercise of its judicial review power to judge whether the areas of disclosure carved out by the legislature are reasonably adequate to safeguard the citizens' right to information."

24. The very reading of the observation made by the Apex Court, would indicate that the legislative provision should be such as to promote the right to information to a reasonable extent. In the said judgment, the Apex Court has further observed the Election Commission has to issue the revised instructions to ensure the implementation of Section 33-A so as to give effect to what is laid down in the said judgment. Consequent upon the said judgment, the Election Commission of India has made an order in No. 3/ER/2003/JS-II dated 27.3.2003 in exercise of the powers conferred under Article 324 of the Constitution of India containing norms and modalities to carry out and give effect to the directions of the Apex Court. In the said order, the Election Commission has prescribed an affidavit in a prescribed format to be filed by a candidate. The guideline in paragraph 5 of the said order reads as follows:

"If any candidate fails to file the said affidavit along with his nomination paper, he shall be reminded to do the needful by the Returning Officer by a written memorandum. A standard draft of such reminder to the candidate is annexed hereto as Annexure -A to this letter. This reminder should be issued immediately to the candidate or his proposer presenting the nomination paper."

25. In the instant case, it is not in controversy that when the first respondent filed his nomination papers on 21.4.2004, he did not file the necessary affidavits. The Returning Officer, on whom a duty is cast, has to remind the candidate by a written memorandum to do the needful, if the candidate failed to file the said affidavits along with the nomination paper. It is pertinent to point out that a standard draft of such reminder to the candidate is also annexed thereto as

Annexure-A. It is an admitted position that the nomination papers were filed by the first respondent on 21.4.2004. The Returning Officer on the initial scrutiny found that those affidavits were not filed, and hence, he has reminded the first respondent to file the affidavits by way of a written memorandum, and accordingly, the first respondent has also filed the same on 23.4.2004 the last date for filing nomination. At this juncture, it remains to be stated that at the time when the nomination papers of the first respondent were taken up for scrutiny on 24.4.2004 the date of scrutiny, the nomination papers were complete and found to be in order. It is not the case of the petitioners that when the nomination papers of the first respondent were taken up for scrutiny by the Returning Officer on 24.4.2004, they were either incomplete or did not satisfy the legal requirements.

26. Placing much reliance on Section 33-A(2) of the Representation of the People Act and Rule 4-A of the Conduct of Election Rules 1961, it was urged by the petitioners' side that it was mandatory that at the time of delivering to the Returning Officer nomination papers under sub-section (1) of Section 33, the candidate should also deliver to him, an affidavit sworn in the prescribed form, verifying the information specified in Sub-section (1); but, in the instant case, those affidavits in the prescribed form were not filed along with the nomination papers on 21.4.2004, and they were filed subsequently; that so long as those affidavits were not filed along with the nomination papers, it was violative of the said mandatory provision, and hence, the incomplete nomination papers should have been rejected by the Returning Officer, since there was no nomination paper at all in the eye of law, and thus, the entire proceedings accepting the nomination paper of the first respondent and his pursuant election were void, non-est and void ab-initio. It is true that Section 33-A(2) reads as follows:

"33A. Right to information. (2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1)."

At this juncture, it is pertinent to point out that Section 33-A and Section 33 of the Act are distinct and different. Section 33-A is an introduction by the legislature pursuant to the judgment of the Apex Court stated supra. In such circumstances, the contention of the petitioners' side that Section 33-A is part of Section 33 of the Act cannot be countenanced.

27. Section 36 of the said Act deals with the scrutiny of nomination by the returning officers. Section 36(2) directs the returning officer to examine the nomination papers and to decide all objections that may be made to any nomination and may, either on his objection or on his own motion after such summary inquiry, which he thinks necessary, reject the nomination papers on any of the following grounds:

"(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:-

Articles 84, 102, 173 and 191, Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or

(b) that there has been a failure to comply with any of the provisions of section 33 or section 34; or (c) that the signature of the candidate or the proposer on the nomination paper is not genuine."

28. u/s 36(2)(b), the non-compliance of any of the provisions of Section 33 or Section 34 could be a good ground to reject the nomination. It is pertinent to point out that the failure to comply with the provisions found u/s 33-A is not shown a ground to reject the nomination. It remains to be stated that Section 33-A was introduced by the Amendment Act of 2002, as a result of the directions of the Apex Court in Union of India (UOI) Vs. Association for Democratic Reforms and Another, . Had it been the intention of the legislature that the non-furnishing of the affidavits contemplated by the order dated 27.3.2003 of the Election Commission should be considered as one of the grounds for rejecting a nomination paper, a corresponding amendment in Section 36 of the Act would have also been done including Section 33-A in Section 36(2)(b), but not done so. Hence, it would be clear that the affidavits as contemplated in the Election Commission's order dated 27.3.2003 though not furnished along with the nomination paper, could be supplied later, but before the time fixed for the filing of the nomination paper, thereby enabling the Returning Officer to decide the objections made by the other candidate or on his own motion in order to find out whether any ground to reject the nomination paper was available at the time of scrutiny.

29. Admittedly, the first respondent has furnished necessary affidavits on 23.4.2004 and has made the nomination papers complete and order. From the admissions made by the petitioner in Election Petition No. 1/2004 and the evidence of C.W.1, it would quite evident that on 24.4.2004, the said petitioner filed his objections and those objections were overruled by the Returning Officer the very day, by way of an order, wherein he has clearly stated the reasons for doing so. Having raised objections at the time of scrutiny, the said petitioner cannot now be permitted to say that he was not given sufficient opportunity. Only after dissemination of the affidavits and the said petitioner was put on notice, he should have raised objections in that regard, and thus, the contention of the petitioners that there was improper acceptance of the nomination paper has got to be rejected both factually and legally.

30. In the instant case, the Returning Officer was perfectly correct in accepting the affidavits though not filed along with the nomination paper on 21.4.2004, but filed on 23.4.2004 within the last date for filing nomination papers. Since for making scrutiny, all nomination papers were present. u/s 36(2)(b), the non-

compliance of Section 33-A is not shown as a ground to reject the nomination paper, and apart from that, as per the guideline in paragraph 5 of the order of the Election Commission stated supra, the Returning Officer had issued a written memorandum to the candidate namely the first respondent reminding him of the affidavits to be filed and received them on 23.4.2004 when filed by the first respondent. Hence, the contention put forth by the petitioners' side that the Returning Officer has committed an illegality in accepting the nomination papers of the first respondent has got to be rejected as devoid of merits.

31. Apart from all the above, it should not be forgotten that those affidavits are to be filed by a candidate and to be scrutinised by the Returning Officer to find out whether the candidate is qualified to be a candidate or to be rejected on any on the grounds enumerated in Section 36(2). It is pertinent to point out that the legislative intent u/s 33-A was to protect the right of the voter to reasonable and adequate information about the candidate in respect of the pending criminal cases and past involvement in such cases. Needless to say that those information's are intended to be passed on to the citizens who are the voters and not to the Returning Officer. Merely because those affidavits were furnished not at the time of filing the nomination paper and on a subsequent date, but within the final date for filing of nomination, it cannot be said to be defective. So long as the nomination papers were complete along with the necessary affidavits on the date of the final scrutiny enabling the Returning Officer to decide whether the candidate suffers by any disqualification or not, the Returning Officer was justified in accepting the nomination paper of the first respondent.

32. As pointed out supra, the petitioners have to plead and prove not only the improper acceptance of the nomination paper of the first respondent by the Returning Officer, but also the fact that the result of the election insofar as it concerns the turned candidate, was materially affected. In the instant case, the Court has found that the petitioners have not proved that there was any improper acceptance for the reasons stated above. This Court is of the considered opinion that the petitioners have neither put forth requisite and sufficient pleading nor proved that the result of the election insofar as it concerns the first respondent, has been materially affected in the instant case. The petitioners have only stated in paragraph 21 in Election Petition No. 1/2004 and in paragraph 20 in Election Petition No. 2/2004 respectively as follows:

"The petitioner states that the partisan attitude of the Returning Officer shows that the entire election process in respect of No. 36, Tirunelveli Parliamentary Constituency, State of Tamil Nadu, is vitiated by various aforesaid irregularities materially affected the result of the election held on 10.05.2004."

The Court is of the firm opinion that this itself would not constitute the necessary and requisite pleading in order to declare the election of the first respondent to be void. Needless to say that u/s 100(1)(d)(iv), it is absolutely necessary for the election petitioners to plead that the result of the election insofar as it concerns the returned candidate, has been materially affected by the non-compliance with

the provisions of the Act or of the Rules. The burden is always upon the petitioner s to show positively that the result of the election of the first respondent has been materially affected by the non-compliance with the provisions of the Act. In other words, the petitioners have to demonstrate that the poll would have gone against the successful candidate, if the provisions of the Act have been complied with. In the instant case, the petitioners have neither sufficiently pleaded nor proved that the result of the election insofar it concerns the returned candidate namely the first respondent, has been materially affected. This Court is of the view that the decisions relied on by the petitioners" side and cited supra, are not applicable to the present facts of the case. Thus, the petitioners have miserably failed to prove either there was improper acceptance of the nomination of the first respondent or as a consequence of such improper acceptance, the election insofar as it concerns the first respondent, has been materially affected.

33. For the reasons stated above, this Court has to necessarily hold:-

- (1) that the nomination paper filed by the first respondent is valid;
- (2) that the filing of affidavits as stated above, though not along with the nomination papers, but on a subsequent date within the date of filing nomination is justified;
- (3) that the act of the Returning Officer calling for affidavit and Form No. 26 from the first respondent is well within his jurisdiction and as per law;
- (4) that the nomination paper of the first respondent is well within the provisions of the Act and the Rules;
- (5) that the nomination paper of the first respondent accepted by the Returning Officer, is legal and sustainable in law;
- (6) that the nomination paper of the first respondent is sustainable under the Representation of the People Act, 1951; and
- (7) that the petitioners are not entitled for the declaration as asked for. Therefore, the above issues are answered accordingly.

34. In the result, both these election petitions fail, and they are dismissed.