

**(2010) 04 MAD CK 0361**

**In the Madras High Court**

**Case No : C.R.P. (NPD) No. 3779 of 2009**

P. Dharmalingam

APPELLANT

Vs

Arumugham @ Sattu, The Commissioner, Thriuporur  
Panchayat Union, Thiruporur and The State Election  
Commissioner

RESPONDENT

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**Date of Decision : 29-04-2010**

**Acts Referred:**

Constitution of India, 1950 — Article 227  
Evidence Act, 1872 — Section 103, 114(g)  
Tamil Nadu Panchayats Act, 1994 — Section 258

**Citation : (2010) 6 CTC 18**

**Hon'ble Judges : S. Tamilvanan, J**

**Bench : Single Bench**

**Advocate :** C.N. Ramesh, for the Appellant; R. Vijayakumar, Advocate for Respondent No. 1; V.R. Thangavelur, Advocate for Respondent No. 2; I. Parathaman, Advocate for Respondent No. 3., for the Respondent

**Final Decision : Dismissed**

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## **Judgement**

S. Tamilvanan, J.—This Civil Revision Petition has been filed under Article 227 of the Constitution of India, challenging the order of the Election Tribunal, under the Tamil Nadu Panchayat Act, 1994, and the rules there under made in Election Original Petition No. 299 of 2006 on the file of the Principal District Judge, Chengalpattu to declare the election of the First Respondent void by setting aside the order and decretal order dated 28.08.2009 and declare that the Petitioner is the duly elected President of Madiathur Village and other consequential relief. It is admitted fact that the Petitioner herein had contested for the post of President of Madiathur Village Panchayat as an independent candidate and the Petitioner was allotted "lock and key" symbol. The First Respondent also contested for the said post as an independent candidate and he was allotted "bulb" symbol, and the aforesaid election was held on 15.12.2006. As per the averments of the Election Petition, after the counting of votes on 18.10.2006, it was announced

that the votes polled in favour of the First Respondent was 378 and in favour of the Petitioner herein was 377, invalid votes were 12 and the total votes polled was 767. The Petitioner was present at the time of counting of votes and found three of the votes out of 12 votes declared had been caused in favour of the Petitioner. According to the Petitioner, the said three votes had been declared as invalid, on account of splitting of little drop of ink in the ballot papers however, the Petitioner would say that the aforesaid three votes ought to have been counted in favour of the Petitioner and on the aforesaid circumstances, the Petitioner herein submitted a letter on 18.10.2006 requesting the Returning Officer, Tiruporur for re-counting of votes before declaring the election results.

2. However, the Returning Officer, Tiruporur refused to order recall of votes but declared that the First Respondent won in the election by one vote. The declaration that the First Respondent won in the election by one vote, according to the Petitioner, is illegal and null and void. With the above pleadings, the Petitioner has filed the Election Petition No. 229 of 2004 u/s 258 of the Tamil Nadu Panchayats Act, 1994 read with Rule 122 of the Tamil Nadu Panchayats (Elections) Rules 1995, (1) to declare that the election result of the First Respondent as President of Madiathur Panchayat is null and void, (2) Order recounting of all the votes polled, (3) declare that the Petitioner was the duly elected candidate and is the President of Madiathur Panchayat, (4) direct the Respondents to pay the costs of the proceedings and (5) grant such other suitable reliefs. The First Respondent denied the averments of the Petitioner and submitted in his counter that on counting it was found that the First Respondent was polled with 378 votes out of 767, though the Petitioner was polled with 377 votes and 12 votes were declared as invalid. Hence, the First Respondent was declared the winning candidate. The Petitioner requested the Second Respondent to recall the votes polled, accordingly it was done by the Second Respondent and in the recounting one of the invalid votes from and out of the said 12 invalid votes was thoroughly verified and declared as valid which was also polled in favour of the First Respondent. According to the First Respondent, three votes out of 11 votes were declared as invalid as per Rules, because the Returning Officer found the LIT on the respective votes in the ballot papers. According to the First Respondent, the Petitioner herein has suppressed the facts and hence prayed for dismissal of the Revision Petition.

3. The Second Respondent in the counter submitted that the counting was done properly and according to him no valid vote polled in favour of the Petitioner herein was rejected as invalid. According to the Second Respondent, neither the Petitioner nor his counting agent had raised any objection regarding the said votes being declared invalid votes at the time of counting or afterwards on the same day in writing.

4. It is seen that the Election Tribunal, learned Principal District Judge, Chengalpattu, framed the following point for consideration:

Whether the election of the First Respondent as Panchayat President of Madiathur

Village during the election dated 15.10.2006 is null and void?

It is seen that the Petitioner himself was examined as P.W.I, on the side of the Petitioner and Exs.P.1 to P7 were marked. The First Respondent was examined as R.W.1 and the then Election Officer was examined as R.W.2. The call letter dated 18.10.2006, for taking charge for the post of Panchayat President, Form 26 Notice, Form 25 Declaration of Election results, were marked as Exs.R1 to R3. Considering the evidence both oral and documentary and also the arguments advanced by both the learned Counsel, the learned Principal District Judge, Chengalpet, dismissed the Election Petition filed by the Petitioner herein.

5. Learned Counsel appearing for the Revision Petitioner submitted that there was manifest violation of Election Rules, especially proviso to Rule 63 and 66 of Tamil Nadu Panchayats (Elections) Rules, 1995, however, the same was not considered by the Court below. As per the announcement of the Retaining Officer, total votes polled were 767 out of which originally it was found that 378 votes were polled in favour of the First Respondent herein and 377 votes were polled in favour of the Revision Petitioner and 12 votes were invalid. As per the evidence of the Election Officer, R.W.2, on the oral request of the Revision Petitioner before announcing the result, the votes were recounted whereby the First Respondent got 379 votes and the invalid votes were only 11, accordingly the same was declared and the First Respondent was declared elected. R.W.2 further submitted that there was no illegality or material irregularity in the procedure being followed by him and that no written request was given by the Petitioner for recounting the votes polled in the election.

6. Learned Counsel appearing for the Petitioner submitted that the Petitioner herein had given his written representation for recounting the votes, however, the Second Respondent/Election Officer was not inclined to recall the votes. Learned Counsel appearing for the Petitioner further submitted that out of the alleged 12 invalid votes, 3 votes were found to be valid and out of which 2 were in favour of the Revision Petitioner herein and one was polled in favour of the First Respondent and therefore, the Second Respondent could have declared the Petitioner won in the election by 1 vote. Alongwith the Election Original Petition, the Petitioner filed a copy of the letter said to have been given to the Election Officer, however, on 18.10.2006 that was denied by the Respondents. It is an admitted fact that it contains no initial with the date by the Election Officer or no seal of the Election Officer containing the date, to establish the allegation that the Petitioner herein had given any written representation on the date of counting the votes.

7. As contended by the learned Counsel appearing for the Respondent, had the written representation been given to the Second Respondent/Election Officer, the Petitioner cannot produce the same original letter before the Court below, as evidence. Admittedly, Ex.P7, containing the date 18.10.2006 is not a carbon copy. As contended by the learned Counsel appearing for the Respondent, had the objection letter been given to the Election Officer on 18.10.2006, it could not

be possible for the Petitioner to produce the original hand written letter, before the Court below. In the absence of the signature/initial of the Election Officer with date in Ex.P7, letter, the plea of the Petitioner that he had given objection letter on the same day, cannot be accepted when there is a denial of any written representation being given for re-counting on the date of counting by the Second Respondent, burden of proving the factum would be on the Petitioner.

8. As contemplated under Rule 63 of the Tamil Nadu Panchayats (Elections) Rules, 1995 ballot paper shall be rejected (a) if it bears any mark or writing by which the elector can be identified, or (d) if the mark indicating the votes thereon is placed in such manner as to make it doubtful to which candidate the vote has been given. The Second Respondent has specifically stated in his counter that none of the valid votes polled in favour of the Petitioner were decided as invalid, as alleged in the Petition. It is also averred in the counter that neither the Petitioner nor his counting agent had raised any objection with regard to the invalid votes, at the time of recounting.

9. Tamil Nadu Panchayats (Elections) Rules, 1995, Rule 66 regarding recounting of votes reads as follows:

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.

As per Rule 66(2) on the Application being made the Returning Officer shall decide the matter and may allow any Application in whole or in part, or may reject it in toto if it appears to him to be frivolous or unreasonable. It is not in dispute that for re-calling the votes, the Petitioner could have given an Application in writing to the Returning Officer on the same day. Though the Petitioner has stated that he had given an Application that was rejected by the Returning Officer, there is no acceptable evidence available on the side of the Petitioner to show that he had given any Written Application for re-counting of votes.

10. Learned Counsel appearing for the Petitioner drew the attention of this Court to the decision in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, while interpreting Section 114(g) and Section 103 of Indian Evidence Act, 1872, the Honourable Supreme Court held that a party in possession of best evidence which would throw light on the issue in controversy withholding it, Court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him-party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it.

11. However, I am of the view that the aforesaid decision is not applicable to the

facts and circumstances of the case on hand, since the Petitioner has produced only the alleged original hand written letter which contains no endorsement or initial, of the Election Officer with date. In the said circumstances, as contended by the learned Counsel appearing for the Respondents, Ex.P7 has to be construed only as self-serving document. The Honourable Supreme Court has observed in T.A. Ahammed Kabeer Vs. A.A. Azeez and Others, as follows:

The task before the Election Judge is ticklish. It is often urged and also held that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. On account of a right following of these principles the Election Courts are inclined to lean in favour of the returned candidates and place the onus of proof on the person challenging the result of election, insisting on strict compliance with the rules of pleadings and excluding such evidence from consideration as is in divergence with the pleadings. However, what has so developed as a rule of practice should not be unduly stretched; for the purity of the election process needs to be preserved unpolluted so as to achieve the predominant goal of democracy that only he should represent the constituency who has been chosen by the majority of the electors. This is the purpose and object of the election law.

12. It has been further held in the decision that a recount cannot be ordered merely for asking or merely because the Court is inclined to hold a recount. In order to protect the secrecy of ballots the Court would permit a recount only upon a clear case in that regard having been made out. To permit or not to permit a recount is a question involving jurisdiction of the Court, once a recount has been allowed the Court cannot shut its eyes on the result of recount on the ground that the result of recount as found is at variance with the pleadings. Once the Court has permitted recount within the well-settled parameters of exercising jurisdiction in this regard, it is the result of the recount which has to be given effect to.

13. In the instant case, though, the Second Respondent, Election Officer has disputed the averments of the Petitioner with regard to the alleged Application given for re-counting on 18.10.2006, it cannot be disputed that the burden of proof lie on the Petitioner to establish the alleged factum, however, the Petitioner herein had produced Ex.P7, a original letter without any signature/initial or date of the officer concerned with stamp to show that the same was given to the Election Officer for recounting on the same day as alleged by the Petitioner. The initial burden cannot be shifted on the Respondents to draw any or adverse inference against the Election Officer. It is an admitted fact that the Village Panchayat Election had taken place on 15.12.2006, and for which votes were counted on 18.10.2006.

14. As per the counter filed by the Second Respondent and the evidence of R.W.2 no Application was given by the Petitioner herein on 18.10.2006 for re-counting the votes. Learned Counsel appearing for the Second Respondent relied on the following decisions, submitted that the Election Petition itself is not legally

maintainable, on account of objection not being raised in writing on the date of counting the votes:

1. Peddireddy Venkata Satyanarayana Murthy v. The Election Tribunal-cum-Principal Junior Civil Judge, Yelamanchilli, Visakhapatnam District and others, CDJ 2009 APHC 658; and

2 Sundaram Vs. Vadivelu,

15. In Sundaram Vs. Vadivelu, it has been held as follows:

Even the Petitioner has no case that counting has to take place once again. What he wanted was regarding the invalid votes. When he did not get details of the invalid votes, naturally, counting cannot be ordered. The Tribunal below circumvented the same by ordering recounting, and it was far beyond the claim of the election Petitioner himself.

16. In P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others, it has been held as follows:

Thus, the settled position of law is that the justification for an order for examination of ballot papers and recount of votes is not to be derived from hindsight and by the result of the recount of votes. On the contrary, the justification for an order of recount of votes should be provided by the material placed by an election Petitioner on the threshold before an order for recount of votes is actually made. The reason for this salutary rule is that the preservation of the secrecy of the ballot is a sacrosanct principle which cannot be lightly and hastily broken unless there is prima facie genuine need for it. The right of a defeated candidate to assail the validity of an election result and seek recounting of votes has to be subject to the basic principle that the secrecy of the ballot is a sacrosanct in a democracy and hence unless the affected candidate is able to allege and substantiate in acceptable measure by means of evidence that a prima facie case of high decree of probability existed for the recount of votes being ordered by the Election Tribunal in the interests of justice, a Tribunal or Court should not order the recount of votes.

17. In Vadivelu Vs. Sundaram and Others, the Honourable Supreme Court has held as follows:

The result of the analysis of the above cases would show that this Court has consistently taken the view that re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the Election Petition that illegality or irregularity was committed while counting. The Petitioner who seeks re-count should allege and prove that there was improper acceptance of valid votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the above allegation, it can order re-count of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has

materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the Court can resort to re-count of votes under such circumstances to do justice between the parties.

18. In the Civil Revision Petition it has been clearly established that on 15.10.2006 Election was conducted for the Village Panchayat and counting of votes was taken place on 18.10.2006. As per the evidence of the election officer, R.W.2, the total polled votes were 767 and as per counting, it was found that the votes polled in favour of the Petitioner was 377 whereas the votes polled in favour of the First Respondent was 378 and the invalid votes were 12. Therefore, it was found that the Respondent had obtained one vote more than the Petitioner herein. According to R.W.2, at the request of the Petitioner herein, the invalid 12 votes were again verified and recounted in the presence of both the parties, before the Election result was declared, whereby one vote was found valid out of the alleged 12 invalid votes in favour of the First Respondent herein. Hence, the First Respondent had secured 379 votes and the invalid votes were reduced to 11 from 12, According to R.W.2, the Petitioner had not given any Application in writing and he had requested only to reconsider the 12 invalid votes. On perusal, out of 12 invalid votes one vote was subsequently found valid only in favour of the First Respondent, for which there was no objection raised by the Petitioner herein hence, the First Respondent herein was declared elected by the Election Officer. There is no evidence available on the side of the Petitioner to show that there was any Application in writing given by him on the same day for recounting and Ex.P7 cannot be construed as an Objection Letter or Application given on 18.10.2006 itself for recounting, as discussed earlier.

19. On the aforesaid facts and circumstances, in view of Rule 63 & Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995, I am of the view that there is no error or infirmity in the order passed by the Election Tribunal, learned Principal District Judge, Chengalpet in dismissing the Election Petition filed by the Petitioner herein. At the time of argument, learned Counsel appearing for the Petitioner argued that atleast in the interest of justice, the Court below be directed to produce the ballot boxes for the purpose of deciding the genuiness of the defence raised by the Second Respondent. The ballot boxes are not in the custody of the Court below, since such a plea was not raised before the Court below. Learned Counsel appearing for the Second Respondent submitted that as per Rules and procedure being followed ballot papers would be available only for a period of six months in the office of the Commissioner of the concerned Panchayat Union and subsequently be sent to the Office of the State Election Commissioner for distinction as per procedure. It is not in dispute that the ballot papers retained as permanent records at the Office of the State Election Commissioner. As the counting of votes had taken place on 18.10.2006. It is a settled proposition of law that unless any illegality or material irregularity leading to miscarriage of justice has been found or established, this Court cannot direct the Respondents 2 and 3 to produce the ballot boxes for the purpose of deciding the genuiness of the defence, at this stage. As contended by the learned Counsel

appearing for the Second Respondent to call for the ballot boxes for re-counting at this stage is also not practically possible. On the aforesaid facts, I am of the view that this Civil Revision Petition has to be dismissed as devoid of merits. In the result, this Civil Revision Petition is dismissed. No costs.