Palode Ravi Vs Mangode Radhakrishnan

Court: High Court Of Kerala

Date of Decision: Sept. 10, 2002

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 18 Rule 13, Order 18 Rule 19, Order 18 Rule 4, Order 18 Rule 5
Representation of the People Act, 1951 â€" Section 80A(2), 87(1)
Specific Relief Act, 1963 â€" Section 6

Citation: (2002) 3 ILR (Ker) 523

Hon'ble Judges: M.R. Hariharan Nair, J

Bench: Single Bench

Advocate: K. Ramkumar, for the Appellant; K.T. Sankaran, G.S. Mohandas and Siby J. Manipally, for the Respondent

Final Decision: Allowed

Judgement

M.R. Hariharan Nair, J.
This petition necessitates resolution of certain apparent conflicts arising from amendments brought to the CPC

through CPC (Amendment) Act of 1999 and 2002.

2. In this Election Petition challenging the election of the 1st respondent to the Kerala Legislative Assembly from Nedumangad Constituency in the

general elections pursuant to polling held on 10.5.2001, the petitioner and some official witnesses have been examined and the stage has been

reached when evidence is to be collected from various witnesses with regard to double voting, alleged incompetence of some persons to be voters

in view of minority and the like, denial of voting right based on alleged removal from the electoral roll after the last date for filing nominations etc.

3. The prayer in the present petition is that considering the fact that as many as 500 witnesses who are residents of Nedumangad have now to be

examined from the above categories, the collection of evidence may be made in sittings of the Judge of the High Court to be held at

Thiruvananthapuram which will substantially reduce the expenses of the petitioner and also mitigate the inconvenience to all parties.

4. In view of the amendment to the CPC as per the Amendment Act, 2002 enabling collection of evidence through Commission, the feasibility of

that alternative in the place of sitting at Thiruvananthapuram was considered. Based on order dated 6.9.2002, Sri. Thottathil B.Radhakrishnan was

heard as amicus curiae on the aspect, besides the parties themselves.

5. The learned counsel for the petitioner and the 1st respondent submitted that even assuming that evidence through Commission as contemplated

in Order XVIII Rule 4 of the CPC is possible even in an election case, the nature of the present case and the nature of evidence to be collected

are such that it is not a convenient or viable alternative and that the Court might itself examine the witnesses. Sri. Radhakrishnan submitted that a

harmonious interpretation of the apparently conflicting provisions in Orders XVIII and XXVI of the CPC is possible and that there will be no

illegality if the work of recording evidence is entrusted to a Commissioner of appropriate qualities. Even though an opportunity was allowed to the

counsel for the Election Commission of India also, Sri. K. Radhakrishnan, who represented the Commission submitted that in view of the findings

of the Apex Court that the Election Commission is an unnecessary party to an Election Petition, the Commission does not want to advance any

arguments on the point.

6. The three questions to be considered before passing orders on this Petition are the following :

(1) Whether in view of the contents of Order XVIII Rule 5 (unamended) it is possible to follow the new procedure in Order XVIII Rule 4 of the

CPC in the trial of a civil suit?

(2) Whether a Commission could be issued in the present case to examine the witnesses of the petitioner as sought for herein?

(3) Whether the court should hold a special sitting at Thiruvananthapuram as sought for in this petition and if so, the modalities to be adopted

therefor?

7. Point No. 1:- Order XVIII Rule 4 of the CPC, as it stands introduced as per Section 12(b) of the CPC (Amendment) Act, 2002 reads as

follows:

4. Recording of evidence.- (1) Inevery case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the

opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed

along with affidavit shall be subject lo the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been

furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

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

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

the Commissioner, as the case may be. and where such evidence is recorded by the Commissioner, he shall return such evidence together with his

report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

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

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

at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the Commission within sixty days from the date of issue of the

Commission unless the Court, for reasons to be recorded in writing, extends the time.

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

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

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

of such Commission under this Rule .

8. Order XVIII Rule 5 which is a provision substituted by the CPC (Amendment) Act, 1976, on the other hand, reads as follows:

5. How evidence shall be taken in appealable cases.- In cases in which an appeal is allowed, the evidence of each witness shall be -

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

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

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

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

9. The possible objections to the recourse to Rule 4 aforementioned appear to be the following:

(i) Though it is provided that the examination-in-chief of a witness shall be on affidavit, there is no corresponding amendment brought to the Indian

Evidence Act which enables collection of evidence through affidavit.

(ii) When a proof affidavit in substitution of chief-examination is prepared in the office of the counsel at whose instance the party is summoned,

there is possibility of the "" contents of the affidavit being elicited through leading questions which is a taboo under the Indian Evidence Act.

(iii) The witnesses, especially those of the rustic and illiterate categories might not actually know what is recorded in the proof affidavit and there is

possibility of matters which are not within the contemplation of the witness getting into proof affidavit. The damage will be more where the witness

gives his statement in the vernacular and the proof affidavit is prepared by the counsel in English. In such cases there ispossibility of the witness

being exposed to the need to face cross-examination on matters not actually stated by him.

(iv) Witness on summons cannot be compelled to meet the counsel for preparing proof affidavit.

10. Though the possibility of preparation of proof affidavit of the above nature cannot be ruled out, there are methods whereby the possible harm

can be avoided. No doubt, the proof affidavit, normally would be prepared by the advocate who brings the witness; but then, that is expected to

be prepared based on answers given by the witness to the questions put to him.

11. u/s 142 of the Indian Evidence Act leading questions in chief-examination is not completely prohibited. By way of introduction and on matters

not in controversy or already proved sufficiently such questions are allowed. Even assuming that there is possibility of facts being elicited through

leading questions for incorporating in the proof affidavit, that will enable saving of time of the Court and all concerned and that perhaps is the

reason why Rule 4 has been amended enabling the filing of proof affidavit in the place of chief-examination even with the possibility of questions

being elicited through leading questions. There is not much of a risk involved in the matter in so far as there is an effective remedy of cross-

examination on all facts contained in the proof affidavit.

12. It is certainly necessary to avoid incorporation of facts not intended by the party in the affidavit; but this can be easily ensured if it is provided

for by the Rules to be framed that before a witness is asked to face cross-examination and as soon as he is sworn in by the Court Officer/Bench

Clerk or Commissioner as the prelude for cross-examination, questions are put to him by the Court or by the Commissioner as the case may be to

ensure that the particular proof affidavit contains the signature/ thumb impression of the particular witness on all pages and also the fact that he had

answered to questions put by the counsel exactly as stated in the proof affidavit. It is also essential that the Court/the Commissioner reads out the

entire proof affidavit to the witness and certifies that fact before proceeding to the stage of cross-examination if the proof affidavit is in the language

known to the witness. In case the affidavit is prepared in English or in other language not. familiar to the witness which should be the exception to

be followed in unavoidable circumstances only, the contents are also to be interpreted to the witness and got admitted and certified by the Court/

Commissioner before proceeding to the stage of cross-examination. It is possible that while doing so, the witness might point out that particular

facts contained in the proof affidavit were not actually given by him or that what is recorded is slightly different from what was stated by him. The

Court or the Commissioner, as the case may be, can record these aspects before going into the stage of cross-examination and confine the cross-

examination on aspects actually admitted and owned by the witness. This procedure is to be followed by the subordinate courts until Rules are

framed.

13. Another possibility in the matter of proof affidavit is the chance of inadmissible documents being marked and referred to therein. Secondary

evidence not fulfilling the requirements of the Evidence Act, (for example, unattested photocopies), documents which are liable to be impounded

being insufficiently stamped; documents executed outside India which are not duly stamped after it reaches India, unattested Will, Pro-Notes

insufficiently stamped etc., are some of the documents that fall within the above category. Here again, when the proof affidavit is read over to the

witness or interpreted to him, the Court/Commissioner gets an opportunity to go into the relevant documents and to pass immediate orders making

their acceptability in evidence subject to orders to be passed during final hearing after completion of the evidence or to give opportunity to the

parties who produces the documents to pay duty and penalty if it is a case of insufficient stamping. If this procedure is followed until necessary

rules are framed to cover the various aspects, the damage arising from incorporation of inadmissible material in proof affidavits can be abated. No

doubt, reading out of the proof affidavit as above would consume a little time of the Court. But then, whether it is proof affidavit or chief-

examination, once the evidence is complete, the Court has necessarily to read out the same before getting signature of the witnesses and hence

there is no question of any additional wastage of time involved in the process.

14. There is an observation in Sudha Devi Vs. M.P. Narayanan and Others, that affidavits are not included in the definition of ''evidence'' in

Section 3 of the Evidence Act and can be used as evidence only if for sufficient reason Court passes an order under Order XIX, Rule 1 or 2 of the

CPC. First of all this is an obiter and the observation was made in an entirely different context. That apart, the Parliament, in its wisdom, has

thought it fit to lay down that the examination-in-chief as contemplated in the Evidence Act shall be by affidavit. By incorporating Rule 4 of Order

XVIII as above, proof affidavit has been made an acceptable mode of evidence. A contention that proof affidavit is not acceptable evidence

cannot hence succeed.

15. It is true that there is some conflict between Rules 5 and 4 of Order XVIII of the CPC while the mandate in Rule 4 is that in appealable cases

evidence shall be taken in the language of the Court in writing or in the presence and under the personal direction and superintendence of the Judge

or from the dictation of the Judge directly on a typewriter or mechanically in the language of the court in the presence of the Judge, what is allowed

under Rule 4 is recording of evidence by the Commissioner which obviously is otherwise than in the presence of the Judge. The absence of a non-

obstante clause in Rule 4 adds to the problem. But then Rule 5 which is an unamended provision has to be read in the light of the Rule 4 which was

in existence before the Amendment Acts of 1999 and 2002. The said provision (Rule 4 before amendment) reads as follows:

4. Witnesses to be examined in open Court:- The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and

under the personal direction and superintendence of the Judge"".

16. It was at a time when the only mode of recording evidence as allowed under the CPC was through oral evidence recorded in the presence and

under the personal direction and superintendence of the Judge that a distinction was drawn between appealable and non-appealable cases and it

was provided under Rule 5 that evidence should be recorded in the presence of the Judge and under Rule 13 that it would not be necessary in

non-appealable cases, to take down or record the evidence of the witness at length and that it would be sufficient that the Judge, as the

examination of each witness proceeds, records or dictates directly on the typewriter or cause to be mechanically recorded a memorandum of a

substance of what the witness deposes.

17. Order XVIII, Rule 19 which is an amended provision reads as follows:

19. Power to get statements recorded on commission.- Notwithstanding anything contained in these rules, the Court, may, instead of examining

witnesses in open Court, direct their statements to be recorded on commission under Rule 4-A of Order XXVI.

The non-obstante clause aforementioned forces the Court to read Rule 5 subject to the new Rule 4-A of Order XXVI. Rule 5 has therefore to be

read subject to the amended provisions viz., Rule 4 of Order XVIII and Rule 4-A of Order XXVI.

18. The rules regarding interpretation in such matters are well settled. The principles to be adopted while interpreting such conflicting provisions are

the following:

(1) It is the duty of the Courts to avoid a head on clash between two Sections of the Act and to construe the provisions which appear to be in

conflict with each other in such a manner as to harmonise them.

(2) The provisions of one Section of a statute cannot be used to defeat the other provisions unless the Court, in spite of its efforts, finds it

impossible to effect reconciliation between them.

(3) It has to be borne in mind by the Courts that when there are two conflicting provisions in an Act which cannot be reconciled with each other,

they should be so interpreted that if possible, effect should be given to both. This is the essence of the rule of ''harmonious construction''.

(4) The Courts have also to keep in mind that an interpretation which reduces one of the provisions as a ''dead letter'' or ''useless lumber'' is not

harmonious construction.

(5) To harmonise is not to destroy any statutory provision or to render it otiose''''. (See Sultana Begum Vs. Prem Chand Jain,

19. It may be mentioned here that recording of evidence through Commissioners and acceptance of the same by Court was not something

unknown to law even at the time when Rule 5 of Order XVIII was in existence. Order XXVI, Rule 1 of the CPC enabled issuance of commission

for examination of witnesses though that was subject to the limitations therein viz., that examination of persons resident within the local limits of the

Court''s jurisdiction was possible only if the witness was exempted under the Code from attending the Court or due to sickness or infirmity was

unable to attend the Court, Order XVIII Rule 5 of the CPC was never interpreted to be a bar to the examination of witnesses contemplated in

Order XXVI Rule 1. What is done now through introduction of Order XXVI Rule 4-A which is an amended provision is only to widen the scope

and ambit of the examination of witnesses through Commission and to enable the issuance of Commission even in respect of persons resident

within the local limits of its jurisdiction. Rule 4-A is quoted below:

4-A. Commission for examination of any person resident within the local limits of the jurisdiction of the Court.-Notwithstanding anything contained

in these rules, any Court may, in the interest of justice or for the expeditious disposal of the case or for any other reason, issue commission in any

suit for the examination, on interrogatories or otherwise, of any person, resident within the local limits of its jurisdiction, and the evidence so

recorded shall be read in evidence.

If Rule 5 is given precedence over new Rule 4 of Order XVIII the purpose of the amendment would be defeated; for the evidence that could be

collected through Commissioner, in that event, would be limited to suits of an insignificant number. Perhaps only some suits u/s 6 of the Specific

Relief Act and the Small Cause Suits come under the non-appealable category. The objects and reasons behind the amendment does not confine

the applicability of the amendment to suits of the said categories.

20. The provision "notwithstanding anything contained in these rules" which appear in Order XVIII Rule 19 (quoted in para 17 above) actually has

to be read as "notwithstanding what is stipulated in Rule 5" also. Likewise, the opening words in Order XVIII Rule 4 ""in every case"" also include

cases of appealable nature contemplated in Rule 5 and if that is so even in a case of appealable nature it is open to the Court to apply the method

of recording evidence prescribed in Rule 4 of Order XVIII.

21. The provisos appearing under Rules 4(1) and 4(4) of Order XVIII make the proof and admissibility of documents which are tiled along with

the proof affidavit subject to the orders of the Court. The proviso to Rule 4(2) of Order XVIII directs the Court to take into account all relevant

factors while issuing commission. The Court is also to consider any objection raised during recording of evidence before Commissioner by the

opposite party, as recorded by the Commissioner, and then only to decide admissibility etc., at the stage of arguments. These are built-in

safeguards to ensure that any defect in the recording of evidence by the Commissioner would not in any way affect the interests of the parties.

22. Order XXVI Rule 16 of the CPC provides that any Commissioner appointed under Order XXVI, may unless otherwise directed by the Order

of appointment, examine the parties themselves and any witness whom they, or any of them may, produce and "any other person whom the

Commissioner thinks proper to call upon to give evidence in the matter referred to him" and also call for and examine documents and other things

relevant to the subject of inquiry. No doubt, this provision gives a discretion to the Commissioner even to examine witnesses not specifically

mentioned by the Court and to examine documents on his own. But this also is subject to Rule 16-A of Order XXVI according to which where

any question put to a witness is objected to by a party or his pleader the Commissioner is bound to take down the question, the answer, the

objections and the name of the party or as the case may be the pleader so objecting. The proviso to the rule further provides that when a question

is objected to on the ground of privilege the Commissioner may proceed with the examination notwithstanding the objection and shall not take

down the answer and continue with the examination of the witness and where the Court ultimately decides that there is no question of privilege, the

witness may be recalled by the Commissioner and examined by him or the witness may be examined by the Court itself with regard to the question

which was objected to on the ground of privilege. Any objecting party may also seek interdiction by the Court in the course of action proposed by

the Commissioner. There are thus adequate safeguards against arbitrary exercise of the abovesaid discretionary power of the Commission also.

23. Rule 8 of Order XXVI provides that where evidence is taken under a Commission, it shall not be read as evidence in the suit without the

consent of the party against whom it is offered unless the person who gave the evidence is beyond the jurisdiction of the Court or is dead or

unable, from sickness or infirmity, to attend to be personally examined, or is exempted from personal appearance in Court or is a person in the

service of the Government who cannot, in the opinion of the Court, attend without detriment to the public service or the Court, in its discretion,

dispenses with the proof of any of the circumstances being read as evidence in the suit, notwithstanding proof that the cause for taking such

evidence by commission has ceased at the time of reading the same. This provision has also to be read subject to Rule 4-A of the CPC according

to which for, the expeditious disposal of the case the Court can issue commission in any suit for the examination on interrogatories or otherwise of

any person resident within the local limits of its jurisdiction and the evidence so recorded shall be read in evidence. The non-obstante clause in Rule

4-A makes Rule 8 subservient toil.

24. What follows from the above discussion is that by virtue of the amendments aforementioned the Court has the power to direct examination of

any witness subject to the safeguards aforementioned and the question whether in a particular case or with respect to a particular witness such a

method should be adopted is a matter within the discretion of the Court. Likewise, the selection of the Commissioner to be engaged for the

aforesaid service is also a matter of discretion to be used very carefully with reference to the nature of the case though Rule 4-A fully enables the

Court to make such appointment. The choice is to be with reference to the need and not based merely on the numeral priority in the panel. It also

follows that it will be open to the court in an appropriate case to refuse appointment of Commission to record evidence as well if it is of the view

that the nature of the case or nature of evidence required of a particular witness is such that it can properly be done only by the Court and not by

the Commission. Suffice it to say that proof affidavit cannot be insisted on with regard to witnesses coming on summons. The reason is that there is

nothing in the amended provisions whereby a witness can be compelled to go over to any Advocate''s office for preparing such an affidavit. With

regard to official witnesses and those on summons the conventional method of recording chief-examination may be followed whether it be

recorded by the Court or by the Commissioner. This is not to say that where a witness under summons (official or otherwise) is prepared to file

proof affidavit it can be discarded. It will always be open to such witness also to file proof affidavit if they are prepared to do so. Pending the

framing of Rules the procedure mentioned in the preceding paras is to be followed in the matter of trial in pending cases.

25. Point No. 2:- u/s 80A of the Representation of the People Act, 1951, it is the High Court which has jurisdiction to try an Election Petition. u/s

80A(2) such jurisdiction is to be exercised ordinarily by a single Judge of the High Court and it is for the Chief Justice to assign one or more

Judges for that purpose. The fact that the Chief Justice nominates one or more Judges to try and dispose of Election Petitions filed in the High

Court does not mean that he is a persona designata. There is hence no possibility of a contention that issuance of Commission to examine

witnesses would be a delegation of power by a persona designata. u/s 87, the Election Petition is to be tried by the High Court as nearly as may be

in accordance with the procedure applicable under the CPC to the trial of suits. The powers and procedure contemplated in Order XVI1I of the

CPC also would hence be applicable in the matter of trial of Election Petitions.

26. The aspects of variance with regard to the applicability of the provisions of the CPC in the matter of Election Petition is contained in the

proviso to Section 87(1) of the Representation of the People Act and that is only that the High Court shall have the discretion to refuse, for reasons

to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for

the decision of petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the

proceedings. May be a Commissioner, who is deputed to effect the examination of witnesses invoking power under Order XVIII Rule 4, cannot

exercise the said power of refusal to examine the witnesses; but that does not mean that for that reason issuance of a Commission is impermissible.

27. Since the proviso to Order XVIII, Rule 4(2) allows the Court to take into account all relevant factors as it thinks fit in the matter of appointing

a Commission, the Court would certainly be enabled to choose appropriate person to conduct the examination of witnesses. Rule 19 of Order

XXVI enables the High Court to issue Commission to examine witnesses if the proceeding is of a civil nature and if the witness is residing within the

limits of the High Court''s appellate jurisdiction. Under Rule 21 of Order XXVI, such Commission can be issued to the Court within the local limits

of whose jurisdiction the witness resides or where the witness resides within the local limits of the ordinary original civil jurisdiction of the High

Court, to any person whom the Court thinks fit to execute the Commission. Thus, the Court is expected in an appropriate case even to appoint

another Court as Commission and such appointment may very well take care of the special facts of particular cases as applicable to election cases.

Further, even after collection of evidence by the Commission it is only the High Court which disposes of the case u/s 98 of the Rule P. Act.

28. Sahodrabai Rai Vs. Ram Singh Aharwar, is authority for the proposition that the trial of an Election Petition has to follow, as far as may be, the

provisions of the Code of Civil Procedure. It is hence permissible to look into the CPC to see what exactly could have been done treating the

petition as a suit. The powers that can be invoked in the matter of trial of an Election Petition can therefore include those available under Order

XVIII of Rule 4 read with Order XXVI Rule 4-A both of which are amended provisions. That is to say Section 80A(2) of the Rule P. Act relating

to trial of Election Petition by a nominated single Judge can very well be taking into account the procedure allowed in Order XVIII Rule 4. Order

XVIII, Rule 19 also enables the High Court which tries an election case to direct that the statements of particular witnesses be recorded on

Commission under Rule 4A of Order XXVI of the CPC. The Commissioner so deputed only aids the Court. The trial, nevertheless, is done by the

High Court. The discretion that might be exercised by the Commissioner under Rule 16-A of the CPC will only be subject to the further decision

of the Court and in the circumstances, it cannot be said that the collection of evidence through Commissioners as contemplated in the aforesaid

provisions is inapplicable to election cases. Whether this power should be exercised in this particular case can be considered under Point No. 3.

29. Point No. 3:- The request in the present petition is for having necessary sittings done at Thiruvananthapuram by this Court itself. The reason

pointed out to justify such camp sitting is that witness numbering about 500 have to be brought to Court which would be a time consuming process

and would lead to unbearable expenses for the petitioner. Thiruvananthapuram is very near to Nedumangad and that is why the place of sitting is

suggested as Thiruvananthapuram which is 221 Kms. away from the seat of the High Court. The 1st respondent is also from Nedumangad and he

would not be prejudiced in any manner by holding such sittings. In fact, during hearing, the learned counsel for the 1st respondent also did not

object to the holding of sitting in Thiruvananthapuram.

30. Section 80A(3) of the Representation of People Act, 1951 reads as follows:

80A. Election Petitions.-

XXX xxx XXX

(3) The High Court in its discretion may, in the interests of justice or convenience, try an Election Petition, wholly or partly, at a place other than

the place of seat of the High Court.

There is, thus, ample power available to have the sitting outside the seat of the High Court as well.

31. In the present case the records produced are too voluminous to be handled by a Commissioner. If a Commissioner is appointed, elaborate

arrangements would have to be made for safe handling of the sensitive documents. The learned counsel for the 1st respondent submits that utmost

care is necessary in the matter of handling the records because there are some underscorings, endorsements and marks available in the final

electoral rolls produced in court and it would be easy to manipulate such entries in the marked copies of the electoral roll as well. Further, the

evidence to be collected has to be bearing in mind the evidence of the petitioner as PW5 and his evidence itself runs to 106 pages. It will be easier

for the Court to appreciate the evidence because this part of the evidence is already recorded by it. If a Commissioner is to examine the other

witnesses it will be difficult for him to go through the entire evidence already recorded.

32. Some of the sealed envelopes containing election records produced in Court are not yet opened. The marked copies of the electoral rolls, the

register of voters, the slips issued by the Polling Officers to voters etc., come under this category. Without knowing the contents of these records

which still remain un-opened, it is unsafe to leave the same to the Commissioner because even if some additional entries are made in these records,

no one would be able to notice the same in the circumstances.

33. An election case is not exactly adversarial in nature. The aspirations of the people as reflected by the voting pattern also has to be taken note

of. The appreciation of evidence has to be with reference to the plethora of case law laid down by the Apex Court and bearing in mind the

restrictions and requirements regarding pleadings, verifications etc. A Commissioner may not be quite familiar with the above and it is better that

the Court itself does the examination of witnesses bearing in mind the relevant case law and principles. This is more so in the present case where

for example, the question of voting right of the alleged minors who are already enrolled is to be considered.

34. Taking into account all these aspects, I am of the view that the collection of evidence has to be continued by this Court itself on the facts and

circumstances of this case and that the appointment of a Commissioner is not feasible.

35. For examining the witnesses numbering to 456 about 10 days would be required. There is also the precedent available in this Court itself

where such examination was held outside the seat of the High Court viz., in E.P. No. 4 of 1991. There also the sittings were fixed bearing in mind

the possibility of examination of 50 witnesses a day.

36. In these circumstances, this petition is allowed and it is directed that in the interests of justice and'' for convenience of the parties the

examination of the 456 witnesses as per schedule filed by the petitioner on 3.9.2002, and of additional witnesses, if any, of that category, will he

held at Thiruvananthapuram between 23.9.2002 to 27.9.2002 and from 7.10.2002 to 11.10.2002. Sitting time will be from 10.15 a.m. to 4.30

p.m. as in the case of regular sittings of the High Court.

37. The learned counsel for the petitioner submits that summons has to be issued directly to witnesses whose names are found in Annexures-H, I

and J, viz., witness Nos. 321 to 447 of the list and that he would be prepared to produce the other witnesses excepting witness Nos. 448 to 456

who are official witnesses. Even though the learned counsel for the 1st respondent submitted that summons might be issued to the rest of the

witnesses also in order to ensure that there would be appropriate record in court to show in which address they were served, I do not think it

necessary to follow this course considering the expenses and labour involved. The petitioner is hence allowed to produce witness Nos. 3 and 320.

In their case proof affidavits will also be filed with copy to the learned counsel for the 1st respondent at least by 5 p.m. on the day prior to the date

of examination. Witness Nos. 3 to 50 will be produced by the petitioner on 23.9.2002, witness Nos. 51 to 100 on 24.9.2002, Nos. 101 to 150

on 25.9.2002, Nos. 151 to 200 on 26.9.2002; Nos. 201 to 250 on 27.9.2002 and Nos. 251 to 300 on 7.10.2002. Witness Nos. 301 to 320

will also be produced by the petitioner on 8.10.2002. Issue summons to witness Nos. 321 to 350 for appearance on 8.10.2002, Nos. 351 to 400

on 9.10.2002, Nos. 401 to 450 on 10.10.2002 and witness Nos. 451 on wards on 11.10.2002. The sittings will be held in the Government Guest

House, Thiruvananthapuram. The Registrar will make appropriate arrangements for transporting the records and for keeping them in safe custody

at Thiruvananthapuram besides sufficient security and other arrangements for the holding of the trial at the said premises.

Before parting with the case I place on record my appreciation for the erudite exposition of the correct law with regard to all the relevant aspects

by Sri. Thottathil B. Radhakrishnan and for the lucid manner in which the relevant aspects were highlighted by him with a positive approach which

enabled this Court to appreciate the relevant legal aspects from the correct perspective.